AMERICAN ARBITRATION ASSOCIATION

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the
Arbitration Between:

Employer **Case: Roumell #1**,

-and-

Union

APPEARANCES:

For Employer	For Union
F. N., Director, Labor Relations	P. P., Arb. Spec.
R H., Branch Manager	F. M., Grievant
C. S., Secretary	
O. M., Management Asst.	

On August 25, 1992, F. M. signed an application for employment with the Employer. Question 3 on page 2 of this application provided:

> 3. Have you been convicted or have you been in prison within the past 10 years as a result of a felony, and/or are there any felony charges pending against you?
>
> [ ] YES [ ] NO
>
> If you answered YES to the above, explain below when, where, and nature of offense. Felony convictions or indictments will not necessarily preclude you from being employed by this Agency.

This was the last question on the application.

> Under this question, there was the following legend:
>
> CERTIFICATION -- I hereby certify that this application contains no willful misrepresentation or falsification and that the information given by me is true and complete to the best of my knowledge and

> belief. I AM AWARE THAT SHOULD INVESTIGATION AT ANY TIME DISCLOSE ANY WILFUL MISREPRESENTATION OR FALSIFICATION, MY APPLICATION WILL BE REJECTED AND/OR I WILL BE DISMISSED.

In his August 25, 1992 application, F.M. did not answer the question concerning prior convictions. He placed his signature under the above-quoted legend and dated it August 25, 1992.

The fact is that F.M. on April 18, 1985, F.M. was convicted of a violation of MCLA 750.520(c), criminal sexual conduct in the second degree, for which he served 17 weekends in jail and was on probation for three years. Subsequently, on February 24, 1986, F.M. was convicted and sentenced to prison for three and one-half years for criminal sexual conduct in the second and fourth degrees, second offense, MCLA 750.520(c).

F.M., in 1992, pursuant to the above application, was hired at the Agency's Detroit Branch No. 1 as a veterans' local outreach worker. Within six months of his employment, he was promoted and transferred to the Pontiac office as a local veterans' employment representative, where he remained for fifteen months. Thereafter, he took a transfer to the Alpena office, arriving there in July, 1994, working as a local veterans' employment representative.

R.H. has been employed by the Agency for 25 years, the last live years as a manager. In March, 1997, R.H., who had been the manager of the West Branch office, was transferred as manager of the Alpena office. In June, 1997, at the direction of Human Resources. R.H. gave F.M. a notice of an investigation. The notice read:

> To: F. M.
> From: R. H., Branch Manager
> Date: June 20, 1997
> Subject: Investigatory Conference
>
> You are hereby scheduled to attend an investigatory conference at the above address on June 23, 1997, at 1:00 p.m. in the conference room. The issue to be discussed is your employment application dated August 25, 1992.
>
> You are allowed union representation at this conference, if you so choose.

R.H. conducted an investigative meeting at about 1:30 PM on June 23, 1997. R.H., F.M., R. P., the office steward, and R.H.'s secretary were present.

R.H. asked F.M. three questions. R.H. stated: "I asked F.M. if this was a photocopy of his employment application dated 8/25/92." R.H. testified that F.M. responded: "His response to that question, I don't know, I think so." R.H. then asked: "I asked F.M. if his signature appeared in the certification box on the application." F.M., according to R.H., responded "Yes." Then F.M. testified he asked: "I asked F.M. if the information contained on this document was accurate and truthful." Again, according to R.H., F.M. responded: "Yes." F.M. basically agreed that this was the extent of the interview, but suggested there may have been a fourth question concerning a second signature on the application.

Then, R.H. announced "the meeting was over" and closed the investigatory conference. After so announcing, F.M. asked R.H. what specifically on the application was in question. R.H. responded that it was his answer, question no. 3 concerning any criminal record. F.M. then stated that when he had his employment interview with R.H. in Detroit, he explained his criminal record.

F.M. testified that during the answering of questions, he noticed that R.H.'s secretary was taking notes, as was R.H..

Following this interview, there was a disciplinary meeting on July 22, 1997, at which time F.M. was notified of a five working day suspension. F.M., through his union, has grieved the suspension maintaining that it as not for just cause, the standard set forth in the parties' applicable 1996-1998 Collective Bargaining Agreement. See, Article 18, Section 2.

