

ARBITRATION DECISION NO:

675

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

State Medical Board of Ohio

DATE OF ARBITRATION:

DATE OF DECISION:

June 1, 1998

GRIEVANT:

Heath Fox

OCB GRIEVANCE NO.:

42 00 (97 06 02) 0008 01 09

ARBITRATOR:

John J. Murphy

FOR THE UNION:

Brenda J. Goheen

FOR THE EMPLOYER:

Gabriel J. Jiran, Legal Counsel

KEY WORDS:

Falsification of Employment History

Notice of Charges

Removal Notice

Right of Union Representation

ARTICLE:

Article 24 – Discipline

§24.01 - Standard

§24.02 – Progressive Discipline

§24.04 – Pre-Discipline

FACTS:

The grievant was a Reproduction Equipment Operator I at the State Medical Board of Ohio. The Employer removed the grievant for dishonesty and misrepresentation. When the grievant applied for a promotion to Licensure Assistant, the State discovered discrepancies on his promotion application and initial employment application.

The Ohio National Guard reported that the grievant served until November 16, 1988 when he was

discharged to enter the "regular Navy." The grievant reported that his service at the Ohio National Guard lasted until February of 1990. He stated that his reason for leaving was that his "tour of duty was complete." Additionally, the grievant noted in his promotion application for the Licensure Assistant position that he had worked for FLEX Temp from February of 1989 to February of 1990. The information provided by FLEX Temp reported that they employed the grievant from March of 1990 until November of 1991. The grievant was removed for falsifying his work history.

EMPLOYER'S POSITION:

The Employer argued that the grievant was not denied due process in the procedures that ultimately lead to removal. The Employer asserted that: 1) The March 24, 1997 meeting was not an investigatory interview, and the grievant did not request representation. 2) The grievant received proper notice of the pre disciplinary meeting. The grievant was informed of the nature and possible consequences of the meeting.

The Employer also asserted that the grievant received a fair investigation; the evidence supports the conclusion that the grievant was dishonest, and he falsified his employment history. The Employer held that the grievant misrepresented the date and reason for leaving the Ohio National Guard as well as the dates and nature of employment at FLEX temp.

Additionally, the Employer asserted that the information received from the US Navy is admissible at arbitration even though it was received subsequent to the grievant's discharge. The information from the Navy shows that the grievant was "discharged for procuring a fraudulent enlistment."

UNION'S POSITION:

The Union raised several procedural issues. First, the March 24, 1997 meeting was an investigatory interview, and the grievant was entitled to union representation under National Labor Relations Board v. I Weingarten, Inc. 420 U.S. 251 (1975); In re City of Cleveland SERB 97 011 (6 30 97). Additionally, the grievant did not request union representation because he believed the meeting concerned his promotion.

Second, the grievant was given insufficient notice of the charges against him in the notification letter of the Pre-Disciplinary Meeting and in the removal letter of May 22, 1997. See Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985). Because the language of the removal letter was in the singular, referring to the initial application, the arbitration should be limited to the information concerning the Ohio National Guard. The Pre Disciplinary Meeting letter did not list the grievant's omission of employment by FLEX Temp.

Third, the grievant did not have a fair investigation. The grievant was asked by his superior to falsify his employment history. Therefore, the Employer should be estopped from removing the grievant on this ground.

In addressing the merits, the Union argued that the State did not have just cause to remove the grievant because the grievant did not attempt to defraud the Employer. The Union argued that the grievant obtained no advantage from the incorrect information, and therefore, had no motive to deceive. In the initial job application, the grievant was hired before he supplied the information; therefore, he did not benefit from the incorrect information. Similarly, in the promotion application, the grievant was not awarded the job; therefore he obtained no benefit from the mistakes.

Finally, the Union argued that the State could not present the Navy discharge information because the State obtained the information after the grievant's discharge.

