ARBITRATION AWARD

In the matter of arbitration between

FEDERAL BUREAU OF PRISONS FCI INGLEWOOD, COLORADO	
AND	Sheila Pugh Discharge FMCS # 11-58353
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709	

APPEARANCES FOR THE EMPLOYER

Jennifer Spangler

APPEARANCES FOR THE UNION

Heidi Burakiewicz

ARBITRATOR
EDWIN R. RENDER

By the terms of the contract between **THE UNITED STATES BUREAU OF PRISONS,** hereinafter referred to as the Employer, and the **AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 709,** hereinafter referred to as the Union, there is a grievance procedure including arbitration. Accordingly, the parties selected **EDWIN R. RENDER, LOUISVILLE, KENTUCKY,** as impartial Arbitrator. Hearings were held in **Littleton, Colorado**, on **September 24 and 25, 2012; November 5, 2012; February 4, 2013; and May 14, 2013**. Equal opportunity was given the parties for the preparation and presentation of evidence, examination and cross-examination of witnesses and oral argument. Additional telephonic testimony was given on **August 2, 2013**. The parties submitted post-hearing briefs on **August 28, 2013**.

THE ISSUE

The basic issue in this case is whether the Employer had just cause to discharge the Grievant, and, if not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 30, Section A of the contract provides in part:

> *Disciplinary and Adverse Actions*
> *The provisions of this article apply to disciplinary and adverse actions which will be taken only for just cause and sufficient cause and to promote the efficiency of the service, and nexus will apply.*

INTRODUCTION

This case involves a complicated set of facts. Before getting into the details of the testimony, it may be useful to summarize them in chronological order. From 1995 to 1997, the Grievant was employed by RRK Enterprise, Inc. at a halfway house called Independence House in which some federal prisons apparently stayed prior to a full release from custody. The circumstances of the Grievant's leaving Independence House are central to this dispute. After leaving Independence House, the Grievant had a number of other jobs, some of which may have been in corrections.

In 2006, the Grievant became an employee of the Employer at FCI-Englewood. In about 2008, the Grievant began working for a Lieutenant Brown at FCI-Englewood. Sometime after that, she filed a hostile work environment claim against the lieutenant. During the investigation of the Grievant's hostile work environment claim, officials investigating that claim interviewed Thomas Everett, who was the director of Independence House at the time the Grievant either quit, was discharged or resigned from Independence House. After a review of that evidence, the Employer concluded the Grievant had resigned in lieu of discharge from Independence House and that she falsely stated in an employment interview in 2005 and again in 2006 that she had not been dismissed or resigned in lieu of dismissal from any other employer. The Employer concluded these statements were false and discharged her for providing false information during the employment application process.

On February 22, 2011, the Employer issued the Grievant a Notice of Proposed Removal. This document contained two specifications or charges of falsification of pre-employment information. Each specification states:

> Specification A: On August 17, 2005, you signed a Pre-employment Interview Form certifying that all of your answers and statements were true, complete and correct. During this interview, you were asked if you had ever been dismissed or resigned in lieu of dismissal from any job (Question

> A.1.). You answered "No." However, according to a memorandum dated January 22, 1997 contained in an Office of Internal Affairs investigative file, #1997-00756, you were terminated from employment at the Independence House on January 21, 1997. You failed to acknowledge this termination or resignation in lieu of termination during your Pre-employment Interview.
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> Specification B: On January 9, 2006, you signed a Pre-employment Interview form certifying that all of your answers and statements were true, complete and correct. During this interview, you were asked if you had ever been dismissed or resigned in lieu of dismissal from any job (question A.1.). You answered "No." However, according to a memorandum dated January 22, 1997, contained in an Office of Internal Affairs investigative file, #1997-00756, you were terminated from employment at the Independence House on January 21, 1997. You failed to acknowledge this termination or resignation in lieu of termination during your Pre-employment Interview.

The Grievant was actually terminated on May 11, 2011 by Warden Garcia.

The decision letter provides in part:

> On February 22, 2011 you were issued a notice which proposed that you be removed from you position for Failure to Provide Accurate Information During the Pre-Employment Interview. In making my decision, I have given full consideration to the proposal, to your written and oral responses of March 24, 2011 and to the relevant evidence contained in the adverse action file which has been made available to you.

> After careful consideration, I find the charge sustained and fully supported by the evidence in the adverse action file. Your actions in this matter have destroyed your credibility and effectiveness as a correctional worker. Your removal is in the interest of the efficiency of the service. It is my decision that you be removed from your position effective midnight May 12, 2011.
>
> When considering was penalty was appropriate, I considered the written response, including attachments, which your union representative submitted on your behalf during your oral response on March 24, 2011 . . .
>
> In addition to the above, I consider the charge of Failure to Provide Accurate Information During the Pre-Employment Interview a very serious charge in light of your position as a law enforcement officer. In your affidavit dated August 31, 2011, you acknowledge the Director of Independence House notified you that you could not work at the Independence House, a Federal contract facility, but that you could work at any of the other halfway houses . . .

Subsequently the Union filed a grievance. The parties were unable to resolve it, and the grievance went to arbitration under the terms of the collective bargaining agreement.

SUMMARY OF TESTIMONY

Thomas Everett testified for the Employer. He was the director at Independence House at the time the Grievant worked there. He testified an

investigation revealed that on a holiday weekend when the Grievant was not scheduled for work, she came to the halfway house. There was also a charge that she had in inappropriate relationship with an inmate. Later, several inmates tested positive for alcohol. The Bureau of Prisons made an investigation of the incident and told Mr. Everett that the Grievant would not be allowed to work with federal prisoners in the future. He said he called the Grievant into his office and told her she could resign over the incident. He said she walked out without giving him a meaningful response. She never tendered him a letter of resignation. Mr. Everett appears not to have had firsthand knowledge of the incident over the holiday weekend about which he was informed by Bureau of Prisons officials. He further said he did not investigate the case.

On January 15, 1997, a Joy Walters, who was an employee of the Bureau of Prisons, Community Corrections Division, wrote Mr. Everett a letter in which she stated that the Bureau of Prisons had done an investigation and that "[The Grievant] was not on official business when she visited Independence House on November 29, 1996." Ms. Walters concluded with the statement, "The investigation concluded that there was a lack of credibility on [the Grievant's] part; therefore, she is no longer permitted to work with federal offenders." Mr. Everett testified he did not recall receiving this letter.

On January 22, 1997, Mr. Everett wrote a memorandum to "Personnel File" that states:

> On Monday, January 20, 1997, I received a letter fro Joy Walters, Federal Bureau of Prisons Community Corrections Manager, indicating that an investigation had been concluded (see attached). The Bureau of Prisons letter indicated that [the Grievant] was no longer permitted to work with federal offenders. I met with [the Grievant] on the morning of January 21, 1997 when she arrived for work. I informed [the Grievant] that I could no longer allow her to work at Independence House because of the investigation conducted by BOP and the letter received. I offered [the Grievant] the option of submitting a resignation and provided her with a copy of the letter from BOP. I made arrangements with her to pay her one hour of show-up time and to make her last check available for pick-up at South Federal. [The Grievant] asked if we were done, filled out her time sheets, and left. As [the Grievant] never offered or tendered a resignation, I terminated her employment.

Leslie Jones interviewed Mr. Everett by telephone and prepared an undated summary of that interview. (Employer Exhibit 3). She said she interviewed the Grievant in 2010 about providing false information during the employment process.

She testified the Grievant had filed two EEO complaints, one for harassment and one for retaliation. She said he interviewed a Sara Ulrich and took a statement from her. It was during the investigation of the Grievant's harassment claims that her departure from Independence House came to light.

Sara Ulrich is a retired employee of the Employer. She was formerly a Human Relations Manager for the BOP. Ms. Ulrich did the Grievant's Pre-employment Interview. She said she interviewed the Grievant twice. She said she told the Grievant there was no time limitation regarding any of the questions asked. The Employer introduced its Exhibit 7, the Employer's Guidelines of Acceptability. She said it is policy for the Employer to consider everything in the interview in determining whether a job applicant meets the Guidelines of Acceptability. The following two paragraphs appear at page 1 of the Guidelines:

> To sustain a charge of falsification of records, the agency must prove by a preponderance of the evidence, not only that the employee knowingly provided incorrect information, but that s/he did so with specific intent to defraud, deceive, or mislead the agency.
>
> The various forms have different time requirements. Pay special attention to your dates in the specification. Ensure that the dates for the alleged falsification are within the time period required by the form you are alleging was falsified. For example, if the form requires the employee to disclose removals for the last three years, you cannot use a removal five years ago to show falsification on this form.

On page 2 of the Guidelines is a memorandum with the subject heading, "Guidelines of Acceptability Revision." The second paragraph in this memorandum states in part:

> The Employment History time frames with regard to "a)" terminations, "b)" counseling or disciplinary action for attendance problems, and "c)" disciplinary actions, have been reduced to two (2) years. The two-year time frame is commensurate with the reckoning period for disciplinary actions within the Bureau's Standards of Employee Conduct . . .

Page 5 of the Guidelines states in part:

> Standard A: Employment History
>
> Not Acceptable:
> a. Any dismissal for cause or resignation in lieu of dismissal for cause (not including legitimate layoff) in the last two (2) years.

She said that the Agency may consider everything said in the pre-employment interview in determining acceptability. In the case of dismissal or resignation, if that occurs within two years, it makes the applicant unacceptable. However, if it occurred more than two years ago, then the Employer can still consider it. Had the Grievant said she had been fired or resigned in lieu of discharge in this case, the Employer would have considered it and asked why she had been fired. She would not have been considered unacceptable, however.

She said the Grievant was discharged for failing to provide accurate information in her pre-employment interview. The reason for which the Grievant was discharged is different than making a false statement on an employment application. She said she would not have recommended the

Grievant for employment had she known she had been terminated from Independence House.