F.M. readily acknowledges that he did not answer question no. 3; that he did sign the certification that the application was "true and complete." The application, obviously, was not complete because F.M. did not reveal his criminal record. F.M. stated that when he was interviewed by R. H. at the Detroit Office, before his employment there, he told R.H. of his criminal record. F.M. explained that the reason he did not answer question no. 3 was because he wanted the opportunity to explain to an interviewer the details of his criminal record, which he did to R.H.. F.M. was employed by R.H.; he maintained that during the course of his six months in Detroit, he and R.H., on one or two occasions, discussed his criminal record and his survival while in prison.

F.M. also stated that when he applied for the Alpena job, he actually went to Alpena and met with the branch manager and a supervisor, and told them of his criminal record. He was accepted for transfer.

As the persons to whom F.M. revealed his criminal record had all retired and apparently were not available to the Agency for testimony, this Arbitrator became concerned that F.M.'s testimony could be self-serving. However, R.H., while branch manager at West Branch, also had occasion to interview F.M., who had applied there to become a veterans' representative. R.H. testified that F.M. did prepare an application similar to the application he prepared on August 25, 1992

and that that application contained the same question 3; that F.M. again did not answer question 3, though he did sign the legend indicating that the application was true and complete.

R.H. acknowledged that F.M., during the interview, revealed the details of his criminal record. This action is consistent with F.M.'s testimony that he did the same thing with R.H. and again when he transferred to Alpena. For this reason, the Arbitrator is persuaded that F.M. had been truthful in his testimony concerning revealing his criminal record.

At the time of F.M.'s discipline hearing, he agreed to amend his application. The amended application read:

> 3. Have you been convicted or have you been in prison within the past 10 years as a result of a felony, and/or are there any felony charges pending against you?
>
> [X] YES [ ] NO
>
> If you answered YES to the above, explain below when, where, and nature of offense. Felony convictions or indictments will not necessarily preclude you from being employed by this Agency.
>
> WHEN: Conviction and subsequently sentenced on 2/18/95.
> WHERE: 20th Judicial Circuit Court, Ottawa County MI
> NATURE OF OFFENSE: Violation pursuant to MCLA 750.250(c), served 17 weekends in jail.
>
> WHEN: Conviction and subsequently sentenced on 2/24/96.
> WHERE: 20th Judicial Circuit Court, Ottawa County, MI
> NATURE OF OFFENSE: Violation pursuant to MCLA 750.520(c), served 3 1/2 years in prison.

This application had two signatures: one dated 8/25/92, and another dated 7/26/97, the date of the amendment.

As already suggested. F.M. signed a certification that was incorrect. The legend on the application does provide." I hereby certify that this application contains no willful misrepresentation or falsification and that the information given by me is true and complete to the best of my knowledge and belief." Without answering question 3, the application was not complete, and the certification was therefore inaccurate. The whole idea of the legend is for the Agency to receive all information concerning an applicant in order to make initial judgments in processing the application. F.M., by his actions, deprived the agency of this opportunity. However, as noted, F.M. did, before being employed, reveal the details of his criminal record.

The disciplinary action here came five years after the event. During these five years, F.M., on at least three occasions, revealed his criminal record to agency interviewers who were considering him for employment or transfer, namely, R.H., the Alpena manager, and R.H. himself.[1] It is not clear as to what prompted the investigation five years after the application. F.M. speculated that it followed some public statements he made, but this is mere speculation and is not a factor in the Arbitrator's decision.

Falsification of applications by job applicants are usually divided into two categories, as explained in Discipline and Discharge in Arbitration, Brand, ed. (BNA. 1998) at 243:

> As a general principle, arbitrators agree that discipline is warranted when the evidence supports a finding that an employee falsified an employment applicant or other documents attendant to the initial employment processes, such as a medical history form. Falsification in this context generally falls into either of two types; willful acts of "commission" and deliberate acts of "omission." "Commission" occurs when an employee knowingly provides incorrect information to an inquiry. "Omission" occurs when an employee knowingly withholds information or provides answers that intentionally are incomplete, thus misrepresenting and misleading an employer. Arbitrators often are called upon to distinguish between such deliberate and willful acts of either "commission" or "omission" that involve an intent to defraud and situations where no intent to defraud is manifested. These situations include lapses of memory, oversights, inadvertent errors, poor judgment, or good faith misunderstandings as to how to answer.

