Correctional Officer at the Chicago MCC.[32] For the purpose of this arbitration the following question and answer provided by the Grievant is deemed to be the most relevant.

Under the Section "Your Medical Record"

Q. In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition? You do not have to answer "yes" if you were only involved in marital, grief, or family counseling not related to violence by you.

A. No

At the time Grievant submitted her employment application (Standard Form 85P) in September, 2002 and again when she submitted her Supplemental Questionnaire in November of 2002, Grievant authorized a release of information and authorized a separate release of medical information limited to ascertaining the answers to three (3) specific questions. Specifically, Grievant assented to the release of both types of information to "any investigator, special agent, or other duly accredited representative of the BOP, conducting a background investigation to obtain information relating to her activities from individuals, schools, residential management agents, employers, criminal justice agencies, credit bureaus, consumer reporting agencies, collection agencies, retail business establishments, or other sources of information. In authorizing the release of said information, Grievant concurred that the information obtained might include but not be limited to her academic, residential, achievement, performance, attendance, disciplinary, employment history, criminal history record information, and financial and credit information. Grievant also authorized the Federal agency conducting the investigation to disclose the record of her background investigation to the BOP for the purpose of making a determination of suitability or eligibility for a security clearance (Jt.Ex.2)[33]

The record evidence reflects that pursuant to Grievant's authorization to release both information and medical information, the then incumbent Assistant Human Resource Manager at MCC Chicago, Sharon Benefield, on November 21, 2002 initiated a written request directed to the Office of Personnel Management (OPM) to perform a background investigation of Grievant.[34] According to applicable sections of Chapter 7 of the Human

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[32] As explained on the front of the "Supplemental Questionnaire for Selected Positions", the Questionnaire is used only after an offer of employment has been made and when the information it requests is job-related and justified by business necessity.

[33] At the very bottom of the Authorization Release form, it is stated that, "this authorization is valid for five (5) years from the date signed or upon the termination of [the applicant's] affiliation with the Federal Government, whichever is sooner.

[34] The request for such a background investigation is made in the top block of the application for employment which is titled, **Agency Use Only** (Jt.Ex.2). According to the applicable section of Chapter 7 of the Human Resource Management Manual (Jt.Ex.8, Agency Ex.20 & Un.Ex.14), the position of Correctional Officer for which Grievant applied for is categorized as a Non-Critical Sensitive position

Resource Management Manual, the type of request for a background investigation of an applicant for the position of Correctional Officer entails a Limited Background Investigation and, as such, requires that OPM initiate and receive the appropriate background investigation prior to new employees reporting for duty, except where such pre-appointment investigation is waived by the selecting official by certifying the applicant has been the subject of a satisfactory pre-employment interview and the background investigation has been initiated with OPM (see preceding Relevant Documentation section, p.30 of this Opinion and Award). Notwithstanding the absence in this arbitral proceeding of a waiver by the selecting official at BOP to certify that Grievant had been the subject of a satisfactory pre-employment interview, nevertheless, Grievant entered on duty on December 15, 2002 whereas, Grievant's Limited Background and Security Investigation conducted by the Investigation Service of OPM commenced in and around April 23, 2003, four (4) months after Grievant had been employed, and did not conclude with a transmitted final report until September 19, 2003, a full nine (9) months after Grievant assumed her position of Correctional Officer at MCC (Jt.Ex.5 & Un.Ex.2).

By letter dated November 3, 2003, approximately one and a half (1 ½) months after the BOP received the results of OPM's completed Limited Background Investigative report on Grievant, Security Specialist, Therisa Blue of the BOP's Security and Background Investigation Section (SBIS) apprised Grievant there were issues that had arisen in connection with her background investigation that were of concern to the BOP. As such, Blue informed Grievant the BOP was affording her the opportunity to comment on the information in her background investigation upon which the BOP intends to rely on in determining whether to continue her employment. The following were the issues presented to Grievant to which she made the following responses (Jt.Ex.10):

Issue: It was revealed in the background investigation (BI) that you resigned from your position of Correctional Sergeant with the WI DOC in November of 2002 in lieu of termination because you failed the fitness standard yet, during the Pre-employment interview (PEI) you answered "no" when asked if you had ever been dismissed or resigned in lieu of dismissal from any job.

Q. Did you resign from the WI DOC in November of 2002 in lieu of termination because you failed the fitness standard?

A. Yes [35]

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deemed to be at the moderate risk level and, as such, calls for a **Limited Background Investigation** (see the preceding Relevant Documentation section, p.29 of this Opinion and Award).

[35] On a separate document referenced in these proceedings as Supplemental Answers Jt.Ex.11), Grievant provided explanations to the responses that differed from her answers she provided in her Pre-employment interview. However, for some unexplained reason, the majority of these explanations in the reproduction of this separate document (Jt.Ex.11) were cut off so that individual sentences were not complete making most of the supplemental answers unintelligible. For example, the explanation, as reproduced, which Grievant provided in response to this issue was: "The interview was in September 2003 I took the promotion for th That's why the answer to the above question was No. This happ" In her testimony regarding this question Grievant held that in failing the fitness standard she automatically failed to

Issue: It was revealed in the BI that you resigned from your position of Supervisory Youth Counselor in September of 2001 in lieu of termination, due to misconduct on your part yet, in the (PEI) you answered "no" when asked if you had ever been dismissed or resigned in lieu of dismissal from any job.

Q. Did you resign from the WI DOC in lieu of termination in September of 2001 due to misconduct?

A. No

In a separate document (Jt.Ex.11), Grievant provided an explanation for her response, however, as noted in footnote 35, supra, the explanations were not complete due to some mishap in their reproduction. However, the core of her incomplete explanation with respect to this issue is that she had not resigned from her employment at the WI DOC but rather, when she left the position of Supervisory Youth Counselor she remained employed at the Southern Oaks Girls School (SOGS). Grievant testified to same in these arbitral proceedings.

Issue: It was revealed in the BI that you received a written reprimand in June of 2002 for Violation of Work Rules yet, in the PEI you answered "no" when asked if you had ever been disciplined (suspended, reprimanded, etc.) in former or current civilian employment.

Q. Did you receive a Written Reprimand for Violating Work Rules in June of 2002?

A. Yes

In explanation of her opposite answer, Grievant explained she had forgotten about the incident (Jt.Ex.11). Grievant also asserted the same response in her testimony at this arbitration (Tr.Vol.Ip.68).

Issue: It was revealed in the BI that you received a verbal reprimand in May of 2002 for Failing to Complete Inventory Sheets on your unit yet, in the PEI you answered "no" when asked if you had ever been disciplined (suspended, reprimanded, etc.), in former or current civilian employment.

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successfully complete her probationary period for the Sergeant's position and therefore returned to her position as Youth Counselor. Additionally, Grievant indicated that her effort to attain the promotion of Sergeant and her return to the Youth Counselor position all occurred after she had submitted her application for employment as a Correctional Officer at BOP. However, the import of her answer is that she never resigned nor was she terminated from her employment at the Wisconsin DOC.

Q. Did you receive a Verbal Reprimand for Failing to complete inventory sheets on your Unit in May of 2002?

A. Yes

In explanation of her opposite answer recorded partially on her separate written submission (Jt.Ex.11), the core of her response was that it was the lead worker on the unit that had the responsibility to fill out the inventory sheets but because the lead worker did not do the paper work, all staff on the unit including herself, received a Verbal Reprimand. Grievant's further explanation as to why her initial answer was "no" could not be discerned due to its incompleteness as a result of the mishap in photocopying the document. At the arbitration however, Grievant asserted that at the time of her Pre-employment interview, she did not recall having received a Verbal Reprimand (Tr.Vol.I,p.69).

Issue: It was revealed in the BI that you received a written reprimand in September of 2001 for Intimidating a Supervisor yet, in the PEI you answered "no" when asked if you had ever been disciplined (suspended, reprimanded, etc.), in former or current civilian employment.

Q. Did you receive a Written Reprimand in September of 2001 for Intimidating a Supervisor?

A. No

In explanation for giving the same answer, Grievant indicated on the separate document (Jt.Ex.11) even though the response was incomplete as photocopied, that she had been working with the Union to get the disciplinary action removed. At the arbitration, Grievant indicated that, in fact, a grievance had been filed contesting this incident (Tr.Vol.I,p.70).

Issue: It was revealed in the BI that you were sued in Racine County Circuit Court under Case Number 01SC5197 for Eviction in October of 2001 yet, in the PEI you answered "no" when asked if you had ever been sued or held for non-support.

Q. Was a suit filed for Eviction against you in Racine County Circuit Court in October of 2001?

A. No

Although Grievant appeared to indicate on the separate response document (Jt.Ex.11, supplemental answers to the interrogatories) that she intended to provide an explanation for her response, nothing was recorded below the heading titled, "Page Eleven Question".

Issue: It was revealed in the BI that you were sued by Kohl's Food Stores, Inc. for the balance of $861.47 for three returned checks written to the store yet, in the PEI you answered "no" when asked if you had ever been sued or held for non-support.

Q. Were you sued by Kohl's Food Stores, Inc. for $861.47 for three returned checks?

A. **(Grievant failed to indicate a response to this query).**[36] At the arbitration, Grievant explained that at the time she answered the interrogatories, she thought she had answered all the questions.

Issue: It was revealed in the BI that you were sued by Kemper and American Family Insurance Companies for payment of cost incurred as a result of an Automobile Accident yet, in the PEI you answered "no" when asked if you had ever been sued or held for non-support.

Q. Were you sued by Kemper and American Family Insurance Companies for payment of cost incurred as a result of an Automobile Accident?

A. Yes

The record evidence reflects that at the pre-employment interview, a hand written notation was made regarding entries taken from Grievant's credit report of which one entry referenced a collection account from Kemper Insurance in the amount of $5,157 which, it was noted, Grievant had included in a bankruptcy filing (Jt.Ex.3).

Issue: It was revealed in the BI that you wrote three non-sufficient funds checks to Kohl's Food Stores, Inc. yet, in the PEI you answered "no" when asked if the applicant had ever willfully issued a bad check.

Q. Did you write three non-sufficient funds checks to Kohl's Food Stores, Inc. knowing that funds were not available to cover the cost of the checks written?

A. No

Although Grievant indicated she wished to have additional information considered regarding this concern she indicated this would be the same response she noted in the separate document (Jt.Ex.11) for the previous issue pertaining to Kohl's on page 13. However, this previous response was missing from the document as said response appears to have been recorded on a page that is missing from this document.

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[36] As to any explanation regarding this question as well as questions posed on pages 12 through 16 on the interrogatories (Jt.Ex.10) setting forth the issues of the BOP's concern, it appears that not only were Grievant's expanded explanations recorded on the separate document (Jt.Ex.11) truncated so as not to be intelligible but, a page to these supplemental answers was also missing from this document.

Issue: It was revealed in the BI that you were removed from your position as Supervisory Youth Counselor because you used poor judgment which potentially could have resulted in severe harm to a Juvenile Offender yet, in the PEI you answered "no" when asked if you had ever been involved in excessive use of force as a law enforcement official, conduct such as abuse of any person detained or confined in law enforcement's custody.

Q1. Were you removed from your position as Supervisory Youth Counselor for using poor judgment which potentially could have resulted in severe harm to a Juvenile Offender?

A. No

Q2. Did you spray a Youth Offender with Pepper Spray while they were in restraints?

A. (Grievant did not answer yes or no but indicated she wished to have additional information considered)

In the separate supplemental answer document (Jt.Ex.11), Grievant set forth an explanation but due to the fact the sentences were not complete as they were cut off in the reproduction, the full explanation is not intelligible. However, with regard to Q1 pertaining to whether she had been removed from her position as Supervisory Youth Counselor, Grievant began her explanation by indicating she had not been removed but rather she had been demoted and stayed at the same employment. Grievant then went on to give a detailed response to Q2 but that explanation was the part that was not intelligible though a few of the specifics could be discerned such as, the youth offender in question had mental health problems and the particular incident that occurred, Grievant indicated that the youth offender in question was very combative and head butting * * * .

In Voir Dere testimony in this arbitral proceeding, Grievant asserted that the Wisconsin DOC never charged her with engaging in excessive use of force at any time during her employment at the DOC and that she was never the subject of any type of hearing while at the DOC involving excessive use of force (Tr.Vol.I, p58).

Issue: It was revealed in the BI that you were seen by at least two mental health professionals within the last seven (7) years in which you were treated for depression, and was prescribed Zoloft, and an anti-depressant for treatment. In addition, it was also revealed that you are currently seeing a mental health professional and being treated for ADD [Attention Deficit Disorder] yet, in completing the Supplemental Questionnaire for Selected Positions you answered "no" when asked if, in the last seven (7) years, had you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.), or had you consulted with another health care provider about a mental health related condition.

Q. In the last 7 (seven) years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.), or have you consulted with another health care provider about a mental health related condition? You do not have to answer "yes" if you were only involved in marital, grief, or family counseling not related to violence by you.

A. No

On the separate document (Jt.Ex.11), setting forth the supplemental answers, Grievant's response was, "I'm dealing with family issues.

The record evidence reflects that Grievant transmitted her written responses to the above interrogatories accompanied by a written certification dated November 16, 2003, eleven (11) days after Grievant acknowledged receipt of the interrogatories (Jt.Ex.7), that all of the statements made on these pages (22 in all plus additional written responses on the separate document, Joint Exhibit 11) were true, complete, and correct to the best of her knowledge and belief, and made in good faith (Jt.Ex.8).[37] The record evidence further reflects that SBIS Security Specialist, Therisa Blue indicated in a handwritten notation bearing the date of December 1, 2003, recorded on the face of the first page of the separate document containing Grievant's supplemental answers (Jt.Ex.11) to her responses recorded on the interrogatories (Jt.Ex.10), that, "this documentation is not complete and cannot be understood". Grievant testified that between the date she submitted her answers to the interrogatories accompanied by her supplemental responses, November 16, 2003 and September 27, 2005 the date she was notified by the Agency that it proposed to remove her from her employment, a period of time just shy of two (2) years, she never had been made aware that her supplemental answers were deemed by the Agency to be incomplete and was never advised by the Agency that it needed a full and complete copy of those responses.[38]

By letter dated December 2, 2003, just one (1) day after SBIS Security Specialist Blue notated that Grievant's supplemental answers to the interrogatories were not complete and could not be understood, Blue apprised Grievant she had been assigned to adjudicate her Limited Background Investigation, that she needed to speak to Grievant about some

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[37] While the record evidence reflects that Security Specialist Blue directed her letter dated November 3, 2003 to Grievant which apprised Grievant of the Agency's concern regarding certain issues and affording her the opportunity to address those concerns by answering the interrogatories, nevertheless, Grievant testified that she was given the interrogatories by Lieutenant Hanson, one of her supervisors on November 5, 2003, at which time both she and Hanson signed an Acknowledgement Form certifying she had read and understood her legal rights with respect to answering the interrogatories along with certifying she had received the interrogatories (Jt.Ex.7 & Tr.Vol.I,p.59).