On cross-examination, she acknowledged the Grievant had worked for the BOP five years and in that period she had done nothing unacceptable. She also testified about Joint Exhibit 7, the Standards for Employee Conduct. Offense #32 in that document is "Falsification, misstatement, exaggeration or concealment of material fact in connection with employment, promotion, travel voucher, any record investigation or other proper proceeding." The penalty for the first offense is "Official reprimand to removal." However, the heading titled "Reckoning Period" indicates the reckoning period is two years. She indicated the two years referred to in Joint Exhibit 7 is a kind of limitation.

On cross-examination she also acknowledged that in the discharge letter (Joint Exhibit 5), she did not mention the allegation contained in some of the other documents that the Grievant had an inappropriate relation with an inmate. She also testified she never saw the Independence House investigative report which alluded to an inappropriate relationship. She did say it was inappropriate to have a personal relationship with an inmate. She said the OIA investigation report contained reference to the Grievant having had an inappropriate relation with an inmate and that Ms. Jones told her about this.

She also said Joint Exhibit 7 is a guide and that it is not all-inclusive. She said she had Employer Exhibit 8 in her possession when she considers an employee for hire. That document is a six-page questionnaire that covers former employment.

She also said she drafted Union Exhibit 5, a request for a waiver of the Pre-employment Guidelines of Acceptability for the Grievant, dated November 28, 2005. That document indicates the Grievant disclosed some debts which were in excess of the Guidelines of Acceptability. Insofar as the discharge itself is concerned, she indicated she had the following information: Ms. Jones contacted her. She received the OIA investigative report; the proposing official's letter, the Grievant's response, and the Warden's decision. Based on all of this she wrote the decision letter.

Rene Garcia, the Warden, testified for the Employer. He made the decision to discharge the Grievant. He examined her job application and other background documents. He said he analyzed the "Douglas factors," and he believed she lied to the Employer in the employment application. He testified had he been aware of the prior discharge, he would not have hired the Grievant. He considered the table of penalties and believed her conduct justified discharge. He said she was hired under false pretenses. He considered the false statements she made in her employment application to be

more serious than lying during the investigation. He made a statement, "We do not check 41A. We did not know if she lied when we hired her."

On cross-examination, Warden Garcia admitted the Employer should have checked the OIA investigation to see about her former employment and that it should have checked with prior employers, such as Independence House. He indicated he had participated in other discharges, including one who had improper contact with an inmate. He did not personally analyze the other discharge cases but left that job to Human Relations. With respect to the employee involved in Union Exhibit 13, there was a conflict between the stories told. He said this employee did lie. Regarding Union Exhibit 14, he said the inmate lied during the investigation. Union Exhibit 13 involved a fourteen-day suspension of an employee for inattention to duty. This employee was apparently caught in a locked room in the facility, apparently with an inmate, and he had no pants on. Union Exhibit 14 is documentation of a proposed removal for taking a package from an inmate.

He said the Grievant was terminated because she failed to disclose she had been terminated from Independence House. He said, "We did not know that she worked at the halfway house. She never disclosed that she worked there." The only charges against the Grievant are failing to provide accurate information on her employment application and not stating that she had been

discharged. He said she had been a good employee while she was at FCI-Englewood. He did not recall whether he had Union Exhibit 6 with him at the time he made the discharge decision.

He also testified about the Grievant's EEO complaint against Lieutenant Brown. He indicated Lieutenant Brown told him during the investigation that the Grievant had been terminated from Independence House.

He also testified about a recent case of an employee failing to provide information. It appears that employee resigned. He agreed that a person may forget to say something in an interview. He said other employees have provided inaccurate information but have not been discharged. He said there are arbitration decisions on this point. He said he did not look at the arbitration decisions in evaluating the present case. He said he had requested waivers in cases where employees had provided inaccurate information in the past. He said excessive debt may make an employee unacceptable. They exercise discretion where the job applicant has large debts. He acknowledged there was a dispute as to whether the Grievant was fired from Independence House. He acknowledged that the Grievant said she walked out. He said if the Grievant was telling the truth about walking out, she did not resign in lieu of discharge. She should have given two weeks notice, however. What she did was rude and inconsiderate if one believes her. He said he knew Mr.

Everett, the director of Independence House, said she may have thought she quit.

Rob Neil testified by telephone for the Union. He is the former Union President, and he handled the Grievant's case through the earlier steps of the grievance procedure. He testified the Union made a request for additional documents and was assured the Employer had given it all of the relevant documents. He discussed other cases in which employees committed offenses similar to those with which the Grievant is charged and were given less severe punishment than the Grievant.

He also said when an employee files an EEO complaint, management makes it uncomfortable for the employee. He said after the Grievant filed the EEO charge, the Employer started watching her more carefully and criticized her work.

The Grievant testified twice. She said she filed an EEO complaint in 2008 alleging harassment. In 2009 she filed a harassment claim alleging retaliation. The 2008 claim was against Lieutenant Brown. Warden Garcia was involved in her case. She told him she was being harassed. He tried to get her away from the harassers. During the EEO process, no one requested any information from 1996 from her.

She said she did not have possession of the OIA file before the arbitration began. She said Johnson gave her the discharge letter, but Sara Ulrich wrote it. She said it was important to her to get the job. It got her off welfare. She said she was standing up for herself when she filed the EEO complaints. Had she not filed the EEO complaint against Brown, she believed she would not have been discharged. She introduced Union Exhibit 23, a performance appraisal.

On cross-examination, she was asked about Employer Exhibit 6, page 1, specifically her response to question A)1. This is the question about her having been discharged or resigned in lieu of discharge. She said she was doing work for the United States Postal Service when she applied to the BOP. With regard to Employer Exhibit 6, she denied resigning in lieu of discharge. Employer Exhibit 5 is a record of an interview which is called an Affidavit. In this affidavit she admitted working at Independence House, which was a halfway house, as a counselor. She said while she was working at Independence House, there was an investigation into an allegation that she brought alcohol to the inmates. She denied doing this. In this affidavit she also admitted having an interview with the director at Independence House, and the director told her should could not work at Independence House any longer. He offered to let her work at other halfway houses. She said she did

not want to do that because it would imply that she was guilty, and she was not. She said the director would not go into any detail about what happened, and she got angry and walked out. She did not get a final paycheck, and she did not even tell them that she left. She just left and never went back. She denied that she resigned in lieu of being fired. The key paragraphs from her interview with the investigator in the case state:

> While I was working at the Independence House, there was an investigation that I supposedly brought in alcohol to the inmates. That is wrong. I don't even drink. I did go into the House and spent time with a co-worker who had trouble staying awake. It was my day off and I went to the House in the middle of the night. I do not remember what time I went in, but it would be what the BOP considers to be morning watch. The next day, I was called in to work and was questioned about bringing in the alcohol, and I denied it.
>
> I had a meeting with the Director of Independence House, and he said they didn't believe me when I said I did not bring in the alcohol. The Director said that I could not work at the Independence House on Fillmore Street anymore, but that I could work at any of the other halfway houses. I did not want to do that because that would mean I was guilty, and I was not. The Director would not go into any detail about what happened and I was angry, so I walked out. I did not go to personnel and get a pay check. I did not even tell him that I was quitting. I walked out and did not tell them that I was quitting. I just left and never went back.
>
> I was not fired and I did not resign because I was going to be fired. I walked out because I was mad,

> and the Director said that I was able to work at the other halfway houses, so I was not fired.

She was cross-examined about a Michelle Anderson and Aleva Scott being at Independence House. Both of them said the Grievant used the word "smooches" as a salutation which addressing inmates. She said the three of them used the word in their own conversation. She was also cross-examined about a 1997 affidavit in which she denied using that term as a salutation.

Mike Meserve, Jeff Roberts and Clelan Tyson all testified for the Union. All are Union officers. All testified about other cases in other parts of the country where employees had been terminated for some form of falsification of documents and as to the disposition of their cases. These employees were reinstated either through negotiations or arbitration.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer notes the Grievant was terminated on May 11, 2011 for providing false information during her employment interview. On August 17, 2005 the Grievant answered "No" to the question of whether she had been dismissed or resigned in lieu of termination. On January 9, 2006, Grievant

again answered "No" to the question if she had been dismissed or resigned in lieu of termination. The Grievant failed to disclose she had been terminated from Independence House, a BOP contract community corrections facility, because she lacked credibility and was no longer allowed to work around federal prisoners. When the Employer learned the Grievant had failed to disclose that she had resigned in lieu of termination, it discharged her. The Employer states the issue as, "Was the disciplinary adverse action taken for just and sufficient cause, and if not, what shall be the remedy?"

The Employer's brief contains a "Factual and Procedural Timeline." That timeline states:

1. Grievant was a correctional officer at FCI Englewood.
2. Grievant worked for Independence House, a Community Corrections Agency who had a contract with the BOP and housed federal offenders.
3. In 1997, the Grievant was the subject of an investigation into the allegations of introduction of contraband and an inappropriate relationship with an inmate while employed at Independence House, a BOP contract Community Corrections Facility. On January 13, 1997, Community Corrections Manager Joy Walters took a sworn affidavit

from the Grievant regarding the introduction of contraband and an inappropriate relationship with an inmate.

4. On January 15, 1997, BOP Community Corrections Manager Joy Walters issued a letter to Mr. Thomas Everett, Director of Independence House, stating that the Grievant was no longer allowed to work with federal offenders due to her lack of credibility.
5. Mr. Everett met with the Grievant and offered her the opportunity to resign or he was going to terminate her employment because she could no longer work with federal offenders.
6. The Grievant walked out on Mr. Everett without stating that she was resigning. At this point, Mr. Everett terminated the Grievant's employment.
7. Mr. Everett testified that the Grievant should not work in corrections again because she may have been involved in bringing alcohol into a correctional facility.
8. On August 17, 2005 and on January 19, 2006, Sarah Ulrich conducted a pre-employment interview of the Grievant as part of the application process for a correctional officer position at FCI Englewood. On August 17, 2005, the Grievant answered "no" to the question of had she been dismissed or resigned in lieu of termination. On January 9,

2006 the Grievant again answered "no" to the question of had she been dismissed or resigned in lieu of termination.