ARBITRATOR'S OPINION:

Addressing the procedural issues, the Arbitrator held that the mistakes related to FLEX Temp were oversights. The Arbitrator based this determination on the fact that the grievant and his supervisor were aware that the grievant was employed by FLEX Temp while the grievant worked for the State. The Arbitrator then rejected the Union's estoppel argument on the grounds that there was no evidence that the supervisor had requested that the grievant supply incorrect information. The Arbitrator also rejected the Union's assertion that the grievant did not request a union representative. The Arbitrator noted that the grievant was aware that he was under investigation for document falsification, and he should have been aware of the nature of the meeting. Additionally, the Arbitrator rejected the Union's argument that the grievant was not given adequate notice that his removal was based on the falsification of the employment application and promotion application. The Arbitrator also noted that the grievant was given a charge from the Employer that addressed the falsification of both applications, which was sufficient notice.

Addressing the merits, the Arbitrator held that the grievant had falsified his work record related to his employment with the Ohio National Guard. The Arbitrator went on to determine that the nature of the grievant's work necessitated honesty. Moreover, the Arbitrator concluded that the Employer would not have employed the grievant if it had been aware of his misrepresentations. The Arbitrator rejected the argument that the Employer failed to exercise its duty to ferret out false applications, and that it was using its discovery to free itself of the grievant.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

* * *

In The Matter of the Arbitration

between

The State of Ohio

and

Ohio Civil Service Employees Association,
AFSCME Local 11

OPINION AND AWARD
Heath Fox Removal Matter
42-00-(970602)-0008-01-09

ARBITRATOR: John J. Murphy
Cincinnati, Ohio

APPEARANCES:

FOR THE UNION: Brenda J. Goheen
Staff Representative
OCSEA, AFSCME, Local 11

1680 Watermark
Columbus, Ohio 43215

Also present:

Heath Fox
Grievant

Jewel Bates
Employee, State Medical Board of Ohio

Regina Bouldware
Licensure Assistant, State Medical
Board of Ohio

Marva McCall
Union Representative

FOR THE STATE
MEDICAL BOARD:

Gabriel J. Jiran
Legal Counsel
Office of Collective Bargaining
106 North High Street, 7th Floor
Columbus, Ohio 43215-3009

Also present:

Kris Goodman
Human Resources Officer

Anand Garg, M.D.
Member, State Medical Board of Ohio

Lauren Lubow
Case Control Officer

* * *

FACTUAL BACKGROUND:

This case involves an Employee who admittedly misstated facts and omitted facts in his initial employment application. He repeated the same misstatement and omission in an application for promotion five years later. The discrepancies were discovered by the Employer after investigating the entries in the promotion application a task the Employer did not undertake with the initial application. The question becomes whether the Employer has just cause to discharge the Employee for falsification of the employment and/or promotion application.

A) The Promotion Posting and the Grievant's Application

On January 24, 1997, the State Medical Board of Ohio posted a vacant position as Licensure Assistant. The posting and the position description by the Ohio Department of Administrative Services stated that the duties include independent review of applications and credentials for physicians and other medical personnel. This includes verifying prior work experience and noting any gaps in dates in work history and education. The pertinent minimum qualifications included two years experience in secretarial or administrative positions, and one course or three months experience in typing, word processing or data entry using IBM compatible computer.

The posting was an open posting calling for responses by persons employed by the State Medical Board, or persons employed by the State of Ohio, or from persons without any current association with the Board or the State. The posting required all applications **1**

to be submitted on "a completed, notarized Ohio Civil Service application.,, (Emphasis in the posting itself.)

In filling posted vacancies, the State Medical Board gives first consideration to applications from persons already working within the Board. If these inside applications do not meet minimum qualifications, then the Board reviews applications from other Ohio employees, and finally outside applications.

The Grievant and another employee of the State Medical Board submitted notarized Ohio Civil Service applications for the posted position of Licensure Assistant. The Ohio Civil Service application is a multi page application that requires the applicant to appear before a notary public for signature and for the following oath that appears in print above the signature.

APPLICATION WILL NOT BE ACCEPTED IF THIS OATH IS OMITTED. YOU MUST PERSONALLY APPEAR BEFORE A NOTARY PUBLIC OR OTHER AUTHORIZED OFFICIAL FOR THIS PURPOSE.