[38] Union Advocate, Heuer noted in commentary (Tr.Vol.I,p 66) that neither the Union nor the Grievant had been aware the Agency had not received the full responses proffered by Grievant until the time of her removal. Agency Advocate, Vogel added that he did not know this to be the case until a couple of weeks prior to convening the first arbitration hearing in this matter. Vogel further noted that upon learning of this information, he attempted to contact Blue to determine the existence of the file and to secure the complete file but learned that the file had already been archived. Vogel did not explain why an archived file could not be retrieved (Tr.Vol.I,pp. 66-67).

of the information that was part of her background investigation and that she requested of Grievant that she agree to submit to a "Subject Interview" (Jt.Ex.9). In response, Grievant signed an **Agreement to Subject Interview** form witnessed by one, Tonya Davis, wherein, Grievant agreed to discuss information in her background investigation with BOP officials and in signing and dating this **Agreement** on December 2, 2003 and faxing the **Agreement** back to Blue, Grievant certified that her answers would be true, complete and correct to the best of her knowledge and belief, and would be made in good faith. A perusal of this December 2, 2003 correspondence from Blue to Grievant reveals that Blue made no reference to the fact that the day before, she had indicated on Grievant's supplemental answers to the interrogatories that she had deemed them to be incomplete and not understandable.

The record evidence reflects that after Grievant faxed the **Agreement to Subject Interview** back to Blue, Blue conducted the interview with Grievant by telephone the very same day (December 2, 2003). It was noted by Blue in a written summary of the interview (Jt.Ex.12) that the purpose of the interview was to clarify issues of employment and financial responsibility. From her written summary of the interview, Blue noted that she queried Grievant regarding her "termination" from her position as Supervisory Youth Counselor while employed at the Wisconsin DOC. Grievant represented to Blue that the action taken did not constitute a termination but rather she had been 'demoted' from that position and returned to her position as a Youth Counselor A. The next clarification Blue sought pertained to the written reprimand the Limited Background Investigation reported having to do with the incident of her having intimidated a supervisor and the fact she did not reveal this disciplinary action on her pre-employment interview. Grievant explained that at the time the pre-employment interview was conducted, this incident had been grieved and a final determination had yet to be made. In any event, Grievant added that this should not have been something that was reported on as part of her background investigation since the disciplinary action at the time the investigation was conducted was over a year old and any reference to this disciplinary action should not have been in her personnel file. The third and last query of this subject interview as reported by Blue in her written summary pertained to the financial matter of the three (3) insufficient fund checks Grievant issued to Kohls Food Store. Grievant informed Blue she was currently paying off the balance due on the returned checks and advised Blue she had provided proof of her payments to the store when she responded to the written interrogatories in November of 2003. According to this written summary, Blue noted there was "no additional issues discussed during this interview." By this latter notation, it is clear that Blue did not inform Grievant that she had deemed her supplemental responses to the interrogatories to be incomplete and not understandable, which she had done just one (1) day prior to conducting this Subject Interview.

The record evidence reflects that twenty-one (21) months after Grievant submitted to the subject interview with Blue, Captain Lazo Savich, the Department Head of Correctional Services at the Chicago MCC and the supervisor of Grievant's immediate supervisor, in his role as proposing official for all disciplinary and adverse actions affecting subordinate employees in his Department, issued Grievant written notice dated September 27, 2005 proposing that she be removed from her position of Correctional Officer no sooner than

thirty (30) calendar days from the date she received said notice. The notice signed by Savich but prepared by BOP's Employee Services (Personnel), apprised Grievant the proposal was being made because of her "Failure to Provide Accurate Information" regarding Employment Documents and Security Investigation Forms which she had submitted as part of her appointment process (Jt.Ex.14). Specifically, with respect to the submission of Standard Form 85P [the application for Employment, Jt.Ex.2] and Standard Form 85P-S [the Supplemental Questionnaire for Selected Positions, Jt.Ex.4], and an Integrity Interview Form as part of her appointment process, she was required to report all dismissals and resignations in lieu of dismissal from any job, as well as, if you had been disciplined (suspended, reprimanded, etc.) in former or current civilian employment on these forms. The notice apprised Grievant that she failed to report the following information as set forth in five (5) delineated specifications, to wit:

Specification A: In September 2001, you were terminated from your probationary appointment as Supervisory Youth Counselor due to misconduct involving poor judgment on your part which had the potential to result in severe harm to an offender. The disciplinary action taken was shown as removal from your probationary promotion. In your pre-employment interview conducted 9/17/02, you were also asked, "Has the applicant been dismissed or resigned in lieu of dismissal from any job?" You responded, "No". During the same pre-employment interview, you were also asked, "Has the applicant been disciplined (suspended, reprimanded, etc.), in former or current employment?" You responded, "No". In a subject interview conducted on 12/02/03, you deny being terminated or removed from your position as Supervisory Youth Counselor indicating you were demoted to a lower position. The background investigation clearly reflects that you were disciplined for misconduct with the Department in 9/2001. Your failure to report the above disciplinary action constitutes falsification of pre-employment documents.

Specification B: In June, 2002, you received a written reprimand for Violating Work Rules. The letter also states that on 5/25/02 you were given a verbal reprimand for Failing to Complete Inventory Sheets on you Unit. In your pre-employment interview conducted on 9/17/02, you were asked, "Has the applicant been dismissed or resigned in lieu of dismissal from any job?" You responded, "No". During the same pre-employment interview, you were also asked, "Has the applicant been disciplined (suspended, reprimanded, etc.), in former or current employment?" You responded, "No". You did however, admit to your receipt of a written reprimand for Violating Work Rules in your response to written interrogatories dated 11/03/03. Your failure to report the above constitutes falsification of pre-employment documents.

Specification C: In May, 2002, you received a Verbal Reprimand for Failing to complete inventory sheets on your unit while employed at Wisconsin Department of Corrections, Division of Juvenile Corrections, Southern Oaks Girls School. You failed to reveal this information during your pre-employment interview conducted on 9/17/02. Specifically, during the pre-employment interview, you were asked, "Has the applicant been disciplined (suspended, reprimanded, etc.), in former or current employment?" You responded, "No". In your response to written interrogatories dated 11/03/03, you admit

that you did receive a verbal reprimand for Failing to Complete Inventory Sheets on your unit. Your failure to report the above constitutes falsification of pre-employment documents.

Specification D: The background investigation report reveals that in September, 2001, you received a written reprimand for Intimidating a Supervisor. During your pre-employment interview conducted on 9/17/02 you were asked, "Has the applicant been disciplined (suspended, reprimanded, etc.), in former or current employment?" You responded, "No". In your response to interrogatories dated 11/03/03, you deny that you received a written reprimand in September, 2001. During a subject interview on 12/02/03, you indicated that you did receive a written reprimand for Intimidating a Supervisor, however, you did not reveal this during the pre-employment interview of 9/17/02 because you had not heard the results of your appeal of the reprimand. Your failure to report the above constitutes falsification of pre-employment documents.

Specification E: You answered "no" on the SF 85P-S, Supplemental Questionnaire for Selected Positions, if, within the last seven years, you had consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.), or had you consulted with another health care provider about a mental health related condition. The background investigation reveals you were seen by at least two mental health professionals within the last seven years, having been treated for depression, and prescribed Zoloft, an anti-depressant for treatment. In addition, the background investigation report reflects that you are currently seeing a mental health professional and being treated for Attention Deficit Disorder. While both mental health professionals indicate you do not have a condition or treatment that could impair your judgment or reliability, your failure to report the above constitutes falsification of pre-employment documents.

The proposal notice apprised Grievant that the Warden would be the official that would make the final decision and that she had the right to file a reply to the Warden orally, in writing, or both orally and in writing. Grievant was apprised she had fifteen (15) days from the date she received the proposal notice (which the record evidence reflects she was given the notice by Savich on September 27, 2005) to file her reply to the Warden but that consideration would be given to extending the time limit if such a request was made in writing to the Warden stating the reasons for desiring more time. The notice further apprised Grievant she had the right to a representative of her choice to assist her in the preparation and presentation of any reply she might submit and that she and her representative would be afforded a reasonable amount of official time to review the materials (if copies had not been provided) upon which the removal action is based. Grievant was further apprised that, no final decision on the removal proposal would be made until after her reply, if any, was received and considered. Additionally, Grievant was apprised her present duty and pay status were not affected by the proposal letter.

Savich testified that, in addition to not preparing the removal proposal, he also did not review Grievant's investigative file although he could not recall whether or not the investigative file accompanied the removal letter. Savich averred that as part of his duties as a Department Head, he fulfills the role of proposing official, yet he is without

any discretion to object to the action taken. Thus, his role as proposing official, derived solely from the fact of his position as a Department Head is strictly a pro forma function. Savich however, related in his testimony that prior to issuing the proposal letter to Grievant, he read the proposal and made one correction to it that involved changing a date set forth in Specification D.

The record evidence reflects that in the interim twenty-one (21) month period between Grievant's subject interview conducted by Blue on December 2, 2003 and the issuance to Grievant of the removal proposal on September 27, 2005, Grievant was given a total of six (6) performance evaluations, each of which rated her on the same five (5) elements, to wit: **Supervises Inmates; Inspects, Operates, Controls Equipment; Contraband; Security; Communications.** Five (5) of the rating periods were on a quarterly basis and the remaining rating period was an annual performance appraisal. The rating periods were as follows: **4 / 01 to 6 / 26 / 04; 6 / 26 / to 9 / 25 / 04; 9 / 26 to 12 / 25 / 04; 12 / 26 / 04 to 3 / 26 / 05; 3 / 28 / 04 to 3 / 26 / 05 (the annual rating period); and 4 / 01 to 6 / 25 / 05** (Jt.Ex.13). A perusal of the annual performance rating period covering March of 2004 through March of 2005 as compared to the second, third, and fourth quarterly reviews in 2004 and the first quarterly review in 2005, are all deemed to be consistent in that, Grievant was rated as both Exceeds and Outstanding on all five (5) elements comprising the duties of her position as Correctional Officer and, not once was she given a rating below Exceeds on any of the five (5) elements. It appears that the ending comments made by the Management Official rating Grievant for the annual performance appraisal captures best her prior quarterly performance ratings in 2004 as well as her performance ratings for the second quarter of 2005, to wit:

RATER'S COMMENTS: Officer S. Jackson [meaning Sameka Wright, who by this time during her employment had since gotten married] **has had a very productive year at MCC Chicago. She has shown that she can work a variety of posts and can perform all tasks with little supervision. Officer S. Jackson can be counted on to accomplish anything asked of her with pride and professionalism. Officer S. Jackson continues to be a driving force in the efforts to maintain security and good order in the institution. Great Job, Keep up the Good work. The rating official gave Grievant an Overall Performance Rating of Exceeds.**

It is noted that the then incumbent Warden at MCC Chicago, Silas Irvin signed this performance appraisal as the Reviewing Official and added his own comment, to wit: **"I concur with the rater's comments. Ms. Jackson is a valuable asset at MCC Chicago"** (Jt.Ex.13).

The record evidence reflects that in accord with Article 7, Section j of the Master Agreement (Jt.Ex.1), simultaneously with notifying Grievant of its proposal to remove her from its employ, the Agency also notified the Local Union at MCC by Memorandum dated September 27, 2005 that it would be issuing a proposal for disciplinary/adverse action to a bargaining unit employee (without identifying Grievant by name) on the charge of **Failure to Provide Accurate Information Regarding Employment Documents & Security Investigation Forms.** This Notification Memorandum further

advised the Union that the proposed corrective action to be taken was **Removal** (Jt.Ex.1).[39] The record evidence reflects that the Union's initial response to the Agency's proposal to remove Grievant was a Memorandum dated October 1, 2005 from the then incumbent Vice President of the Local, Mike Rule (as of this arbitration, the incumbent President of the Local), to Warden Irvin wherein, Rule apprised Irvin that the Union's concern regarding the proposal was SBIS, Security Specialist Blue's notation on Grievant's written supplemental answers (Jt.Ex.11) to the November 3, 2003 Interrogatories (JtEx.10), that, "this documentation is not complete and cannot be understood", which, in the Union's view did not indicate that the investigation had been completed prior to issuing the proposal of removal pursuant to the provision set forth in Article 30, Section d, Paragraph 1 of the Master Agreement (Jt.Ex.1, see also p.26 of this Opinion and Award). As a result, Rule requested that the Agency provide a complete copy of the response Grievant provided the Agency (specifically to Blue) to the November 3, 2003 interrogatories, asserting this information was crucial to the Union in order to prepare a serious response in Grievant's behalf prior to the Warden making a final decision pertaining to removing Grievant from the Agency's employ (Jt.Ex.15).[40] In a follow-up Memorandum to Warden Irvin dated October 25, 2005 (Un.Ex.18), in not having received the information requested in the October 11, 2005 Memorandum, Rule reasserted the Union's request for the following information as well as requesting an extension of time in order to respond to the proposed removal.

- **A complete copy of the response Grievant provided the Agency to the interrogatories date 11/03/03.**
- **Copies of Grievant's performance appraisals from December 2002 to present.**[41]
- **The Agency's justification for the waiver for Grievant.**

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[39] This Memorandum was directed to the then incumbent President of Local 3652, Jeffrey Jackson, Grievant's spouse.

[40] Rule explained in his testimony that after the Union received notification of the proposal to remove Grievant from the employ of the Agency, the Union followed the usual procedure and secured Grievant's investigative file from the MCC's Human Resource Department (Tr.Vol.II,p.369), which file also included Grievant's written supplemental answers to the interrogatories upon which Blue made her handwritten notation. However, Rule asserted that where he personally has requested an employee's investigative file who is the subject of a disciplinary or adverse action, the Agency, in most cases, has not given the Union the employee's full and complete file. Rule asserted that in Grievant's case, he knows the file given to him by the Agency was not the full and complete file as substantiated by the fact that pages were missing from her investigative report. Moreover, Rule testified in not being given Grievant's full and complete file, it has impeded the Union's efforts to provide Grievant with satisfactory representation in this matter.

[41] As referenced on p.63 of this Opinion and Award, the Union submitted as evidence in these arbitral proceedings, Grievant's performance appraisals going back to 2004, beginning the second quarter of that year and going forward to include the second quarter of 2005 and including, as well, the 2004-2005 annual performance appraisal (Jt.Ex.13). With respect to this information request, Warden Irvin, by Memorandum dated November 2, 2005 (Un.Ex.6), transmitted copies of Grievant's "applicable" performance appraisals to the Union. As there is nothing in these record proceedings to indicate that, by "applicable" the Agency met the Union's request for Grievant's performance appraisals dating back to December, 2002, it is not known as to the reason why, if the Union did receive all of Grievant's performance appraisals as requested, it did not submit the fourth quarter appraisal of 2002 which would have been Grievant's first performance appraisal and, thereafter, all of the appraisals for 2003 including the 2003-2004 annual performance appraisal all of which preceded the performance appraisals put into evidence by the Union.