9. On August 17, 2005 and again on January 9, 2006, the Grievant signed the following statement on her pre-employment interview form: "Read the following carefully before signing this statement. A false answer to any question on this form or portion thereof may be the grounds for not employing you, or for dismissing you after you begin to work, and may be punishable by fine of up to $10,000 for imprisonment of up to five years or both. All the information you give will be considered in reviewing your answers and is subject to investigation (18 U.S.C. §1001)."

10. On August 6, 2010, Warden Garcia forwarded an email detailing allegations misconduct in which the Grievant in her prior employment had been terminated from Independence House, a BOP contract Community Corrections Facility.

11. Office of Internal Affairs Special Agent Leslie Jones conducted an investigation into the allegations of misconduct against the Grievant. Ms. Jones interviewed the Grievant and took an affidavit from her. In her affidavit the Grievant stated that she had a meeting with the Director of Independence House, was told that she could no longer

work at Independence House, got angry and walked out. The Grievant stated that she left Independence House and never came back.

12. In November, 2010, the BOP's Office of Internal Affairs sustained the allegation that the Grievant falsified employment records.

13. On February 22, 2011, Associate Warden Calvin Jones issued the Grievant a proposal to remove her from the federal service for providing inaccurate information in her pre-employment interview.

14. On March 24, 2011, the Grievant gave her oral response to Warden Garcia.

15. On May 11, 2011, Warden Garcia issued a decision letter to remove the Grievant.

16. On June 20, 2011, the Union filed a grievance regarding the Grievant's removal from the federal service.

17. On January 18, 2012, the Union invoked arbitration.

Next, the Employer analyzes the legal standards applicable to this case. It concedes it bears the burden of establishing that the Grievant engaged in misconduct, a nexus between the misconduct and the efficiency of the agency and that the penalty is reasonable. The Employer also relies on the seven tests for just cause announced by Arbitrator Daugherty in Enterprise Wire, 46 LA 359 (1966). The Employer argues it has complied with all of the

seven tests for just cause enunciated in the Daugherty standard by a preponderance of the evidence. It also contends the Union has failed to prove any of the defenses raised at the hearing.

Here, the Employer has charged the Grievant with providing inaccurate information during her pre-employment interview. This charge does not require the Employer to prove intent to deceive. Hoofman v. Dep't of the Army, 2012 WL 4092512 (2012), *citing* Ludlum v. Dep't of Justice, 278 F.3d 1280, 1284 (Fed. Cir. 2002). In Ludlum, the Federal Circuit Court of Appeals noted that "lack of candor is 'broader and more flexible than falsification, and, as such may involve a failure to disclose something that should have been disclosed to make the given statement more accurate and complete.'" Lack of candor does not require the Employer to prove the employee made an affirmative misrepresentation. Hoofman, *citing* Rhee v. Dep't of the Treasury, 17 M.S.P.R. 640 (2012).

The Employer also notes that consistency of the penalty is one of the factors considered under Douglas when deciding the reasonableness of the penalty. The MSPB has noted that "where an imposed penalty is appropriate for the sustained charge(s), an allegation of disparate penalties is not the basis for reversal or mitigation of the penalty unless the agency knowingly and intentionally treated similarly situated employees differently or if the agency

decides to begin levying a more severe penalty for certain offenses without giving notice of the change in policy." Taylor v. Dep't of Veterans Affairs, 112 M.S.P.R. 423 (2009), *citing* Whelan v. U.S. Postal Service, 103 M.S.P.R. 474 (2006), *aff'd* 231 Fed. Appx. 965 (Fed. Cir. 2007). In order for the Union to establish disparate treatment, it must show that "the charges and circumstances surrounding the charged behavior are substantially similar." Reid v. Dep't of the Navy, 118 M.S.R.P. 396 ¶ 19, *citing* Archuleta v. Dep't of the Air Force, 16 M.S.R.P. 404, 407 (1983). In order to establish "disparate penalties," an employee must show that the "comparators work in the same work unit, were subjected to the same governing standards and faced discipline close in time." Reid, *citing* Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, ¶¶ 6, 12 (2010).

Neither is the Employer required to explain lesser penalties imposed against other employees whose charges were resolved in settlements. Blake v. Dep't of Justice, 81 M.S.P.R. 394 (1999). In making penalty determinations, arbitrators are required to apply the same rules applied by the MSPB. Arbitrators may not substitute their judgment for the reasonable judgment of the deciding official. The Employer argues, "More specifically, an agency's penalty determination must not be disturbed unless it exceeds the range of allowable punishment specified by statute or regulation, or unless the

penalty is 'so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion.'" Batten v. U.S. Postal Service, 101 M.S.P.R. 222, *aff'd* 208 Fed.Appx. 868 (Fed. Cir. 2006).

Next, the Employer argues that it has demonstrated the Grievant was not a credible witness. In 1997, Joy Walters, the manager of Independence House, wrote a letter which stated, "The investigation concluded there was a lack of credibility on [the Grievant's] part; therefore, she is no longer permitted to work with federal offenders." In her testimony before the Arbitrator the Grievant demonstrated her lack of credibility. She denied referring to inmates as "smooches" and several of the Grievant's co-workers said she did. Similarly, the Grievant denied using obscene language in the presence of inmates, and former co-workers gave sworn affidavits that she did. The Grievant also lied about what her BOP job meant to her.

Given the Grievant's lack of credibility, her testimony with regard to her employment status should not be believed. In the Grievant's affidavit (Employer Exhibit 5), the Grievant left Independence House, yet she said she did not quit and was never fired. This statement is internally inconsistent. Ms. Walters also took an affidavit from the Grievant regarding the introduction of contraband and inappropriate relationships with inmates. When the Grievant met with Mr. Everett on January 21, 1997, she was

clearly on notice of the investigation and the nature of her alleged misconduct. She claims ignorance of Mr. Everett's offer to let her resign in lieu of discharge. Her testimony was directly contradicted by Mr. Everett's. Mr. Everett stated in a memorandum to file dated January 22, 1997 and in an interview with OIA Investigator Jones and in his testimony that he terminated the Grievant's employment at Independence House. Mr. Everett had nothing to gain by his testimony.

The Employer contends the Grievant's removal was based on just and sufficient cause. The Employer argues its rule regarding the failure to provide accurate information in a pre-employment interview is reasonably related to the safe, orderly and efficient running of the agency. Here, the Grievant on two occasions signed forms which warned her that any false answer to a question could result in discharge and a fine up to $10,000 or imprisonment up to five years, or both. The BOP is a law enforcement agency, and as such its employees are held to a higher standard of honesty and integrity. This is essential to the successful operation of the BOP.

In this case, the Grievant's failure to provide accurate information is particularly egregious because the information she failed to provide went to the heart of the Employer's mission. On August 7, 2005 and on January 19, 2006 Ms. Ulrich interviewed the Grievant. (Employer Exhibit 6). The

Grievant answered no to the question whether she had been dismissed or resigned in lieu of termination. She did this on two separate occasions notwithstanding the fact that she had worked at Independence House, which had a contract with the BOP to house federal inmates, and notwithstanding the fact that she had been investigated for having inappropriate relationships with inmates. Mr. Everett, the director of Independence House, met with the Grievant and told her she would no longer be allowed to work with federal offenders due to her lack of credibility. He met with her and offered her an opportunity to resign or be terminated. The Grievant walked out on Mr. Everett without stating she was resigning. After this, Mr. Everett terminated the Grievant. The fact that the Grievant failed to disclose to Ms. Ulrich that Mr. Everett offered her the opportunity to resign in lieu of termination or that she was terminated after she walked out was providing falsified information.

This incident was relied on by Warden Garcia when he made the decision to terminate the Grievant. He also said had he been aware of the Grievant's history at Independence House, he would not have hired her. The Employer argues this was a serious offense that went to the heart of the Employer's mission of supervising incarcerated federal offenders.

Prior to making the above-referenced false and misleading statements in the employment process, the Grievant was given a very clear warning that

providing false or misleading information was punishable under 18 U.S.C.A. 1001.

Next, the Employer contends it conducted a full and fair investigation of the matter prior to making the decision to discharge the Grievant. Internal Affairs Investigator Leslie Jones conducted a thorough investigation into whether the Grievant provided inaccurate information in her pre-employment interview. She interviewed eight individuals, including the Grievant, Mr. Everett and Ms. Ulrich. Ms. Jones noted Mr. Everett told her he gave the Grievant an opportunity to resign and she did not take it, so he terminated her. (Union Exhibit 6; Employer Exhibits 2 and 3). The OIA concluded there was "sufficient evidence to show [the Grievant] provided false information during her pre-employment processing at FCI Englewood." (Union Exhibit 6).

The Union's allegation that the investigation and subsequent discipline took too long lacks merit. There is no contractual timeline for completing an investigation and imposing discipline in the contract. The Arbitrator has no authority to impose a deadline. To do so would exceed his authority because he would be adding to the terms of the Agreement. Article 30(d)(1) simply does not provide that discipline must be imposed within any particular time limits. The Employer contends there being no limits for imposing discipline is consistent with the practice of the Employer at other locations. Attachments

2 and 3 to the Employer's brief are two illustrative cases. If the parties had intended that a precise line would govern the investigatory or adjudicative phases of discipline, they would have so stated in the Master Agreement. The parties chose not to have specific time limits regarding these issues.

Union Exhibit 6 is the Investigative Report regarding this case. The investigation was completed in November, 2010. The Employer issued a proposed letter of removal on February 22, 2011, and the termination became effective on May 11, 2011. Only six months elapsed between the completion of the investigation and the final discharge notice. The Employer contends this is not an unreasonable length of time.