I solemnly swear or affirm that the answers I have made to each and all of the questions in this application are complete and true to the best of my knowledge and belief. I hereby waive all provisions of law forbidding my physician or other person who has attended or examined me or who may hereafter attend or examine me, colleges or universities which I attended, or past employers, from disclosing any knowledge or information which they thereby acquired relevant to my employment and I hereby consent that they may disclose such knowledge or information to the Division of Personnel, Department of Administrative Services.

Within the body of the application the Grievant noted that his current Employer was the State Medical Board, and that he had the position of Reproduction Equipment Operator 1. The Grievant entered FLEX Temp as his next most recent employer with his length **2**

of employment at FLEX Temp from February 1988 to February 1990. With respect to duties performed, the Grievant entered "various duties and positions as Computer Operator."

The third employer listed was the Ohio National Guard from February of 1986 to February of 1990. With respect to the reason for leaving, the Grievant entered "tour of duty was completed."

Because of the significant trust placed on Licensure Assistants by the State Medical Board, both of the insider applications, including the Grievant's, were reviewed for accuracy. Discrepancies were discovered in the Grievant's application but not in that of the other insider application. First, the National Guard provided information to the Board that the Grievant had been discharged on November 16, 1988 for the following reason: "enlistment in regular Navy." Secondly, FLEX Temp informed the Board by letter that the Grievant started with their service on March 22, 1990 and had worked two days on an assignment. The extent of this

employment record with FLEX Temp included one other assignment on May 31, 1991 that lasted approximately 7 months.

B) The Grievant's Initial Employment with the State medical Board

The Grievant first arrived at the State Medical Board through an assignment by his employer, FLEX Temp, on May 31, 1991. He remained a FLEX Temp employee while working at the State Medical Board for 7 months. He was then hired as a temporary employee by the Board toward the end of 1991, and became a permanent employee on March 9, 1992 as a clerk. **3**

On March 10, 1992, the Grievant was asked by his superior Sandra Caldwell to complete a notarized Ohio Civil Service application. The Grievant's notarized signature and oath were made on March 10, 1992.

When the Board discovered discrepancies in the Grievant's 1997 application for promotion to the position of Licensure Assistant, the Board reviewed his initial employment application filed on March 10, 1992. The initial application has no reference to the Grievant's current or prior work with the State Medical Board, and is silent about his work for FLEX Temp.

The Grievant, however, did enter the Ohio National Guard as an employer from February of 1986 to February of 1990. His reason for leaving the Ohio National Guard was "my time was done servicing., The information received from the National Guard in 1997 raised the question of discrepancies in the Grievant's reference to the National Guard in his initial employment application on March 10, 1992.

When the Board discovered apparent discrepancies in the Grievant's reference to the Ohio National Guard and FLEX Temp in the promotion application, and apparent discrepancies in the Grievant's reference to the Ohio National Guard in his 1992 initial application, the Grievant held the position as Reproduction Equipment operator 1 at the State Medical Board.

On complaint, the State Medical Board conducts investigations of doctors and other medical professionals. The complaint and the work product of the investigations are confidential by state law **4**

until they are made part of the public record. The Grievant, as Reproduction Equipment Operator 1 was responsible for photocopying the documents pertaining to the investigation, subpoenaed records, and evidence for review by experts to determine violation of law.

C) The Disciplinary Trail

The Grievant was not promoted to the position of Licensure Assistant; the position was awarded to the other inside applicant. what happened to the Grievant was a disciplinary trail that ultimately led to his discharge from his position as Reproduction Equipment Operator 1 effective May 28, 1997. His discharge is the subject of this arbitration.

The disciplinary trail began shortly after Sandra Caldwell and the Human Resources Officer Kris Goodman discovered the apparent discrepancies in the Grievant's application for promotion in January of

1997 and the Grievant's initial employment application on March 10, 1992. The Grievant was summoned to a meeting on March 24, 1992 with Ms. Caldwell and another supervisor. He was asked to explain the discrepancies, to provide documentation for the dates he had listed, and asked for his permission to obtain records of his service in the United States Navy. No Union representative was present during this meeting, nor did the Grievant request Union assistance.