With respect to the latter request pertaining to a waiver, Rule testified that he had had a closed door conversation with Warden Jerry Graber, Irvin's predecessor at an unspecified time prior to January of 2005, the month and year Graber retired and Irvin assumed the position of Warden at the MCC wherein, Graber apprised Rule that he was aware there existed some semi-serious issues concerning Grievant's background but, as he did not think the issues were grounds for terminating her employment, he filed a waiver to the BOP's North Central Regional Office requesting to retain her employment at the MCC. Rule testified it was his understanding that a waiver was a written justification to the Regional Office by Warden Graber as to the reasons he believed Grievant should not be terminated.[42] Rule testified that it was his impression that prior to Graber retiring, Graber would let him know of the Regional Office's decision but, as that did not happen, he met with Irvin almost immediately upon Irvin's assumption of the Warden's position to talk to him about pending open issues, one of which was the waiver Graber had sent to the Regional Office in favor of retaining Grievant's employment. Rule noted that at the time of this first meeting with Irvin, he had already been elected President of the Local. Rule testified that in this first meeting with Irvin, Irvin informed him that he had had a conversation with Graber pertaining to the waiver he had filed with the Regional Office in Grievant's behalf and that he (Irvin) was checking with the Regional Office to find out what the status was of the waiver and that he would get back to him to let him know what was going on.[43]

Rule testified that as Irvin did not get back to him as he had indicated he would, he contacted Randy Martin, the Union's North Central Regional Vice President, a position which is the counterpart to the Agency's North Central Regional Office Director, who at that time was Alamar Montley and asked Martin to inquire as to whether or not the waiver existed and, if so, what was its status.[44] According to Rule, Martin reported to him that he had spoken with the Agency's North Central Regional Deputy Director who told him that there was a waiver that had originally been sent by Warden Graber but they could not find the waiver due to the fact that both Graber and Greg Herschberger, the Director of the Agency's North Central Regional Office to whom Graber had sent the waiver to, had retired subsequent to the waiver being filed. Additionally, Rule testified, Martin related to him that the Deputy Director (identified by Martin by title as the Assistant Director and by name as Claude Chester) also told him that Warden Irvin had also filed a waiver on Grievant's behalf but that Irvin's waiver had been denied. Rule asserted in his testimony that Irvin, like Graber, had personally told him that he had filed a waiver (Tr.Vol.II,p393). Martin in his

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[42] See p.30 of this Opinion and Award for the procedure involving Waivers which procedure is provided for prior to the selecting official hiring an applicant for a position at the BOP.

[43] In addition to his testimony regarding this first meeting with Irvin, Rule referenced this meeting in a Memorandum to Irvin dated November 17, 2005 (Un.Ex.4) wherein Rule stated, "What is interesting is your failure to acknowledge the conversation you had with me in which you told me personally that Warden Graber and yourself requested a waiver to retain Grievant's employment with the BOP".

[44] In his testimony, Martin explained that the Union has six (6) Regional Vice Presidents that mirror identically the six (6) Regions that comprise the BOP's organizational structure (Tr.Vol II, p 433). Additionally, Martin related that Local 3652 involved in this arbitration is one of nineteen (19) locals he services within his North Central Region.

testimony corroborated Rule's with respect to what he had told Rule he had learned from Assistant Regional Director Chester about the waivers filed by both Warden Graber and Warden Irvin. However, in other testimony Martin conceded that he had not personally seen either waiver nor, had he ever seen any waiver but averred he was aware that waivers were a procedure that have been utilized in retaining an employee's continued employment.

Warden Irvin testified that when he arrived to assume his position at MCC Chicago in January of 2005, his predecessor, Warden Graber had already left the facility and, as a result, he did not communicate with Graber about the state of affairs at MCC upon his arrival or anytime thereafter. Irvin testified however that shortly after he arrived at MCC Chicago, he became aware of "several cases" that had been languishing as a result of no action having been taken by Graber and that Grievant's case was one of them.[45] Irvin related that in and around February/March of 2005, he reviewed Grievant's personnel file at which time he became aware of the issues that had arisen from her Limited Background Investigation and security background clearance. Notwithstanding a Memorandum from Irvin to Rule dated November 2, 2005 (Un.Ex.6) wherein, in responding to the Union's request for information set forth in two (2) previous written requests, specifically, October 11, 2005 (Jt.Ex.15) and October 25, 2005 (Un.Ex.18), Irvin acknowledged that Rule had alleged to him that Graber had advised Rule of his intent to request a waiver for Grievant pertaining to issues that were raised during her security background clearance and that Rule had indicated that he (Irvin) had also indicated he was also requesting a waiver for Grievant, nevertheless, Irvin maintained in his testimony that he never requested such waiver for Grievant. Rather, Irvin asserted he wrote the Agency's Regional Director outlining the issues that had arisen in her background investigation and then asking permission if he could continue her employment; yet, in his Memorandum of November 2, 2005 to Rule (Un.Ex.6), Irvin acknowledged to Rule that his request to know what was the Agency's justification for requesting the waiver and, too, the status of the waiver met the requirements of a particularized need, however, Irvin noted that pursuant to **5 USC, 7114B(4)C**, such information as Rule was seeking is considered to constitute advice provided by management officials and therefore not subject to release. Irvin related that at the time he wrote the Agency's Regional Director asking permission to retain Grievant's employment, he had no personal knowledge of her, that is, he did not specifically know her, but that at this point in time he had no issues with her.[46] Irvin testified that in addition to having written the Regional Director asking permission to retain Grievant's employment, he also had conversations with the Regional Director concerning the same matter. Irvin explained that since he was brand new in the position of Warden, and because he had never dealt with the possibility of terminating an employee, here the Grievant, this

[45] According to Irvin, of the cases he characterized as languishing as a result of no action having been taken with respect to them, Grievant's case was the one that had languished the longest (Tr.Vol.I,p235). Irvin explained that he became aware of Grievant's case as a result of his conducting a broader review of all outstanding disciplinary cases that had yet to be resolved or disposed of (Tr.Vol.I,pp254-255).

[46] Irvin averred at this point in time when he moved to ask permission to retain Grievant's employment, that he had confidence in her, he did not feel she was jeopardizing the mission of the institution, and that he did not feel her confidence had been destroyed with him (Tr.Vol.I,pp.222-223).

was not a prospect he was comfortable with and as a result, he sought guidance from his peers, from supervisors and from subject experts. Although he noted a decision to terminate Grievant was not one he wanted to make, through conversations with his superior, the Agency's Regional Director, Mike Nalley, he was made aware that regardless of his personal feelings and his reluctance to do certain things, it was incumbent upon him, in his position as Warden, to make a decision that was in the best interests of both the MCC Chicago and the Agency.[47]

Notwithstanding Irvin's having informed Rule in the November 2, 2005 Memorandum (Un.Ex.6) that the Union's request to know what the Agency's justification was for requesting the waiver was information not subject to release because it constituted advice provided for management officials in accord with **5 USC 7114 B(4)C,** the record evidence reflects that in a Memorandum dated the following day, November 3, 2005, Rule reasserted the Union's position that it was important to know the Agency's justification for requesting the waiver and what the status of the waiver was. Rule allotted that, assuming the waiver had been denied, the information he was seeking was needed to prepare a response to the Agency pertaining to Grievant's employment with the Agency (Un.Ex.7). In response to Rule's renewed request for information related to the filing of a waiver, Irvin, in a Memorandum to Rule dated November 15, 2005 (Jt.Ex.16), referenced Chapter 7 of Program Statement 3000.02 (Un.Ex.14), the section pertaining to "Waiver to Standards of Acceptability" (see p.30 of this Opinion and Award), wherein Irvin noted that such a waiver is available to selecting officials to request authorization to hire an applicant whose past behavior is defined as unacceptable by the Guidelines of Acceptability and, as such, the filing of a waiver must be exercised **prior** to the candidate's entrance on duty. Irvin explained that as the Agency was not aware the Grievant's background reported behavior which was unacceptable by the Guidelines of Acceptability (prior to the time she entered on duty), no such waiver was submitted, thereby rendering the Waiver provision inapplicable in Grievant's case.[48]

Roger Payne, National Secretary-Treasurer of the Council of Prison Locals 33, concurred in his testimony that while the Waiver provision set forth in Program Statement 3000.02 (Un.Ex.14) is applicable only to the situation **prior** to an applicant entering on duty, he nevertheless maintained that a waiver procedure not extant in Agency policy is utilized to retain employees who are found by the results of a background and security clearance investigation to fall outside the Guidelines of

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[47] It is apparent that Irvin's focus shifted from retaining Grievant to the possibility of imposing the adverse action of dismissal in her case as a result of his effort at retention ultimately being rebuffed by Agency officials at the Regional level, which is consistent with both Martin's testimony and Rule's testimony as to what Martin told him regarding the rejection of Irvin's request (in their terms, a waiver) to retain Grievant's services being rejected at the Agency's Regional level.

[48] With respect to this point, Rule responded by Memorandum dated November 17, 2005 (Un.Ex.4) noting the following: "The fact is that the Agency has traditionally hired employees prior to completing their background investigation. Grievant is a prime example of the Agency's practice to hire an employee then three (3) to five (5) years later, the Agency completes the background investigation, there are issues raised that enables the Agency to issue the employee a security clearance which is a condition of employment. In this case, because of the issues raised, the Agency is proposing termination".

Acceptability, even though, after being personally involved in myriad adverse action cases, he has never seen a copy of such Guidelines and is convinced no such Guidelines exist. As to waivers executed after-the-fact of one entering on duty, Payne testified he has made written requests to obtain such waivers in adverse cases he has personally been involved in, has been informed that such waivers are part of the employee's personnel file who is under charge, but he has never found such waivers in a personnel file nor has he ever been given a waiver in response to a written request for same. Notwithstanding the Agency's non-acknowledgement that a waiver procedure exists applicable to employees already on board with the Agency (post employment as opposed to pre-employment), and the fact he has never been successful in obtaining such a waiver by way of a formal request for information, Payne related that serendipitously, he secured a copy of such a waiver, the only one he has ever seen to date, that was executed by a Warden at the Federal Correctional Institution located at Cumberland, Maryland falling within the jurisdiction of the Agency's Mid-Atlantic Region (Un.Ex.16).[49] A review of this waiver reflects that the employee entered on duty January of 2005 and that the waiver was requested by the warden in March of 2006, fourteen (14) months after the employee commenced working for the BOP. The warden stated in the waiver that the subject employee had developed into an excellent employee, has a good rapport with coworkers and Lieutenants, is an asset to the Bureau and should continue to excel. This warden ended the waiver request stating the following.

> The waiver process was developed for occasions where an applicant's past behavior is defined as unacceptable by the pre-employment guidelines, but due to extenuating circumstances, the selecting official still wishes to retain the applicant. Program Statement 3000.02 requires the selecting official to request a waiver to the Guidelines of Acceptability. It is our request that [the employee] be retained as an employee.

Payne opined the Agency's non-acknowledgement of the existence of a post-employment waiver procedure is due to the incongruous situation such procedure imposes on a warden that issues such a waiver based on his/her belief that the subject employee is sufficiently of value to the Agency that said employee should be retained; but when the waiver is subsequently rejected by the Agency's regional director, the warden must now take the one hundred eighty (180) degree position of instituting either a disciplinary or adverse action against the very employee that was advocated by the warden as being worthy enough to retain his/her employment status. Payne further opined that that part of the waiver procedure where a regional director who does not personally know the employee on whose behalf a waiver is filed rejects the waiver filed by a warden who is familiar with the employee, that is, his/her record of employment and job performance, is part of what was criticized as a disciplinary system that is inconsistent by the Agency's internal investigation conducted by the Department of Justice, Office of the Inspector General in 2004.(Un.Ex.13).

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[49] It is noted for the record that this document was categorized as "sensitive but unclassified".

The record evidence reflects that in his November 15, 2005 Memorandum to Rule (Jt.Ex.16), Irvin also addressed the Union's requests for information other than the request for a copy of the waiver Rule was under the impression Irvin had filed for Grievant. With respect to the Union's request to secure a copy of Grievant's complete responses to the interrogatories she filed in November of 2003, Irvin maintained that what the Agency had in its possession constituted her entire response, notwithstanding Rule's reference to Blue's having notated on the interrogatories that the document was incomplete. With respect to Grievant's request for her entire security file, Irvin apprised Rule the Bureau does not have the authority to release the Investigative Report as it is the property of OPM but that this file could be requested directly from OPM. Irvin asserted that, as to the remaining items comprising Grievant's security file, they were advisory documents for management's use and therefore not subject to release in accord with **5 U.S.C. 7114 B(4)C**. Finally, as a reminder to Rule, Irvin noted that the documents initially provided the Union comprised the information on which he, the deciding official would be making a decision on the disciplinary/adverse action proposal.

As noted elsewhere above, Rule responded to Irvin's November 15, 2005 Memorandum by Memorandum dated November 17, 2005 (Un.Ex.4) wherein, with regard to Irvin's point that a waiver was not applicable in Grievant's situation as pursuant to Program Statement 3000.02, Chapter 7 waivers pertaining to Standards of Acceptability are exercised in a pre-employment not a post-employment situation, Rule asserted he was not disputing the waiver procedure as set forth in Program Statement 3000.02, Chapter 7 but, rather, he was disputing the Agency's reluctance to release information. Rule then apprised Irvin that Martin was told by the Agency's North Central Assistant Regional Director that his (Irvin's) waiver for Grievant had been denied and in light of this denial, Rule indicated he wanted to know the following:

- What was Irvin's reason for requesting a waiver, taking into consideration he had full knowledge at the time he requested the waiver that there were some issues raised in Grievant's background investigation.

- Did Grievant's behavior change when Captain Savich issued her the proposal to be removed from the position of Correctional Officer

- What was Irvin implying by reminding him that the documents initially provided comprise the information on which he, the deciding official would consider in making the decision on the removal proposal.

Rule apprised Irvin it was the position of the Union that the information it was requesting was absolutely within the employee's rights to receive in accord with **5 U.S.C. 7114** and, that therefore, the Union would pursue obtaining these documents through other administrative remedies.[50]

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[50] Rule noted in a meeting held December 1, 2005 for the purpose of Grievant giving an oral response to the Warden as to the removal proposal that the administrative remedy he would utilize to obtain the documents he was seeking would be to file a Freedom of Information request.

The record evidence reflects that Grievant elected to meet with Warden Irvin to provide an oral response to the removal proposal. This meeting, held December 1, 2005, was attended by Grievant, Rule, Irvin, MCC Employee Services Manager, Casandra Loggins-Mitchell and by Irvin's Secretary, Mary Kay Cashman who transcribed the proceeding (see pp. 15 and 16 of this Opinion and Award for a recitation as to Grievant's responses to each of the Specifications A through E).[51] Rule stated at this meeting that he did not think the proposed action of removal was fair to Grievant and that she was a victim of poor management. Grievant stated that in the time she has been employed at MCC she has had no problems, that her performance evaluations have been "exceeds" and wondered why, after being employed three (3) years, was the Agency pursuing an action against her and why did the action have to be the adverse action of termination.[52] Irvin responded to Grievant's remarks by stating it is not unheard of that background investigations take this long and, that he understood her frustration but there were issues he had to take into consideration. In a remark directed to Irvin, Rule stated he was sure he would consider the Douglas Factors in making his decision (see pp. 41-42 of this Opinion and Award). By letter dated January 26, 2006 (Jt.Ex.18), nearly a full two (2) months after the meeting in which Grievant provided him her oral response to the removal proposal, Irvin informed Grievant that upon giving full and careful consideration to the removal proposal, her oral response of December 1, 2005, and to the relevant evidence contained in her adverse action file, he found the charge [meaning the Specifications] fully supported by the evidence in the adverse action file. Irvin held that her actions in this matter had destroyed her credibility and effectiveness as a correctional worker and that her removal, effective midnight January 27, 2006 was in the interest of the efficiency of the service.[53] Irvin then went on to inform Grievant as to what Douglas

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[51] The Arbitrator notes that the record evidence before him includes a written response by Grievant dated October 12, 2005 (Un.Ex.5), to the removal proposal which was noted in the preceding Chronology section of this Opinion and Award, p.11. However, Irvin, in his letter to Grievant dated January 26, 2006 informing her of his decision to remove her from her position and employ of the Agency, noted that Grievant had not submitted a written response to the removal proposal for his consideration (Jt.Ex.18).

