IN THE MATTER OF THE ARBITRATION

Between

EMPLOYER
United States Department of Justice
Federal Bureau of Prisons
Metropolitan Correctional Center (MCC)
Chicago, Illinois

And

UNION
American Federation of Government Employees,
AFL-CIO; Council of Prison Locals 33,
Chicago Illinois Local 3652

FMCS Case No. 06-58934

GRIEVANCE

Removal of
Sameka Wright-Jackson

OPINION and AWARD

PRELIMINARY INFORMATION

CASE PRESENTATION-APPEARANCES

For the Employer

JAMES A. VOGEL, JR.
Labor Relations Specialist
Department of Justice
Federal Bureau of Prisons
HOLC Building, Room 812
320 First Street, N. W.
Washington, DC 20534
(202) 307-6684
(202) 307-6857 (Fax)
jvogel@bop.gov (E-mail)

For the Union

SAM T. HEUER
Attorney
Coplin & Heuer
Capital at Louisiana
124 West Capitol Avenue
Suite 1650
Little Rock, Arkansas 72201
(501) 707-0300
(501) 707-0304 (Fax)
sheuer@coplinheuer.com (E-mail)

CHRONOLOGY OF RELEVANT EVENTS

Application for Employment Submitted by Sameka L. Wright (later known as Sameka Wright-Jackson), herein Grievant, to the Bureau of Prisons (BOP) for the Position of Correctional Officer at the BOP's Chicago Metropolitan Correctional Center (MCC) Located at 71 West Van Buren Street, Chicago, Illinois; Application Dated [1]	**September 12, 2002**
Grievant Submitted to a Pre-Employment Interview Wherein She Answered a Number of Predetermined Written Questions with a Yes or No Answer and Depending on the Answer Indicated, Given an Opportunity to Provide a Written Exposition. The Questions Posed Were Set Forth Under the Following Major Topics: Employment History; Military History; Financial History; Dishonest Conduct, Excessive Use of Force and Integrity; Criminal and Driving History; Family History; and Miscellaneous Information; Date Interview Conducted and Answers Submitted [2]	**September 17, 2002**

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[1] Appended to this Application were two (2) authorizations signed by the Grievant for release of information. The first authorization was for release of information excluding medical information to any investigator, special agent, or other duly accredited representative of the authorized Federal agency conducting her background investigation to obtain any information relating to her activities from individuals, schools, residential management agents, employers, criminal justice agencies, credit bureaus, consumer reporting agencies, retail business establishments, or other sources of information. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, disciplinary, employment history, criminal history record information, and financial and credit information. Grievant further authorized the Federal agency conducting her investigation to disclose the record of her background investigation to the requesting agency (here BOP) for the purpose of making a determination of suitability for employment or eligibility for a security clearance. The second authorization pertained to the release of information to the investigator by health practitioners with respect to the answers to questions about her mental health consultations, specifically; Does she have a condition or treatment that could impair her judgment or reliability? If so, describe the nature of the condition and the extent and duration of the impairment or treatment; What is the prognosis? Both authorizations were signed by the Grievant and dated September 12, 2002 (Jt.Ex.2).

[2] The Pre-employment Interview Questionnaire ended with the following cautionary 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). In signing the Pre-employment Interview Questionnaire, Grievant certified the following: **"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"** (Jt.Ex.3).

CHRONOLOGY OF RELEVANT EVENTS (continued)

Prior to Commencing Her Employment, Grievant Was Required to Provide Answers to Three (3) Questions Set Forth on the Form Titled, Supplemental Questionnaire for Selected Positions; The Three Questions Pertained to the Following Topics, to Wit, Her Use of Illegal Drugs and Drug Activity; Her Use of Alcohol; and Her Medical Record; Grievant Answered All Three Questions in the Negative, that is, With a "No" Answer; Supplemental Questionnaire Dated[3]	November 19, 2002
Sharon Benefield, the then Incumbent Assistant Human Resource Manager at the Metropolitan Correctional Center in Chicago in 2002, Was the Agency Official Who Requested a 20C Investigation of the Grievant be Initiated; Written Request as Set Forth on the Top Portion of SF 85P, Grievant's Employment Application Form Dated	November 21, 2002
Date Grievant's Employment Application Form And Agency's Request for a 20C Investigation of Grievant be Initiated, Received by the Office of Personnel Management (OPM)	November 25, 2002
Grievant Resigned Her Employment With the Wisconsin Department of Corrections; Date of Resignation	December 14, 2002
Grievant Commenced Her Employment With the Federal Bureau of Prisons as a Correctional Officer at the Chicago Metropolitan Correctional Center; Date Employment Commenced	December 15, 2002
Security and Background Investigation of Grievant Performed by Investigations Service of the Office of Personnel Management; Investigation Findings as Set Forth in a Document Titled, Report #2 Noted that This Phase of the Investigation Commenced April 23,	September 19, 2003

[3] Under the block titled Instructions, Grievant was apprised that this Questionnaire was supplemental to her employment application she had submitted on September 12, 2002 and was used only after an offer of employment has been made and when the information it requests is job-related and justified by business necessity (Jt.Ex.4).

CHRONOLOGY OF RELEVANT EVENTS (continued)

2003 and Concluded on June 27, 2003; Date Investigation Closed[4]

[4] It is noted that Report #2 consisted of eleven (11) pages but that pages 3, 4, and 5 were not included as part of the subject document which was introduced, identified as Joint Exhibit 5 and moved into evidence in these proceedings. On April 11, 2007, one (1) day prior to the first day of hearing in this arbitral proceeding, the Union initiated a written information request directed to MCC Warden, Eric Wilson for, among other documents, "a full complete and un-redacted copy of the investigative file pertaining to Grievant's case, Case #03104465, date of investigation 4-23-03 through 6-27-03 (Un.Ex.2). Said written information request was responded to on April 11, 2007 by MCC Employee Services Manager, Casandra Loggins-Mitchell wherein, in addressing the Union's request for a full complete and un-redacted copy of Report #2 (identified by the Union as the report dated April 23, 2003 through June 27, 2003), Loggins-Mitchell asserted that the Bureau of Prisons does not have the authority to release the Investigative Report as it is the property of the Office of Personnel Management (OPM). Loggins-Mitchell further asserted that the Union had been afforded copies of all documents on which the decision to remove Grievant from her employment with the MCC was based (Un.Ex.3). At the April 12, 2007 hearing, the Agency reasserted its position that the Bureau of Prisons does not have the authority to release the investigative file as it is the property of OPM, to which the Union responded that the Bureau's position was unacceptable maintaining such position constitutes a violation of both the Preamble and Article 3, Section A of the Parties' Master Agreement (the 1998-2001 Collective Bargaining Agreement, Jt.Ex.1). Specifically, the Union noted that portion of the Preamble that requires good faith on the part of both Parties as set forth in the following language, to wit, "Moreover, the parties recognize that the administration 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." As to Article 3, Section A of the Master Agreement (Jt.Ex1), that provision reads as follows: "[B]oth parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations." With respect to this provision, the Union asserted that OPM is not a higher government-wide authority but rather simply a separate agency and that such a higher source would be a Presidential Executive Order, an Act of Congress, or a statute. In furtherance of its position it is entitled to the full, complete, and un-redacted copy of Investigative Report #2, the Union cited Article 30, the Disciplinary and Adverse Actions clause of the Master Agreement (Jt.Ex.1), Section E1 which states the following: "any notice of proposed disciplinary or adverse action will advise the employee of his/her right to receive the material which is relied upon to support the reasons for the action given in the notice." The Union contends the Agency is denying its right to obtain the missing pages of Investigative Report #2. In response, the Agency concurred that Article 30, Section E1 obligates it to provide to the Union those records it **relied upon** in its decision to remove the Grievant from its employ and that's exactly what it has done in providing the Union with a copy of Investigative Report #2 in its present state. In an effort to resolve this dispute, the Arbitrator held an off-the-record meeting with Agency advocate, James Vogel and Union Advocate, Sam Heuer, wherein the Parties agreed to an arrangement whereby the Department of Justice (the Agency) would attempt to secure the requested missing pages of Investigative Report #2 from OPM, that said attempt would be made no later than three (3) weeks from the date of hearing (April 12, 2007), that if successful, the pages would be reviewed solely by the Arbitrator and in his review, the Arbitrator would determine if the missing pages were either relevant or irrelevant to the grievance at hand and, if found to be relevant, the hearing might have to be reconvened. Additionally, if found to be relevant, the Agency would have the right to address the matter in argument to be included in its post-hearing brief and the Union would also be given this same opportunity in its post-hearing brief. By letter dated April 24, 2007, Loggins-Mitchell directed a written request to OPM for the missing pages and by letter dated May 2, 2007, OPM indicated it would authorize release of the entire investigative file if it received a notarized authorization from the Grievant instructing it to release the entire investigative file to the Arbitrator for his review. Upon receipt of OPM's May 2, 2007 written response, Loggins-Mitchell faxed the OPM letter to the Arbitrator and by e-mail to Loggins-Mitchell the Arbitrator acknowledged receipt of the faxed letter. As a result of a misunderstanding, the Union was not notified that the Agency

CHRONOLOGY OF RELEVANT EVENTS(continued)

A Second Part of OPM's Investigation of Grievant Was Set Forth in Written Report #3 Numbering Seven (7) Pages Which Consisted of Interviewing Grievant Pertaining to Financial Issues, Credit History, Personal Matters, and Dates and Circumstances When She Consulted With a Mental Health Professional; the Dates of this Phase of the Investigation Occurred From May 22, 2003 through July 6, 2003; Upon Completion of Report #3, Date Investigation Closed by OPM[5]

September 19, 2003

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had made the request to OPM within the stated agreed upon time frame of three (3) weeks and that OPM had agreed to release the entire investigative file upon written authorization from the Grievant. Thus, Union Advocate, Sam Heuer filed a written Motion For Adverse Inference with the Arbitrator but upon being informed the Agency had made the request to OPM and OPM's willingness to accede to the request should it receive written authorization from the Grievant, the Union at the second hearing held May 3, 2007 withdrew its Motion For Adverse Inference.