On the same date, March 24, 1992, the Grievant was sent a notice of a Pre Disciplinary meeting to be held on April 7, 1997. The notice began with the allegation that the Grievant falsified two employment applications: one certified by you on 3/10/92 when **5**

you applied for your original position with the State medical Board and one certified by you on 1/16/97 when you applied for promotion to Certification/Licensing Examiner 2 with the State Medical Board of Ohio. The notice referred to the statement "in both applications that your dates of employment with the Ohio National Guard were February 1986 to February 1990."

The alleged falsification in both applications was stated as follows:

Verification with the Ohio National Guard shows that you were in the National Guard from February 1986 until November of 1988 at which time you were to enter the United States Navy.

A second allegation of falsification applied only to the "employment application certified by you on 1/16/97." It "shows that you were a computer operator with FLEX Temp Employment Services, Inc. agency from 2/88 until 2/90. The alleged falsification was:

Verification with that agency shows that you were on one assignment with them for two (2) days in 1990 and an assignment starting in May of 1991 as a Copy Assistant with the State Medical Board of Ohio.

The pre disciplinary meeting was held on April 8, 1997 before Kris Goodman, Human Resources Officer, with the Grievant in attendance, represented by the Union. The hearing officer extended time to the Grievant to Wednesday, April 16, 1997, to supply any documents. On April 21, 1997, the hearing officer submitted a report and concluded that "there is sufficient proof to proceed with discipline."

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The State Medical Board reviewed the report of the pre disciplinary meeting, and in a removal letter dated May 22, 1997, the Board's president reported a determination "that just cause exists for your removal from your duties." The letter concluded: "that you were dishonest and falsified your employment application.

STIPULATED ISSUE:

Whether just cause exists for the discipline imposed on the Grievant, and if not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS AND BOARD RULES:

A) Contract**ARTICLE 24 DISCIPLINE****24.01 Standard**

Disciplinary action shall not be imposed upon an employee except for just cause

24.02 Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

- A. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. one or more written reprimand(s).;
- C. a fine in an amount not to exceed two (2) days pay for discipline related to attendance only; to be implemented only after approval from OCB;
- D. one or more day(s) suspension(s);
- E. termination

24.04 Pre Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

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B) Board's Disciplinary Policy

<u>Violations</u>	1st	2nd	3rd	4th
17. Falsification of Removal any document, including expense reports.	Suspension or Removal	Removal		
30. Dishonesty	Suspension or Removal	Removal		

POSITIONS OF THE PARTIES:A) Union Position

The Union raised several procedural claims. First, the March 24, 1997 meeting with the Grievant and two supervisors, Caldwell and Barr, was an investigatory interview. As such the Grievant had a right to Union representation under National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251 (1975); In re City of Cleveland SERB 97 011 (6 30 97) . The Grievant did not request Union representation at this meeting because he thought the meeting was called to discuss his promotion application.

The second procedural claim was based upon Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) Based on this case, the Union argued that the Grievant was given insufficient notice of charges against him in two instances the removal letter by the Board dated May 22, 1997, and the notice of Pre Disciplinary meeting dated March 24, 1997.

The removal notice charged that the Grievant was dishonest and falsified "your employment application. The word "application" is in the singular and can only refer to the Grievant's initial
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application dated March 10, 1992. The application dated in January of 1997 was an application for promotion under Article 17.04 of the contract. The removal notice, consequently, does not adequately notify the Grievant that he was being removed for dishonesty and falsification in his application for promotion. Therefore, the arbitrator should limit the case only to the reference to the Ohio National Guard dates of employment on the initial employment application.

The second part of the Loudermill claim concerns notice in the Pre Disciplinary Meeting letter of March 24, 1997. The notice does not list the Grievant's omission of employment by FLEX Temp on the initial employment application. However, the hearing officer refers to this omission in her report. Therefore, the Grievant did not have adequate notice that he was being charged with the omission of FLEX Temp on the initial employment application.