[52] Irvin noted in his testimony that as Warden, he was the Agency official that had to authorize Human Resources to proceed with disciplinary action. Irvin noted that prior to his issuing said authorization, he reviewed Grievant's personnel file, the investigation report, and conferred with Savich, Grievant's Department Head. According to Irvin, in authorizing that disciplinary action be taken, a determination is also made by looking at the table of available penalties (BOP Program Directive 3420.09, Attachment A, see pp. 37-38 of this Opinion and Award), as to what quantum of discipline would be appropriate. Although the table of penalties for a first infraction of Offense 32, falsification in connection with employment and investigation ranges from "official reprimand" to "removal", it was determined in Grievant's case that removal was the appropriate disciplinary action to be taken. Irvin explained that as disciplinary action is required to be consistent within each institution, that is, not Agency-wide, Human Resources, which keeps records of disciplinary actions taken at each institution, reviews the proposed disciplinary action for the purpose of consistency before drafting the proposal letter. Irvin acknowledged that of the many cases he reviewed that possibly required disciplinary action to be taken that had not been attended to by his predecessor, Warden Graber, Grievant's was the only case that involved termination of employment. Irvin was unable to recall the number of cases he reviewed that Graber left unattended, nor did he render any testimony pertaining to the issues involved in those other cases.

[53] Under cross-examination, when asked how it was that he first requested of the Regional Office if he could retain Grievant's services fully knowing the issues that had been raised by her Limited Background Investigation and her responses to the interrogatories and then proposing to terminate her employment, Irvin answered that once he went back, thoroughly reviewed and looked at the investigation and the

factors he considered in determining the appropriate penalty, to wit:[54]

Douglas Factor 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 * * *.

Irvin's Point (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.

Douglas Factor 2 The employee's job level and type of employment, ... contacts with the public, and prominence of the position.

Irvin's Point (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 its law enforcement officers.

Douglas Factor 3 The employee's past disciplinary record.

Irvin's Point (d) While you have no prior disciplinary record, your misconduct is so serious as to warrant a substantial penalty.

Douglas Factor 4 The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.

Irvin's Point (c) While your past work record has been acceptable, it does not shield your very serious breach of trust.[55]

Douglas Factor 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).

Irvin's Point (e) The penalty is consistent with the Agency's table of penalties.[56]

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allegations, it was with a set of eyes that he should have used in reviewing Grievant's file initially (Tr.Vol.I,p278)

[54] While Irvin enumerated eight (8) separate considerations in points (a) through (h), he did not specifically identify these considerations as being the Douglas Factors.

[55] In his testimony, Irvin conceded that he did not give any consideration to Grievant's performance evaluations relative to this Douglas Factor explaining that the issue of falsification pertained to her pre-employment interview and the paperwork she filled out relative to her application for employment and had nothing to do with her performance on the job (Tr.Vol.I,pp.288-289).

[56] As indicated on page 38 of this Opinion and Award, the penalty for a first offense involving a charge of Falsification of documentation (**Offense 32**) ranges from "Official Reprimand" to "removal".

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

Irvin's Point (f) There was no widespread notoriety about your misconduct

Douglas Factor 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.

Irvin's Point (g) There were no mitigating factors.

Douglas Factor 12 The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Irvin's Point (h) Alternative sanctions were considered, but I concluded that they would not have had the desired corrective effect.[57]

Pursuant to advice set forth in the decision to sustain the removal proposal pertaining to exercising her rights in contesting the decision, specifically, that she could elect to pursue one of three (3) appeal procedures, to wit; file a written grievance in accord with provisions of the Master Agreement (Jt.Ex.1), file an appeal with the Merit Systems Protection Board (MSPB), or file a formal complaint with the Equal Employment Opportunity Commission (EEO). As noted elsewhere above, Grievant elected to file a

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[57] The Arbitrator takes judicial notice of the fact that in making his final decision to remove Grievant from the employ of the Agency, Irvin considered eight (8) of the twelve (12) Douglas Factors. The Douglas Factors Irvin did not consider are the following:
Factor 5; The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisor's confidence in the employee's ability to perform assigned duties. Note: Irvin explained in his testimony he did not consider Grievant's job performance as he viewed the issue in the very narrow perspective as pertaining to issues relative to her pre-employment with the Agency.
Factor 6; Consistency of the penalty with those imposed upon other employees for the same or similar offenses. Note: According to Irvin, such consistency of penalty intra-institution is tracked by Human Resources. The inference drawn from this testimony is that Human Resources in drafting the removal proposal did not ascertain from its records of disciplinary actions assessed at the Chicago MCC facility, that the imposition of removal, the most severe disciplinary action set forth in the Table of Penalties for a first offense of Rule 32, was inconsistent with the penalty assessed other employees in the past for commission of the identical offense. Note: with the record here devoid of substantiating evidence of such consistency of penalty administration, such an inference remains only that, just an inference.
Factor 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. Note: The record evidence reveals that Grievant had been put on notice several times that answers she provided on her employment application, her supplemental application, and her written interrogatories had to be true, complete, and correct to the best of her knowledge and belief and made in good faith and that she certified she understood that a knowing and willful false statement could be punished by fine or imprisonment or both.
Factor 10; The potential for employee's rehabilitation. Note: It would appear based on Irvin's admission that in initially addressing the issues surrounding Grievant's situation by inquiring of the Regional Director, both in writing and orally whether he could retain Grievant's services, that this was an indication by him that he was of the belief there existed the potential on Grievant's part to be rehabilitated.

written grievance thus giving rise to this arbitral proceeding. The written grievance addressed the following major points:

- Grievant's employment was terminated three (3) years after her entrance on duty whereas, the time frame stipulated in the Agency's policy is that the background investigation be completed within the probationary period for the employee of one (1) year.

- Information provided by Patricia Ogren, Superintendent of Southern Oaks Girls School, a correction facility of the Wisconsin Department of Corrections, Grievant's employer prior to her being employed by the BOP, to Chicago MCC Employee Services Manager to clarify some of the issues raised by Grievant's Limited Background Investigation, was not included in Grievant's disciplinary file upon which the Warden based his decision to remove Grievant from the employ of the BOP.

- The Agency denied requests by the Union for certain information which the Agency acknowledged met the requirement of particularized need but based its denial on providing such information on the grounds that it constituted advice for Management officials and therefore not information the Union was privileged to obtain.[58]

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[58] It is noted by the Arbitrator that the Union continued in its quest to secure certain specified information from the Agency even up until the day before the first arbitral hearing in this matter, April 11, 2007 (see Un.Ex.3), and after April 11th, specifically by Memorandum dated April 25, 2007, a week before the May 3, 2007 hearing (see Un.Ex.17). With respect to the former request, the Union reasserted its prior requests to obtain a full, complete and un-redacted copy of Report #2 comprising Grievant's Limited Background Investigation file, all waivers and/or vouchers prepared by either Warden Graber and/or Warden Irvin pertaining to Grievant together with any e-mail correspondence and/or memoranda prepared for Warden Graber or Warden Irvin pertaining to Grievant. The Union's request for the un-redacted copy of Grievant's investigative file was an issue discussed in depth and on the record at the beginning of the first hearing. The Arbitrator ruled that the Agency would make a special request for the full and complete file with OPM for the purpose of his review only to determine the relevance of any of the missing information. The Agency made the request, OPM responded positively and indicated it would release the information if it received a notarized authorization from the Grievant to release the full file. The Arbitrator notes he was never given the missing information to review. With respect to the latter request, the Union was seeking the additional information of sanitized copies of all disciplinary and adverse actions that occurred at the MCC Chicago from March 9, 1998 (the date the Master Agreement, Jt.Ex.1 became effective), through to the present time. The Union delineated the following six (6) reasons for wanting to obtain this information, to wit: (1) To establish the facts that there were no discipline or adverse action decision[s] made without proper notification to the Union; (2) To establish the facts that there were no disciplinary or adverse actions that were inconsistent and to assure that all bargaining unit employees were treated in a fair and equitable manner (the Arbitrator notes this relates to Douglas Factor #7); (3) Determine the consistency of the disciplinary or adverse action issued to all employees by the Agency (this relates to Douglas Factor #6); (4) Determine whether or not employees assigned to MCC Chicago have been given disparate treatment (this relates to both Douglas Factors #6 and #7); (5) Determine whether or not Title 5 U.S.C., Title VII U.S.C., Master Agreement, Federal Labor Statutes, and Federal and/or Government-wide laws, rules and regulations were violated; (6) Fulfill the Union's statutory obligation to represent bargaining unit employees adequately, effectively, and fairly (this relates to Article 7of the Master Agreement, Jt.Ex.1). In a colloquy between Agency advocate Vogel and Union advocate Heuer, Vogel indicated the Agency was working to compile the information requested whereas Heuer maintained

- Grievant's performance evaluations have been nothing less than "exceeds"; that she has never received any disciplinary actions including any verbal reprimands by the Agency; and, at times previous to the Warden's decision to uphold her removal from service, Grievant had received several service awards and is considered to be an outstanding employee according to her supervisors.

- Both Warden Irvin who made the final decision to sustain the removal proposal and his predecessor, Warden Graber, advocated to the Agency's Regional Director that Grievant be given a security clearance.

- In sum, the Union contended in the written grievance that the removal action was not taken for just and sufficient cause to promote the efficiency of the service but rather, the Warden's decision to remove Grievant was based on the prejudices established by the Agency's internal and/or external personnel policies and, in addition, the imposition of the adverse action of removal for a first offense does not embrace the concept of progressive discipline designed primarily to correct and improve the employee's behavior. Moreover, the Union contended, the conduct allegedly Grievant was charged with committing did not warrant the severe and extremely harsh penalty of terminating her from her employment as a correctional officer with the BOP (Jt.Ex.19).

As to the remedy, the Union requested the Arbitrator to award the following:

- To make the Grievant whole with respect to all lost wages, and all accrued benefits to which she would have been entitled to receive had she not been removed from service such as, annual and sick leave and any other such benefits between the time of her removal effective January 26, 2006 and the date of her return to service.

- Reimbursement for all out of pocket expenses due to her removal.

- Grievant be compensated for all overtime paid while being removed from her duty in her department.

- That the Agency be ordered to pay Grievant the highest percentage of interest allowable by law for all lost wages.

- That all negative records contained by the Agency relative to this subject adverse/disciplinary action be expunged.

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the Agency was stonewalling the Union's data request in the same manner it has stonewalled other of the Union's data requests since 2005 (see Tr.Vol.II, pp 315-322). The Arbitrator notes the second hearing ended without said data entered into evidence.

- That the Regional Director and Warden Irvin be ordered to make a formal written apology to Grievant for the disparate treatment against her in this matter.[59]

- That the Agency be ordered to post on every bulletin board throughout the Chicago MCC institution a listing of the violations committed by the Agency in this matter and the corrective remedies awarded by the Arbitrator.

- That the Agency comply with the Master Agreement, the Local Supplement Agreement, and applicable Laws, Rules, and Regulations.

- That a Memorandum of Understanding be entered into regarding this matter and be posted on all staff bulletin boards for sixty (60) working days.

- That the Arbitrator order any other actions to be taken deemed by him to be appropriate and necessary.[60]

The record evidence reflects that by letter dated March 23, 2006 from Irvin to Rule, the Agency denied the subject written grievance (Jt.Ex.20). Additionally, Irvin noted that while the grievance set forth allegations that the Agency violated specified articles and sections of the Master Agreement and also claimed the Agency violated the Local Supplemental Agreement, Chapter 7 of the Human Resources Manual, and/or applicable laws, and federal statutes or regulation, the grievance, though it outlined a number of issues, failed to indicate how each specific article of these various documents had been violated by the Agency. Irvin further indicated that even though the grievance failed to articulate specific violations, nevertheless, based on the information provided in the grievance it was the Agency's conclusion that the Union's intent was for an arbitrator to decide whether the adverse action taken was for just and sufficient cause or, if not, what should the remedy be. Having so concluded, Irvin apprised the Agency was prepared to make a joint request for a panel of arbitrators upon the Union's notification of intent to do so.[61]

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[59] The Arbitrator notes that even if this remedy were included in a finding to sustain the subject grievance, such a remedy would be inapplicable to Warden Irvin since he is currently in retirement status and no longer employed by the BOP. It is noted that his successor is the now incumbent Warden, Eric Wilson.

[60] In its post-hearing brief at page 60, the Union stated the remedy in more succinct terms as follows: "the Union respectfully requests that the discharge of Grievant not be sustained, and that it be set aside; that she be awarded full back pay, reinstatement of all seniority rights and other emoluments in connection with her job, that the Union be awarded attorney fee [and expenses], that the Agency bear the costs of this action, and for any and all other relief which is proper".

[61] Notwithstanding its position that despite its judgment the written grievance as filed lacked specificity and putting the Union on notice as to its position, and despite too, that even though this lack of specificity constituted a defect in the grievance, the Agency nevertheless assented to entering into a joint request with the Union to arbitrate the grievance. Apparently however, notwithstanding its having jointly entered into the agreement with the Union to progress the subject grievance to arbitration, the Agency did not, by this agreement, yield on its position that the lack of specificity by the Union to detail just how it had violated the provisions of the Master Agreement (Jt.Ex.1), as well as, provisions and sections of other controlling agreements, policies, rules and regulations, and statutes, qualified the subject grievance as inarbitrable, as it presented its position at the outset of the first hearing that the lack of specificity constituted a "Threshold Issue" (Agency Ex. 14A and Tr.Vol.I,pp 33-35). In its formal written position statement, the Agency

In other testimony, Vincent E. Shaw related that as Senior Attorney Advisor for MCC Chicago, he is the primary liaison between the MCC and the Federal District Court in Chicago, a position which entails assisting the U.S. Attorney's Office in defense of litigation filed against the BOP, as well as in prosecutions of inmates for commission of offenses during the time of their incarceration such as, for example, serious assault, murder, or introduction of contraband, and advising the warden and staff, all of whom are deemed to be correctional officers at the MCC regardless of their designated titles, on general legal issues. With regard to the duty of prosecuting inmates for commission of offenses, Shaw indicated that part of the evidence used in the prosecutions consist of incident reports written by correctional officers involved in the dispute who may be called upon to testify at trial. That being the case, correctional officers who serve as witnesses in a court proceeding must be persons of great integrity and beyond reproach. Shaw related that given current legal precedent, any information pertaining to a witness who might be called upon to render testimony on behalf of the BOP that could be used to impeach the potential witness, is required to be disclosed.[62] According to Shaw any information that could potentially be used to impeach the staff member in a criminal case during trial must be turned over to the defense. In his testimony, Shaw concurred that the attribute of integrity on the part of a BOP staff member is the cornerstone and one of the core values of the Agency (see pp.27 and 28 of this Opinion and Award). Shaw also concurred that if a staff member lied on his/her application of employment, that person not only would be susceptible to being compromised in the performance of their duties at the institution but, it would also be incumbent upon the Agency to provide such impeachment information and documentation of the person's entire history of working for the BOP if such became a matter before civil or criminal litigation.[63]

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claimed the lack of specificity made the grievance defective asserting the Union had placed the Agency in a situation wherein, it had to guess what the Union was complaining about (dates, times, procedures, individuals involved, etc). The Agency maintained that in meeting the Contractual requirement to file the subject grievance on the jointly agreed Grievance Form as mandated by the applicable provisions of Article 31, the Grievance Procedure clause, of the Master Agreement (Jt.Ex.1), it was incumbent upon the Union to comply with the requirement in Block 6 of the Grievance Form to "be specific" as to, "in what way were each of the above (referring to those provisions and sections cited by the Union as having been violated by the Agency in removing Grievant from the service of the BOP) violated". The Agency ventured in its written "Threshold Issue", that if the local institution (meaning the MCC Chicago) management were to unilaterally change said requirement for submitting grievances as did the Union in this situation, there is no doubt the Union would complain of this action to many parties and in many forums. The Agency submitted therefore, that such conduct as displayed by the Union in not complying with the negotiated grievance procedures should not be excused, condoned, or rewarded. As such, the Agency posits that pursuant to Article 32, Section h of the Master Agreement (Jt.Ex.1), the Arbitrator has "No Power" to release the Union from the Contractual requirement to "Be Specific" when filing a formal written grievance. Thus, submits the Agency, the Arbitrator is therefore left with no alternative but to reject the subject grievance as not conforming to national requirements as set forth in the Master Agreement and to reject the grievance for lack of specificity.