[5] The purpose of this interview with Grievant conducted under unsworn declaration was to clarify answers to several of the questions posed to her during her pre-employment interview, conducted by MCC Assistant Human Resource Manager, Sharon Benefield on September 17, 2002 and summarized in a written report by Benefield in a document titled, **"Summary of Findings of the Pre-Employment Interview"** (Jt.Ex.3). In particular, the OPM investigator addressed Grievant's responses to the following questions, to wit: "Has the applicant been disciplined (suspended, reprimanded, etc.) in former or current civilian employment" to which Grievant answered, "No"; "Has the applicant ever served in the military" to which the Grievant answered, "yes"; a series of questions pertaining to Grievant's financial history, specifically, "Has the applicant – been sued or held for non-support, had involuntary repossession of auto or other property – been evicted from a residence – failed to fulfill a rental or other contractual agreement, - had a tax lien placed against them or their property – had any other financial default, - had their wages assigned or garnished, to which the Grievant gave a "No" answer to all of these questions except the last indicating "yes" that she had had her wages assigned or garnished (it is noted that the investigator appended to this Report #3 a one page handwritten summary of Grievant's credit report); "Has the applicant ever made intentional false statements or been involved in deception or fraud such as impersonation in examination, altering transcripts or other official records, falsifying reports/records including his/her BOP application" to which Grievant answered "No"; "Does the application for employment submitted for this interview accurately reflect (1) your employment history, i.e., duties, supervisory responsibilities, reason for leaving jobs, (2) education, and (3) any other experience used in meeting the qualification requirements for this position [Correctional Officer]" to which Grievant answered, "Yes"; "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 law 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 question? **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)" to which Grievant answered, "No"; "Has the applicant been convicted of any moving traffic violations within the past three years" to which Grievant answered, "Yes"; "Has the applicant ever had his/her license suspended or revoked" to which Grievant answered, "Yes"; "Has the applicant used marijuana" to which Grievant answered, "Yes"; Does the applicant currently have any relatives who are inmates at any correctional facility at the Federal, State, or Local level" to which Grievant answered, "Yes". As noted elsewhere above, by signing Section H, the Signature Block of the Pre-Employment Interview, Grievant certified that all answers and statements made on this form (**Summary of Findings of the Pre-Employment Interview**) are true, complete and correct to the best of my knowledge and belief, and are made in good faith (Jt.Ex.5).

CHRONOLOGY OF RELEVANT EVENTS (continued)

Subsequent to Submission of the OPM Investigative Report, Grievant Received a Letter From Security Specialist, In the Agency's Security and Background Investigation Section (SBIS), Therisa Blue, Apprising Grievant that Issues Have Arisen in Connection With Her Background Investigation Which are a Concern to the BOP; As a Result, the BOP was Extending to Her the Opportunity to Comment on the Information in Her Background Investigation Upon Which the BOP Intends to Rely in Determining Whether to Continue Her Employment; Blue Advised Grievant that if She Chose Not to Answer One or More of the Written Questions, She Was to Complete a Waiver; Blue Further Advised Grievant That After Answering the Written Questions or Completing the Waiver, She Was to Send All of the Documents Along With Any Additional Information She Chose to Provide to the SBIS and that, Should She Have Any Questions, She Should Feel Free to Contact Her by Telephone at the Numbers Indicated; Letter Dated[6]	**November 3, 2003**
Grievant Responded to the Interrogatories Presented to Her Which consisted of Twelve (12) Questions of Concern of Which She Answered Eleven (11) and Provided Additional	**November 16, 2003**

[6] Accompanying this letter was a one page "**Notice of [Legal] Rights**" which Blue advised Grievant she should read before answering any of the written questions then sign the Notice and return it to SBIS in a separate envelope. This document set forth the following enumerated six (6) Legal Rights possessed by Grievant, to wit:

1. You have the right to remain silent and not answer any of the written questions;
2. If you choose to answer only some of the written questions, you do not waive your right to remain silent with respect to the other written questions;
3. Any answers to the written questions which you furnish can be used against you in any proceeding, including criminal proceedings;
4. You have the right to seek advice from a representative before you answer any written questions;
5. With respect to any unanswered written questions, your eligibility for employment with the Bureau of Prisons in a sensitive or Public Trust position will be initially determined solely on the investigative Information available to the Bureau;
6. If you choose to answer the written questions, you must return your answers to Therisa Blue, Security Specialist, Security and Background Investigation Section, within 5 working days, unless you request For good cause shown, and are granted an extension not to exceed 5 days.

Grievant signed the Notice on November 5, 2003, two (2) days after receiving the letter from Blue dated November 3, 2003 in the presence of a witness named, J. Hansen who also signed the Notice on November 5, 2003. In signing the Notice, Grievant certified she had read the statement of her legal rights and understood them, that she had received the interrogatories concerning her background investigation. Further, Grievant acknowledged by her signature on the Notice that no promises or threats had been made to her, and no pressure or coercion of any kind had been applied against her by any employee of the United States Government (Jt.Ex.7).

CHRONOLOGY OF RELEVANT EVENTS(continue)

Comments to Eight (8) of the Questions on a Separate But Accompanying Document; Date Grievant Certified Her Responses to the Interrogatories Along With Her Additional Comments[7]	
By Letter, Blue Informed Grievant She Had Been Assigned to Adjudicate Her Limited Background Investigation with the Bureau of Prisons and that She Needed to Speak With Her About Some Information that Was Part of Her Background Investigation; To This End, Blue Attached a Form Titled, "Agreement to Subject Interview" Which Blue Requested Grievant to Complete and Should be Faxed to Her Within Three (3) Days of Her Receipt of the Form; Blue Apprised that After She Received the Completed Faxed Form, She Would Contact Grievant Telephonically; Letter Dated	**December 2, 2003**
Grievant Signed the "Agreement To Subject Interview" In Which She Agreed to Discuss Information in Her Background Investigation with Bureau of Prisons' Officials and to Certify That Her Answers Would Be True, Complete and Correct to the Best of Her Knowledge and Belief, and Would be Made in Good Faith; Agreement Signed in the Presence Of a Witness Named Tonya Davis and Dated	**December 2, 2003**

[7] By her signature along side the date of November 16, 2003, Grievant acknowledge having read the following statement, to wit; "A false answer to any of the attached written questions may be grounds for terminating your employment in a Bureau of Prisons' position, and may be punishable by fine or imprisonment. All the information you give will be considered in reviewing your responses and is subject to investigation. (18 U.S.C. Sec. 1001)" Additionally, Grievant certified that "all of the statements made on these pages [of the interrogatories of which there were 22 pages (Jt.Ex.10) plus 2 pages on which she recorded additional comments (Jt.Ex.11)] are true, complete, and correct to the best of my knowledge and belief, and are made in good faith." (Jt.Ex.8). In a hand written notation by Blue dated December 1, 2003, on page 1 of Grievant's additional comments, Blue indicated "this documentation is not complete and cannot be understood." A perusal of the two (2) pages of additional comments submitted by Grievant to Blue reveals that all sentences were truncated apparently cut off in reproducing the document and therefore the additional comments were barely intelligible (Jt.Ex.11). According to comments made by Union advocate, Attorney Heuer at the arbitration hearing of April 12, 2007, Blue did not bother to contact Grievant to inform her that she received only partial responses relative to the filing of her additional comments and that she needed the whole of the responses (see Transcript page 66). Agency advocate, Attorney Vogel averred at the hearing that he only became aware of this deficiency in Grievant's submission of additional comments just a couple of weeks prior to the hearing date of April 12th, that he attempted to secure the complete file from Blue but learned that Blue no longer had possession of the file, that the file had been archived (see Transcript pages 66-67).

CHRONOLOGY OF RELEVANT EVENTS(continued)

Telephone Interview of Grievant by Blue Pursuant to Grievant's Having Signed and Returned the Form, "Agreement to Subject Interview", Wherein Blue Queried Grievant Further Regarding Three (3) Issues, To Wit: Alleged Termination From Her Position as Supervisory Youth Counselor by Her Former Employer, the Wisconsin Department of Corrections; Written Reprimand Issued to Her in September of 2001 By Her Former Employer, the Wisconsin DOC For Allegedly Intimidating a Supervisor; and Her Being Sued by Kohls Food Store for the Balance of Three (3) Insufficient Fund Checks; Date Interview Conducted And Date Blue Recorded the Interview in a Memorandum For File[8]	**December 2, 2003**
Letter Issued to Grievant by Captain Lazo Savich, Department Head of the Correctional Services Department at MCC and Grievant's Second Line Supervisor Wherein, Savich Informed Grievant He Was Proposing that She be Removed From Her Position of Correctional Officer no Sooner Than Thirty (30) Calendar Days From the Date She Received This Letter Based on Her Failure to Provide Accurate Information Regarding Employment Documents, Specifically Her Employment Application Forms (SF 85P and SF 85P-S) and Security Investigation Forms, Specifically, an Integrity Interview Form as Part of Her Appointment Process; The Letter Further Apprised Grievant She Was Required to Report All Dismissals and Resignations in Lieu of Dismissal From Any Job, As Well As, If She Had Been Disciplined (suspended, reprimanded, etc.) in Former Or Current Civilian Employment on These Forms; The Letter Asserted Grievant Had Failed to Report the Following Information as Set Forth in Five (5)	**September 27, 2005**

[8] As to the first query, Grievant advised she had not been terminated from this supervisory position but, rather, she had been demoted and returned to her former position with the Wisconsin DOC of Youth Counselor A. As to the second query, Grievant stated that at the time of her pre-employment interview, an appeal of this disciplinary action by the Wisconsin DOC was pending in the grievance procedure and she was not sure if the written reprimand would stand as a final action and too, the written reprimand at the time had been issued then for over a year and should not have been in her personnel file when reviewed by the Agency's investigator. And as to the third and last query, Blue reported that Grievant had provided proof of her payments to Kohls at the time she responded to Written Interrogatories dated 11/03/2003 (Jt.Ex.12).

CHRONOLOGY OF RELEVANT EVENTS(continued)

Separate Specifications [Charges] Identified as Specifications A Through E All of Which Alleged Grievant's Failure to Disclose and Report Certain Information that Came to the Agency's Attention as a Result of Information Contained in The OPM's Investigation of Her Background, Constituted Falsification of Pre-Employment Documents; Specification A Pertained to Grievant's Failure to Report the Disciplinary Actions Taken Against Her by the Wisconsin DOC of Having Been Terminated From Her Probationary Appointment as Supervisory Youth Counselor and Her Failure to Report She Had Been Given a Written Reprimand in September of 2001, Both Actions of Which Were Contrary to the Answers She Provided on Both Her Pre-Employment Interview and Her Supplemental Questionnaire; Specification B Pertained to Her Failure to Report Two (2) Disciplinary Actions Imposed by Her Former Employer, the Wisconsin DOC, Specifically, a Written Reprimand in June of 2002 for the Infraction of Violating Work Rules and a Verbal Reprimand in May of 2002 For the Infraction of Failing to Complete Inventory Sheets on Her Unit; Specification C Repeats Her Failure to Report that In May of 2002 She Was Given a Verbal Reprimand For Failing to Complete Inventory Sheets on Her Unit While Employed by the Wisconsin DOC, Division of Juvenile Corrections, Southern Oaks Girls School But, Noting that She Had Initially Answered "No" on Her Pre-Employment Interview In Response to the Question, "Has the Applicant been Disciplined (suspended, reprimanded, etc.)in Former or Current Employment", Whereas in Her Written Interrogatories She Admitted to Having Been Given a Verbal Reprimand for Failing to Complete Inventory Sheets on Her Unit; Specification D Pertained to Her Failure to Report Having Been Given a Written Reprimand For Intimidating a Supervisor Both at Her Pre-Employment Interview and in Her Response to Interrogatories But Revealing this Written Reprimand at Her Subject Interview Conducted by Blue in December of 2003; Specification E Pertained To Her Failure to Disclose at Any Time Consultations With a Mental Health Professional Whereas, It Was Noted that Her Background Investigation Revealed She Had Been Seen by Two Mental Health Professionals Within the Stated Time Frame of the Last Seven (7) Years Having Been Treated for Depression and Currently Being Seen by a Mental Health Professional and Being Treated for the Condition of Attention Deficit Disorder; The Letter Went on to State that Her Actions of Falsifying Pre-Employment