The Union contends the Employer should have conducted an investigation into the Grievant's employment at Independence House at the time of the pre-employment interview. This argument lacks merit. Her employment application states she worked for RRK Enterprises, the Company which manages Independence House. The application does not state that RRK Enterprises was a BOP contract facility. The application does not state she worked with federal offenders. There was nothing in the Grievant's employment application that would have triggered an investigation during the hiring process.

Next, the Employer contends it applied its rules without discrimination. The Table of Penalties in the Standards of Employee Conduct states that the offense for falsification may range from a reprimand to removal for the first offense. Although the standards state the principles of progressive discipline normally apply, there are offenses so egregious as to warrant severe sanctions up to and including removal. Here, the Grievant's conduct was so egregious as to warrant discharge. She provided false information on her employment application. The Grievant's offense directly affects the mission of the agency. The Employer contends the penalty of discharge is consistent with the agency's standards of employee conduct.

The Employer also contends the penalty was consistent with the penalties issued in other similar cases. A review of the disciplinary log at this institution demonstrates that the Company has consistently removed employees for the offense of providing inaccurate information during the employment process. The Union's argument that other offenses, such as failing to provide accurate information on an official document during an official investigation, are comparable lacks merit. M.S.P.B. has held that the circumstances surrounding charged offenses must be substantially similar. In this case, Warden Garcia reasonably believed that providing inaccurate information in a logbook or during an investigation was different than

providing false information when one was attempting to get hired. The Grievant's offense directly impacted her ability to perform her duties at FCI Englewood.

The Employer also argues the Union has failed to show that the Employer has been inconsistent in issuing discipline for the offense of failing to provide accurate information during the pre-employment process. The Union produced six examples of employees who were not removed for failing to provide accurate information during the employment process. The Employer it has 119 institutions around the country, six regional offices, 22 residential re-entry offices and a staff of 38,000 employees. Six examples is not a significant sample. Of the six cases cited by the Union, two were resolved by settlement agreements. More importantly, none of the six employees were similarly situated to the Grievant. None had previously been removed from a BOP contract community corrections facility for lack of credibility and inability to work around federal prisoners. The Agency attemped to remove Spearman during his probationary period. Probationary employees are not similarly situated to permanent employees such as the Grievant. (Employer Exhibit 16).

Furthermore, the Employer had legitimate reasons for not removing Harlow, Sterling and Dyson. Harlow had been laid off, not fired, from his

previous employer. He was never told he had been discharged from Dollar Inn. He did disclose two of his three reprimands by the Coca-Cola Company. It is important to note that Harlow was not investigated by Internal Affairs. With regard to Sterling, his official personnel file from the State of Hawaii Department of Public Safety did not contain any of the disciplinary documents alleged in the background investigation. The Employer notes that the State's "unofficial working file" had been shredded, and he was never made aware of the contents of that file. Dyson provided documentation that she did not receive notice of her discipline for unexcused absences with the Wisconsin Department of Corrections. The Employer contends it has demonstrated it had legitimate reasons for not discharging Harlow, Sterling and Dyson.

Next, the Employer argues it has not discriminated against the Grievant on the basis of her prior EEO activity. The MSPB relies on the burden shifting analysis of McDonell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under McDonell Douglas, if a plaintiff succeeds in establishing a *prima facie* case, then the burden shifts to the employer to articulate a non-discriminatory reason for the discharge. To meet this burden, the employer need only produce evidence that creates a genuine issue of fact as to whether it intentionally discriminated against the Grievant. If the employer offers a

legitimate reason, the burden shifts back to the plaintiff to show that the agency's reason was a mere pretext. When the employee makes a showing that the employer's stated reason for discipline is merely a pretext for prohibited discrimination, "it is not enough . . . to disbelieve the employer, the fact finder must . . . believe the [employee's] explanation of intentional discrimination."

The Employer contends it has legitimate, non-discriminatory reasons for the actions it took in this case and that the stated reasons are not pretextual. The Employer notes the Union made a very broad information request in this matter. Based on Warden Garcia's testimony and the discovery requests, the Grievant has not established intentional discrimination on the basis of EEO activity with regard to her termination.

Furthermore, the Employer contends it proved by a preponderance of the evidence that the penalty of removal was within the bounds of reasonableness. Warden Garcia considered all of the relevant McDonnell Douglas factors. As noted earlier, in making penalty determinations, arbitrators are required to apply the same rules as the MSPB. In this case, Warden Garcia properly considered the McDonnell Douglas factors. Most importantly, Warden Garcia considered the serious nature of the offense. He was concerned that the OIA had made a finding that the Grievant could not

work around federal prisoners, which goes directly to the heart of the Employer's mission. Warden Garcia also stated that had he known about the Grievant's previous termination for lack of credibility and inability to work with federal offenders, he would not have hired her. He also considered whether the penalty was consistent with the BOP's Standards of Conduct and other cases involving similar offenses. He testified that providing inaccurate information in a logbook or an investigation is different than providing inaccurate information during the pre-employment process. He also considered the Union's argument that OIA Investigator Jones was biased because she worked at FCI Englewood. Warden Garcia specifically requested Ms. Jones because she had a Human Resources background and was not working at FCI Englewood when the Grievant was terminated. Thus he considered the Grievant's failure to disclose that she had been terminated from a BOP contract community corrections facility to be a serious breach of trust which warranted removal. The Employer concludes:

> The evidence presented clearly demonstrates that the Agency had "just and sufficient" cause to remove the Grievant, a law enforcement employee, for failing to provide information about her termination from a BOP community corrections facility for lack of credibility and for inability to work around federal offenders. The Agency demonstrated that on August 17, 2005, the Grievant answered "no" to the question of whether she had been dismissed or resigned in lieu of termination.

> On January 9, 2006, the Grievant again answered "no" to the question of had she been dismissed or resigned in lieu of termination. However, the evidence demonstrated that Grievant failed to disclose that she has been terminated from Independence House, a Community Corrections Agency who had a contract with the BOP. The mission of the Bureau of Prisons is the care and custody of federal offenders. Therefore, the Grievant's offense directly impacts the Agency's mission and was serious breach of trust. The Agency has shown by a preponderance of the evidence that the deciding official, Warden Garcia, appropriately considered all relevant McDonnell Douglas factors and reasonably concluded that the egregious nature of the Grievant's conduct outweighed any mitigating factors. Thus, the penalty of removal was not "so harsh and unconscionably disproportionate to the offense that it amount[ed] to an abuse of discretion." Accordingly, the Warden's decision is entitled to deference under the Board case law. The Agency respectfully requests that the grievance be denied.

Position of the Union

The Union first summarizes in detail the factual background of this case. It notes the Grievant applied for employment with the BOP in July/August, 2005 and January, 2006. In 2005 she applied for a position in Carswell, Texas. She declined that position. In January, 2006 she applied for a position at FCI Englewood. On July 19, 2005 she submitted a pre-employment questionnaire to the Employer. This questionnaire was updated on January 9, 2006. The form asks for applicants to list all employment for

the last seven years and whether the applicant had been terminated from any job in the last seven years. Because the Grievant's employment at RRK Enterprises ended more than seven years prior to 2005, she was not required to list that job on her employment application. However, she did so. The Employer never contacted RRK to verify her employment. The Employer normally checks previous employment back five years.

As part of the application process, the Grievant was interviewed by Ms. Ulrich. During this interview the Grievant stated that she had not "been dismissed or resigned in lieu of dismissal from any job." (Employer Exhibit 6, p. 1). Ms. Ulrich interviewed the Grievant on January 9, 2010.

After reviewing the Grievant's application, Warden Sharrod wanted to hire the Grievant. However, the Grievant's debts exceeded BOP's "Guidelines of Acceptability." Warden Sharrod requested a waiver to the Guidelines of Acceptability. In May, 2006 the Employer offered the Grievant a correctional officer position. She began work on June 11, 2006.

The Union next reviews the Grievant's employment history at FCI-Englewood. Before she began employment, the Office of Personnel Management conducted an employment background check of the Grievant. This was completed in January, 2008. On March 19, 2008 the BOP completed its approval process of the Grievant. This approval was good for

five years. An upcoming investigation in 2013 would have been limited to the previous five years.

Next, the Union contends the Grievant was an exceptional employee at FCI-Englewood. She was promoted to senior officer. Annual reviews were good, and her supervisors rated her overall performance as "exceeds/excellence." She received several outstanding ratings in her evaluations. Union President Neil also corroborated the fact that the Grievant was an excellent employee.

While employed at FCI-Englewood the Grievant filed two formal EEO complaints. The first complaint was filed in February, 2008 against Lieutenant Brown for creating a hostile work environment. The Union alleges that as a result of this complaint, superior officers retaliated against the Grievant and "overly scrutinized her work." This retaliation began almost as soon as the first EEO complaint was filed. As a result of this harassment, the Grievant filed a second EEO complaint in August, 2009 alleging harassment and retaliation. EEO investigations were conducted in response to each complaint. Subsequently the Grievant requested an EEO hearing.

After the Grievant requested a hearing on her EEO complaints, the BOP opened "an EEO complaint background check" on the Grievant. It was during this investigation that the Employer learned the Grievant may have been

terminated from Independence House in 1997. This information was eventually reported to Warden Garcia. Warden Garcia and Mr. Gulick, the attorney handling the defense of the BOP in the Grievant's EEO complaints, contacted the BOP's Office of Internal Affairs and opened an investigation into allegations that the Grievant had falsified her employment records by failing to disclose her termination from Independence House.

On August 5, 2010 Warden Garcia contacted Agent Boyd with the OIA to inform him he would receive a referral on the Grievant's termination at Independence House. Warden Garcia "requested an on-site for this investigation due to [the Grievant's] filing an EEO complaint against [Lieutenant Brown]." (Union Exhibit 12). According to the Union, Warden Garcia "hand selected" Special Agent Jones to perform the investigation. Such investigations are normally done by Laurri Lee. Warden Garcia also conveyed that he would not have hired the Grievant had he known of her termination from Independence House. Mr. Gulick made similar comments to Mr. Robinson, the Employee Services Chief.