[62] As referenced in the preceding Documentation section of this Opinion and Award, it was noted this legal precedent was established in **Giglio v. United States (405 U.S. 150, 1972)** [see also Agency Ex.9]. As also noted in the Documentation section of this Opinion and Award at p. 42, **Giglio** formed the basis for the promulgation of the BOP's Program Statement 1380.06, 2 / 10 / 98 (see also Agency Ex.10).

[63] Although Shaw noted at the end of his testimony under cross-examination that he was called as an Agency witness to proffer information concerning the importance of integrity on the part of BOP staff employees, even though he never mentioned Grievant's name, the thrust of what he testified to was intended as an oblique reference to the given and surrounding circumstances of Grievant's case.

In rebuttal testimony, MCC Chicago Employee Services Manager, Casandra Loggins-Mitchell proffered the following information, to wit:

- That she contacted Therisa Blue, at the Security and Background Investigation Section of the Agency to inquire about Blue's notation on Grievant's supplemental answers to her interrogatories that they were incomplete and could not be understood and that Blue told her she had made that notation to indicate that Grievant's responses did not address all the issues. Loggins-Mitchell related she then inquired of Blue whether she had gotten more information from Grievant to which she responded, "no". Loggins-Mitchell further related that she next asked Blue if there were more pages to the document (meaning Grievant's supplemental responses recorded on a separate document apart from the pre-printed interrogatories) and that Blue responded, "no", stating that those were all the pages she had received.[64]

- She confirmed that although Warden Graber talked to her about submitting a retention request (the more accurate reference to what has been referred to as a waiver), for Grievant, to her knowledge he had not submitted such a request, asserting that in her position in personnel, she surely would have known if he had submitted such a retention request.

- She opined, based on her knowledge of the pre-employment process that had the Agency known from Grievant's responses given at her pre-employment interview what the Agency later learned about her answers by way of the Limited Background Investigation, Grievant would not have been hired in the first instance.[65]

- Loggins-Mitchell acknowledged that her office maintains a log of disciplinary actions taken by MCC Chicago and that this log contains the names of the employees so disciplined. She maintained that she knew of no employee who had been issued a removal proposal and then, subsequently a retention request was made or was given a security clearance.

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[64] It is recalled as stated elsewhere above, that Blue dated the notation she had written on the face of the first page of Grievant's supplemental responses, December 1, 2003 and that the very next day, she held a Subject Interview of Grievant by telephone and the record evidence is devoid of any effort by Blue to inform Grievant that her supplemental responses to the interrogatories she had submitted were incomplete and therefore not understandable. Additionally, as previously noted elsewhere above, the separate supplemental response document (Jt.Ex.11) apparently was missing an entire page.

[65] Loggins-Mitchell related that her expressed view as to Grievant's not being employable is procedurally based in that her office is responsible for reviewing the pre-employment documents and making recommendations to the warden as to who is and who is not eligible for hire. Since the state of knowledge regarding the information Grievant tendered during her pre-employment interview and in her supplemental application differed from the information uncovered in her Limited Background Investigation, Loggins-Mitchell noted that her office recommended to the then incumbent warden, Warden Graber that Grievant be hired. Loggins-Mitchell noted that because of MCC Chicago's high turnover rate relative to the position of Correctional Officer, almost every applicant determined to be acceptable is hired.

- Loggins-Mitchell acknowledged that she drafted a retention request applicable to Grievant for Warden Irvin, that he signed said retention request and that this retention request was submitted to the Agency's Regional Director although she was unable to recall how the request was sent to the Regional Office. She testified that the retention request was made to the Regional Director in the early Spring of 2005, just a couple of months after Irvin assumed the position of Warden at MCC Chicago and that Regional Director, Michael K. Nalley subsequently denied the retention request in writing. She further testified that her office has retained Nalley's written denial of this retention request and that the reason this written denial has not been introduced as evidence in this arbitral proceeding is because the Agency considers this denial to be an advisory document, an Agency internal communication and, therefore, outside the scope of information it is obligated to provide the Union and/or to be proffered as evidence in an arbitral proceeding.

As the Parties were unable to reach a satisfactory resolution of the aggrieved disputed issue of Grievant's removal from the Agency's employ, the matter comes now before this Arbitrator for determination.

CONTENTIONS

Employer's Position[66]

The following are points in argument set forth by the Agency in support of its adverse action of removing Grievant from its employ as a Correctional Officer assigned to the MCC Chicago Institution:

- The Agency has proven by a preponderance of the evidence that the Grievant provided inaccurate information numerous times during the Pre-Employment Interview process. The five (5) Specifications underlying the charge of Grievant's Providing Inaccurate Information were proven by testimony, exhibits, and the record.

- The Agency submits the maximum penalty allowable as set forth by the established Table of Penalties was appropriate, to wit: given the core value of the Agency of truthfulness, trustworthiness, and integrity required of its career employees, personal attributes that with respect to writing incident reports and proffering testimony at a criminal or civil court proceedings would not result in possible witness impeachment, in compliance with the United States Supreme Court ruling in the case, **Giglio v. United States, 405 U.S. 150 (1972);** consideration was given by Warden Irvin, the Deciding Official of all the relevant **Douglas Factors**; and, the penalty of removal met the MSPB's standard of reasonableness and therefore does not require any modification by the Arbitrator; Grievant's job performance evaluations found to be satisfactory during the time of her employment at the Agency and the absence of prior discipline in her work record during the time of her employment at the Agency, are not relevant and not to be considered as factors in mitigating the penalty pursuant to the ruling in **McCreary v. OPM 101 M.S.P.R. 351 (2006)**, wherein it was held that, "performance in a position to which an employee has been appointed as a result of falsification has no relevance to a falsification charge and consequent removal" as well as, the ruling in **Benoist v. Department of Justice, 40 M.S.P.B. 418 (1989)** wherein it was held that, "falsification of security clearance forms was sufficient basis for employee's removal, notwithstanding his good work record and absence of prior discipline"; the penalty of removal was also within the bounds of reasonableness on grounds that law enforcement officers are held to a higher standard as compared to other federal employees as decided in **Crawford v. Department of Justice, 45 M.S.P.R. 234 (1990)** as well as in **Scott v. Department of Justice, 69 M.S.P.R. 211 (1995)** wherein it was held, in relevant

[66] Given the length of the Employer's post-hearing brief (32 pages, accompanied by numerous case cites) setting forth its position in support of the adverse action of removal taken against Grievant, the exposition in this Contention section merely reflects an outline of the Agency's argument. However, without appending the argument put forth by the Agency to this Opinion and Award, the Arbitrator incorporates the Agency's post-hearing brief in full as if it were made an Appendix.

part that, "the seriousness of a falsification offense is increased when the appellant is a law enforcement officer".

- The Agency submits that the removal action was for the efficiency of the service supported by the ruling in **Crawford, et. al.**, that as a law enforcement officer, Grievant was held to a higher standard and the testimony of several Agency witnesses who explained that to be entrusted with the care and custody of inmates requires high professional standards both on and off duty in order to maintain the public's trust in the Agency's mission. Additionally, such higher standards promote integrity among staff members which contributes to the secure and orderly running of the prisons. As such, as the subject charges in Grievant's case relate to the hiring practices of the Agency, and the standards expected of all employees, and law enforcement officers in particular, the penalty assessed Grievant of removal from the employ of the Agency was for the efficiency of the service. This removal action taken for the efficiency of the service is further supported by the testimony proffered by Warden Irvin, Benefield, and Loggins-Mitchell that had Grievant provided the information she failed to provide during the hiring process, she never would have been hired in the first instance.

- Within regulations required of the Agency, requests by the Union for documents were complied with. With regard to the Union's request for Grievant's OPM file, the Agency followed the applicable terms of the Master Agreement (Jt.Ex.1) and provided the Union with all documents used by Warden Irvin in making his decision to sustain the charges against Grievant and to remove her from its employ. Had the Union followed its advice to direct its request for Grievant's complete personnel file to OPM, the proper federal agency, the Union would have been able to obtain all the documents it was seeking from the Agency but was beyond its authority to provide the Union. The request by the Union for a waiver or waivers supposedly filed by both Warden Graber and Warden Irvin were not provided to the Union as such documents are deemed pre-decisional documents that assist in the deliberative process and, as such, are covered by exemption (b)(5) of the Privacy Act. The Union's allegation the Agency has come to this arbitration with "unclean hands" (as that legal principle is understood) because its requests for documents have not been complied with is both untrue and inapplicable as this claim was never asserted in the subject grievance giving rise to this arbitration and therefore is an impermissible expansion of the grievance which the Arbitrator has no authority under the applicable provisions of the Master Agreement (Jt.Ex.1) to address.

- The instant grievance is distinguishable from the case authorities referenced by the Union in support of its position the Agency's action of removing Grievant from its employ constituted a wrongful action under applicable provisions of the Master Agreement (Jt.Ex.1) as well as Agency rules and regulations and statutes.

- The Arbitrator has no authority to award, as the Union has requested if he finds to sustain the grievance, attorney fees.

In conclusion, the Agency submits it has met its burden of proof in this case; the charges have been proven by a preponderance of the evidence; the discipline invoked of removal promotes the efficiency of the service, the assessed penalty of removal was appropriate and, in accordance with M.S.P.B. case law. Accordingly, the Agency respectfully requests that the removal of the Grievant be affirmed and the grievance be denied.

Union's Position[67]

In its extensive post-hearing brief, the Union set forth the following points in argument contending the adverse action by the Agency to remove Grievant from its employ was not for just and sufficient cause:

- The Agency committed harmful error in their procedures; engaged in prohibited personnel practices in this process; and made a decision which was not in accordance with the law.

    1. The Agency refused to give the Union material that was necessary for the defense of Grievant; engaged in word games when asked about the existence of documents, in particular "waivers" (Waivers to Standards of Acceptability), which would have vouched for the continuation of Grievant's employment; and totally avoided complying with any data request submitted to it in anticipation of this hearing.
    2. Pursuant to the Agency's Program Statement 3420.09, the "reckoning period" for a violation of Offense 32, falsification of material fact in connection with employment, the Offense Grievant was charged with infracting is two (2) years. The evidence clearly shows that the removal action against Grievant was invoked beyond the reckoning period as the elapsed time between the date of initial employment and the effective date of removal amounted to over three (3) years.

- The Agency failed to sustain the Specifications by a preponderance of the evidence, the standard of proof required of it in cases of adverse action.

    1. Specification A. The Agency failed to present any evidence that Grievant was ever dismissed or resigned in lieu of termination from her job. Rather the evidence showed the opposite, that is, that Grievant was continually employed by the Wisconsin Department of Corrections from the time of her hire until the day before she entered on duty at the MCC Chicago and began her employment with the Bureau of Prisons.

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[67] Given the length of the Union's post-hearing brief (61 pages, accompanied by numerous case cites) setting forth its position asserting the adverse action of removal taken against Grievant was not for just and sufficient cause, the exposition in this Contention section merely reflects an outline of the Union's argument. However, without appending the argument put forth by the Union to this Opinion and Award, the Arbitrator incorporates the Union's post-hearing brief in full as if it were made an Appendix.

2. Specification B. The Union asserts that because Grievant's explanation that she forgot about the incident that led to her receiving a written reprimand by the Wisconsin Department of Corrections in June of 2002, is plausible in light of an absence of evidence it was her intent to deceive or mislead the Agency, this explanation should have been sufficient in ending this inquiry
3. Specification C. The Union asserts that like Specification B, Grievant's explanation, though not fully recorded in the supplemental responses she filed with her interrogatories, was very plausible pertaining to the verbal reprimand issued to her by the Wisconsin Department of Corrections in May/June of 2002, especially given the absence of evidence to show it was Grievant's intent to deceive or mislead the Agency.
4. Specification D. In the absence of any evidence proffered by the Agency that Grievant's explanation she did not disclose the issuance of a written reprimand issued to her in connection with an incident that occurred in September of 2001, due to the fact a grievance had been filed and the final outcome was unknown to her at the time she applied to the Bureau for employment, was intended by Grievant to deceive and/or mislead the Agency, the Union asserts the Agency should have accepted her explanation.
5. Specification E. The record evidence clearly showed Grievant was within her right not to answer this medical question pertaining to consulting a mental health professional relative to seeing Dr. Barry Alternberg for depression as her depression was related to a problem akin to marital grief. As to the Agency's charge Grievant failed to provide accurate information by not indicating having seen a mental health professional for the condition of Attention Deficit Disorder, the Union argues that, in the absence of any medical record in evidence as part of Grievant's disciplinary file, there is nothing that would even remotely establish that this was anything but family counseling and, as such, Grievant did not have to answer the medical question on her Supplemental Questionnaire.

- The punishment was not reasonable. The Merit Systems Protection Board held in the case of **Brown v. Department of Treasury, 61 M.S.P.R. 484 (1994)** that it has the authority to mitigate an agency-imposed penalty found to be "clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable." If the agency's judgment clearly exceeds the limits of reasonableness, it is proper for the Board to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. Further, the Board stated, that although falsification of documents is a serious misconduct, it does not mean that falsification, per se, mandates removal in every case.