CHRONOLOGY OF RELEVANT EVENTS (continued)

Documents Have Destroyed Her Credibility and Effectiveness as a Correctional Worker, that Her Actions Demonstrate that She is Not One to Whom the Care, Custody, and Correction of Federal Criminal Offenders May be Entrusted and, that If the Proposal for Her Removal Is Sustained, it Would be Fully Warranted and In the Interest of the Efficiency of the Service; Savich Informed Grievant that the Final Decision on the Proposal to Remove Her From Her Employment at the MCC Would Be Made by the Warden and that She Could Reply to the Proposal to the Warden Either Orally or in Writing or Both And that She Had Fifteen (15) Working Days From the Date She Received the Proposal Letter to Make Such Reply; Further, Savich Indicated to Grievant She Had the Right To Have a Representative of Her Choice Assist Her in the Preparation and Presentation of Any Reply She Might Wish to Submit and that If She Should Have Any Questions or Need Assistance in This Matter, to Contact Casandra Loggins-Mitchell, the Employee Services Manager; Proposal Letter Dated[9]

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[9] In his testimony, Savich explained that by virtue of his position as Department Head of the Correctional Services Department one of his duties is to assume responsibility as the proposing official in matters pertaining to disciplinary and adverse actions relating that, there are other department heads at the MCC whose responsibility is to assume the function of proposing official for their respective departments, offering ,as an example, Loggins-Mitchell who is Department Head of Employee Services. Savich further explained the process by which he exercises his responsibility as proposing official stating that he receives an already drafted proposal letter from Employee Services along with the affected employee's investigative file. In the instant case, he received the subject proposal letter dated September 27, 2005 from Employee Services admitting that he has no input into drafting such letters. Savich further related that while he read the proposal letter and made one correction to a date set forth in Specification D and initialed the corrected date, changing the year to 2002 from 2005, he did not recall receiving Grievant's investigative file and asserted that even if he had received it he is certain, without any doubt, he did not review said file but simply accepted the content of the proposal letter as is since he is without authority to have any input relative to a proposal letter's content. In continuing to explain the process, Savich testified that after he receives a proposal letter, he contacts the employee who is the subject of the letter for the purpose of meeting with the employee in order to issue the proposal letter. Savich explained he executes three (3) signed copies of the proposal letter giving the affected employee the original and one copy of the letter and returning the other signed copy along with the employee's entire personnel file to Employee Services. Savich further explained that proposal letters are issued to employees with regard to two (2) types of issues, to wit, job related or pre-employment issues. In Grievant's case, her proposal letter addressed pre-employment issues, not job related. Thus, even though in his view Grievant was a good employee, her excellent and outstanding job performance ratings (see Jt.Ex.13), during the time she was employed had no mitigating effect on the quantum of discipline imposed, here removal, as he has no authority to change the quantum of discipline assessed since he is not the final decision maker, that is, not the deciding official in these matters.

CHRONOLOGY OF RELEVANT EVENTS (continued)

Pursuant to Article 7, Section 1 of the Master Agreement, Loggins-Mitchell notified the then incumbent President of Local Union 3652, Jeffrey Jackson that Management Would be Issuing a Proposal For Disciplinary/Adverse Action to a Bargaining Unit Employee (without identifying the Grievant by name), On the Charge of "Failure to Provide Accurate Information Regarding Employment Documents & Security Investigation Forms" and that the Corrective Action Proposed was Removal: Notification & Memorandum Dated	**September 27, 2005**
By Memorandum From the Then Incumbent Local Union Vice-President, Michael S. Rule to the Then Incumbent MCC Warden, Silas Irvin, Rule Apprised the Union Had Received Grievant's File on October 6, 2005 Relative to the Notice Issued to Her Dated September 27, 2005 Proposing Her Removal From Her Position as a Correctional Officer and That in Reviewing Her File, the Union Became Aware of SBIS Security Specialist, Theresa Blue's Notation on Grievant's Written Response to the November 3, 2003 Interrogatories, that "This Documentation is not Complete and Cannot be Understood" bearing the date of December 1, 2003; Pursuant to Article 30, Section d, Paragraph 1, the Union Requested that the Agency Provide a Complete Copy of the Response Grievant Provided the Agency to the November 3, 2003 Interrogatories, Explaining this Information was Crucial to the Union in Order For It to Prepare a Serious Response in Grievant's Behalf to the Warden Prior to Him Making a Decision; Additionally, the Union Requested to be Given All of Grievant's Performance Appraisals Beginning December 2002 Through to the Present Time; Memorandum Dated[10]	**October 11, 2005**
Grievant Filed a Written Response to Warden Irvin Pertaining To the September 27, 2005 Notice She Received Proposing Her Removal, Wherein She Addressed Each of the Five (5) Specifications Set Forth in the Removal Proposal; Written Response Dated	**October 12, 2005**

[10] The cited provision reads as follows: "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" (emphasis by Union).

CHRONOLOGY OF RELEVANT EVENTS (continued)

Memorandum From Local Union Vice-President Rule To Warden Irvin Wherein Rule Apprised that the Agency Had Yet to Respond to the Union's Request For the Information Set Forth in the Union's October 11, 2005 Memorandum and Renewing Said Request on the Same Grounds Asserted in Its October 11th Memorandum, that the Information Is Crucial to the Union in Order to Prepare a Serious Reponse Prior to The Warden Making His Decision; Memorandum Dated[11]	**October 25, 2005**
Memorandum From Warden Irvin to Local Union Vice-President Rule Wherein He Responded to the Union's Request for Specific Information to Wit: Although Irvin Acknowledged That the Request With Respect to Waivers Allegedly Issued by Him and His Predecessor Warden, Jerry Graber in Behalf of Grievant Met the Requirements of a Particularized Need, Nevertheless, Irvin Maintained that Such Information Constituted Advice Provided for Management Officials and Therefore Not Subject to Release in Accordance With 5 USC, 7114 B(4)C;[12] **As to Providing Grievant's Complete Response to The Interrogatories Dated November 3, 2003, Irvin Asserted the Documents Already Provided the Union Reflect Grievant's Complete Written Response and As a Result There Was No Additional Information to Provide; The Union's Request for Grievant's Performance Appraisals From December, 2002 to the Present Were Attached to this Memorandum; Memorandum Dated**	**November 2, 2005**

[11] Specifically, the information requested was as follows: (1) the Agency's justification for the waiver for Grievant; (2) a complete copy of the response Grievant provided the Agency to the interrogatories dated November 3, 2003; and (3) Grievant's performance appraisals dating back to December, 2002 to the present time. It is noted by the Arbitrator that prior to this second request for information from the Agency, Grievant had already submitted to Warden Irvin a written rebuttal to each of the five (5) asserted Specifications.

[12] Article 7114 B(4)C states the following: The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation, in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data – **which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining;** (emphasis by the Arbitrator).

CHRONOLOGY OF RELEVANT EVENTS (continued)

Memorandum From Rule to Irvin Wherein He Referenced The Union's Request of October 12, 2005 for Information Regarding Waivers for Grievant by Irvin and Former Warden Graber in Regard to Issues that Were Raised During Her Security Background Clearance, Recalling that On November 2, 2005, Shortly After His (Irvin's) Arrival As Warden at MCC, that He (Rule) Inquired as to What The Status of the Waiver Was, at Which Time Irvin Indicated to Him that He (Irvin) Was Also Requesting a Waiver Concerning Grievant's Security Background Clearance; Rule Apprised It is Important for the Union To Know What the Agency's Justification Was for Requesting a Waiver for Grievant Taking Into Consideration Grievant Had Received a Proposal to Remove Her From Her Position as Correctional Officer Because of Issues Raised in Her Security Background Clearance; Rule Stated He Assumed that the Waiver Had Been Denied and Asserted the Union Needed the Information to Prepare a Response to the Agency Pertaining to Grievant's Employment With the Agency; Memorandum Dated	November 3, 2005
Memorandum From Warden Irvin to Rule Wherein Irvin Addressed the Union's Request of November 3, 2005 for Information Pertaining to Waivers Apprising that Waivers As Referenced in Program Statement 3000.02, Chapter 7 Are Waivers to Standards of Acceptability and are Available to Selecting Officials to Request Authorization To Hire an Applicant Whose Past Behavior is Defined as Unacceptable by the Guidelines of Acceptability and Therefore Such a Waiver Must be Exercised and Approval Granted Prior to the Candidate's Entrance on Duty; Irvin Asserted that as the Agency Was Not Aware that Grievant's Reported Behavior as Set Forth in Her Background Investigation Was Unacceptable When Judged by the Guidelines of Acceptability, No Such Waiver Was Submitted Thus Making the Waiver Provision Inapplicable; Irvin Addressed for a Second Time the Union's Query Pertaining To the Completeness of Grievant's Written Response to the November 3, 2003 Interrogatories Even Though Said Responses Were Deemed by Blue to be Incomplete, Reiterating the Agency's Position that Her Written Response Reflects the Entire Document Provided by the Grievant; With	November 15, 2005

CHRONOLOGY OF RELEVANT EVENTS (continued)

Respect to the Grievant's Request to Have a Copy of Her Entire Security File be Provided to the Union, Irvin Apprised That the File Was the Property of the OPM and that the BOP Does Not Have the Authority to Release the Investigative File And that Inquiries to Secure Said File Should be Directed To the OPM Federal Investigative Services; According to Irvin, the Remaining Items in Grievant's Security File Are Documents for Management's Use and Therefore Not Subject to Release in Accordance With 5 USC 7114 B(4)C; Irvin Ended this Memo by Assuring Rule that the Documents Initially Provided the Union Comprise the Information on Which He, as the Deciding Official Considered In Making the Disciplinary/Adverse Action Proposal, that is, The Proposal to Remove Grievant From the Employ of the Agency; Memorandum Dated[13]	
Memorandum From Rule to Irvin Wherein, Rule Noted Irvin's Position With Regard to Applying a Waiver to Standards of Acceptability, that is, That the Waiver Had to Be Applied Prior to an Applicant Being Hired, But Pointed Out that, As In Grievant's Case, the Agency Has Traditionally Hired Employees Prior to Completing Their Background Investigation and Moreover, Like in Grievant's Case, the Time Span Between Hiring an Applicant and the Completion of the Background Investigation Can be As Long as Three (3) to Five (5) Years; Rule Maintained That The Union's Position Was Not Per Se Disputing the Procedures Set Forth in Program Statement 3000.02, Chapter 7 But Rather The Agency's Reluctance to Release Information and Irvin's	**November 17, 2005**

[13] With respect to the United States Code 5 USC Article 7114 B(4)C, cited by Irvin in this Memorandum, see Fn. 12 on page 12 of this **Opinion and Award.** As to Program Statement, Chapter 7, Number 3002.02 referencing Waivers to Standards of Acceptability also cited by Irvin in this Memorandum, it is noted by the Arbitrator that this Program Statement is set forth in the **Human Resource Management Manual** that is applicable to the U.S. Department of Justice, Federal Bureau of Prisons (Un.Ex.14). The provision on Waivers to Standards of Acceptability reads as follows: " There may be occasions where applicant's past behavior is defined as unacceptable by the Guidelines of Acceptability, but due to extenuating circumstances the selecting official still wishes to select the applicant. When this situation arises, the selecting official must request that the Guidelines of Acceptability be waived. Such a waiver can only be granted by the respective Regional Director or Assistant Director. This waiver must be in writing and conclude: * The details and circumstances surrounding the applicant's derogatory behavior which is outside the guidelines. * The reasons why this applicant should receive further consideration. * The availability of other suitable applicants. A copy of this waiver must be maintained in the employee's temporary security file and must be forwarded to SBIS when adjudicating their investigation. Employment of an applicant who falls outside the guidelines without the proper waiver may be grounds for taking disciplinary action against the party/parties responsible for the selection (Agency Ex.20, p.12).