Next, the Union summarizes the Grievant's work history at Independence House. She began working there in 1995. Independence House is a halfway house operated by RRK. On November 29, 1996 an Independence House staff member found an empty brandy bottle at the

halfway house. An investigation was conducted into allegations that the Grievant introduced the contraband and that she had an inappropriate relationship with a federal offender. These charges were never sustained. (Union Exhibit 6, p. 3). The investigation did conclude that the Grievant made a false statement during the investigation and that there was an appearance of an inappropriate relationship with an inmate. The Grievant was never given an opportunity to challenge the OIA charges. At that time she was not a federal employee. OIA never communicated to the Grievant the results of the investigation, much less the nature of any of the alleged false statement or the appearance of an inappropriate relationship. Neither did the OIA provide her with any of the documentation in the investigative file. Nevertheless, OIA informed Mr. Everett, the Director of Independence House, that the Grievant was no longer permitted to work with federal offenders. (Employer Exhibit 1). The Grievant was never provided a copy of this letter.

Next, the Union argues the Grievant quit her position at Independence House and had no further communication with RRK. The Grievant met with Mr. Everett on January 21, 1997. Mr. Everett told the Grievant she could no longer work at Independence House. He also told her she could work at any of the other halfway houses RRK managed. The Grievant was not interested because to accept employment elsewhere at RKK would be a concession that

she was guilty of misconduct. The Grievant became upset and left Independence House and never returned. According to the Union, prior to the Grievant's departure, Mr. Everett never told her she was fired, nor did he present her with any paperwork indicating she was terminated. Ms. Ulrich does not recall giving the Grievant a copy of the BOP letter dated January 15, 1997. Mr. Everett considered the Grievant's walking out of the meeting as a "voluntary job abandonment." (Tr. p. 30).

After this conversation, Mr. Everett did not see the Grievant again. The Grievant did not learn about this purported termination from Independence House until 2010, during the OIA investigation which led to her discharge. At Warden Garcia's request, Special Agent Jones conducted the investigation leading to the Grievant's discharge, that is to say, the allegation that the Grievant had falsified her pre-employment records, including the onsite investigation at FCI-Englewood. Agent Jones completed her investigation on November 16, 2010. She concluded that the Grievant had falsified her pre-employment application with the Employer. The report was approved by her supervisors. The documentation was passed back to FCI-Englewood on November 29, 2010. The evidence was reviewed by Ms. Ulrich. She modified the charge against the Grievant from "falsification of employment records" to "failure to provide accurate information during the

pre-employment interview." Ms. Ulrich conceded that the Employer could not sustain a falsification charge against the Grievant because it "can't show that [the Grievant] knowingly . . . provided or excluded information." Ms. Ulrich proposed termination, however. Her memorandum cites Mr. Everett's 1997 memorandum as proof of the Grievant's termination from Independence House. On February 22, 2011 Associate Warden Calvin Johnson signed the letter, and it was issued to the Grievant.

Next, the Union notes that the Grievant responded to the proposed termination without seeing the OIA investigative report upon which the Employer based its decision to terminate her. The Union did not receive the bulk of the 1997 OIA file until after the hearing began. Thus, the Grievant was forced to respond to the termination without seeing the evidence upon which the Employer relied. On March 24, 2011 the Union delivered oral and written responses to Warden Garcia. The Union maintained that the Grievant had never been dismissed nor resigned in lieu of dismissal by Independence House. The Grievant said she walked out and was never told she was fired. This being the case, the Grievant answered all of the questions to the best of her knowledge and belief during her two pre-employment interviews. The Union also asks why the 2010 OIA investigation had been conducted in the

first place. Mr. Neil argued the investigation and termination were retaliation for the Grievant's EEO complaints.

After the Union's oral and written responses, Ms. Ulrich drafted the removal letter which terminated the Grievant. The Union contends the discharge letter acknowledges that the Grievant walked out of Independence House and did not return to that job:

> In your affidavit dated August 31, 2011, you acknowledged the Director of Independence House notified you that you could not work at the Independence House, a Federal contract facility, but that you could work at any of the halfway houses. It is at this point you acknowledge you walked out and did not return to work. As you chose not to return to work for RRK Enterprises at another location and you had been informed you could not return to the Independence House, I believe you resigned in lieu of dismissal.

The Union contends it is unclear how the Employer could conclude that the Grievant was told she could work at other RRK locations but that her walking out constituted a resignation in lieu of termination. (Employer Exhibit 11).

Next, the Union discusses the grievance process. The grievance was filed June 17, 2011 alleging that the Grievant's discharge was a prohibited personnel practice not for just and sufficient cause which did not promote the efficiency of the service, and that her termination was retaliation for her EEO

complaints. The Employer denied the grievance, and it proceeded to arbitration. Two days before the arbitration the Employer provided the Union with portions of the 1997 OIA file. During the hearing the Union first learned of the circumstances precipitating the 2010 OIA investigation, which was that the Employer had conducted an "EEO complaint background check."

Next, the Union contends Warden Garcia was not a credible witness. When asked why he hired Agent Jones to conduct the 2010 investigation, he said it was because she had a background in Human Resources. However, in his conversations with OIA, Warden Garcia justified deviating from the standard protocol based on Ms. Lee's friendship with the Grievant. He provided another inconsistent statement about selecting Agent Jones to perform the investigation. Warden Garcia maintained the investigators are assigned by OIA, not by the institution. This is incorrect. Warden Garcia's testimony that he did not inform OIA that the Grievant would not have been hired was invalidated by documents from the OIA investigative file. Warden Garcia said several times that had he known the Grievant had been terminated from Independence House, he would not have hired her. However, at the hearing he said it would be inappropriate for him to make such a statement to OIA because "they have to do the investigation."

Additionally, Warden Garcia contradicted himself when he testified he did not know the Grievant's termination was discovered through an EEO background check. He even said he had never heard the term "EEO complaint background check," yet the 2010 investigative file indicates he told OIA that the Grievant's termination was revealed through an EEO complaint background check.

Warden Garcia's testimony that he was unaware the Grievant had disclosed her employment at Independence House was contradicted by the Grievant's oral and written responses. (Union Exhibits 19, 22). Similarly, his testimony that he was unaware the Union had alleged retaliation was contradicted by the Grievant's oral and written responses.

Next, the Union discusses the discipline of similarly situated employees. The Union contends employees at FCI-Englewood have been disciplined less severely than the Grievant for similar and more severe conduct. First it discusses the case of an employee disciplined for inattention to duty and providing inaccurate information during an official investigation. This employee received a ten-day suspension. The Union also discussed the case of an employee's failure to exercise sound correctional judgment and providing inaccurate information during an official investigation who received a 21-day suspension. Finally, the Union discussed the failure of an employee

to follow post orders, failure to provide accurate information on an official document and failure to provide accurate information during an official investigation who received a ten-day suspension.

Next, the Union discusses the "legal standard" applicable to these types of cases. It asserts the Arbitrator has broad discretion to review the reasonableness of penalties imposed by employers. The Employer also has the burden of proving the charges against the Grievant by a preponderance of the evidence. 5 C.F.R. §1201.56(c)(2). OPM has defined the phrase "preponderance of evidence" as "the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find a contested fact more likely to be true than untrue." 5 C.F.R. §1201.56. Finally, an agency may take disciplinary action against an employee for causes which will promote the efficiency of the service. In order to sustain this burden, the employer must establish that:

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

When the union demonstrates that lesser penalties had been imposed on other employees, the employer has the burden of proof to establish legitimate reasons for the disparity in treatment. If the agency fails to put forth any

legitimate reasons for the disparity in treatment, it fails to meet its burden. Parker v. Dep't of the Navy, 50 M.S.B.R. 343, 352 (1991).

Next the Union summarize the so-called Douglas v. Veterans Affairs, or Douglas, factors found in 5 MSPR 280 (1981). They are:

1. The nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed on other employees for the same or similar offenses;

7. The consistency of the penalty with any applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The Union's first argument is that the Employer's violation of the Grievant's due process rights necessitates overturning her removal. The Union states, "The Grievant did not provide inaccurate information during her pre-employment interview because she thought she had walked out and quit; thus her removal is without just cause and should be overturned." Even if the Arbitrator concluded that she did provide inaccurate information, the Union

notes the Grievant on documents it did not provide to her. Furthermore, the Employer failed to conduct an impartial investigation, and the termination was egregiously untimely.

The Union argues the Employer failed to provide the 2010 OIA investigative file which contained documents from the 1997 OIA investigation in a timely manner. Industrial due process requires an employer to provide employees notice and an opportunity to be heard. An employee is entitled to oral or written notice of the charges against him and an explanation of the employer's evidence. A federal employee is entitled to the material relied on by the agency in an adverse action. This is statutorily prescribed. 5 C.F.R. §752.404. The Master Agreement contains a provision requiring the Grievant "to receive the material which is relied upon to support the reasons for the action given in the [proposed] notice." Article 30, Section E(1). Many arbitrators have concluded that an employer did not have just cause to remove an employee by reason of its failure to disclose information regarding the basis of removal. *See, e.g.*, Council of Prison Locals, AFGE & Fed. Bureau of Prisons, 110 LRP 16649 (Shea, 2010); Young v. Dep't of Housing & Urban Dev., 706 F.3d 1372 (Fed. Cir. 2013); and Ward v. U.S. Postal Serv., 634 F.3d 1274 (Fed. Cir. 2011).

Here, it is clear Warden Garcia based his decision to terminate the Grievant on the contents of the 1997 OIA investigation, especially the letter from Ms. Walters to Mr. Everett. Warden Garcia frankly admitted he relied on the 1997 OIA investigation to make his determination. The Grievant was never given the opportunity to review these documents and respond to them. The Union asked for them before the Grievant was terminated, but the Employer only provided a few hand-selected pages of the 1997 investigative report two days before the arbitration hearing. The Grievant was not aware of the discussions between Agent Jones, Ms. Ulrich and Warden Garcia until their testimony at the hearing. This prevented the Grievant from adequately defending the charges made against her.