The third procedural claim is that the Grievant did not have a fair investigation. The Grievant testified that his superior, Caldwell, asked him to omit FLEX Temp employment on the initial application to save the Board from paying a finder's fee. Since the Board requested the Grievant to falsify his initial application, the Board should be estopped "from now removing him for his applications, errors in fact." (Union post-hearing brief at 10).

The second claim of an unfair investigation centers on the admission at the arbitration hearing by the human resources officer of her mistake in the minimum qualifications for the job of
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Certification/Licensing Examiner 2. when she was appraising the Grievant's promotion application, she

assumed that the minimum qualifications required two years of computer experience. In fact, the minimum qualifications required only one course in computers or three months of experience.

Turning to the merits, the Union urged that the Board did not have just cause to remove the Grievant. The Grievant did not attempt to defraud the Board. The National Guard information in the initial application was incorrect, but the Grievant did not gain by this information because he had already been hired on March 9. Since he had already been hired a day before he provided the incorrect National Guard information, this information, albeit incorrect, was not a factor in the employment decision. In addition, military experience was not a qualification for the job for which the initial employment application was submitted.

With respect to the promotion application, the National Guard information was again incorrect. There was, however, no gain to the Grievant from this incorrect statement because he was not awarded the promotion.

The Employer did not have a right to information about the Grievant's service record with the United States Navy. Furthermore, information on this subject obtained by the Board subsequent to the Grievant's discharge should not be considered by the arbitrator. The propriety of the discharge should be determined from an analysis of what the Board knew prior to its decision to discharge.

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Lastly, it is "ridiculous" for the Board to claim that the reference to employment for two years by FLEX Temp is an attempt to defraud the Board. Temporary agencies simply do not require you to work every day.

B) Board Position

The Board responded to all the procedural claims of the Union. First, the Grievant did not have a right to Union representation at the March 24, 1997 meeting because the elements of such a right were not present. The meeting was not an investigatory interview, and, if it were, the Grievant did not request Union representation.

The notice of Pre Disciplinary meeting was proper and gave ample information to the Grievant of the charges against him. With respect to the removal notice, this notice does refer to employment application in the singular. However, the Grievant was not denied any due process rights. First, Loudermill does not speak to the adequacy of the notice of a decided, disciplinary action. Also, the preceding disciplinary hearing clearly informed the Grievant that the prospect of discharge was being considered because of alleged falsifications in both employment applications.

The Grievant was accorded a fair investigation, and the evidence supports a finding of dishonesty and falsification by the Grievant. In both applications he omitted the fact that he was discharged from the National Guard in November of 1988, and that he had entered the United States Navy in 1988. In addition, he stated that he was a computer operator with FLEX Temp for two years when

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in fact he had worked on a 2 day assignment with them prior to his assignment for seven weeks as a clerk for the Board.

Lastly, the Employer received from the Grievant a few days before the hearing a Form DD 214 setting forth his date of entry into the Navy as November 29, 1988 and his discharge on January 31, 1989. According to the Board, information on this document indicates that the Grievant was discharged for procuring a fraudulent enlistment. While this information was obtained by the Board subsequent to the Grievant's discharge, this information may be considered in the arbitration.

OPINION:

A) The Procedural Issues

The Union put the Board on trial at least by claiming the Board requested the Grievant to falsify his initial employment application in 1992. "It is striking that they (the Board) want to charge him with leaving his navy time off his application when it suited them (the Board) just fine for him to leave off his Flextime on his original application." (Union post hearing brief at 16). The evidence does not support the claim. It is based on the oral testimony of the Grievant with his superior Caldwell occurring in March of 1992, who did not testify because she is on disability leave from the Board. The Grievant's testimony is questionable in light of the document itself. It also incredibly suggests that his superior in an agency devoted to conducting sensitive, confidential investigations of physicians would request an applicant to lie on an application.