CHRONOLOGY OF RELEVANT EVENTS (continued)

Failure to Acknowledge the Conversation They Had in Which Irvin Told Him that Both Former Warden Graber And Himself Requested a Waiver to Retain Grievant as An Employee With the BOP; Rule Informed Irvin that as a Result of Their Conversation About Requesting a Waiver, He Spoke With Union Regional Vice President, Randy Martin Who in Turn Spoke to the Deputy Director of the North Central Region of the BOP Who Apprised Martin That the Waiver Originally Requested by Graber Could Not be Found, But that Irvin's Waiver Had Been Received And the Request Had Been Denied; Rule Then Renewed His Request to Irvin of Wanting to Know From Irvin the Reason for His Having Requested a Waiver at a Time He Had Full Knowledge There Were Some Issues Raised in Grievant's Background Investigation; Rule also Requested To Know From Irvin if Grievant's Behavior Had Changed When Captain Savich Issued Her the Proposal to Remove Her From Her Position of Correctional Officer at the MCC And, Additionally, He Asked Irvin What Was He Implying By Reminding Him that the Documents Initially Provided The Union Comprised the Information on Which He, the Deciding Official Considered in Making the Decision on The Proposal for Disciplinary/Adverse Action When the Proposal Was for Termination of Employment; Rule Apprised ItWas the Union's Position that the Information It Had Requested Was In Accord With 5 USC 7114 and, as A Result It Would Pursue Obtaining the Requested Documents Through Other Areas of Administrative Remedies Provided To Employees and Their Union Representative; Memorandum Dated

Oral Response by Grievant to the Proposal for Her Removal for Failure to Provide Accurate Information As Disclosed by Her Security Background Investigation; As to Specification "A" Set Forth in the Proposal for Removal, Grievant Asserted She Had Not Been Terminated From Her Employment at the Wisconsin Department of Corrections (DOC), that She Left Her Employment at DOC Voluntarily Effective December 14, 2002 and Commenced Her Employment at the MCC on December 15, 2002; As to Specifications "B", Grievant Maintained that She Had Neither Resigned nor Was Dismissed But, Rather She Had Been Demoted; As to

December 1, 2005

CHRONOLOGY OF RELEVANT EVENTS (continued)

Specification "C", Grievant Asserted that Her Answer To the Question of Having Been Disciplined While an Employee of the DOC Was, as in Specification "B" That She Had Not Been Found Guilty of Anything; As to Specification "D", Grievant Questioned the Allegation of How She Could Have Intimidated Someone (a Supervisor) Who Weighs 250 Pounds And Asserted She Was Not Aware She Had Been Written Up on a Charge of Having Committed Intimidation; There Was No Reference in the Written Memorandum For File Recorded of Grievant's Oral Response by the Warden's Secretary, Mary Kay Cashman Dated December 5, 2005 of Grievant Having Addressed the Last Specification, Specification "E" Regarding Her Having Consulted a Mental Health Professional in the Last Seven (7) Years; Grievant Noted That Since She Had Been Employed at MCC, She Had Had No Probems, that Her Performance Evaluations Had Consisted of Ratings of "Exceeds" And Protested by Asking Why, After Having Been Employed for Three (3) Years Was the Agency Pursuing the Action of Terminating Her Employment And Questioning Why the Action Taken Had to be Removal; Date of Grievant's Oral Response

By Letter, Warden Irvin Notified Grievant of His Decision to Remove Her From Her Employment at MCC for Her Failure to Provide Accurate Information Regarding Employment Documents and Security Investigation Forms and Apprising Grievant that in Making His Decision He Gave Full Consideration to The Proposal, Her Oral Response of December 1, 2005, And to the Relevant Evidence Contained in the Adverse Action File Which Had Been Made Available to Her and After Careful Consideration He Found the Charge Fully Supported by the Evidence in Her Adverse Action File And Therefore, Found to Sustain the Charge; Irvin Opined that Grievant's Actions in this Matter Had Destroyed Her Credibility and Effectiveness as a Correctional Officer and, as Such, Her Removal Was In the Interest of the Efficiency of the Service Which Was to Occur Midnight, January 27, 2006; Irvin Further Apprised Grievant of the Factors He Considered in

January 26, 2006

CHRONOLOGY OF RELEVANT EVENTS (continued)

Determining What Penalty Was Appropriate; Letter Notice to Grievant of Her Removal From the Employ of the BOP Dated[14]	
Formal Written Grievance Filed by the Union on Behalf of Grievant Alleging the Agency Violated Various Identified Articles and Provisions of the 1998 – 2001 Master Collective Bargaining Agreement as Well as Provisions of the Local Supplemental Agreement But Not Limited to These Articles and/or Applicable Laws, Federal Statutes or Regulation, and Chapter 7 of the Human Resource Management Manual; the Union Contends that the Disciplinary Action of Removal Was Not Taken by the Agency For Just and Sufficient Cause to Promote the Efficiency of the Service, that the Warden's Decision to Remove Grievant From the Employ of The BOP, Chicago MCC Is Based on the Prejudices Established by the Agency's Internal and/or External Personnel Policies, that the Warden's Decision Does Not Endorse the Concept of Progressive Discipline Designed Primarily to Correct and Improve The Employee's Behavior and Most Definitely Did Not Warrant Such a Severe Sanction of Terminating Grievant From Her Position as a Correctional Officer; The Union Specified Eleven (11) Separate Actions Incumbent Upon the Agency to Remedy the Contractual Violations Committed by Its Action to Remove Grievant; Date Written Grievance Received By the MCC Warden's Office[15]	**February 21, 2006**

[14] Irvin noted the following factors he considered when determining that Removal constituted the appropriate penalty, to wit: (a) a charge of Failure to Provide Accurate Information regarding Employment Documents and Security Investigation Forms is a very serious charge in light of your position as a law enforcement officer and the fact that you knowingly provided inaccurate statements; (b) your position as a federal law enforcement officer requires that your word be above reproach and that the general public expects the highest standards from it law enforcement officers; (c) while your past work has been acceptable, it does not shield your very serious breach of trust; (d) while you have no prior disciplinary record, your misconduct is so serious as to warrant a substantial penalty; (e) the penalty is consistent with the agency's table of penalties; (f) there was no widespread notoriety about your misconduct; (g) there are/were no mitigating factors; and (h) alternative sanctions were considered, but I concluded that they would not have had the desired corrective effect (Jt.Ex.18).

[15] In the letter notice of Removal dated January 26, 2006, Warden Irvin apprised Grievant of her right to appeal the removal action in one of three (3) forums, to wit: by initiating a grievance pursuant to the Grievance Procedure set forth in the Master Collective Bargaining Agreement; by initiating an appeal with the Merit Systems Protection Board (MSPB); or by initiating a complaint with the Department of Justice (DOJ) Equal Employment Opportunity Commission (EEO) under its complaint procedures. Warden Irvin

CHRONOLOGY OF RELEVANT EVENTS (continued)

By Written Response Denying the Formal Grievance Timely Filed Contesting Grievant's Removal, Irvin Asserted that Although the Grievance Referenced a Number of Issues and Cited a Number of Provisions Alleged by the Union the Agency Had Violated by Its Action of Removing Grievant From Its Employ, the Union Nevertheless Failed to Indicate Just How Each Specific Article of the Master Collective Bargaining Agreement Cited, Along With Provisions Set Forth In the Local Supplement Agreement and Chapter 7 Of the Human Resource Management Manual Were Violated; Irvin Opined that Contrary to the Conclusion One Might Derive From a Reading of The Grievance that the Union Wished to Have an Arbitrator Decide Other Issues in Addition to the Issue of Whether or Not the Removal Action Taken Was for Just and Sufficient Cause, Nonetheless, Irvin Maintained that Based on the Information Set Forth In the Grievance, It Was the Agency's Conclusion That the Union's Intent Was For an Arbitrator to Decide Only, Whether the Adverse Action Taken Against Grievant Was for Just and Sufficient Cause and, If Not, What Should be the Remedy; Given this Latter Conclusion, Irvin Stated the Agency Was Prepared to Make a Joint Request for a Panel of Arbitrators Upon the Union's Notification of Intent to Proceed to Arbitration; Additionally, Irvin Provided the Agency's Position Rejecting Each of the Eleven (11) Remedies the Union Set Forth in Its Formal Grievance to Redress the Claimed Wrongful Action by the Agency in Removing Grievant From Its Employ; Written Denial of Grievance Dated	**March 23, 2006**
Written Notice of Appointment From the Federal Mediation & Conciliation Service Dated October 23, 2006 Apprising This Arbitrator that the Parties Had Jointly Selected Him to Arbitrate the Matter of Grievant's Removal; Date Arbitrator Received FMCS Notice of Appointment	**October 27, 2006**

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further apprised Grievant that she was limited to choosing one of these three (3) forums to contest the decision to remove her and that if she elected to initiate a grievance under the applicable provisions of the Master Collective Bargaining Agreement, she had no more than 40 calendar days from the date she received the removal letter to file a written grievance. It is noted therefore that receipt of the written formal grievance by the Warden's Office on February 21, 2006 fell well within the permitted time limit of 40 calendar days as it was noted by Loggins-Mitchell in a handwritten notation at the bottom of the Removal Notice dated January 26, 2006, that Grievant refused to sign receipt of the Removal Notice (Jt.Ex.18).

CHRONOLOGY OF RELEVANT EVENTS (continued)

Date First Arbitration Hearing Held as Rescheduled[16]	April 12, 2007
Date of Second Arbitration Hearing	May 3, 2007
Volume I Transcript of 300 Pages Covering The Hearing of April 12, 2007, Received by The Arbitrator on Date of	April 26, 2007
Volume II Transcript of 261 Pages Covering The Hearing of May 3, 2007, Received by the Arbitrator on Date of	June 1, 2007
Date Post-Hearing Briefs Received by the Arbitrator	
Employer/Agency	July 2, 2007
Union	July 3, 2007
By Transmittal Letter Dated July 3, 2007, the Arbitrator, Having Received an Original and A Copy of the Employer's Post-Hearing Brief But Having Received Only the Original of the Union's Brief, Sent the Copy of the Employer's Brief to the Union Noting that the Union Had Simultaneously Delivered the Copy of Its Brief Directly to the Employer; In This Transmittal Letter, the Arbitrator Declared The Case Record In The Matter of Grievant's Removal Officially Closed as of the Receipt Date of the Last Post-Hearing Brief; Date Case Record Officially Closed	July 3, 2007

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[16] Initially, the hearing in this matter was scheduled to convene on February 1, 2007.