Here, there can be little question that F.M. committed a deliberate omission when he failed to answer yes to question 3 concerning his conviction of a felony. It is not uncommon for employers to discharge employees whose applications are discovered to be false, even though the employee has worked for some time for that employer. See, for example, Utility Trailer Manufacturing Co., 85 LA 643 (1985), where Arbitrator Brisco upheld a discharge where the employee was discharged 23 months after employment after discovery of concerning a former back condition when the employer was faced with a disability claim. In American Commercial Vehicles, 107 LA 1 (Bittel, 1996), a discharge that occurred approximately nine months after hire was upheld after discovery that an employee failed to reveal his criminal record on his employment application, even though the applicant claimed that he clarified his conviction during his job interview.

However, there is a suggestion among arbitrators that if the discharge occurred over a year after the event, there is an inclination not to sustain the discharge,

but in such cases, there is a reinstatement without back pay, as for example in Arbitrator Turkus' opinion in Kraft Food, 50 LA 161 (1967), where there was a false answer to questions about prior injuries on an employment application, but the employee had 34 months of satisfactory service.

Here, F.M. did not reveal his felony convictions at the time he applied in 1992 on his application, though he did tell the interviewers on at least three different occasions, when he was initially interviewed and when he sought promotions and/or transfers, of the felonies. In a case similar to this, where the applicant did not include criminal information on an application that was made verbally known to the interviewer and as a result, Arbitrator D.L. Howell, in Ball-Foster Glass Container Co., 106 LA 1209 (1996), wrote at 1215-1216:

> ... The Grievant was terminated for "falsifying his employment application." The Company contends the Grievant marked "no" to the felony question on the Employment Application. The Grievant, his mother, and Bullock state the felony question was left blank on the advice of Bullock. It has already been ruled and discussed. however, that the Company had knowledge through Bullock of the Grievants arrest and/or conviction on a drug felony charge before he was permanently employed by the Company. The Grievant was employed on February 9, 1993, and was terminated June 8, 1995, for "falsifying his employment application." If the Company through a responsible representative, overlooked the Grievant's arrest and/or conviction on a drug felony charge and the related misrepresentation on the Employment Application, and proceeded to employ him anyway, it would hardly appear just to raise this offense as a basis for discharge two and one-half years later. (See Tubular Product Co., 26 LA 914) In other words, a company cannot be aware of an incorrect entry on an application form, and either accept or knowingly ignore the incorrect entry, then decide several months later to terminate the employee for falsification of the application form. This is not acceptable industrial jurisprudence. This is different from a situation where a company learns of a falsification and several months ago, but takes immediate action after learning of the falsification.

Thus, Arbitrator Howell reinstated the grievant who had worked for the company for over two years as a full time employee, and was a part time employee for two years prior to that. Nevertheless, despite the fact that employer representatives at the time of the application knew of the conviction, Arbitrator Howell did not provide for back pay, resulting in a suspension over one year, and in doing so wrote at page 1216:

> On the other hand, the Grievant is by no means faultless in this case. The Grievant was charged with attempted distribution of Schedule 1 CDS. He

> was convicted and sentenced to five (5) years at hard labor (labor changed to five (5) years probation), fined over $4,000, and sentenced to serve six (6) months in the parish jail. This was only a few months prior to completing the Company's Employment Application. Both the Grievant and his mother knew there was a problem if the felony question were answered truthful on the Employment Application. That was the reason for going to Bullock to get his advice on what to do about answering the question. It should be stated here that even if Bullock told the Grievant to leave the felony question blank. and the question was in fact left blank. the Grievant was guilty of being a party to misrepresentation because he knew that the question should be answered. and the correct answer was "yes", not "no", or left blank. As to the Grievant, he was also guilty of willful misrepresentation/falsification on the application form per se even if Bullock did suggest he leave the answer to the felon question blank. Even if Bullock did have knowledge of the arrest and/or conviction as already ruled above, the Grievant should have completed the Employment Application in an honest and truthful manner.
>
> * * *
>
> ... When a company hires a person with the knowledge there is a falsification on the employment application, this same falsification may not be used a cause to discharge the employee several months later. Under all the facts and circumstances of this case as explained in detail above, it the Arbitrator's opinion that while there is a sufficient basis for the imposition of a stem disciplinary penalty upon the Grievant, the penalty of discharge is not warranted. The Grievant precipitated his difficulty by his actions, including being a party to misrepresentation/falsification of his Employment Application. Therefore, on the basis of the above reasoning, the Arbitrator award that the Grievant should be permitted to return to work without loss of seniority, but no back pay. the period since his discharge on June 8, 1995, until his reinstatement shall be considered as a disciplinary suspension. Furthermore, it is my opinion that he disciplinary supine that occurred should be made a part of his record. The Grievant and the all employees should recognize that the Grievants actions were serious, and that falsification of Company records and drug related problems may subject a person to disciplinary action up to and including discharge. . . (emphasis in original)