Next, the Union argues the Employer violated the Grievant's due process rights by not acting promptly which resulted in the Grievant being removed almost six years after her alleged misconduct. Arbitrators have acknowledged that timeliness is a critical function of due process. FCI-Tallahassee, Florida & Local 1570, AFGE, FMCS # 07-1726-50576-3 (Hoffman, 2009). (page 33). Arbitrators have frequently held that an agency's untimeliness warrants a reversal of a termination. *See, e.g.*, FDC Miami, Florida & Council of Prisons Local 33, Local 501, 107 LRP 34948 (Wolfson, 2007); Fed. Bureau of Prisons, Metro Corr. Ctr., Chicago, Illinois

& Local 3652, Am. Fed. Of Gov't Employees (Larney, 2007); Bureau of Prisons, U.S. Penitentiary, Leavenworth, Kansas & Local 919, Am. Fed. Of Gov't Employees, 92 FLRR 2-1620 (Hendrix, 1992). The Union argues timeliness of the investigation and disciplinary process is especially important in cases involving pre-employment applications. Here, the Employer's untimeliness is particularly egregious. Her interviews were conducted in August, 2005 and January, 2006. Five years elapsed before the Employer investigated the alleged misconduct in August, 2010. At that time the Grievant had completed her probationary period, had her background check officially cleared and received consistently high performance ratings from senior officials at FCI-Englewood.

Furthermore, the Employer had in its possession the information about the Grievant's employment at Independence House throughout the entire application process. The OIA had a file identifiable by the Grievant's name concerning the events of 1997. The Grievant listed RRK on her employment application, but the Employer did not contact RRK. The Grievant should not be penalized for the Employer's failure to inquire into information it had for five years before she was employed.

The Union also notes the DOJ Office of Inspector General prepared a report critical of the BOP's disciplinary process. One criticism was that the

BOP did not have written standards for measuring the timeliness of the investigative and adjudicatory phases of the disciplinary system.

Next, the Union contends the Employer failed to insure the Grievant's discipline was decided by an unbiased tribunal based on an objective pre-disciplinary investigation. Just cause requires that an employer "demonstrate that its disciplinary action was imposed after an objective pre-discipline investigation which resulted in the proof of the charges upon which the discipline was based." Council of Prison Locals & FCI Bennettsville, FMCS No. 90-03387 *10 (2010).

Agent Jones had conversations with Human Resources Manager Ulrich during the investigation. Ms. Ulrich was the person who proposed the termination, and she explained she thought it was an appropriate penalty "given the nature of why she left Independence House." Ms. Ulrich said it was her understanding that the Grievant had been under investigation for an "inappropriate relationship with an inmate," and this was the reason she was asked not to return to Independence House. (Tr. 166-67). Ms. Ulrich said she learned this from Agent Jones during the 2010 investigation. The Union notes Ms. Ulrich's understanding regarding the inappropriate relationship at Independence House is incorrect because those charges were not sustained in 1997. Furthermore, it is completely unacceptable for Ms. Ulrich to have

made her decisions during the disciplinary process based on the *ex parte* communications she had with Agent Jones while the investigation was ongoing. Moreover, neither the Grievant nor the Union was ever informed or this or given the opportunity to respond to it.

The Union next contends that the Employer did not have just cause to terminate the Grievant's employment. The Employer simply has not met its burden of establishing the Grievant failed to provide accurate information during the pre-employment interview. Specifically, she failed to report her termination from RRK in 1997. According to the Union, the Employer must show the Grievant willfully and intentionally failed to provide accurate information during the pre-employment process. To do so, the Employer must first prove that the information was in fact inaccurate. The Union contends the Employer must prove the Grievant "willfully and intentionally provided inaccurate information." Although the Employer contends it need not prove willfulness, the arbitration decisions clearly hold otherwise. *See, e.g.*, Council of Prison Locals, Am. Fed. Of Gov't Employees & Fed. Bureau of Prisons, 110 LRP 16649 (Shea, 2010); Local 39697, Am. Fed. of Gov't Employees & Fed. Bureau of Prisons, Fed. Corr. Complex, Victorville, California, 111 LRP 22724 (Riker, 2009); and Local 506, Am. Fed. of Gov't Employees & Fed. Corr. Complex, Coleman, Florida, FMCS No. 08-50626

(West, 2008). The Union contends the Grievant quit her job at Independence House, and there is no basis for the Employer's charge that she provided inaccurate information during her pre-employment interview. The Grievant was not dismissed from her job at Independence House, nor did she resign in lieu of dismissal. Rather, she stormed out and quit on January 21, 1997. In the 2010 investigatory file, Agent Jones made notes of a conversation with Mr. Everett in which he stated,

> Everett said that because the Grievant walked out of the meeting and never came back to work, he "would consider that voluntary job abandonment, and I would have considered a termination for walking out." Everett added, "In her mind, she may have quit. Lots of people say, 'Oh, I was not fired, I quit.'"

The Union contends the Employer cannot meet its burden of showing that the Grievant was terminated if the same man who fired her acknowledges that she may have thought she quit. Further, he considered the Grievant's walking out and never coming back to be a voluntary quit. At one point he was asked, "You testified on cross that you considered the Grievant walking out to be a voluntary job abandonment?" He answered, "Yes." The conclusion to be drawn from all of this is Mr. Everett terminated the Grievant after she had quit. Therefore, her assertion in the employment interview that she had not been dismissed is accurate. The Employer's decision to terminate

is groundless because the Grievant did not provide inaccurate information. The Union also notes that Mr. Everett never told the Grievant she was terminated either orally or in writing. Following this conversation there was absolutely no contact between Mr. Everett and the Grievant. He never saw, called or mailed documents to her. He never saw his memorandum terminating her employment since it was drafted after she walked out. The Union argues it is not surprising the Grievant was unaware she had been discharged until the 2010 OIA investigation.

Thus, the Grievant did not provide any inaccurate information, let alone do so with a malicious intent. Ms. Ulrich even testified she could not show that the Grievant knowingly provided or excluded information. (Tr. 157-59). In addition, had the Grievant intended to deceive the Employer in her employment application, she would not have disclosed her employment with RRK in the first place because she was not required to do so.

Even if one assumes the Grievant knew she had been terminated from RRK, she was not required to disclose that information beyond the seven-year limit explicitly stated as part of the pre-employment interview process. On the Questionnaire for Public Trust that the Grievant responded to during the pre-employment process, applicants are only asked about their employment history and terminations within the past seven years. Although the Employer

asks for seven years of employment history, it only investigates the most recent five years of employment history.

Mr. Young, the Southeast Regional Vice President for the Council of Prison Locals, testified it was not acceptable for an agency to ask whether an employee had ever been terminated in an oral interview without limiting the time period to seven years. The Union contends it would not be unreasonable for the Grievant to assume that the seven-year time limit applied to all questions about her employment history throughout the pre-employment process.

The Union also argues the Grievant's removal is unwarranted under the "four point and two point tests" concerning falsification of pre-employment documents. The four point test involves considering the following: (1) was the misrepresentation willful; (2) was the misrepresentation material to the hiring; (3) was it material to the employment at the time of the discharge; and (4) was the employer acting promptly and in good faith? The two point test involves the following requirements: (1) the applicant's failure must be willful and deliberate; and (2) the matter(s) involved in the question must be material. *See* AFGE, Local 4010, FMCS No. 070323-02359-1, *citing* Firestone Tire & Rubber Co. & United Rubber Workers of America, 93 LA 381 (1989).

The Union contends the Grievant's non-disclosure was not willful or deliberate. Even assuming that the Grievant was dismissed from the Independence House, her failure to disclose that termination was not willful or deliberate. The Grievant believed she had quit her employment, and thus the non-disclosure was inadvertent. Even the individual who terminated the Grievant recognized that "in her mind, she may have quit." The Employer conceded it could not establish that the Grievant knowingly excluded the information.

The Union also contends the immateriality of the non-disclosure at the time of termination far outweighed the limited materiality, if any, of the non-disclosure at the time of the Grievant's hiring. It is important to note that even if the Grievant had been terminated from Independence House, that did not disqualify her from employment with the BOP. Agent Jones explained the Grievant was not disqualified because her termination fell outside the five-year time frame established by the Guidelines of Acceptability.

The Union also contends the Grievant's termination was of limited materiality at the time of her hiring, and it is likely she would have been hired irrespective of any dismissal. Even though Warden Sharrod testified that he would not have hired the Grievant had he known about the Independence House incident, this contention is contradicted by a waiver request he drafted

at the time the Grievant was hired. Considering the fact that Warden Sharrod sought a waiver to hire the Grievant, it is questionable whether he would truly have passed on the Grievant for an issue that did not even require a waiver. The Union notes the Employer's Questionnaire for Public Trust and the Guidelines for Acceptability reflect the position that terminations outside of five years are immaterial to the determination of whether an applicant would be suitable for employment. The Guidelines only disqualify applicants with dismissals within five years. Thus, the Grievant's termination is of limited significance.

More importantly, the Grievant's dismissal from RRK in 1997 was immaterial at the time of her termination in 2011. There was ample evidence demonstrating that the Grievant had been performing admirably as a correctional officer for five years. One month prior to her termination a supervisor said the Grievant was a pleasure to work around, that she came to work motivated and displayed a good attitude. Warden Garcia's claim that his confidence in the Grievant's ability to do her job is destroyed by his failure to remove the Grievant from the inmate population throughout the entire duration of the 2010 OIA investigation. Arbitrators have reinstated employees who have made misrepresentations that were material at the time because they were no longer material at the time of removal. FDC Miami & Council of

Prison Locals, Local 501, FMCS # 07-51043. The Grievant should be reinstated because her non-disclosure is no longer material.