LOCATION OF HEARINGS

Agency Staff Training Center
14 th Floor, Room 1450
55 East Monroe Steet
Chicago, Illinois

CONTRACTUAL AUTHORITY TO ARBITRATE

March 9, 1998 – March 8, 2001 Master Agreement (Jt.Ex.1, pp 1-92)
Article 32 – Arbitration, pp 68 – 70

WITNESSES (in order of respective appearance)

FOR THE EMPLOYER

Sameka Wright-Jackson
Former MCC Correctional Officer
and Grievant

Particia Ogren
Superintendent, Southern Oaks
Girls School
Wisconsin Department of Corrections

Sharon Benefield
Former MCC Assistant Human
Resource Manager[17]

Vincent E. Shaw
MCC Senior Attorney Advisor

Silas Irvin
Former MCC Warden, Retired[18]

Casandra Loggins-Mitchell[19]
MCC Employee Services Manager

FOR THE UNION

Lazo Savich
Captain and Department Head
Correctional Services

Mike Rule
Maintenance Mechanic Foreman
Facilities Department and
President of Local Union 3652

Randy Martin
North Central Regional
Vice President, AFGE
Council of Prison Locals 33

Roger Payne
National Secretary-Treasurer,
AFGE Council of Prison Locals 33

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[17] Witness' current employment with the Bureau of Prisons is, Employee Services Manager at FCI Taladega.
[18] Irvin retired on January 6, 2007.
[19] Testified as a Rebuttal witness.

ISSUE

The Parties indicated at the outset of the hearing that, pursuant to Article 31, Section H, the Grievance Procedure clause of the Master Collective Bargaining Agreement (Jt.Ex.1), they had stipulated to the following issue as being properly before the Arbitrator for resolution on the merits.[20]

Was the disciplinary/adverse action taken for just and sufficient cause?

If not, what shall be the remedy?

RELEVANT DOCUMENTATION

I. APPLICABLE MASTER AGREEMENT PROVISIONS (Jt.Ex.1)

ARTICLE 31
GRIEVANCE PROCEDURE

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances under 5 USC 7121.[21]

* * * *

Section c. Any employee has the right to file a formal grievance with or without the assistance of the Union.

* * * *

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[20] Section H reads as follows: "Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The Parties are then free to contest the action in one (1) of two (2) ways: 1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?, or 2. through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues." See also, page 18 of this **Opinion and Award**, wherein, in denying the subject grievance, Warden Irvin stated that if the issue as stated above were the issue the Union intended to arbitrate, then the Agency was prepared to make a joint request for a Panel of Arbitrators upon notification by the Union of its intent to proceed to arbitration,

[21] Article 7121 of 5 USC provides is subsection (a) the following: (1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage. (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

4. the Union has the right to file a grievance on behalf of any employee or group of employees.

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) [days] to the informal resolution process. * * *

* * * *

Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. if the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and

2. a grievance may only be pursued to arbitration by the Employer or the Union.

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or id not, what shall be the remedy?".

or

2. through the conventional grievance procedures outlined in Article 31 and 32, where grieving party wishes to have the arbitrator decide other issues.

* * * *

ARTICLE 32
ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. * * *

Section b. When arbitration is invoked, the parties (or the grieving party) shall, within three (3) working days, request the Federal Mediation and Conciliation Service (FMCS) to submit a list of seven (7) arbitrators.

* * * *

5. the arbitrator selected shall be instructed to offer five (5) dates for a hearing.

* * * *

Section d. The arbitrator's fees and all expenses of the arbitration, except as noted below, shall be borne equally by the Employer and the Union.

* * * *

Section g. The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit.[22] The arbitrator shall forward copies of the award to addresses provided at the hearing by the parties.

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters, may file exceptions to an award as allowed by the Statute. The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or

2. published Federal Bureau of Prisons policies and regulations.

Section i. A verbatim transcript of the arbitration will be made when requested by either party * * *.

PREAMBLE

* * * The Bureau of Prisons will develop and maintain constructive and cooperative relationships with its employees, through their exclusive representative, where applicable, the Council of Prison Locals and the American Federation of Government Employees. The parties respect the rights granted to Management, employees, and the Council of Prison Locals by the Civil Service Reform Act of 1978, as amended.

The parties recognize that efficient and effective service is a paramount requirement and that public interest requires the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency.

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[22] The Parties mutually agreed to waive this time limit in rendering the decision in this matter.

Moreover, the parties recognize that the administration 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. Therefore, the Federal Bureau of Prisons and Federal Prison Industries, Inc. hereinafter referred to as "the Employer" of "the Agency", and the Council of Prison Locals and the American Federation of Government Employees, hereinafter referred to as "the Union" or "exclusive representative," do hereby agree to:

(A) focus on problems and ways to deal with them;

* * * *

This Agreement and such supplementary agreements and memorandums of understanding by both parties as may be agreed upon hereunder from time to time, together constitute a collective agreement between the Agency and the Union.

ARTICLE 1
RECOGNITION

Section a. The Union is recognized as the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71.

Section b. The Employer recognizes the Union as the exclusive bargaining agent under the provisions of the Federal Service Labor Management Relations Statute, 5 USC, Chapter 71, 7101 et. seq., hereinafter referred to as "the Statute," and the Civil Service Reform Act of 1978, of all the employees in the unit, as the recognized Union for bargaining purposes with respect to conditions of employment of employees represented by the Union. The Union has the full authority as provided by Statute to meet and confer with the Agency for the purpose of entering into negotiated agreements, concerning changes in conditions of employment covering bargaining unit employees, and to administer this Collective Bargaining Agreement.

ARTICLE 6
RIGHTS OF THE EMPLOYEE

Section a. Each employee shall have the right to form, join, or assist a labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided by 5 USC, such right includes the right:

1. to act for a labor organization in the capacity of a representative and the right, in that capacity , to present the views of the labor organization to heads of agencies and other

officials of the executive branch of government, the Congress, or other appropriate authorities; and

2. to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees in accordance with 5 USC

ARTICLE 7
RIGHTS OF THE UNION

* * * *

Section d. Union representatives are authorized to perform and discharge the duties and responsibilities which are assigned to them by the Union in accordance with applicable laws, rules, regulations, this Agreement, and applicable supplemental agreements.

* * * *

Section j. In accordance with 5 USC, 552a (Privacy Act):

1. The local President will be notified of any proposals or decisions regarding disciplinary or adverse action against bargaining unit staff, and such notification will include the charge(s) and the proposed/decided upon corrective action;

* * * *

Section l. The Union will be given the opportunity to be present at formal discussions and meetings between the Employer and employees covered by this Agreement concerning grievances, personnel policies and practices, and any other matter affecting general working conditions of employees covered by this Agreement.

The following procedures will be used in providing notice of a formal discussion/meeting to the Union:

1. whenever possible, the Employer will notify the local Union president, or his/her designee, at least twenty-four (24) hours prior to the scheduled discussion/meeting; and

2. notification will include the date, time, and location of the discussion/meeting. Whenever possible, the notification should also include a brief description of the topic(s) to be discussed.

The Union will inform the Employer of who will represent the Union at the discussion/meeting.

Relief for the Union representative will be accomplished in accordance with **Section e** of this article.

* * * *

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.

* * * *

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.

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.

Section e. When formal disciplinary or adverse actions are proposed, the proposal letter will inform the affected employee of both the charges and specifications, and rights which accrue under 5 USC or other applicable laws, rules, or regulations.

1. any notice of proposed disciplinary or adverse action will advise the employee of his/her right to receive the material which is relied upon to support the reasons for the action given in the notice.

* * * *

Section h. When an employee exercises his/her right to orally respond to a proposed disciplinary or adverse action, the reply official will allow ample time for the employee to respond at this meeting. Although the reply official may ask follow-up questions, nothing requires the employee to answer such questions during this meeting.

* * * *

ARTICLE 36
HUMAN RESOURCE MANAGEMENT

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 and the Employer commit to these principles.[23]

II. BUREAU OF PRISONS MISSION STATEMENT, (Agency Ex. 12)

The Federal Bureau of Prisons protects society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure, and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.

III. BUREAU OF PRISONS VISION STATEMENT, (Agency Ex. 12)

The Federal Bureau of Prisons, judged by any standard, is widely and consistently regarded as a model of outstanding public administration, and as the best value provider of efficient, safe and humane correctional services and programs in America. This vision will be realized when . . .

* * * *

* * * Staff maintain high ethical standards in their day-to-day activities. * * *

IV. BUREAU OF PRISONS CORE IDEOLOGIES, (Agency Ex. 11)

* * * *

- Staff who are ethical, professional, well-trained, and diverse

[23] The Arbitrator notes that the Contract provisions cited are those the Union indicated in its written formal grievance with but a few additions of Sections under cited articles by the Arbitrator.

V. BUREAU OF PRISONS CULTURAL ANCHORS/CORE VALUES, (Agency Ex. 13)

* * * *

- **Promotes Integrity**
  The Bureau of Prisons firmly adheres to a set of values that promotes honesty and integrity in the professional efforts of its staff to ensure public confidence in the Bureau's prudent use of its allocated resources.

- **Recognizes the Dignity of All**
  Recognizing the inherent dignity of all human beings and their potential for change, the Bureau of Prisons treats inmates fairly and responsively and affords them opportunities for self-improvement to facilitate their successful re-entry into the community. The Bureau further recognizes that offenders are incarcerated as punishment, not for punishment.

* * * *

VI. HUMAN RESOURCE MANAGEMENT MANUAL, CHAPTER 7, AS REFORMATTED, 5/10/06; DEPARTMENT OF JUSTICE PROGRAM STATEMENT 3000.02 11/1/93, (Un.Ex.14, Agency Ex.20, & Jt.Ex.8)

1. PURPOSE AND SCOPE. To provide for the recruitment, selection, promotion, training, and evaluation of Bureau employees and to establish a Human Resource Management system to conduct these operations.

2. PROGRAM OBJECTIVES. The expected results of this program are:

a. The Bureau of Prisons will maintain a competent and representative workforce.

* * * *

731.1 Personnel Security, Suitability, and Investigation Program, pp. 6-41

1. PURPOSE AND SCOPE. To establish personnel security, suitability, and investigative procedures applicable to the Bureau and to establish sensitivity requirements for all positions.

* * * *

3. RESPONSIBILITIES

* * * *

e. Institution Human Resource Managers are responsible for pre-employment screening and initiating appropriate background investigations on institution employees, assisting with the resolution of any and all derogatory information as needed.

f. Human Resource Security Specialists are responsible for processing and reviewing background investigations. The human resource security specialist ensures all derogatory information has been satisfactorily resolved, or if issues remain unresolved refers to higher management official for further review.

4. PROCEDURES

a. DESIGNATIONS. All positions within the Bureau of Prisons are designated as sensitive positions for national security purposes. There are three categories of sensitive positions – **Special Sensitive, Critical Sensitive,** and **Non-Critical Sensitive**. There are three levels of risk designation described in 5 CFR 731 – **High**, **Moderate**, and **Low**. All positions within the Bureau are designated at the High or Moderate risk level as determined by the position's potential for adverse impact to the efficiency of the service.