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The original employment application was completed by the Grievant after he had been working at the State Medical Board for ten months. His first seven months (May through December, 1991) occurred on assignment to the Board from FLEX Temp; the next five months as a temporary employee of the Board. Not only does this application contain no reference whatsoever about the Grievant's prior employment by the State Medical Board, it is silent about his work FLEX Temp. This is quite understandable given the fact that he completed the application while employed by the Board. He did this on the request of a supervisor who dealt with him as an employee during the preceding ten months that he acted as a clerk for the Board. Therefore, both the applicant (the Grievant) and the supervisor (Caldwell) viewed his application as occurring in the midst of his work at the Board both as an employee of the Board as an employee of FLEX Temp.

This is the reasonable implication from the silence of the initial application of any prior employment by the Board by FLEX Temp. The Grievant's testimony leaves unexplained the omission of any reference to employment by the Board, and explains the omission of a reference of employment by FLEX Temp on the basis of a requested lie by his supervisor.

A more serious procedural question is raised by the claim that the Grievant was denied his right to Union representation during his March 24, 1997 meeting with his supervisor, Caldwell, and another supervisor. The record contained a representation attributed to Caldwell in the report of the pre disciplinary

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hearing that the March 24 meeting was not an investigatory interview. The State Employment Relations Board, however, in In re City of Cleveland, SERB 97 011 states the test for whether the meeting is investigatory. "A meeting is investigatory if its purpose is to elicit information pertaining to the conduct of the employee being interviewed." Id. at 3 68. This meeting was an investigatory interview. First, on the same

day March 24, 1997 the Employer issued a notice of a pre disciplinary meeting to the Grievant with charges of falsification in both his initial and promotion employment applications. The Board certainly had discipline on its mind when it summoned the Grievant to a meeting with two supervisors on March 24, 1997. In addition, the testimony at the hearing clearly indicates that the focus of the discussion at the meeting was the discrepancies found in both of the employment applications.

We now come to the question of the Grievant's request for Union representation required by both the contract between the parties in Section 24.04 and by the State Employment Relations Board in In re City of Cleveland. The union paints a picture of the Grievant lulled to inaction because the meeting concerned his promotion application. This is inconsistent with the record on what was discussed during the meeting. The discrepancies in his applications were discussed. He was given an opportunity to produce documentation of the dates he had listed in his application. moreover, he was asked to cooperate by obtaining records of his service in the United States Navy. In spite of all

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of this, the Grievant did not request Union representation; therefore, this procedural claim fails.

There are twin claims of inadequate notice to the Grievant, the first of which centers on the removal notice issued by the President of the Board and dated May 22, 1997. The removal notice makes a finding of dishonesty and falsification in "your employment application," and discharges the Grievant effective May 28, 1997. This, according to the Union, provided inadequate notice to the Grievant that his dismissal was based upon falsification of his promotion application.

This claim cannot be based upon Loudermill. This case concerned an Ohio public employee who was dismissed for dishonesty in filling out a job application. He was not afforded an opportunity to respond to the dishonesty charge prior to the discharge. In addition, his post termination hearing before the Civil Service Commission resulted in a 9 month wait for the administrative decision. The Supreme Court decided that under the Due Process clause, a public employee must be given some form of a pre termination hearing. It also remanded the delay issue concerning the administrative hearing to the lower court. Loudermill does not speak to the issue of the adequacy of the notice of the decision of discipline. Rather, it requires some form of pre discharge hearing before the decision to discharge.

This conclusion does not end the matter, however. The question is whether the removal notice created lack of clarity and ambiguity to the Grievant on the reason for his discharge. Does the reference to the employment application, mean that the

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Grievant and the Union were unaware that both employment applications were the subject of the discharge decision?

The record shows that the Grievant was given a charge of falsification in both employment applications prior to the Pre-Disciplinary Hearing.

It has been alleged that you falsified two (2) employment applications for the State of Ohio. Furthermore, both applications were discussed at the Pre Disciplinary hearing attended by the

Grievant and the union.

Finally, it is clear that the Grievant and the Union were not surprised, and in any way impaired during the grievance process by the singular reference "employment application" in the notice of removal. The Board's response to the Step 3 meeting clearly shows that the parties considered both employment applications during the Grievance process.

I find no evidence presented by you which fully supports the information given by you on your employment application(s) for the jobs you held prior to beginning your employment with Medical Board.