Next, the Union argues the Employer has not met its burden of establishing that the penalty was appropriate. Assuming the Grievant knowingly failed to provide accurate information during her pre-employment interview, it is clear the Employer has not met its burden of proving removal was the appropriate remedy. The Union argues the Employer did not properly balance the Douglas factors when it decided to terminate the Grievant. Not every minor, unintentional or distant in time falsification warrants removal. The nature and seriousness of the offense and its relation to the employee's duties, position and responsibilities, including whether the offense was technical or inadvertent or committed maliciously or for gain, has not been properly evaluated by the Employer. The Employer's policy regarding staff misconduct categorizes offenses into three classifications, with classification 1 being the most serious offense and classification 3 being the least serious offense. The Union contends even if the Grievant was terminated or resigned from RKK in lieu of termination, the severity of her misconduct is limited, particularly in light of the circumstances surrounding the offense. Her misconduct was a single inaccurate statement made during an employment interview. According to the Employer's Program Statement, falsification of

documents constitutes a classification 1 offense, while falsification of employment documents is a classification 2 offense. There is no evidence that the Grievant lied or made any false or inaccurate statements during the five years she was employed at FCI-Englewood. Her offense was neither recurring nor directly related to her work at the facility. The Union notes that the three employees discussed earlier provided false information during the course of their employment at FCI-Englewood, and they lied during official investigations in order to conceal their own on-duty misconduct. These three cases are clearly more egregious than anything the Grievant may have done. Warden Garcia's attempt to distinguish those employees (A, B and C) from the Grievant's case is totally unpersuasive.

The Union also contends the Grievant's lack of discipline while employed at FCI-Englewood should be a mitigating factor in this case. Moreover, the Grievant has had an exemplary record for five years at this facility. She is highly regarded by her supervisors. Warden Garcia failed to give due consideration to the Grievant's work record.

Next, the Union analyzes the Grievant's work record against the Douglas factors and concludes that the factors applicable require reinstatement. First, the Union notes the nature and seriousness of the Grievant's offense, if any, and its relation to her duties and responsibilities,

including whether the offense was intentional, inadvertent or frequently repeated, indicate the Grievant should be reinstated. Under the Employer's own classification of offenses, falsification of employee documents is a classification 2 offense, not the most serious offense. Also, her offense consisted of a single inaccurate statement made during an employment interview. The statement was made prior to her being employed, and there is no evidence she made any other false or inaccurate statements during her five years of employment. The Union also notes that the three employees discussed above were given lesser penalties even though their offenses were more serious than that of the Grievant. One employee lied about using the Employer's washer and dryer to launder her own personal clothing. Even though this employee had a previous three-day suspension, she was only suspended ten days for this offense. The second employee lied about transferring a package with unknown contents to an inmate in a special housing unit. This employee's proposed termination was reduced to a 21-day suspension under a "Second Chance Agreement." The third employee was charged with failure to provide information on an official document and failure to provide information during an official investigation. He doctored an official logbook. This employee was not discharged. He received a ten-day

suspension. Each of these offenses was more serious than that of the Grievant's.

Second, the Union considers the Grievant's past disciplinary record. It argues her past disciplinary should be a mitigating factor and highlights the Employer's failure to use progressive discipline. Third, the Grievant's past work record, including her length of service and ability to get along with her fellow co-workers points in the direction of reinstatement. It is undisputed that her work record for five years is well above average. Her colleagues and superiors spoke highly of her performance. The Employer was incorrect in failing to consider the Grievant's good work record. Moreover, its failure to do so is inconsistent with the way in which it handles other employees whose cases involving similar misconduct.

The fourth Douglas factor argued by the Union is the effect on the employee's ability to perform at a satisfactory level and its effect on supervisory confidence in the employee's ability to perform assigned duties. The Union contends the Grievant's alleged misconduct had no effect on her performance as a correctional officer. For five years after the alleged offense the Grievant received overall "exceeds/excellent" ratings. Though Warden Garcia said his confidence in the Grievant's ability to do her job had been destroyed, his actions belie this contention. Warden Garcia knew he could

remove the Grievant from having inmate contact during the pendency of the 2010 OIA investigation, yet he did not do this. The Union also argues it is important that Warden Garcia's decision not to remove the Grievant from the inmate population undermines his assertion that her offense warranted termination, because the 1997 OIA investigation stated she could not work around federal offenders.

Fifth, the Union contends the Employer has acted inconsistently as to the penalty imposed in this case compared to that imposed on other employees for the same or similar offenses. It is clear the Grievant was dealt with much more harshly than other inmates who committed similar offenses. Warden Garcia made virtually no attempt to insure the decision to remove the Grievant was consistent with the decisions of other Agency officials. He did not inquire into the type of discipline that had been imposed on other employees at FCI-Englewood prior to his arrival. Even though he was not the deciding official in those cases, he was responsible for insuring the Grievant's discipline was consistent with that imposed on other similarly situated employees.

Next, the Union's brief compares the Grievant's situation with three other employees who failed to provide accurate information and who were not terminated. In all of these cases, the employees' work record was a

factor. According to the Union, the case of Brenda Blaylock is quite similar to the Grievant's, and she was reinstated with back pay, transferred to avoid retaliation and given two months of paid leave prior to reporting to her new assignment. The Union also notes no disciplinary action was taken against George Harlow, and he remains a BOP employee at this time. He failed to provide accurate information on pre-employment documents that were for all practical purposes identical to that of the Grievant. However, he failed to disclose his termination from two prior employers.

Similarly, Ricky Spearman had no disciplinary action taken against him, and he is still employed by BOP. Mr. Spearman failed to disclose a termination from a previous job. He also failed to disclose an arrest for simple assault. He received no disciplinary action, while the Grievant was terminated.

Sixth, the Union notes the penalty imposed here is inconsistent with the Agency's own Table of Penalties in its Standard Schedule for Disciplinary Offenses and Penalties. Seventh, the Union observes there was no outside publicity about this offense, so the reputation of the Agency was unaffected. Finally, the Union contends the adequacy and effectiveness of alternative sanctions would have been completely effective to eliminate the chance of any

repetition of this conduct. However, there is no evidence that Warden Garcia considered any alternative other than termination.

The Union also argues the Grievant's removal is retaliatory. It summarizes the statutory requirements found in 42 U.S.C. §2000e-3(a) that are applicable in this type of case. They are: (1) the employee engaged in protected activity; (2) the employee suffered an adverse employment action; and (3) the employee must provide direct and circumstantial evidence of a causal connection between the protected activity and the adverse action. The Union concedes that the McDonnell Douglas burden-shifting analysis applies to retaliation claims.

First, the Union contends the Grievant has established a *prima facie* case of retaliation. The "EEO background check" is direct evidence of a causal connection between the protected activity and the adverse action taken by the Agency against the Grievant. The Employer's response to this claim is that it acted only during the discovery phase of the EEO cases. This is simply inaccurate. The Grievant presented an affidavit from her attorney on the EEO cases confirming that "Neither [the Grievant] nor I as her representative, specifically requested from the Bureau of Prisons copies of any OIA(6) investigations about [the Grievant] during any phase of her EEO cases." Furthermore, the Employer did not provide the 1997 OIA investigation to the

Grievant during the pendency of the EEO cases. This case is remarkably similar to Smith v. Dep't of the Navy, EEOC Petition No. 03950060 (November 2, 1985). The Employer's decision to perform the "EEO background check" is particularly suspicious considering the Grievant had completed four years of service and was no longer a probationary employee. She was not subject to reinvestigation for another year and one half. Had the Grievant not filed the first EEO claim, management would not have undertaken the investigation it did.

Furthermore, the Union argues the proximity and time between the Grievant's ongoing EEO cases and the institution of the investigation that resulted in her termination is circumstantial evidence of a causal connection. It is undisputed that the Employer knew about the Grievant's prior EEO activity. The Employer instigated its EEO background investigation in connection with its attempts to defend itself against the EEO cases. Given the circumstances surrounding the 2010 OIA investigation, the Union argues the Grievant's termination was retaliatory.

The Employer's alleged non-retaliatory reason for the termination is clearly pretextual. Despite the Employer's alleged non-retaliatory reason articulated in the grievance, the Employer's reason for terminating the Grievant is epitomized in the decision to conduct an "EEO background

check." As was noted in Smith, "the reasons given for the initiation of the background check were pretext for retaliation." Had the Employer not needed to defend itself against the Grievant's EEO claims, it would not have performed the background check in an effort to find information to use in its defense.

Additionally, the Union argues Warden Garcia provided false testimony in the hearing. The Arbitrator should find his testimony lacks credibility insofar as the reasons he gave for his decision to terminate the Grievant. Clearly, the Grievant was disciplined much more severely than were other employees who had engaged in similar activities. Warden Garcia was aware of these employees. Almost as soon as the Grievant filed her EEO complaint, the Employer subjected her to heightened scrutiny.

The Union concludes:

> Based on the foregoing, the Union respectfully requests that the Arbitrator rescind the Grievant's removal and order the Agency to immediately reinstate her to her previous position at FCI-Englewood with full back pay, benefits, compensatory damages. Additionally, the Union asks the Arbitrator to order the Agency to correct its records and provide any other appropriate make whole relief. Finally, the Union asks the Arbitrator to retain jurisdiction so that the Union can present evidence regarding damages (back pay and compensatory damages) as well as regarding attorneys' fees and costs.

DISCUSSION

Based on the provisions of the contract, the testimony given at the hearing and the arguments of the representatives of the parties, the Arbitrator has concluded that the Employer did not prove the Grievant failed to provide accurate information in either of her pre-employment interviews with the Employer. For the reasons given in detail below, the grievance is sustained in its entirety.