Each category has distinct background investigation requirements. The three categories of sensitivity and risk designations are generally defined below:

* * * *

NON-CRITICAL SENSITIVE POSITIONS – any position which involves duties that may directly or indirectly adversely affect the overall operations of the Bureau of Prisons, and duties that demand a high degree of confidence and trust. * * *

* * * *

All positions identified as Moderate Risk are considered law enforcement positions for this purpose.

* * * *

- A NON-CRITICAL SENSITIVE position will require a LIMITED BACKGROUND investigation (LBI)

* * * *

c. PRE-EMPLOYMENT PROCEDURES

* * * *

STEP 2

* * * *

WAIVERS TO STANDARDS OF ACCEPTABILITY. There may be occasions where an applicant's past behavior is defined as unacceptable by the Guidelines of Acceptability, but due to extenuating circumstances the selecting official still wishes to select the applicant. When this situation arises, the selecting official must request that the Guidelines of Acceptability be waived.

Such a waiver can only be granted by the respective Regional Director or Assistant Director. This waiver must be in writing and include:

- The details and circumstances surrounding the applicant's derogatory behavior which is outside the guidelines.
- The reasons why this applicant should receive further consideration.
- The availability of other suitable applicants.

A copy of this waiver must be maintained in the employee's temporary security file and must be forwarded to SBIS [Security and Background Investigation Section] when adjudicating their investigation. Employment of an applicant who falls outside the guidelines without the proper waiver may be grounds for taking disciplinary action against the party/parties responsible for the selection.

* * * *

STEP 7. Requesting Limited Background Investigations (LBI).

OPM [Office of Personnel Management] must initiate and receive the appropriate background investigation prior to new employees reporting for duty. In order to ensure waiver of the pre-appointment investigation, selecting officials must certify that the applicant has been the subject of a satisfactory pre-employment interview and the background investigation has been initiated with OPM.

* * * *

STEP 8. Completed OPM Background Investigations.

Upon completing a Bureau-requested background investigation, the OPM forwards the investigative report to the SOI indicated on the investigation form. The appropriate Personnel Security Specialist shall review [the] completed OPM investigations (sic) within 15 working days after receipt. * * *

* * * *

STEP 9. Resolution of Derogatory Information.

If there is derogatory information uncovered in the background investigation, every attempt will be made by the Personnel Security Specialist to resolve it. Resolutions should be documented in accordance with instructions provided in this chapter.

* * * *

6. RESOLUTION OF DEROGATORY INFORMATION

a. The resolution of background investigations and the resolution of derogatory information is an essential part of the process for determining whether an individual is eligible for government employment or access to National Security Information. These functions should be conducted, whenever possible, by designated security personnel outside of the employee's supervisory chain. The supervisor's knowledge of derogatory information may affect the supervisor's objectivity regarding performance appraisal, promotions, etc., of the employee.

* * * *

c. POLICY.

* * * *

Every person seeking or holding employment with the Bureau is judged in hiring and in connection with any other employment action - - including, without limitation, disciplinary action; issuance, denial, or revocation of a security clearance; or dismissal - - on the basis of his or her:

- Abilities
- Demonstrated performance
- Experience
- Conduct
- Character
- Judgment
- Stability
- Discretion
- Integrity
- Responsibility
- Candor, and
- Other appropriate qualifications

The Bureau may inquire into and examine a person's performance, experience, conduct, character, judgment, stability, discretion, integrity, responsibility, and candor to determine suitability for employment and trustworthiness. In the contest of determining eligibility for security clearance or access to sensitive information, the Bureau may

investigate and consider any matter that would reasonably subject the applicant or employee to coercion; but no inference concerning susceptibility to coercion may be raised solely on the basis of the race, color, religion, sex, national origin, disability, or sexual orientation of the applicant or employee.

It is the policy of the DOJ and the Bureau that **all** derogatory information be favorably resolved before employment security approval is granted and a decision on continued employment is made. The resolution will require the adjudicator to identify the information, explain why it is considered insignificant, or provide documented resolution. It is not sufficient to resolve derogatory information by merely indicating that the subject exhibits acceptable job performance.

* * * *

Resolution of derogatory information should afford the subject an opportunity to comment on the derogatory information or a chance to offer his/her "side of the story." Resolution of derogatory information is a critical part of the adjudication process for several reasons. Information which appears derogatory can be refuted or mitigated in some instances by the subject of the background investigation. Similarly, the subject may be able to present circumstances which clarify the derogatory information.

* * * *

Executive Order (E.O.) 10450, entitled "Security Requirements for Government Employment," establishes as the criteria for government employment that individuals must be "reliable, trustworthy, of good conduct and character and of complete and unswerving loyalty to the United States."

Derogatory information is any information that, in the opinion of a reasonably objective person, tends to indicate that an individual may not be possessed of one or more of these qualities.

d. DEROGATORY INFORMATION. E.O. 10450 attempts to provide examples of information which may disqualify an individual for government employment. Listed below are general areas of concern for adjudicators, some specific concerns and examples of resolution.

* * * *

(3) Undesirable Character Traits. Any trait(s) which may show the individual to be unreliable, untrustworthy, or open to compromise is significant in the adjudication of the case. This information may be given by an open or confidential source, be derived from an arrest record or be indicated by the falsification of employment applications or personal history statements. All such information must be viewed in relation to the rest of the file. Isolated incidents in a person's background are viewed less significantly than

a continuing or emerging pattern of behavior. The adjudicator should try to obtain a complete picture for employment and/or access to National Security Information.

Undesirable character traits could also place an individual in a compromising situation where coercion or pressure might be used to blackmail an applicant/employee. The following examples are provided:

* * * *

(c) Mental Disorder Treatment. Medical treatment for a mental condition, as distinguished from marriage counseling and social services counseling for family problems, is significant and must be clarified to determine whether the subject's job performance may be adversely affected. The purpose of identifying this kind of information is to remove any reasonable doubt regarding the current seriousness of a problem. Temporary depression related to the death of a loved one or the failure of a marriage is to be expected, whereas long term depression would cause considerably greater concern.

In resolving derogatory information of this nature, obtain the following information:

Check the Supplemental Questionnaire for Selected Positions (Standard Form SF-85P-S) to see how the applicant/employee answered question 5 to determine if he/she answered honestly.

Medical treatment for a mental/emotional disorder must be accompanied by a recommendation from a competent medical authority that the applicant/employee is capable to perform the duties of a sensitive position.

If the applicant/employee answered "no" to question 5 on the SF-85P-S and there is evidence of medical treatment (i. e., treatment by a psychiatrist as opposed to a marriage counselor) for a mental condition, obtain a written, detailed explanation regarding the apparent falsification. * * *

(5) Dishonesty. As required by E.O. 10450, individuals entering federal service must be:

" . . . **trustworthy . . . and of good conduct and character . . .** "

This requires that applicants answer honestly when completing all employment documents.

Discrepancies on these forms may be an indication that the applicant/employee has falsified one of the forms to either conceal past behavior, or to exaggerate or misrepresent qualifications or suitability. In either case, all discrepancies must be resolved. All security/suitability documents are used as the basis for the background investigation and must be completed in detail. As an adjudicator, a careful review of all security/suitability forms is mandatory.

If there is a discrepancy in any of the information supplied, it must be resolved. To resolve this information, the adjudicator should:

- Present the original information to the subject (either in writing or verbally);
- Present the conflicting information that was developed in the background investigation; and
- Either ask the employee to explain, in writing, the discrepancy or summarize the employee's explanation for the discrepancies and include as documentation in the file submitted to SBIS.

* * * *

7. PROCEDURES TO RESOLVE DEROGATORY INFORMATION. Once derogatory information has been identified, either during the pre-employment process or in the review of the background investigation, it must be resolved. Resolution usually is presented in the form of written documentation obtained through an interview with the employee (referred to as a "Subject Interview") or written questions given to the subject (referred to as "Written Interrogatories"). Written documentation must be provided to allow the SBIS to verify the information, if necessary.

* * * *

750.1 PROCESSING DISCIPLINE AND ADVERSE ACTIONS

1. PURPOSE AND SCOPE. To establish procedures for processing discipline and adverse actions.

2. PROPOSING OFFICIALS. Normally, the following officials will be the proposing officials for disciplinary and adverse actions. Variations to fit unique circumstances are permitted and nothing in this section precludes the proposing official being at a higher or lower level than specified.

a. Institutions

(1) Department Heads are the proposing officials for subordinate staff in their departments.

* * * *

3. DECIDING OFFICIALS. Normally, the following officials will be the deciding officials for discipline and adverse actions. Variations to fit unique circumstances are permitted and nothing in this section precludes the deciding official being at a higher level than specified.

a. Institutions. The Chief Executive Officer is the deciding official for all cases proposed by a subordinate.

* * * *

4. APPROVAL OF PROPOSAL AND DECISION LETTERS

a. Disciplinary Actions. Institution HRM offices will secure the approval of the Regional HRM office and consult LMR as needed prior to issuing any disciplinary action proposal or decision letter. Institutions may obtain technical assistance from Regional HRM offices regarding appropriate charges, supporting evidence, appropriate penalties and other aspects of the case. Regional HRM offices should obtain advice or assistance from the LMR Section as needed in making these determinations.

b. Adverse Actions. Institution HRM offices will secure technical assistance and advice from the Regional HRM office and approval from the LMR Section prior to issuing any adverse action proposal or decision letter. Technical assistance on adverse action cases may be obtained by institutions directly from LMR.

c. Clearance from Office of Internal Affairs. Institution HRM offices must verify that the proper clearance for initiating an action has been received from the Office of Internal Affairs [OIA]. The required verification includes:

(1) Local investigations: The investigation was authorized and the investigator's final report was approved by OIA

(2) Other investigations: The final report was received from OIA.

Verification may be verbal and must be made prior to requesting approval of disciplinary or adverse action letters.

* * * *

5. NOTIFICATION TO THE LMR SECTION

a. Disciplinary Actions. At the time a proposal or decision letter is issued in a disciplinary action, the HRM office will forward a copy of the letter to LMR.

b. Adverse Actions. Prior to issuing a proposal or decision letter in an adverse action, the HRM office will forward a copy of the final draft to LMR for approval and verification that their recommendations and guidance have been implemented. It is not necessary to send LMR a copy of the letter after issuance or a copy of the complete adverse action file.

6. GRIEVANCES AND MSPB APPEALS. Upon receipt of a request for arbitration of a disciplinary action or an adverse action, the HRM will immediately notify the Regional HRM and LMR and forward a copy of the grievance file to LMR.

* * * *

VII. EXECUTIVE ORDER 10450 – SECURITY REQUIREMENTS FOR GOVERNMENT EMPLOYMENT, (Agency Ex. 21)

WHEREAS the interests of the national security require that all persons privileged to be employed in the departments and agencies of the Government, shall be reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States; and

WHEREAS the American tradition that all persons should receive fair, impartial, and equitable treatment at the hands of the Government requires that all persons seeking the privilege of employment or privileged to be employed in the departments and agencies of the Government be adjudged by mutually consistent and no less than minimum standards and procedures among the departments and agencies governing the employment and retention of employment of persons in the Federal Service:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States * * * and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows:

* * * *

Sec. 8. (a) The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in employment in the Federal Service of the person being investigated is clearly consistent with the interests of the national security. Such information shall relate, but shall be limited to the following:

(1) Depending on the relation of the Government employment to the national security:

(i) Any behavior, activities, or associations which tend to show that the individual is not reliable or trustworthy

(ii) Any deliberate misrepresentations, falsifications, or omissions of material facts.