1. The Agency never considered factors of relevance the Board specified in **Brown** to determine reasonableness of a penalty in a falsification case which are as follows: (1) the nature and seriousness of the offense and its relation to the appellant's duties; (2) the appellant's past disciplinary record; (3) the effect of the offense upon the appellant's ability to perform on a satisfactory level; and (4) the mitigating factors surrounding the offense.
2. The Agency failed to consider Elements of "Just Cause" set forth in **Discipline and Discharge in Arbitration** (Author, Norman Brand) when determining the proper quantum of discipline to assess Grievant, to wit: (1) taking action in a timely manner; (2) conduct of a fair investigation; (3) a precise statement of the charges; (4) a chance for the employee to explain before imposition of the charges; (5) no double jeopardy.
3. The Agency failed to consider one or more of the seven (7) tests devised by Arbitrator Carroll R. Daugherty in determining whether Grievant's removal from employment was for just cause. As was noted by Daugherty, a "no" answer to any one of the seven (7) questions is an indication that just cause either was not satisfied or at least seriously weakened. In particular, the question most applicable to the instant case is: "Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?" Because the Agency failed to make available to the Union the penalties it has assessed other employees at MCC Chicago in the past that were similarly situated to Grievant, it is not possible to ascertain the answer to this question and therefore a negative inference must be drawn with respect to this query. Two (2) of the seven (7) questions pertain to the investigatory phase of just cause, specifically, the conduct of the investigation and whether the investigation conducted was fair. The Union submits Grievant's investigation was neither thorough in that parts were missing nor was it timely in that no action was taken in connection with the results of the investigation for years. The Union asserts that, as a result, the instant case is a stale case.

- The Agency has unclean hands. Throughout the hearing, the Agency continually refused to provide it with material that was critical to allow the Union to perform its statutory and bargaining agreement duties of representing Grievant. Under **5 U.S.C. Article 7114(b)(4)**, an agency is obligated "to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data * * *
  (A) which is normally maintained by the agency in the regular course of business;
  (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

CONCLUSION

For the reasons set forth herein, the Union respectfully requests that the discharge of Grievant not be sustained, and that it be set aside; that she be awarded full back pay, reinstatement of all seniority rights and other emoluments in connection with her job, that the Union be awarded attorney fees, that the Agency bear the costs of this action, and for any and all other relief which is proper.

OPINION

Very close scrutiny of the voluminous record evidence before him, persuades the Arbitrator that the resolution of the issue raised by the subject grievance lies in the answers to the following queries, to wit: What did the Agency come to know about Grievant's background?; When did the Agency conclude there were concerns raised about Grievant's background that had the potential of adversely impacting the decision of granting her security clearance, thus putting an end to her continued employment?; and, How did the Agency proceed in handling Grievant's situation?.

What Did the Agency Come to Know About Grievant's Background?

It is clear from the record evidence that the Agency followed its routine procedure in processing Grievant's application for employment and, in so doing, Grievant was treated no differently in this respect than other applicants. This routine procedure consisted of requiring Grievant to provide information about herself on a standard application form, submit to a pre-employment interview which probed aspects of her background to determine her suitability for employment with the Agency in general and, in particular, her suitability to perform the duties of the position of Correctional Officer, and to provide answers on a standard supplemental questionnaire form. After having obtained this information and making the determination that Grievant was among applicants the Agency deemed to possess the required credentials for the position of Correctional Officer, the Agency requested of the Office of Personnel Management that it perform a Limited Background Investigation on Grievant pursuant to applicable provisions of Chapter 7 of the Human Resource Management Manual and Department of Justice Program Statement 3000.02 (see pp.28-36 of this **Opinion and Award**). Three (3) weeks after the Agency requested OPM to conduct a Limited Background Investigation of Grievant, Grievant entered on duty at the MCC Chicago, having resigned from her employment with the Wisconsin Department of Corrections, December 14, 2002, the day before she commenced her employment with the Agency. In all, a total of three (3) months elapsed from the time Grievant submitted her application for employment with the Agency, September 12, 2002 and December 15, 2002, the date she entered on duty.

Even though the Agency's request to OPM to conduct a Limited Background Investigation of Grievant was submitted November 21, 2002, OPM did not commence said investigation until April 23, 2003, five (5) months after receipt of the request and it was not until five (5) months after it initiated the investigation that OPM completed and closed out the investigation and transmitted it to the Agency's Security and Background Investigation Section located in Dallas, Texas in and around September 19, 2003, pursuant to applicable provisions of Section 731.1 Sub-section 4, Step 8 of Chapter 7 of the Human Resource Management Manual (see pp 29-30 of this **Opinion and Award**). According to the record evidence, a time lapse of about one (1) year in performing and closing out a Limited Background Investigation is fairly typical given the number of investigations conducted by OPM at any given time. At the time the Agency received the results of Grievant's Limited Background Investigation, she had been working at the MCC Chicago in her position as Correctional Officer for a full nine (9) months with

every indication she was fulfilling her job responsibilities satisfactorily as evidenced by the absence of any blemish on her work record at that time, and going forward, her exemplary job performance evaluations (see Jt.Ex.13).

In and around November 3, 2003, six (6) weeks following receipt of Grievant's Limited Background Investigation from OPM, and now approaching eleven (11) months after Grievant entered on duty, Therisa Blue, from the Agency's Security and Background Investigation Section discerned discrepancies in information provided by Grievant in her pre-employment interview and supplemental questionnaire as compared to information reported in the completed Limited Background Investigation. As a result, Blue contacted Grievant informing her that concerns had arisen in connection with her Limited Background Investigation that required her to provide answers to written interrogatories. Even assuming arguendo, that the Agency's Security and Background Investigation Section (SBIS) did not receive the closed out OPM Investigation file until the end of September beginning of October, by applicable provisions of Section 731.1, Chapter 7 of the Human Resource Management Manual and the Department of Justice Program Statement 3000.02 (Un.Ex.14, Agency Ex. 20, and Jt. Ex. 8), SBIS is required to review the completed OPM investigation [report] within fifteen (15) working days after receipt (see p.30 of this **Opinion and Award**). Clearly, Blue's contacting Grievant in and around November 3, 2003 surpassed this fifteen (15) working days limit and therefore, the Agency failed to comply with its own policy. Upon being contacted by Blue, Grievant complied with this request and proffered either a "yes" or "no" answer to each of the written interrogatories and gave a more detailed answer to some of the queries on a separate "supplemental document" which she submitted to Blue two (2) weeks later, in and around November 16, 2003. Upon review of Grievant's supplemental answers to the interrogatories which answers had been transmitted in such a way as to not convey a complete response or thought to most of the questions Grievant elected to provide an expanded answer to, Blue indicated in a handwritten notation on the face of the supplemental document dated December 1, 2003, that said documentation was not complete and cannot be understood. As a follow-up to the interrogatories submitted by Grievant, at Grievant's consent, Blue conducted a Subject Interview with her by telephone the very next day, December 2, 2003. Blue recorded the results of this Subject Interview in a Memorandum For File (Jt.Ex.12) which reflects that, she did not inform Grievant that she had determined her supplemental responses to the interrogatories were incomplete and therefore not understandable, thus precluding Grievant the opportunity to address and remedy such asserted deficiency. At first blush, Blue's not informing Grievant of her assessment that her supplemental answers were incomplete and not understandable, could very well be taken as a negative and, precluding Grievant from responding to that assessment as prejudicial to Grievant's situation. However, Blue, as the adjudicator of derogatory information possessed discretion as to what information she elected to reconcile and resolve, and the only information she chose to address and clarify in her Subject Interview of Grievant were three (3) topics set forth in her Memorandum For File (Jt.Ex.12).

Now nearly a year after Grievant entered on duty, Blue's Memorandum For File dated December 2, 2003 set forth the specifics of what the Agency had come to know of

Grievant's background that was in conflict with information she provided the Agency in her pre-employment interview, her supplemental questionnaire, and the responses she submitted to the interrogatories. Blue reported the following:

- Grievant had initially indicated during the pre-employment process that she had never been terminated from a job, yet the background investigation revealed that while employed at the Wisconsin Department of Corrections, she had been "terminated" from her position as a Supervisory Youth Counselor and returned to her position as a Youth Counselor A. Blue reported that in her Subject Interview with Grievant, Grievant disputed this investigation report finding, explaining that she had been "demoted" from the position of Supervisory Youth Counselor and was returned to her previous position of Youth Counselor A, as a result of the demotion.

- Grievant had initially indicated during the pre-employment process that she had never been given a disciplinary action of a written reprimand, yet the background investigation revealed she had been issued such a disciplinary action in September of 2001 on a charge of "Intimidating a Supervisor". In the Subject Interview, Blue reported the Grievant explained that at the time she answered this pre-employment interview question (September 17, 2002, one year after the occurrence of the incident that resulted in the issuance of the written reprimand), the action had been grieved and she was not sure if a final decision had been rendered. Blue reported Grievant proffered the details of the incident that resulted in the issuance of the written reprimand and that, in any event, Grievant maintained this disciplinary action should not have been in her personnel file for review by the United States Information Services (USIS) investigator as the disciplinary action, at the time she submitted to the pre-employment interview was over one (1) year old.

- Blue reported that the background investigation revealed Grievant had been sued by Kohls Food Store, for the balance of three (3) insufficient fund checks and that during the Subject Interview, Grievant explained she was currently paying off the balance due on these returned checks (the sum total as referenced in the interrogatories as amounting to $861.47) and that she had provided proof of her payments to the store when she responded to the written interrogatories in November of 2003.

Notwithstanding other discrepancies revealed by comparing information developed during Grievant's Limited Background Investigation and answers to some of the questions she submitted in the pre-employment process, Blue ended this Memorandum For File by stating that, "there were no additional issues discussed during this interview".

With respect to the first two bullet points set forth above addressing the issues of termination and the issuance of the written reprimand, the Arbitrator notes the revelation contained in the Affidavit (Un.Ex.1) sworn to by Patricia Ogren, Superintendent of the Southern Oaks Girls Schools, the Wisconsin Department of Corrections Institution where

Grievant was employed, that when on May 7, 2003, federal employees were present at Southern Oaks located in Union Grove, Wisconsin, for the purpose of conducting a background check on Grievant, the agents inquired about Grievant with line supervisors and Grievant's former peers but did not speak with her. According to Affiant Ogren, since the line supervisors and former peers of Grievant would not have had access to records of employment as did she, any information they may have imparted to the agents was only speculation and conjecture whereas, given her access to such employment records pertaining to Grievant, she would have been the proper management official the agents should have spoken to. One might, by this revelation, if left by itself as a sole piece of information, deem the investigatory report as substantively deficient in addition to the question of procedural deficiency due to the fact the entire report was never made available to the Union nor, even to this Arbitrator; however, a perusal of Report #2 of the Investigatory Report indicates that the investigators were given a copy of Grievant's Personnel Record by one Rose Beth, identified as the Human Resource Assistant at the Southern Oaks Girls School (Jt.Ex.5). Furthermore, the Arbitrator notes, testimony proffered by Ogren affirmed the various disciplinary actions as set forth in her Personnel Record and referenced in the Investigation report that Grievant had been issued during the time of her employment at the Wisconsin Department of Corrections beginning September 27, 1999 and ending, December 14, 2002. Again, however, of the several disciplinary actions imposed on Grievant during her service with the Wisconsin Department of Corrections, the only derogatory information Blue elected to reconcile in her Subject Interview with Grievant related to disciplinary actions were the "termination" and the written reprimand issued to her in September of 2001.

As to the third bullet point regarding the suit against Grievant by Kohls Food Store, the Arbitrator notes this is the only question Grievant did not respond to on the interrogatories as she failed to indicate by a check mark of "yes" or "no", that while she had indicated in her pre-employment interview a "no" answer to the question if she had ever been sued or held for non-support, the background investigation revealed that she had been sued by Kohls. As indicated in the question posed on the interrogatory with regard to this financial matter, the three (3) checks referenced amounted to the sum total of $861.47. In her testimony at this arbitral proceeding, after being shown a copy of the interrogatories, Grievant asserted she must have overlooked that page thus forgetting to check an answer of either "yes" or "no". Moreover, as noted in the Background section of this **Opinion and Award**, it appears that in addition to Grievant's expanded answers provided to the interrogatories being truncated on the supplemental document to the point that it failed to convey a coherent thought or full response, this supplemental document appears to also be missing a second page which, according to specified answers provided by Grievant that were keyed to the page number of the written interrogatories, Grievant's fuller explanation in answer to this question would have appeared. Given that fact and the fact that Blue in her Memorandum For File did not dispute Grievant's explanation that she provided proof in answering the interrogatories that she was making payments to Kohls in satisfaction of this financial issue, that in all probability, Grievant's response represented the truth of the matter. Additionally, in any event, this did not become one of the five (5) Specifications the Agency eventually charged Grievant with in support of its

position that she had committed Offense 32, falsification of documents relative to the pre-employment process.

The Arbitrator emphasizes that as of December 2, 2003, the only discrepant information the Agency was aware of was that set forth in the first two (2) bullet points as reported by Blue in her Memorandum For File and that the first bullet point regarding "termination" became the basis for Specification A and the second bullet point regarding the September, 2001 written reprimand became the basis for Specification D. Thus, the three (3) other Specifications that comprised the basis for the finding to remove Grievant from the Agency's employ were added sometime subsequent to December 2, 2003. However, such addition of these three (3) other Specifications does not comport with the Agency's policy set forth in Chapter 7, Section 731.1, Subsection 7 of the Human Resource Management Manual and the Agency's Program Statement 3000.02 which requires that once derogatory information has been identified in the review of the background investigation, it must be resolved and that such resolution usually is presented in the form of written documentation obtained through a Subject Interview of the employee or by way of written interrogatories. Such written documentation must be provided to allow the SBIS to verify the information, if necessary (see p.34 of this **Opinion and Award**). Blue, in her role as adjudicator (having identified herself to Grievant by Memorandum dated December 2, 2003 as the SBIS employee assigned to "adjudicate" her Limited Background Investigation, see Jt.Ex.9) was mandated by the provisions set forth in Chapter 7, Section 731.1, Subsection 6(d)(5) to resolve any discrepancies with respect to any derogatory information. The Arbitrator is persuaded that Blue, having deliberately elected not to address any of the incomplete and not understandable responses Grievant filed on her supplemental document to the written interrogatories, fulfilled the mandated responsibility incumbent upon her as the adjudicator of reconciling Grievant's derogatory information and that such information was resolved by the written report Blue authored in the Memorandum For File dated December 2, 2003 prepared immediately following her conducting a Subject Interview with Grievant on that same date (Jt.Ex.9).

When Did the Agency Conclude There Were Concerns Raised About Grievant's Background that Potentially Could Adversely Impact the Decision of Granting Her Security Clearance, Thus Putting an End to Her Continued Employment?