Although the Union raised several defenses to this discharge, the Arbitrator has concluded that the most straightforward way of resolving the matter is by determining what happened during a meeting between Mr. Everett and the Grievant on January 21, 1997. It is noted that only the Grievant and Mr. Everett attended that meeting. The Employer's case fails because the Arbitrator has not been persuaded by a preponderance of the evidence that the Grievant either resigned in lieu of termination or was actually terminated by Mr. Everett during that meeting. Therefore, she did not provide the Employer with inaccurate information during either of her pre-employment interviews.

It is necessary to summarize some of the events that occurred prior to January 21, 1997 in order to understand what happened during that meeting. Prior to this meeting, OIA investigated several allegations of misconduct

against the Grievant. One was that she brought a bottle of alcohol into Independence House. A second allegation was that she had an inappropriate relationship with one of the inmates. In addition, the Grievant was being investigated for regularly using profanity toward inmates and routinely using the word "smooches" as a salutation with inmates. According to an OIA investigative report dated November 16, 2010, at page 3, the allegation of lying during an investigation and having an inappropriate relationship with an inmate were sustained. However, the Grievant did not know any of this on January 21, 1997.

On January 15, 1997 Joy Walters wrote a memorandum to Mr. Everett telling him about the investigation. She told him that the Grievant visited Independence House in the early morning hours of November 29, 1996 when she was not on official business. She also stated that "the investigation concluded that there was a lack of credibility on [the Grievant's] part; therefore, she is no longer permitted to work with federal offenders."

Employer Exhibit 2, Mr. Everett's memorandum to the files, begins with a summary of Ms. Walter's letter. This memorandum goes on to state that Mr. Everett met with the Grievant on the morning of January 21, 1997. The memorandum states Mr. Everett told the Grievant, "I could no longer allow her to work at Independence House because of the investigation

conducted by BOP and the letter received." The next sentence of Mr. Everett's memorandum says that he offered her the option of resigning. The Grievant denied that Mr. Everett offered her an opportunity to resign. In effect, she said she walked out of the meeting upon hearing that she could no longer work at Independence House. It is of some significance that Mr. Everett wrote in this memorandum that he could not allow the Grievant to work at Independence House as opposed to she could no longer work at any facility managed by RRK. The Grievant's affidavit of August 31, 2011 states that while Mr. Everett told her she could not work at Independence House and he said she could work at other halfway houses managed by RRK. There was other evidence in the record that would indicate the Grievant could have worked at other halfway houses operated by RRK. It is also clear that the Walters memorandum only prohibited the Grievant from working with federal prisoners. Mr. Everett's telling told the Grievant she could no longer work at Independence House in this memorandum suggests that she would be allowed to work at halfway houses where there were no federal prisoners, as opposed to firing her. No resignation would be needed to transfer her to another RRK facility. It seems to the Arbitrator that if Mr. Everett wanted to tell the Grievant that she was being fired then and there, he would not have written

his memorandum the way he did. It seems more logical that he would have written, "She is no longer permitted to work for RRK."

There are additional reasons the Arbitrator does not think Mr. Everett told the Grievant she was being discharged or that she could resign in lieu of discharge. The BOP was telling Independence House the Grievant could no longer work there because she had had an inappropriate relationship with an inmate, because she had submitted false information during an investigation, had regularly used profanity and frequently addressed inmates as "smooches." Some of these charges are fairly vague and to be perfectly frank, seem to be insignificant. The Grievant testified and stated in her affidavit that when she heard the reasons she could not work at Independence House, she got mad. She also gave a reason, albeit, I think, a rather silly one, for not wanting to work at another RRK facility. This, too, is consistent with her not being told she was fired or she could resign. If she was being told she was fired, why was she being offered work elsewhere for the same employer?

I may be too harsh on the Grievant by saying her reason for not wanting to work at another RRK facility is silly. Anyone who has been in a jail or prison has been exposed to slang and foul language. It is easy to see how a person who is told she cannot continue in a job in a halfway house because she used too much foul language or because she called inmates

"smooches" too often could immediately become angry. The Arbitrator thinks this is probably what happened.

There are other problems with the Employer's case. The Employer argued the Grievant was not worthy of belief. In the Arbitrator's mind, at least three witnesses made statements at the hearing which were not believable. These include the Grievant, Warden Garcia and Mr. Everett.

There is an additional inconsistency in the Employer's case. The letter of charges, Joint Exhibit 5, contains the following statement, "However, according to a memorandum dated January 22, 1997, contained in an Office of Internal Affairs investigative file, #1997-00756, you were terminated from employment at Independence House on January 21, 1997." It is noteworthy that the letter of charges uses the word "terminated" in this sentence. Mr. Everett was very clear both in his testimony and his January 22, 1997 memorandum that he offered the Grievant the opportunity of resigning. He only terminated her after she left. The letter of charges suggests she was terminated at the time of the January 21 meeting. I hasten to add that there may be material in that investigative file which I have not seen, but it does seem peculiar that the letter of charges does not more closely track Mr. Everett's January 22 memorandum.

In its post-hearing brief, the Union relied on several cases involving misrepresentations or falsifications made during the application process. The Employer also made reference to instances in which employees who made misrepresentations were discharged and argued the Arbitrator had not authority to do anything but uphold the discharge. The Arbitrator thinks both parties somewhat overstated the case law applicable to this matter in their favor. The Grievant in this case was discharged for "failure to provide accurate information during the pre-employment interview." It became apparent during the hearing that the Employer chose this theory of discharge because its case was weak on evidence regarding the Grievant's intent to deceive. The Employer placed great reliance on Ludlum v. Dep't of Justice, *supra*. That case contains several passages which are important for the disposition of this case. First, the court said:

> Falsification involves an affirmative misrepresentation and requires intent to deceive. Lack of candor, however, is a broader and more flexible concept whose contours and elements depend upon the particular context and conduct involved. It may involve a failure to disclose something that should have been disclosed in order to make the given statement accurate and complete.

Later in its opinion the court also said, "Although the lack of candor necessarily involves an element of deception, 'intent to deceive' is not a separate element of the offense—as it is for 'falsification.'" The court then

analyzed the facts that Ludlum left out of his statement to the FBI investigator. The court noted, "This is not a case of only a minor variation between what was stated and what the true facts were." The court went on to point out that the gross disparity between Ludlum initially said and what he said later was such to warrant the conclusion that there was a lack of candor.

For all practical purposes, the Hoffman case relied by the Employer is identical to Ludlum. The Arbitrator thinks there are essential differences between those two cases and this one. In those two cases, there was fundamental agreement on the original statements the employees made, or to use the phrase from Ludlum, "what the true facts were." Here, "what the true facts were" is really the fundamental dispute that this case revolves around. It is not enough for the Employer to prove Mr. Everett terminated the Grievant after she walked out of that interview on January 21 and the Grievant later told the Employer she had never been terminated by RRK. At a minimum, the Employer has to prove that the Grievant was aware that she had been terminated or that she resigned in lieu of termination. As noted earlier, the Arbitrator does not think the Employer did this. Simply put, the "true facts" are not found in Mr. Everett's testimony or in his January 22 memorandum. If the Grievant walked out of the meeting before Mr. Everett told her she could resign, the true facts as the Grievant knew them were that

she got mad and quit. Otherwise put, if the Grievant did not know she had been terminated or told to resign in lieu of discharge, from her point of view she did not provide inaccurate information during the pre-employment interviews. If the Grievant walked out of the meeting before she was terminated, there is no "element of deception" as required by Ludlum. If a person were asked if he or she had all the "childhood diseases" and answered "yes," I do not think that person would be providing inaccurate information if he or she had not, in fact, had measles and did not know he or she never had that disease. The Grievant did not provide inaccurate information to the Employer. She told the Employer the facts as best she knew them.

There are several things in Mr. Everett's testimony which cast doubt on the accuracy of his testimony. In his testimony he was asked whether he gave the Grievant a copy of Ms. Walter's letter. He said he did not recall at first, then he said, "I believe I did." The Grievant denied receiving such a letter. He did say after he told her she could resign or be terminated, she left the office without giving a meaningful response. She did not tender a letter of resignation. This seems to the Arbitrator to be a bit odd. One would think an agency working under contract with the federal government would want some sort of official documentation in its files when an employee resigns, if

for no other reason than to protect itself against liability for something that happens to that person in the future.

It is also important to note Mr. Everett was asked after she walked out, "Did you consider her terminated at that point?" and he responded, "Well, I made a decision to terminate her at that point." That was after she had left. Mr. Everett also agreed it was hard to recall events that happened fifteen years ago. (Tr. 26). He also said he believed the Grievant brought alcohol into the halfway house but did not state any basis for that conclusion.

When the investigators talked to Mr. Everett during the course of the EEO investigation, he responded that the call lasted "a minute maybe." If one examines Employer Exhibit 3, it is impossible for two people to have had a conversation involving everything Agent Jones wrote in that two-page memorandum in a minute. With that, it should be borne in mind that his response to Jones' question was not something that happened fifteen years ago.

Agent Jones quoted Mr. Everett as saying, "In her mind, she may have quit." However, at the hearing he said he did not recall saying that. On cross-examination, he also said he considered her walking out of the interview to be a "voluntary job abandonment."

Although Mr. Everett was not asked about it at the hearing, Agent Jones asked him if he was willing to testify about his January 21 interview with the Grievant, and Jones recorded his response as, "Yes. Her lies are now questioning my integrity." For a witness who has been presented as one who has nothing to gain or lose by giving truthful testimony, the Arbitrator thinks Mr. Everett was very quick to accuse the Grievant of lying rather than taking the position that in talking about events that occurred fifteen years ago, different people could have different recollections and both think they are telling the truth.

Based on the testimony at the hearing and the documents surrounding the January 21, 1997 meeting between the Grievant and Mr. Everett, the Arbitrator has concluded the Employer failed to establish by a preponderance of the evidence that the Grievant was discharged from her job at Independence House or resigned in lieu of termination.

AWARD

The grievance is sustained. The Grievant is reinstated with back pay.

EDWIN R. RENDER
ARBITRATOR

10/4/13
DATE