You presented evidence that you were in the US Navy from November 1988 until January 1989 which you did not include on your employment applications. The reason for leaving the National Guard on your initial employment application was that your "time was done servicing" and on your application for promotion the reason was "tour of duty was completed." These statements are dishonest because you left the National Guard and enlisted in the Navy. (emphasis added)

The other claim of inadequate notice centered on the notice for the pre disciplinary hearing issued on March 24, 1997. The Union claims that the discharge in this case was based in part upon the Grievant's omission of his work for FLEX Temp in his initial employment application in 1992. On the other hand, the notice as

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quoted above, is clearly limited to the reference to employment in the Ohio National Guard in the initial and promotion applications and the one reference to the FLEX Temp only in the promotion application.

B) The Merits

Generally, arbitrators have recognized the Employer's right to full and honest disclosure on job applications as related to the basic employer right to make hiring decisions of the work force. On the other hand, in cases of a substantial period of employment (approximately six years in this case), the Employer has a strong burden of proof in justifying a discharge of an employee for falsification in the initial job application. This case is somewhat complicated by the fact that the falsification was, according to the Employer, repeated and a new one made in an unsuccessful promotion application filed about five years after initial employment.

Analysis of discharge cases stemming from falsification of employment applications broadly touches on three factors. First was the omission of a fact or misstatement of a fact willful and deliberate, or was it the result of carelessness and sloppiness by the applicant. Second, was the misstatement material to the employment at the time it was made, and did it continue to be so at the time of discharge. Lastly, did the Employer act promptly and in good faith in ferreting out the misstatement.

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1) Intent

While a close question, the misstatement of the Grievant's employment by FLEX Temp in the promotion application was not willful or deliberate. He stated that he had been employed by FLEX Temp from February of 1988 to February 1990. In fact, he totally missed the mark of his beginning with FLEX Temp which did not occur until March 22, 1990. His utter carelessness in providing these dates should have been obvious even to the Board in that he neglected to include his employment with FLEX Temp at the Board on assignment for seven months in 1991. This misstatement of fact by the Grievant, while egregiously sloppy and careless was not done with willfulness or intent to deceive the Board.

This conclusion does not, however, apply to the Grievant's misstatement of his employment by the Ohio National Guard as from February 1986 to February 1990. One aspect of this record is painfully clear. The Grievant knew that he had been discharged from the National Guard and had enlisted in the United States Navy in 1988, and the Employer learned of this information in March of 1997.

The Grievant offered two fatuous, but similar, reasons for leaving the Ohio National Guard in his initial employment application and in his promotion application. The initial application stated: "My time was done servicing"; the promotion "Tour of duty was completed.,, In fact, the Grievant knew that he sought discharge from the Ohio National Guard for the reason that he enlisted in the United States Navy.

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2) Materiality

There are two elements for this factor. The first requires that the falsification be tied to the duties of the employee and the nature of the employment operation. The Employer is, after all, not applying a general moral code in favor of honesty; the Employer is seeking to annul or end an employment relation based upon a falsification in the employment application.

The second factor is especially important in a case such as this where the falsifications were discovered approximately five or six years after the initial employment. Would the Grievant have been hired initially had this falsification been discovered, and does the falsification continue to be material five years later at the time of discharge.

When we apply these concepts to the facts of this case, we must center upon the enterprise of the Board and the Grievant's duties in the job from which he was discharged Reproduction Equipment Operator 1.

During all of the time of the Grievant's employment, the Board was engaged in investigating complaints against doctors and other medical personnel. Some of the investigations include charges of impairment from drug, alcohol or mental disorders. The documents include patient records, complaints, and subpoenaed notes and files from the physicians. The Board subpoenas original documents from physicians that are then copied and returned. while some licensing information is public, virtually all disciplinary documents are

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confidential and do not become public until a citation is issued after investigation.

The bulk of the Grievant's job duties was copying medical records in disciplinary investigations, some of which had been subpoenaed by the Board. If the confidentiality of documents during an investigation were breached, considerable harm could occur to either the physician charged in the complaint, the complainant, or patients. In addition, the Board itself would be harmed by the ensuing discouragement of the free flow of information to the Board in order to perform its statutory duties.