Although not explicitly revealed either through witness testimony or written documentary evidence, once Blue completed the mandated responsibility of "adjudicating" Grievant's Limited Background Investigation and resolving any derogatory information, the SBIS then forwarded the OPM investigation report along with the other documentation generated by SBIS in connection with the OPM investigation to the proper management official at MCC Chicago, which apparently was the warden who, at the time was Jerry Graber. It is known from Warden Irvin's testimony that Graber took no action with regard to Grievant's file and it is known from Loggins-Mitchell's testimony that Graber did not initiate a "waiver" request to retain Grievant's employment, notwithstanding Loggins-Mitchell also testifying that Graber had indicated to her his intention to file a

"retention request" to retain Grievant's employ. In effect, by not taking any action one way or another in Grievant's case, Graber constructively granted Grievant retention of employment from the time he received her file from SBIS in December of 2003 to the time he retired in and around January of 2005, a period of between thirteen (13) and fourteen (14) months . By not seeking authority from the Agency's Regional Office to officially retain Grievant's employment, Graber essentially put Grievant in a limbo status, a status she had no knowledge of at any time during Gaber's tenure as Warden. Moreover, placing Grievant's file on hold as Graber did in this manner resulted in a violation by the Agency of Article 30, Section d of the Master Agreement (Jt.Ex.1), which obligates the Parties to endorse the concept of **timely disposition of investigations and disciplinary/adverse actions** (emphasis by the Arbitrator, see also p.26 of this **Opinion and Award**). By the time Irvin assumed the position of Warden at MCC Chicago in January of 2005, Grievant had already been employed for two (2) years and one (1) month. Additionally, over the period of time between the date when Graber received the findings from SBIS of Grievant's OPM Limited Background Investigation along with the SBIS generated documents that accompanied the Investigatory Report, and the date of his retirement, Grievant had been given an annual performance appraisal between March of 2003 and March of 2004 (which was not part of the evidentiary record in these arbitral proceedings) and three (3) quarterly job performance evaluations which were made a part of the record evidence (Jt.Ex.13). As has been noted in the preceding Background section of this **Opinion and Award**, Grievant consistently and continuously received the Agency's highest two (2) ratings of "Exceeds" and "Outstanding" on all five (5) elements of performance rated for employees in the position of Correctional Officer.

According to Irvin, it was not until several months after he assumed the position of Warden at MCC Chicago, that in reviewing "disciplinary files" Graber had left, in Irvin's characterization, "languishing" for a very long time which included Grievant's file, that he became aware there were issues that had been identified relative to Grievant's pre-employment process. However, Irvin noted, on first review of Grievant's file, he did not conclude the issues were serious in nature and given that view of her situation, and the fact that he had indicated on Grievant's annual performance appraisal for the rating period of March, 2004 to March, 2005 that he concurred with the ratings given her of "exceeds" on four (4) of the five (5) performance elements and the rating of "outstanding" on the remaining performance element adding the comment that Grievant was a valuable asset at MCC Chicago, unlike his predecessor Graber, he filed a formal written "retention request" with the Agency's Regional Office seeking official approval to retain the employ of Grievant.

As an aside, the Arbitrator notes that with respect to the Union's numerous requests for information which included obtaining a "waiver" it understood Irvin had filed with the Regional Office to retain the employ of Grievant, the Agency was not forthcoming in informing the Union that what it was really seeking to obtain was not a "waiver", which the Agency did make clear applied only to a situation prior to hiring a prospective employee, but rather, it was seeking a "retention request", a procedure apparently not referenced in any formal Agency policy, which is applicable to persons currently employed. In this respect, the Arbitrator concurs in the Union's contention the Agency

played word games with it which it was unaware of at all times when filing its discovery requests for information relevant to adequately and effectively representing Grievant not only at various stages of the adverse action but also at this arbitration. It was not until Loggins-Mitchell testified in these arbitral proceedings called as the very last witness testifying in rebuttal for the Agency, that it was revealed there existed a distinction between a "waiver" which is provided for in Agency policy pertaining to Waivers to Standards of Acceptability as set forth in Chapter 7, Section 731.1 of the Human Resource Management Manual and a "retention request". While the Arbitrator is persuaded the Agency's position of not providing the Union with the actual retention request document falls under regulations that protect making public, internal Agency communications, nevertheless, it would not have violated any regulation to inform the Union that what it was seeking was not a "waiver" but rather a "retention request" which would have saved a substantial amount of time and effort expended by the Parties in their ongoing exchange through memoranda, by the Union requesting certain documents and by the Agency denying the Union's requests. In this respect, the Arbitrator concurs in the Union's position that the Agency's responses to its requests for information violated, in part, the spirit of the Preamble of the Master Agreement (Jt.Ex.1), wherein, the Agency pledged to develop and maintain constructive and cooperative relationships with its employees through their exclusive representative, here the Union. A review of all the memoranda exchanged by the Parties persuades the Arbitrator that the Agency unnecessarily frustrated the process of progressing this subject grievance to resolution.

As to the answer to this question, the Arbitrator finds that it was not until the Regional Office rejected Warden Irvin's retention request that the Agency concluded there existed concerns serious enough in nature that could potentially impact adversely the decision to grant Grievant a security clearance, a requirement for all correctional officers to obtain in order to continue in their employment. In the absence of a known date when the Regional Office rejected Irvin's retention request, the Arbitrator concludes that the date the Agency determined it could not continue Grievant's employment is September 27, 2005, the date the Agency notified both the Union and the Grievant in writing that it was proposing to remove Grievant from her position as Correctional Officer, thereby ending her continued employment with the Agency (Jt.Exs. 21 and 14).

How Did the Agency Proceed in Handling Grievant's Situation?

With the retention request by Warden Irvin to retain the employ of Grievant rejected by the Agency's Regional Director, Warden Irvin was now put in the unenviable position of having to reverse course from advocating in favor of retaining Grievant's services to advocating for her removal; no easy feat to accomplish which leaves the Arbitrator unconvinced by Irvin's explanation that he reversed his position after taking a second look at Grievant's file. The record evidence is clear and persuasive that Irvin's assessment of Grievant as a "valuable asset at MCC Chicago" (Jt.Ex.13), did not change overnight as he would lead the Arbitrator and the Union to believe by way of his testimony. Rather, like so many of the procedures that comprise the adverse action of removal, the persons involved in prosecuting the removal action subordinate to the

Regional Office staff, specifically, the employee's Department Head and the Deciding Official, here the Warden, play a less than direct and mostly robotic role in facilitating an already predetermined outcome.

In order to achieve that predetermined outcome, Loggins-Mitchell in her role as Employee Services Manager drafted the Removal Proposal dated September 27, 2005 setting forth the five (5) Specifications upon which the proposed removal action was predicated. While it is clear from the record evidence, specifically the applicable provisions of Chapter 7, Section 731.1 of the Human Resource Management Manual that the Agency's SBIS section is delegated the responsibility for reconciling and resolving any derogatory information uncovered by the OPM Limited Background Investigation as compared to the information supplied by an applicant, here the Grievant, during the pre-employment process, as Blue did with Grievant by having Grievant answer a number of interrogatories and following-up Grievant's responses to the interrogatories with a Subject Interview, nevertheless, it is not clear that derogatory information disposed of by SBIS, either by direct inquiry or simply dismissing certain information, in fulfilling its function in this area of responsibility can subsequently be reinstated at a much later time to support a removal action, as did Loggins-Mitchell by adding three (3) items of derogatory information as separate Specifications, items that were not made a part of Blue's Memorandum For File dated December 2, 2003, which referenced only two (2) items of derogatory information left unresolved – termination of Grievant from her position as Supervisory Youth Counselor and the issuance of a written reprimand in September of 2001 on a charge of intimidating a supervisor. The Arbitrator finds interesting, if not instructive that, Loggins-Mitchell acknowledged in her testimony that Blue was responsible for adjudicating Grievant's background investigation and that she contacted Blue to determine what Blue meant by her notation that Grievant's expanded explanations to some of the interrogatories on the supplemental document were incomplete and not understandable. According to Loggins-Mitchell, Blue's response was the she made the notation to indicate that the expanded explanations did not address all the issues. Loggins-Mitchell then asked Blue if there were more pages to the (supplemental) document to which Blue answered, "no", that was all that she received. It is clear to the Arbitrator that in order to strengthen an otherwise weak case by the Agency to justify the removal of Grievant, Loggins-Mitchell simply proceeded to pile onto the two (2) items of derogatory information indicated in Blue's Memorandum For File, with an additional two (2) disciplinary actions imposed on Grievant in her former employment with the Wisconsin Department of Corrections and the discrepancy in information pertaining to her consultations with not one but two (2) mental health professionals; information that was gleaned from Grievant's Limited Background Investigation.

With respect to Specification A which relates to the issue of Grievant having been "terminated" from her position as Supervisory Youth Counselor, (the first of the two items of derogatory information that was the subject of Blue's Memorandum For File), it should have been crystal clear to any professional in the labor-management community that what was characterized as a "termination" action by the Wisconsin Department of Corrections was simply a misnomer in describing the action taken by Ogren, the

Superintendent of Southern Oaks Girls School in reaction to an incident that occurred during the time Grievant was on probation for promotion to the Supervisory Youth Counselor position. The term, "termination" is universally understood in the context of labor-management relations as a separation of employment usually on an involuntary basis on the part of an employee. Regardless of the fact that the action taken by Ogren was recorded in Grievant's personnel file as a "termination", anyone of competence in the labor-management relations field, once made aware of the circumstances, would conclude that the action taken could be described more realistically as either a non-disciplinary demotion since Grievant was not successful in completing her probationary period or, more accurately described as a reversion to her permanent position of Youth Counselor A, an entry level position for which she was hired and subsequently qualified to hold as a result of successfully completing a six (6) month probationary period for the job. In no regard did her return to her permanent position of Youth Counselor A, constitute a disciplinary action as there is nothing in her personnel file associated with her return to that position that indicates she had been disciplined. Finally, the record evidence substantiates without contradiction that Grievant's employment with the Wisconsin Department of Corrections was never involuntarily severed and that she was continuously employed by the Wisconsin Department of Corrections from the time she was hired in 1999 to the time she resigned in 2002 to assume employment with the Agency as a Correctional Officer at the MCC Chicago. The Arbitrator notes that in her oral response to the removal proposal given and recorded on December 5, 2005, Grievant made abundantly clear to Warden Irvin that she was not terminated from her employment at the Wisconsin Department of Corrections as her last day of employment there was December 14, 2002 and her first day of employment at the MCC Chicago was December 15, 2002. In so finding, the Arbitrator rejects this Specification A, as evidence in support of the charge that Grievant committed Offense 32, by falsifying documentation during the pre-employment process.

With respect to Specification D which relates to the written reprimand issued to Grievant for "intimidating a supervisor" (the second of the two items of derogatory information that was the subject of Blue's Memorandum For File), the Arbitrator notes that both Blue's Memorandum and this Specification D incorrectly reference this disciplinary action as having been issued in September of 2001. According to Grievant's employment file (Agency Ex.23), the incident that gave rise to the issuance of this written reprimand occurred September 29, 2001 and the written reprimand was not issued to Grievant until October 22, 2001. Although the month specified is in error, nevertheless, Grievant was issued a written reprimand on the charge of intimidating a supervisor, a disciplinary action she did not reveal in her pre-employment interview, that she denied receiving in answering the interrogatories (page 9 of the written interrogatories which incorrectly identified the month of issuance as September, 2001), but which she acknowledged receiving during the Subject Interview conducted by Blue on December 2, 2003 (Jt.Ex.12). Grievant explained to Blue the reason she did not make reference to this disciplinary action in her pre-employment interview is because a grievance had been filed contesting this action and, at the time of the pre-employment interview in September of 2002, she did not know what the final disposition of the grievance was. The Arbitrator is persuaded that Grievant's response is plausible since the record evidence reflects that a

grievance in this matter was filed on November 9, 2001 but was not denied until five (5) months later on April 2, 2002. It is entirely possible given that much of a delay between filing the grievance and the time a response was issued, that progression of the grievance going forward took many more months so that a resolution still had not been obtained by the time Grievant submitted to her pre-employment interview. As to her denial on the written interrogatories that she had been issued such a written reprimand, the Arbitrator finds that even though the charge was correctly identified as a disciplinary action associated with "intimidating a supervisor", given that the month specified was incorrectly referenced as September and not October, Grievant's response in the negative was technically correct, that is, she was right in answering that she had received no such disciplinary action in September of 2001. Since the record evidence is devoid of any further information regarding whether or not the grievance contesting this disciplinary action was actually progressed to arbitration so that the matter had not been resolved at the time Grievant submitted to her pre-employment interview, the Arbitrator is predisposed to giving the Grievant the benefit of doubt and crediting her response that she was unaware of any final disposition of this disciplinary action in September of 2002. In so finding, the Arbitrator rejects this Specification D as evidence in support of the charge that Grievant committed Offense 32 by falsifying documentation during the pre-employment process.

With respect to Specification E, wherein it is alleged by the Agency that Grievant falsified her answer to Question 5 on the Supplemental Questionnaire for Selected Positions (Jt.Ex.4) by giving a "no" answer and repeating that same answer on the written interrogatories to the following query: "In the last 7 years, have you consulted with a mental health professional (psychiatrist, psychologist, counselor, etc.) or have you consulted with another health care provider about a mental health related condition?" **You do not have to answer "Yes" if you were only involved in marital, grief, or family counseling not related to violence by you** (emphasis by the Arbitrator), noting that the Limited Background Investigation revealed that in the relevant 7 year time period, she had seen/consulted with two (2) different mental health professionals, the Arbitrator is persuaded by the record evidence that her answer in the negative to this question did not constitute a falsification of information and thus a commission of Offense 32 relative to seeing one of the mental health professionals but, with respect to seeing the second mental health professional Grievant failed to provide the requested information. Clearly, with respect to her seeing psychiatrist, Barry Alternberg for depression brought on by a breakup with her then boyfriend, such counseling fell under the exception referenced above which permitted her to answer the question in the negative. However, the counseling she received and, was still receiving at the time the Limited Background Investigation was being conducted from a doctor Roerich for the mental health condition of Attention Deficit Disorder, an out-of-date reference to the condition which is now known as Attention Deficit Hyperactivity Disorder (ADHD), certainly required that she provide a "yes" answer to the question. Grievant's explanation that she did not fully understand that she had to disclose "all" of her counseling and, in addition she was embarrassed that her co-workers would know of her counseling situation, is found by the Arbitrator not to constitute a sufficient reason for not disclosing this information. However, the Arbitrator finds several factors that minimize Grievant's

failure to properly respond to this query on the Supplemental Questionnaire, to wit: (1) that as indicated by the reporting investigator, Grievant contacted him of her own volition and volunteered this information about seeing Dr. Roerich for her ADHD condition; (2) the investigator's finding that the ADHD disorder does not affect Grievant's job performance in any way and does not leave her susceptible to blackmail, coercion, or compromise; (3) that this information was not ultimately deemed derogatory by Adjudicator Blue in her review of the results reported on the Limited Background Investigation and review of Grievant's responses to the written interrogatories (see p.21 of Jt.Ex.10 and p.2 of Jt.Ex.11); and (4) the significant elapse in time between the reporting of this information and the utilization of this information to form the basis of Specification E. As an aside, the Arbitrator notes that as a result of this time elapse of nearly two (2) years, the job performance evaluations given to her over that period of time of nothing less than a rating of "exceeds", on any one of the five (5) elements evaluated, substantiates the investigator's finding in point (2) above, that her ADHD condition has [does not affect] not affected her job performance.

As to the two (2) disciplinary actions she was issued, a verbal reprimand in May of 2002 which forms the basis of Specification C, and a written reprimand in June of 2002 which forms the basis of Specification B, clearly, in not disclosing this information which was certainly very close in time to her pre-employment interview in September of 2002, and therefore, her asserted excuse she simply forgot these disciplinary actions is judged as just not credible, the Arbitrator finds Grievant acted evasively by failing to provide accurate information to the questions posed in her pre-employment interview pertaining to these disciplinary actions assessed her during her employment with the Wisconsin Department of Corrections. However, the severity of this failure by Grievant can be minimized by the following findings: (1) this information was not ultimately deemed derogatory by Adjudicator Blue in her review of the results reported on the Limited Background Investigation as compared to her responses on the written interrogatories; (2) the significant elapse in time of nearly two (2) years between the reporting of this information and the utilization of this information to form the basis of these two (2) specifications; and (3) the fact that despite these two (2) reported disciplinary actions, Warden Graber had indicated an intention to file a "retention request" to retain her employment whereas, Warden Irvin, Graber's successor, actually filed such a "retention request" to retain Grievant's services.