This has been the approach of other arbitrators. Thus, in Tubular Products Co., 26 LA 913, (Donnelly, Ch., 1956), an employee of five years was discharged after it was discovered that did not list upon his employment application a former employer from which he had been discharged for theft, but was reinstated by the arbitrator as the employer knew at the time of the application of the criminal conviction. However, the reinstatement was without back pay. For similar results, see, Gold Kist, Inc., 77 LA 569 (Stratham, 1981), where the grievant was reinstated without back pay after a prior conviction was not recorded on his employment application, but the form was actually filled out by an interviewer to

whom he revealed his conviction and who chose not to enter the information on the form.

On the other hand, there are two cases where the arbitrator not only set aside the discharge for a falsification of the application, where the company knew of the facts at the time of the application, but reinstated the employee with full back pay. One was Arbitrator William C. Heekin's decision in Plymouth Tube Co., 108 LA 1016 (1997), where in setting aside a discharge and granting full back pay, wrote at 1019:

> Critically, the falsification at issue occurred eleven (11) years ago, more than a decade before this discharge action was taken in response. Moreover, throughout his long tenure with the Company, the evidence gives no indication that the Grievant was other than trustworthy, depute apparently having deliberately falsified an employment application regarding not graduating from high school (there is no reason to be gathered from the evidence for concluding anything other than an intentional falsification occurred in this matter). Also, it is worth noting that, when confronted with all of this, the Grievant made no attempt to deny not having graduated. Thus, his not having graduated from high school. and apparently not having been honest about it in the employment application process, is not understood to have harmed the Company regarding its main interest in employing only honest and productive workers. Simply put, the evidence does not support not having a high school diploma, and to not have been truthful about this fact on an employment application, prevented the Grievant from honestly and productively carrying out his assigned tasks for the next eleven (11) years. (emphasis in original)

The second was Arbitrator McCoy's decision in Shell Oil Co., 14 LA 274 (1960), where the employee had omitted the fact that his father worked for the company. and four years had passed the since the date of hire. Arbitrator McCoy took the position that the company had to know this information at the time of the hire. and reinstated with full back pay.

But it is one thing to work for a company for 11 years with an excellent record and omit, in the application, that the employee did not have a high school education, or omit that a family member worked for the company, and it is another thing to fail to reveal on an application two felony convictions which included incarceration in jail, particularly when there was a certification that the application was "true and complete".

This Arbitrator has reviewed the arbitrable authority in this area to get a sense of what has been construed as a definition of just cause in a situation such as he is facing with F.M.. There is no question that if F.M. had been terminated, he would have been reinstated. There is, however, a serious question of whether he would have received back pay, because this situation is more akin to Plymouth Tool,

and such cases as Tubular Products Co., and even the decision in Kraft Foods, involving a previous injury, than failure to reveal a lack of a high school education after 11 years of service, or failure to reveal a family member is working for the company. F.M. had a criminal record that the Agency was entitled to have revealed on the application. Otherwise, there would be no need for the certification.

There is no question that F.M. was a fine employee, and was hoping to "get in the door", so that he could verbally explain his situation. Apparently he was able to do so successfully, for he was hired, and was transferred twice and promoted once, with his managers knowing of his criminal record.