* * * *

(iv) Any illness, including any mental condition, of a nature which in the opinion of competent medical authority may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(v) Any facts which furnish reason to believe that the individual may be subjected to coercion, influence, or pressure which may cause him to act contrary to the best interests of the national security.

* * * *

VIII. FEDERAL BUREAU OF PRISONS PROGRAM DIRECTIVE, 3420.09; STANDARDS OF EMPLOYEE CONDUCT, 2 / 5 / 99 AS REVISED

(Un.Ex.12 & Agency Ex. 22)

1. PURPOSE AND SCOPE. To provide policies and procedures, herein referred to as the "Standards of Conduct," to complement those issued by the Office of Government Ethics on:

- Employee conduct and responsibility

* * * *

Attachment A

STANDARD SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES

1. This table is intended to be used as a guide in determining appropriate discipline to impose according to the type of offense committed. The offenses listed are not inclusive of all offenses.

2. Ordinarily, penalties imposed should be within the range of penalties provided for an offense. In aggravated cases, a penalty outside the range of penalties may be imposed. For example, supervisors, because of their responsibility to demonstrate exemplary behavior, may be subject to greater penalty than is provided in the range of penalties. When a more severe penalty than provided for in the range of penalties is proposed, the notice of proposed action must provide a justification.

3. The deciding official will consider relevant circumstances, including mitigating and aggravating factors, when determining the appropriate penalty. The range of penalties provided for most offenses is intentionally broad, ranging from official reprimand to removal. While the principles of progressive discipline will normally be applied, it is understood that there are offenses so egregious as to warrant severe sanctions for the first offense up to and including removal. This is especially true in cases where there is no indication that the employee would be corrected by a lesser penalty, or if the offense is of such a nature that reoccurrence of the conduct could jeopardize security or bring disrepute on the Bureau of Prisons. For example, if an employee failed to respond to an emergency, even if that emergency turned out to be a false alarm, removal would be appropriate if the deciding official was not convinced that the employee would respond promptly to any future emergency.

4. Where appropriate, consideration may be given to a demotion or other action in lieu of removal.

5. Suspension penalties on this schedule refer to calendar days. Except for emergency suspensions and indefinite suspensions, all disciplinary suspensions are to begin on the first workday of the employee's next regularly scheduled work week.

6. The reckoning period is defined as that period of time following the date management becomes aware of the offense during which that offense can be used to determine the sanction for a subsequent offense.

7. Offenses falling within the reckoning period, even though unrelated, should be considered when determining the appropriate action.

8. Where the deciding official substitutes a letter of reprimand in lieu of a greater proposed sanction, the letter of reprimand itself is to be separate from the decision letter and is not to refer to the greater sanction proposed.

* * * *

NATURE OF OFFENSE	EXPLANATION	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
32, Falsification, misstatement, exaggeration or concealment of material fact in connection with employment, promotion, travel voucher, any record, investigation or other proper proceeding	Includes, but is not limited to, the destruction of records to conceal facts, and a concealed conflict of interest in the performance of official duties	Official Reprimand to removal	14 day suspension to removal	Removal

IX. REVIEW OF THE FEDERAL BUREAU OF PRISONS' DISCIPLINARY SYSTEM, Report Number I-2004-008, September 2004 (Un.Ex.13)

EXECUTIVE DIGEST

The Department of Justice's (Department) Office of Inspector General (OIG) conducted this review to assess the Federal Bureau of Prisons' (BOP) disciplinary system. Specifically, we reviewed whether BOP employees properly reported misconduct; whether investigations were thorough; and whether disciplinary actions were reasonable, consistent, and timely. We examined data for BOP employee misconduct cases opened or closed in fiscal year (FY) 2003, reviewed files related to a sample of 85 randomly selected institutions. We also conducted e-mail surveys to collect views on the agency's disciplinary system from BOP deciding officials, investigators, and employees.

The BOP's disciplinary system is divided into two distinct phases: the investigative phase, when the BOP investigates alleged employee misconduct, and the adjudicative phase, when discipline is proposed and imposed for misconduct allegations that were sustained by the investigation. The BOP's Office of Internal Affairs (OIA) in the Executive Office of the Director oversees the investigative phase. OIA investigators as well as investigators assigned to the institutions, conduct the investigations. The Labor Management Relations (LMR) branch in the Human Resources Management Division oversees the adjudicative phase.

RESULTS IN BRIEF

We found that the investigative phase of the disciplinary process was thorough and the case files we reviewed were well documented. We also found no significant differences in how BOP treated employees of different races, genders, job series, or grade levels during the disciplinary process.

However, we identified deficiencies in the BOP's disciplinary system that prevent it from ensuring that disciplinary decisions are reasonable, consistent, and timely. We found the following deficiencies: the BOP does not require all cases with sustained allegations to be fully adjudicated; deciding officials often fail to document their reasons for mitigating disciplinary proposals; the independence of the investigative and adjudicative phases of the disciplinary process can be compromised because the Chief Executive Officers (CEOs) [which would be the Wardens at institutions such as the MCC at Chicago], have a role in both phases; the BOP does not ensure that BOP employees receive similar penalties for similar infractions BOP-wide; the BOP does not have written timeliness standards for processing misconduct allegations; the BOP does not monitor the reasonableness, consistency, and timeliness of disciplinary decisions; and BOP employees do not report all employee misconduct. By correcting the issues identified above and detailed in the report, the BOP can better ensure that its disciplinary decisions are reasonable, consistent, and timely.

BOP investigations of employee misconduct appeared thorough.

In reviewing a random sample of 85 investigative case files, an OIG Special Agent concluded that the investigations appeared thorough and the files contained the information necessary to understand the actions taken and the conclusions reached during the investigative phase. Our surveys also indicated that the BOP's OIA investigators, deciding officials, and employees generally rated the investigative reports highly for their quality.

BOP disciplinary decisions sometimes did not appear to be reasonable.

Of 92 subjects with sustained allegations in our sample, the CEOs unilaterally took informal or no disciplinary action for 20 of these subjects charged with serious misconduct without fully adjudicating the cases or documenting their reasons for taking these actions. By bypassing the full adjudicative phase, the CEOs failed to involve other entities with review responsibilities. Given the serious nature of the sustained misconduct in these 20 cases, coupled with the minor penalties imposed and the absence of documented reasons for the decisions, the outcomes did not appear to be reasonable.

In their role as deciding officials, the CEOs mitigated the proposed discipline but failed to adequately explain the reasons for the mitigation in the decision letter for 36 of 92 subjects with sustained allegations. Both federal regulations and internal BOP guidelines state that deciding officials must provide reasons for mitigating penalties in the decision letter. Because of the lack of adequate documentation explaining why the proposed discipline was mitigated, the penalty imposed did not appear reasonable in relationship to the proposed discipline.

In addition, the CEOs can influence local investigative reports for cases in which they also will act as the deciding officials, thereby creating the potential for outcomes that are not reasonable. In other Department disciplinary systems we have reviewed, the deciding officials are not involved in the investigative phase. However, in the BOP, the CEOs have the dual responsibilities of reviewing and approving local investigations for misconduct cases in their institutions during the investigative phase and imposing discipline based on these investigations during the adjudicative phase. Because of the CEOs' dual responsibilities, the independence of the investigative and adjudicative phases, which helps to ensure that disciplinary outcomes are reasonable, can be compromised.

BOP guidance instructs CEOs to impose similar penalties for similar misconduct only at their current institution, which does not ensure that discipline is imposed consistently BOP-wide.

An equitable disciplinary system should ensure that employees receive substantially similar discipline for similar misconduct under similar circumstances. However, BOP guidance states that CEOs when acting as deciding officials, need to be consistent only with their own prior decisions at the facility. LMR staff also told us that imposing

consistent discipline is only necessary for the current CEO at each facility because that is all that is required for imposed discipline to be deemed defensible if the subject appeals or grieves the decision to a third party. Consequently, two similarly situated subjects who committed similar misconduct under similar circumstances at the same institution could receive different penalties because the subjects had different CEOs. Under current BOP rules, the CEOs at each of the BOP's 113 institutions, 6 Regional Offices, 28 community corrections offices, 2 staff training centers, and 1 Central Office may impose different discipline for similar misconduct and circumstances.

* * * *

APPENDIX I: THE DOUGLAS FACTORS

In *Douglas v. Veterans Administration* (1981), the Merit Systems Protection Board (MSPB) identified 12 relevant factors that agency management needs to consider and weigh in deciding an appropriate disciplinary penalty. The Douglas factors are:

1. The nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts 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 the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee'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 (which are not to be applied mechanically so that other factors are ignored);

8. The notoriety of the offense or its impact upon the reputation of the agency;

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10. The 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 the employee or others.

* * * *

X. BUREAU OF PRISONS PROGRAM STATEMENT – 1380.06, 2 / 10 / 98, DISCLOSING POTENTIAL IMPEACHMENT INFORMATION REGARDING EMPLOYEES (Agency Ex. 10)

1. PURPOSE AND SCOPE. To implement procedures for disclosure of potential impeachment information to the U.S. Attorney Offices and Department of Justice litigation sections that prosecute criminal cases and to:

- ensure prosecutors receive sufficient information to meet their obligations under *Giglio v. United States,* 405 U.S. 150 (1972), and

- protect the privacy interests of current and former Bureau employees.

This Program Statement implements the Attorney General's Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses (*"Giglio Policy"*) dated December 9, 1996. In *Giglio*, the Supreme Court held that the failure to disclose material evidence regarding the credibility of a witness is a violation of due process and therefore requires a new trial.

This Program Statement also emphasizes the obligation of individual employees to inform prosecuting attorneys of potential impeachment information prior to providing a sworn statement or testimony in any criminal investigation or case. In most investigations and cases, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from employee affiants or witnesses during the normal course of investigations or preparation for hearings or trials; however, a prosecutor may also request such information from the Bureau.