In light of the foregoing analysis, the Arbitrator finds that, notwithstanding the revelation gleaned from the whole of the record evidence that Grievant withheld providing certain information pertaining to her previous employment at the Wisconsin Department of Corrections that was requested in the pre-employment phase of her being hired by the Agency for the position of Correctional Officer, such omissions, when taken together, do not support the Agency's determination that removal of Grievant constituted a reasonable penalty for a first infraction of Offense 32 under all the given circumstances surrounding her situation. While the Arbitrator concurs in the Agency's position that falsification of documentation is a serious offense, nevertheless, not all such acts of falsification deserve to be addressed by the imposition of removal from employment, the most severe quantum of discipline available to be administered. Just by the very fact that the Table of Offenses

(Un.Ex.12 & Agency Ex.22, see also pp. 37 & 38 of this Opinion and Award), provides a range of penalties from Official Reprimand to Removal for commission of a first violation of Offense 32, is recognition of the fact that not all acts of falsification that fall under this Offense are identical. That being the case, coupled with the fact that the imposition of a penalty should not be mechanical in nature, mitigates against the imposition of removal as being a reasonable disciplinary action assessed Grievant under all the surrounding circumstance of her case. Those circumstances include the Agency's own failings in this case that consist of substantial delay in the handling of Grievant's case beginning with the delay between the time the Limited Background Investigation was completed in September of 2003 and Blue's contacting Grievant in mid November of 2003 to answer interrogatories and then the follow-up of conducting a Subject Interview with Grievant in December of 2003. The egregious delay of approximately 21 months between the time Warden Graber received Grievant's file from the Agency's Security and Background Investigation Section in December, 2003 and the time Warden Irvin issued the proposal to remove Grievant in September of 2005; and the delay of another 4 months between the time the removal proposal was issued and the time the removal action was effected in January of 2006. The Arbitrator is convinced there is no clearer example of the concept of "justice delayed is justice denied" than this instant case given the substantial elapsed time between Grievant's entering on duty at the MCC Chicago in September of 2002 and her removal effected at the end of January of 2006. The other significant circumstance that justifies a substantial reduction in the quantum of discipline assessed Grievant is the fact that Warden Graber indicated an intention to file a "retention request" having full knowledge of the information contained in her file as that file was forwarded to him by SBIS, and the actual filing of a "retention request" by Warden Irvin who also had full knowledge of the information in her file, as he attested to the fact that he reviewed her file before submitting such request to the Regional Office. The Arbitrator attaches significant weight to the fact that not one, but two wardens were in agreement, without knowledge of their respective views, that each, independent of the other, deemed Grievant to be a valuable employee deserving of having her employment be retained and that this view was nixed by the Agency's North Central Regional Director who, unlike both wardens, had no direct knowledge of Grievant and no direct knowledge of her work record which was pristine, or her work performance which consistently had been rated by her immediate supervisors as both "exceeds" and "outstanding". Finally, the last circumstance has to do with the obvious stonewalling of the Agency in dealing with information requests submitted by the Union, prime among them the numerous requests for the alleged "waivers" filed by Wardens Graber and Irvin in its quest to adequately and effectively represent the Grievant. There was absolutely no reason for the Agency to stall the Union's request for a copy of a "waiver" when it knew perfectly well that the Union was not familiar with the proper terminology that a "waiver" applicable to an employee already on board with the Agency is known not as a waiver but rather as a "retention request". Nevertheless, the Agency continued in lecturing the Union in its written responses to the Union's requests for a copy of a "waiver" that a "waiver" was only applicable to applicants for employment prior to their being hired. While the Agency was well within its right not to provide the Union with an actual copy of the "retention request" on grounds that it constituted Management advice and, therefore, was exempt from documents to be shared with the Union, nevertheless, in

response to said request, the Agency simply could have acknowledged the fact that Warden Graber had not filed such a request but that Warden Irvin had. The Agency's stonewalling in providing information requested by the Union which, in addition to the "waiver" other information was withheld such as, the history of penalties assessed at MCC Chicago for employees deemed similarly situated to Grievant with respect to having infracted Offense 32, is found by the Arbitrator to have violated the spirit of the Master Agreement (Jt.Ex.1) which obligates the Parties to deal with each other in a cooperative and respectful way.

In sum, what is evident about this case is that Grievant suffered the procedural inefficiencies of a very sclerotic bureaucratic process in the first instance, aided and abetted by individual decision making in the second instance that failed to serve the mutual best interest of the Grievant and the Agency. Seemingly, the ideal of conducting an OPM Limited Background Investigation in a timely manner, that is, prior to hiring an applicant is unattainable yet, even falling short of the ideal, at least in Grievant's case, was not good enough as her Limited Background Investigation was not concluded until nine (9) months after she entered on duty at the MCC Chicago. It took nearly two (2) months after the Investigation was concluded for the Agency's SBIS section to perform its function which is to reconcile any derogatory information uncovered in the background investigation and to make every attempt to resolve said derogatory information. The Arbitrator is persuaded by the whole of the record evidence that it was in the conduct of this part of the procedure that the process began to really fail beyond the inexcusable delays that had already occurred. Although SBIS Adjudicator Blue was not called as a witness to testify in these proceedings, nevertheless, the testimony proffered by other witnesses, which nowhere was contravened, clearly reveals that beyond characterizing Grievant's expanded/supplemental responses to the interrogatories she sent Grievant as part of the process to address derogatory information as incomplete and not understandable, Blue, for whatever her reasons, elected not to pursue this deficiency in response by Grievant as a means to remedy the deficiency. Instead, Blue elected not only to leave Grievant's supplemental answers to the interrogatories unaddressed, but she also elected not to inform Grievant of the deficiency in her responses even though in a matter of just one (1) day following her determination that her supplemental responses were incomplete and not understandable, she conducted a telephonic Subject Interview with Grievant. This fact by itself establishes, without doubt, that Blue elected not to reconcile derogatory information, if any, that could have been discerned had she confronted Grievant about the deficiency in her supplemental responses to the interrogatories. Instead, Blue elected to address only three (3) issues she determined required clarification and reconciliation. Seemingly having fulfilled her responsibility in her role as Adjudicator, Grievant's file consisting of the findings of the OPM investigator accompanied by whatever documents were generated by SBIS which included Blue's Memorandum recording the information she developed in conducting Grievant's Subject Interview along with Grievant's answers to the interrogatories and her unintelligible expanded/supplemental responses to a number of the interrogatories, were all forwarded to the then incumbent MCC Chicago warden, Warden Jerry Graber. Assuming arguendo Graber reviewed Grievant's file upon receipt by SBIS, which there is no reason to assume otherwise, absent Graber testifying in these proceedings, the testimony rendered

by other witnesses reveals, without doubt, that Graber did not find the discrepant derogatory information referenced by Blue in her Memorandum to constitute anything so egregious as to warrant taking any action against Grievant. Instead, Graber left Grievant's file dormant for the next nearly fourteen (14) months (from December, 2003 when he received Grievant's file from SBIS and January of 2005, the month of his retirement from the Agency) and somewhere during this time indicated to Loggins-Mitchell his intention to submit a written retention request to the North Central Regional Director to retain Grievant's continued employment though he never followed through on this intention. In effect then, by not seeking official approval from the Regional Director to retain Grievant's continued employment, but instead "sitting" on her file and doing nothing for over one (1) year, constitutes, in this Arbitrator's view, a decision to constructively retain Grievant's services. Graber's successor, Warden Irvin was shown by the record testimony to have adopted independently the same view about Grievant as had Graber in that he discerned from a review of her file which now also contained her job performance ratings of "exceeds" and "outstandings", that Grievant's employment should be retained and, as a result, unlike his predecessor, he did file a written retention request with the North Central Regional Director to retain her services in addition to several verbal conversations with the Regional Director regarding this request. Since this is a document deemed by the Agency to constitute internal advice, it is not known what exactly Irvin wrote in this retention request, but whatever it was, the Regional Director did not adopt the same view of Grievant as did Irvin, and though Irvin did not admit in his testimony that the Regional Director ordered him to invoke the adverse action against Grievant of removal, it is quite clear to the Arbitrator from Irvin's "fudged" testimony that, that was exactly what occurred.

The bottom line finding is that the adverse action taken against Grievant of removal was an action taken too late by the Agency on information so misconstrued and so lacking in sufficiency to support and warrant any disciplinary action beyond the most minimum penalty associated with infracting Offense 32 which is but an "Official Reprimand". The Arbitrator respectfully disagrees with Loggins-Mitchell's assessment knowing what she now knows about the information developed by Grievant's Limited Background Investigation as a result of all the evidence developed in this arbitration, that had this information been known to the Agency during the pre-employment interview phase, the Agency would not have hired Grievant in the first place. It is abundantly clear from all the information developed in these proceedings that what the Agency continued to interpret as a "termination" connected with Grievant's previous employment at the Wisconsin Department of Corrections was not a severance of her employment and did not even constitute a disciplinary action. The Agency's persistence in viewing the action the Wisconsin Department of Corrections characterized as a "termination" action as constituting the most severe disciplinary action of an involuntary severance of employment is just not understandable given the apparent sophistication of individuals that staff the Agency's Labor-Management Relations function. In the Arbitrator's view, had Grievant falsified information related to a termination action as that term is universally understood by members of the labor-management community, then this Arbitrator would have absolutely no qualms in concurring with the Agency's position that infracting Offense 32 involving such an egregious act of falsification would warrant

imposing the most severe penalty on Grievant of removal regardless of the fact her infraction of Offense 32 constituted a first time violation. However, the record evidence does not support the Agency's interpretation of "termination" as set forth in her personnel record from the Wisconsin Department of Corrections. What can be deemed as the next most egregious falsification of information pertains to Grievant's non-acknowledgement at the pre-employment interview phase about her seeing a mental health professional in the last seven (7) years for a diagnosed ADD condition. Notwithstanding the Union's contention that this was never a proven fact as Grievant's medical file was never produced by the Agency as evidence in support of her having seen a psychiatrist for this condition, the fact is that Grievant admitted in her answering the written interrogatories and again in her testimony in this proceeding that she had been, and was continuing to see a psychiatrist for this condition. However, as reported by the OPM investigatory report, this disorder does not affect her job performance in anyway and does not leave her susceptible to blackmail, coercion or compromise, a finding that is deemed positive with respect to Grievant's being granted the required security clearance as a condition of continued employment. Again, in contradiction to Loggins-Mitchell's view that had this information been known at the pre-employment phase of her application for employment Grievant would not have been hired, the finding by the OPM investigatory report just cited would seem to indicate otherwise. Finally, with regard to the remaining Specifications, the fact that this supposed derogatory information was used against Grievant in support of her removal after all derogatory information was supposed to have been reconciled and remedied by SBIS, leads this Arbitrator to dismiss these specifications as untimely in the extreme and almost smacking of double jeopardy.

As the foregoing findings lead to a ruling to sustain the subject grievance, the remaining issue to be decided pertains to the proper remedy which is set forth in the following **Award** section of this Decision.

AWARD

Based on the rationale set forth in the preceding Opinion section, the Arbitrator finds that the disciplinary/adverse action taken by the Agency against Grievant of removal was not for just and sufficient cause. Additionally, given that the Agency was untimely in the extreme in taking any disciplinary action against Grievant coupled with the fact that Warden Graber intended to file a retention request to the Agency's North Central Regional Director to retain Grievant's services and that Warden Irvin actually filed such a written retention request to the Regional Director followed by verbal discussions with the Director regarding the retention request, leads the Arbitrator to conclude that no disciplinary action now is warranted to be assessed Grievant. Accordingly, the Arbitrator rules to sustain the subject grievance and directs the Agency to implement the following Award:

- **Grievant is to be made whole for all lost wages and benefits to which she would have been entitled to receive had she not been wrongfully removed from her employment with the Agency. The monetary sum of these lost wages and benefits, the latter in accord with the applicability of their being retroactive, shall apply to the time period beginning with the effective date her removal commenced to and including the date preceding the day of her reinstatement to her position as Correctional Officer at the MCC Chicago institution. Such determined monetary sum shall be reduced by the monetary sum of any unemployment benefits Grievant may have received as well as reduced by any monetary sum she may have received from earnings resulting from any employment she held during the relevant time period of her removal. The total monetary sum as properly calculated shall not include accrued interest as requested by the Union.**

  Grievant is to assume the burden of revealing all monetary sums she received during the relevant time period of her removal and such information is subject to the same caveats set forth in all documents executed and signed by her associated with her having been hired, albeit worded differently to wit: certifying that to the best of her knowledge and belief, the information provided is true, correct, complete, and made in good faith and that she understands that any falsified information reported will be grounds for nullifying all parts of this Award. To make sure Grievant does not commit error in complying with this obligation, she is to seek counsel from both the Union and the Agency with respect to submission of the required documentation in substantiation of the information needed, and that such documentation be notarized as a requirement for submission.

- **Grievant's reinstatement to her position shall be accompanied with seniority unimpaired. Reinstatement shall occur as expeditiously as possible, but no later than thirty (30) calendar days from the receipt date of this Opinion and Award. If Grievant should be unable to return to work within this time period, a mutually agreed upon time frame for her return should be negotiated. However, the date the Agency set for Grievant's return to work within this thirty (30) calendar day time frame shall be the date the Agency's liability ends with regard to the payment of back pay and other benefits. Should Grievant for some reason decide not to return to the employ of the Agency, the receipt date of this Opinion and Award shall be the date ending the Agency's liability for making Grievant whole with respect to all lost wages and benefits herein awarded.**

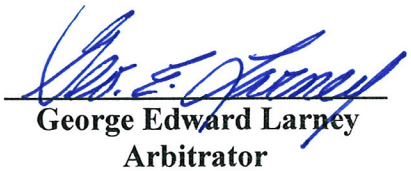
- **Any and all references to this removal action except for a copy of this Opinion and Award, is to be expunged from her official personnel and any other official employment record maintained by the Agency. A signed copy by the Arbitrator of this Opinion and Award shall be made a part of her official personnel file and any other official record maintained by the Agency relating specifically to her employment.**

- **The Agency is to pay the Union for attorney fees billed the Union associated with the representation of Grievant in these arbitral proceedings, which according to a separate submission by Attorney Sam Heuer that accompanied the submission of the Union's post-hearing brief, totals to the monetary sum of $35,467.33.**

- **In accord with Article 32, the Arbitration clause, Section d, of the 1998-2001 Master Collective Bargaining Agreement (Jt.Ex.1), the Parties are to bear equally, the fees and expenses billed by the Arbitrator.**

- **The Arbitrator retains jurisdiction of this matter for the sole purpose of assisting the Parties in implementing this Award, if such assistance should be mutually requested.**

GRIEVANCE SUSTAINED AS AWARDED.



George Edward Larney
Arbitrator

Chicago, Illinois
August 15, 2007