Nevertheless, arbitrable authority suggests that arbitrators, though recognizing, particularly after one year of service, and in this case five years of satisfactory service, will not support discharges, but have refused to give back pay, which have resulted in suspension of several months or more.[2] This is in recognition that applications are to be truthful, so that, as one arbitrator explained, even though reinstating the employee:

> It should be stated here that even if Bullock told the Grievant to leave the felony question blank, and the question was in fact left blank, the Grievant was guilty of being a party to misrepresentation because he knew that the question should be answered, and the correct answer was "yes", not "no", or left blank. As to the Grievant, he was also guilty of willful misrepresentation/falsification on the application form per se even if Bullock did suggest he leave the answer to the felon question blank. Even if Bullock did have knowledge of the arrest and/or conviction as already ruled above, the Grievant should have completed the Employment Application in an honest and truthful manner. [Ball-Foster Glass Container Co., 106 LA 1209, 1216 (Howell, 1996)]

Here, there was a five working day suspension. As the Arbitrator began reviewing the arbitrable authority, this authority would suggest that the employer, here the State of Michigan, for the integrity of the application processes, could, within the concept of just cause, discipline. True, discipline is to be corrective. See, Discipline and Discharge in Arbitration, Brand, ed. (BNA, 1998) at 57. F.M., by the time this case came to arbitration, was no longer employed by the State of Michigan, by his own choice. Nevertheless, under the definition of just cause, it would seem that, to makes it point, not only to F.M. but to any other employee, or potential employee, that one cannot expect, without some expectation of corrective discipline, to falsify an application.

The Arbitrator could attempt to distinguish this case from the arbitrable authority by suggesting that the information was more widely explained to management than in the cases cited above. vis a vis the subsequent interviews in which F.M. was forthright. This perhaps was a factor in the decision not to discharge, and a

modest discipline of five days. True, a five day loss of revenue for an employee is serious. But a certification on an application, certifying that it is true, when in fact it was not true, was likewise from the employer's standpoint a serious deviation of what is expected from an applicant. Perhaps F.M. should have answered the question truthfully and attached a detailed description of the explanation he intended to give to management. But the Agency was entitled, as the employer, to get a true answer.

The discussion in Tubular Products Co., Plymouth Tube CO., and Kraft Co. all lead to this conclusion. F.M. was fortunate that the discipline was not more severe, or that he had to wait while discharged for several months to have his case arbitrated, and then be reinstated without back pay.

In reaching this result, the Arbitrator has considered the challenge to the investigation. It may not have been a perfect investigation within the meaning of the contract, but F.M. was able to acknowledge that the application was his. It would have been preferable to allow him to give a more detailed explanation. and in another situation this Arbitrator may have bee persuaded to set aside the discipline, based upon this inadequate interview. But the fact is that a procedural violation must have effected the results. See, Henry Vogt Machine Co., 66-2 ARB ¶ 8495. (Stouffer, 1966). There is no indication here that the results could have been effected by a more adequate interview; the five day suspension was mild, in comparison, to the discharge that normally results after falsification of an employment application.

The Award that follows is based upon the above analysis.

AWARD

The grievance is denied.

GEORGE T. ROUMELL, JR.
Arbitrator

DATED: October 9, 1999

[1]The date of this interview with R.H. in West Branch is not clear from this record, for R.H. did not remember. However, it appears that it may have been during the same time period F.M. was being interviewed for the Alpena transfer.

[2]Arbitrators have relied differently upon the lapse of time between hire and the time of discovery. For example. in Huntington Alloys. Inc., 74 LA 176 (Katz, 1980), the arbitrator upheld a discharge for falsification almost eight years after the falsification, but in National Vendors, 67 LA 1043 (Edlelman. 1976), the arbitrator reinstated the employee after more than four years of employment after the falsification. Historically, a one year "statue of limitations" was applied to

application falsification. See, Ford Motor Co., Opinion No. A-184 (Shulman, 1945), and see, Discipline and Discharge in Arbitration. Brand. ed. (BNA, 1998) at 247-249. "[a]lthough modern cases revisit the “1-year rule,", the prevailing contemporary approach to the impact of the duration of time between falsification and discovery is simple and direct: the longer the time between falsification and discovery, the more likely it becomes that the arbitrator will be persuaded by extenuating or mitigating circumstances and will apply a modified version of the punishment theory for the falsification.", at 248, footnotes omitted. But even in Ford Motor Company, where Umpire Shulman announced the one year rule, thereby reinstating the employee, the reinstatement was without back pay.