The grossly careless misstatement concerning the Grievant's work with FLEX Temp in the promotion application, and the willful misstatement by the Grievant concerning his employment with the National Guard in both the initial and promotion application were material to the Grievant's duties and the enterprise of the Board.

The bulk of the Grievant's copying duties concerned highly sensitive, confidential information. Release of this information by the Grievant could cause considerable harm a risk present at the time of his initial employment and at the time of his discharge five or six years later. Had the Board been aware at the time of his initial employment of his willful falsification concerning the Ohio National Guard, it would appear that employment would be extremely doubtful.

3) Promptness

The Board certainly acted promptly after discovering the falsifications late in March of 1997. While the Grievant was not **20**

discharged until late in May of 1997, the ensuing two months were devoted to providing a period of time to the Grievant to supply documentation, and complying with the Loudermill requirement for a pre termination hearing.

The Board did check the entries by the Grievant in the promotion application filed in January of 1997, but there is no evidence that it did so with respect to the Grievant's entries in his initial employment application in 1992. The obvious question is: does the failure by the Board to check the 1992 entries by the Grievant in his employment application manifest a lack of concern by the Board in these entries? Does this difference in treatment of the two employment applications indicate that the Board was seeking a way to refuse to promote the Grievant in 1997, and, in the process, happened upon a basis to be rid of the Grievant?

The Grievant was not an off the street applicant when he signed the initial application in 1992. He had already been working at the Board for ten months, seven as a FLEX Temp employee, and three as an employee of the Board. This is a period of on the-job experience that permitted the Board to evaluate the Grievant. while this opinion should not be read as suggesting that the Board will never suffer consequences to a failure to check entries in employment applications of temporary employees, this record does show the Board did not breach its equitable duty to ferret out falsifications in the initial employment application by the Grievant.

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Lastly, the question becomes whether the decision to check the entries in the promotion application were motivated by some retaliatory objectives by the Board. Again, the facts show that the promotion application was for a position involving intense trust by the Board in the persons occupying the positions. The position that the Grievant sought in 1997 involved independent analysis and verification of applications by physicians. Had the Board not checked the entries of all applicants that the Board was considering for this position, the Board would have been negligent.

C) The Discharge

The Grievant was discharged from his position of Reproduction Equipment Operator 1. While the discharge appears justified in light of the above analysis particularly based upon the finding of a willful falsification regarding the omission of his naval service, there is more that is relevant on the issue the propriety of discharge in this case.

The Grievant's misconduct, including a willful, material falsification in the employment applications has been proved. In addition, this misconduct preceded the discharge. on the question of the justice of the particular penalty of discharge, evidence was admitted of information received by the Board after the date of the discharge decision. The Grievant gave the Board a copy of his form DD 214 showing his naval enlistment on November 29, 1988 and his discharge two months later. Block 28 shows that the printed topic "NARRATIVE REASON FOR SEPARATION" had been partially removed and the space in block 28 for an answer to this topic was blank. On

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the other hand, block 25 stated the "SEPARATION AUTHORITY" as Milpersman 3630100. Block 26 stated the "SEPARATION CODE" as JDA. Block 27 stated that the "RE ENLISTMENT CODE" is RE 4.

The Board supplied evidence that Separation Code JDA, Separation Authority Milpersman 3630100, and Re Enlistment Code RE 4 all point to one explanation for a discharge. It is: "procured a fraudulent, induction, or period of military service through deliberate material misrepresentation, omission or concealment. (Not related to drug or alcohol abuse.)"

The above information obtained by the Board from the Grievant after the Board's decision to discharge the Grievant is relevant to the assessment of the propriety of discharge. In light of the Grievant's misconduct in this case -falsification of employment applications this subsequently learned information shows that, if the Grievant were reinstated, he could not reasonably be expected to be of any value as an employee of the State Medical Board of Ohio.

AWARD:

The grievance is denied.

Respectfully submitted,

John J. Murphy
Arbitrator

Date: June 1, 1998

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