* * * *

CASE AUTHORITY CITED BY PARTIES AT HEARING

AGENCY EXHIBIT	CASE CITE	SUMMARY
# 1	**29 M.S.P.R. 477**	Employee was removed from correctional officer position at a federal penitentiary for misstating or concealing material facts on two questionnaires he completed in order to obtain employment with the agency. On appeal, the presiding official reversed the removal, and agency petitioned for review. The Merit Systems Protection Board held that: (1) Agency established charge by preponderant Evidence, and (2) penalty of removal was Reasonable. **Removal Sustained**
# 2	**40 M.S.P.R. 418**	Employee petitioned for review of initial decision sustaining his removal following revocation of his security clearance. The Merit Systems Protection Board held that: (1) agency afforded employee Minimal due process in revoking his security Clearance, and Board lacked authority to review Merits of revocation; (2) employee falsified forms Submitted in connection with his application for "top secret" security clearance, in light of evidence that he failed to provide complete and accurate information regarding his usage of marijuana after being instructed to do so; and (3) falsification of of security clearance forms was sufficient basis for employee's removal notwithstanding his good work record and absence of prior discipline. **Initial decision affirmed as modified.**
# 3	**100 M.S.P.R. 477**	Agency petitioned for review and appellant has cross petitioned for review of initial decision that sustained falsification charge against him but mitigated the penalty from removal to a 10-day suspension. The Merit Systems Protection Board held that: (1) agency proved falsification charge that employee failed to disclose delinquent child support obligation on pre-employment questionnaire, and (2) administrative judge erred in mitigating removal penalty to a 10-day suspension. **Affirmed in part as modified and reversed in part.**

AGENCY EXHIBIT	CASE CITE	SUMMARY
# 5	69 M.S.P.R. 211	Agency petitioned for review of initial decision that reversed its action removing employee from criminal investigator position in agency's Office of the Inspector General (OIG). Director of the Office of Personnel Management (OPM) filed notice of intervention. The Merit Systems Protection Board held that: (1) OPM's motion for Intervention would be granted; (2) preponderant evidence supported falsification charge; (3) agency proved by preponderant evidence that employee engaged in pattern of behavior whose cumulative effect led to conclusion that he lacked trustworthiness and integrity; and (4) penalty of removal was reasonable. **Removal action sustained.**
# 6	12 M.S.P.R. 18 13 M.S.P.R. 425	Employee was removed from position of correctional officer based on charge of concealing material fact in connection with employment. The Atlanta Regional Office upheld removal and Employee petitioned for review. The Merit Systems Protection Board held that: (1) agency properly relied on certain evidence voluntarily provided by employee; (2) hearsay evidence relating to drug incident in which employee was involved was properly relied on by agency; and (3) penalty of removal was reasonable for employee's failure to disclose during pre-employment interview that he had been found to have been involved in possession and sale of drugs while in military. **Petition denied.**
# 8	95 M.S.P.R. 52	Agency petitioned for review of initial decision reversing appellant's removal. The Merit Systems Protection Board held that: (1) agency proved charge that employee filed a false claim for temporary living expenses incurred in connection with a change of station, and (2) penalty of removal was appropriate. **Removal penalty reinstated.**
# 9	405 U.S. 150	*Giglio v. United States*. Decision upon which the BOP developed its Program Statement, 1380.06. **(see preceding Documentation Section, p.42)**

UNION EXHIBIT	CASE CITE	SUMMARY
# 9	**5 M.S.P.R. 313** **5 M.S.P.R. 280**	Employees removed by their agencies upon charges of job-related misconduct appealed agency actions. Presiding officials in the Atlanta,New York,Denver, and San Francisco field offices sustained each of the decisions, finding that selection of an appropriate penalty was a matter essentially committed to agency discretion and not subject to proof. The Merit Systems Protection Board thereupon reopened decisions to consider such issues. The Merit Systems Protection Board held that Board had authority to mitigate agency-imposed penalties when Board determines that penalty is clearly excessive, disproportionate to sustained charges, or arbitrary, capricious, or unreasonable. **Affirmed in part, reversed in part, and remanded in part.**
# 10	**92 FLRR 2-1620**	The discharge of the grievant for falsification of pre-employment documents was not for just cause. Three years after the grievant began working for the Agency and earned complimentary evaluations and respect from supervision, the agency learned he had "walked away from debts" in the past, a fact he did not report during pre-employment investigation. The agency discharged him for falsification, over the objection of his immediate supervisor. The Arbitrator sustained the grievance, finding that the agency "mechanically" applied the contract's requirement for high standards of employee conduct presented questionable evidence on the grievant's financial history, delayed bringing the charges to light and misinterpreted the use of the pre-employment investigation. He directed the agency to reinstate the grievant with back pay. **The Agency Did Not Have Just Cause to Discharge an Admittedly Good Employee for Falsifying Pre-Employment Documents Three Years Earlier.**

UNION EXHIBIT	CASE CITE	SUMMARY
# 11	**FMCS No. 04-04133**	Grievant was removed from his position as a Cook Supervisor at the Forrest City Federal Corrections Institution (BOP) for Falsification of Employment Documents and Security Investigation Forms and Failure to Provide Updated Information. Arbitrator Diane Dunham Massey ruled to **sustain the grievance in part and deny the grievance in part.** Arbitrator Massey converted the removal action to a two week suspension predicated on his having omitted the details of discipline imposed on him by his prior employer, USIS.
# 15	**FMCS No, 04-04611**	Contract Interpretation Issue involving the equitable distribution of overtime and whether the charged contract violation constituted an unjustified or unwarranted personnel action under the Back Pay Act (5 USC) Section 5596. Arbitrator Gregg Lowell McCurdy found the subject bargaining unit employees were entitled to the payment for overtime they would have worked had the agency not violated the Collective Bargaining Agreement by failing to equitably distribute and rotate the overtime in the manner agreed to in the CBA and executed Local Agreements.

BACKGROUND

The Federal Bureau of Prisons (BOP), organizationally a part of the United States Department of Justice (DOJ), one of the cabinet departments comprising the Executive Branch of Government, hereinafter variously referred to as, BOP, the Bureau, the Agency, or Employer, was created in 1930 to professionalize the prison service, to ensure consistent and centralized administration of the Federal prisons (at the time, a total of 11 prisons), and to provide more progressive and humane care of Federal incarcerated persons (Agency Ex.14B). At the present time, the Agency administers approximately 114 institutions employing approximately thirty-five thousand (35,000) workers and, is responsible for the custody and care of approximately 185,000 Federal offenders also known as inmates. One of the 114 institutions administered by the Agency is a facility classified as a Metropolitan Correctional Center (MCC) geographically located in downtown Chicago, Illinois.[24] The Council of Prison Locals 33, organizationally a part of the American Federation of Government Employees (AFGE), an affiliated labor organization of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), hereinafter, Union, is recognized by the Agency as the sole and exclusive bargaining agent/representative pursuant to the provisions of the Federal Service Labor Management Relations Statute, 5 USC, Chapter 71, et. seq., hereinafter "the Statute" and the Civil Service Reform Act of 1978, for all employees included in the bargaining unit (all employees employed by the Bureau except those employees in the Central Office), for bargaining purposes with respect to conditions of employment, and vested with full authority by Statute to meet and confer with the Agency for the purpose of entering into negotiated agreements pertaining to changes in conditions of employment and to administer a collective bargaining agreement. One such bargaining unit employee is Sameka Wright-Jackson, hereinafter Grievant, formerly employed as a Correctional Officer at the Chicago MCC. The Agency and the Union together, hereinafter the Parties, have maintained a formal bargaining relationship since January 17, 1968, the date the then incumbent Director of the Bureau, Myrl E. Alexander issued a letter in accordance with Executive Order 10988, certifying the Union as the exclusive representative of all employees employed by the BOP with the exception of employees of the Agency's Central Office. At all times surrounding the circumstances that gave rise to the subject grievance pertaining to the Grievant's removal from the Service of the Agency, the Parties were governed by the terms, provisions, and conditions mutually

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[24] It is noted by the Arbitrator that a MCC is one of fourteen (14) distinct types of facilities administered by the BOP. For example, to identify just a few, there are: MDCs, Metropolitan Detention Centers; FDCs, Federal Detention Centers; FCCs, Federal Correctional Complex; and USPs, U.S. Penitentiaries. Additionally, as the Chicago MCC is located in the State of Illinois, it is geographically located as are eleven (11) other states, in the BOP's North Central Region. It is further noted that the North Central's Regional Office is located in Kansas City, Kansas. Of the 114 institutions administered by the BOP, approximately twenty-two (22), exclusive of the Regional Office facility, are located in the North Central Region. Additionally, a MCC facility is one of seven (7) types of facilities that are classified as Administrative facilities which are institutions with special missions, such as, the detention of pretrial offenders; the treatment of inmates with serious or chronic medical problems; or the containment of extremely dangerous, violent, or escape-prone inmates and are capable of holding inmates in all security categories, specifically, Minimum, Low, Medium, and High Security (www.bop.gov.).

bargained and set forth in the 1998-2001 Master Collective Bargaining Agreement, hereinafter Agreement or Contract (Jt.Ex.1).

Prior to her entering on duty at the Chicago MCC in the position of Correctional Officer, Grievant had been employed by the Wisconsin State Department of Corrections (DOC), commencing her employment as a Youth Counselor on September 27, 1999 assigned to the Southern Oaks Girls School, a maximum facility for juvenile girls located in Union Grove, Wisconsin (Un.Ex.1).[25] Grievant successfully completed her six (6) month probation in the position as Youth Counselor and on or about July 30, 2000, she was promoted to a higher rated Youth Counselor position which she held until she voluntarily resigned on or about December 30, 2000 in order to assume a promotion to the position of Probation and Parole Agent at the DOC's Marshal Shearer Center located in Sturtevant, Wisconsin. Grievant held this position until she voluntarily resigned on or about June 16, 2001 in order to return to SOGS to assume the position of Supervisory Youth Counselor, effective June 17, 2001, a position that required the fulfillment of a twelve (12) month probationary period.

On or about August 28, 2001, slightly more than two (2) months after she assumed the position of Supervisory Youth Counselor, she was notified by letter by SOGS Human Resource Director, Sherri Harris, she was being summoned to attend a pre-disciplinary meeting scheduled for Thursday, August 30, 2001 to address alleged violations of the following DOC's Work Rules, to wit: # 1) "Insubordination, disobedience, or failure to carry out assignments or instructions; # 2) Failure to follow policy or procedure, including but not limited to the DOC Fraternization Policy and Arrest and Conviction Policy; # 6) Falsifying records, knowingly giving false information or knowingly permitting, encouraging or directing others to do so, and failing to provide truthful, accurate, and complete information when required; and #13) Intimidating, interfering with, harassing (including sexual or racial harassment), demeaning, or using abusive language in dealing with others". In this letter, Harris apprised Grievant that the alleged rules infractions pertained to two (2) separate incidents, the first which allegedly occurred on August 11, 2001 and the second which allegedly occurred on August 19, 2001. With respect to the first incident, Harris apprised Grievant it involved her alleged failure to obtain permission to use chemical agents on a youth and that her report of the incident to a higher official was not accurate, asserting that the inaccurate transfer of information put the safety and security of the subject youth in jeopardy. As to the second incident, Grievant was informed that this pertained to her having made allegations against a family that had come to the school to visit a youth and that the manner in which this occurred involved harassing and intimidating tactics and, as such, she allegedly failed to follow procedures for handling this type of incident. In closing, Harris, in noting Grievant was a

[25] According to the record evidence, prior to her being hired as a Youth Counselor at Southern Oaks Girls School (SOGS), Grievant had been hired by the Wisconsin State DOC in July of 1999 and spent six (6) weeks at the DOC's training center located in Oshkosh, Wisconsin (Jt.Ex.5). It is noted that the interim time period of about five (5) weeks between the end of her training period which commenced on July 6, 1999 and the date she entered on duty at the SOGS on September 27, 1999 is unaccounted for in terms of possible other employment or just a period of unemployment.