BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BAY AREA MEDICAL CENTER EMPLOYEES UNION, LOCAL 3305, AFSCME,	
	Case 12 No. 46228 A-4832
and	
BAY AREA MEDICAL CENTER	

Appearances:
Mr. Steve Hartmann, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI
Mr. Daniel T. Dennehy, vonBriesen & Purtell, S.C., Suite 700, 411 E. Wiscon

ARBITRATION AWARD

According to the terms of the 1989-92 collective bargaining agreement between Bay Area Medical Center (hereafter Employer) and Bay Area Medical Center Employees Union, Local 3305, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving the discharge involving the grievant. The Commission appointed Sharon Gallagher Dobish as arbitrator and the undersigned made full written disclosures to which no objections were raised. Hearing was held at Menomonee, Michigan on December 12, 1992. No stenographic transcript of the proceedings was made. The parties filed their initial written briefs by February 10, 1992 and on February 14, 1992 they advised that they would not file reply briefs herein.

ISSUES:

The parties stipulated to the issues to be decided in this case, as follows:

1) Was the grievant, G.M., discharged for just cause pursuant to the collective bargaining agreement?

2) If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

Article 5 - DISCIPLINARY ACTIONS

Employees shall not be disciplined, except for just cause.
5.01 Dismissal: Employees may be discharged without warning or notice for the following offenses:

(c) Falsifying, or assisting in falsifying, personnel and/or other records, including medical records, employment applications, and time cards;

. . .

Discharged employees, with the exception of probationary employees, may appeal the action by presenting written notice to their steward and their department manager or head nurse within fourteen (14) calendar days after dismissal. Such appeals shall go directly to arbitration.

Article 6 - COOPERATION

Employees will individually and collectively render loyal, efficient, courteous and safe service to the Center and to the patients. They will cooperate with the Center and with each other in advancing the welfare of the Center, providing the proper service to patients at all times.

Article 16 - MANAGEMENT

The Center has the sole and exclusive right to determine the number of employees to be employed, the duties of each, the nature and place of their work, whether or not any of the work will be contracted out, and all other matters pertaining to the management and operation of the Center. This clause will not be used for the purpose of destroying the bargaining unit.

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FACTS:

On August 27, 1990 the Employer hired G.M. as a psychiatric technician. G.M. had filled out an employment application on which he had stated that he had performed "all 12 core functions with a full caseload" at the following four institutions/programs and that he had amassed the number of hours of direct client counseling listed below:

Milwaukee Intercity Council on Alcoholism and other Drugs	320 hours
Sacred Heart Hospital	640 hours
Menominee Delta Halfway House	3040 hours
Three Fires Halfway House	2460 hours

In December 1990, G.M. successfully bid for a position as a Substance Abuse Technician. In his application for the job, G.M. stated that he had "fourteen years experience in this field." Ultimately, G.M. decided not to remain in the Substance Abuse position and he returned to his former job.

In April, 1991, G.M. again applied for a substance abuse technician position and listed "14 years experience in the substance abuse field" on his application for the job posting. G.M. ultimately withdrew his application when he realized the opening was only a part-time one. In July, 1991 a substance abuse technician position opened and G.M. applied again, stating that he had "20,000 hours of working in this field." G.M. was one of six applicants for the position. The Employer accepted applications from each person and conducted 50 to 60 minute interviews with each of these applicants, using a set interview format and set questions. The interviews were conducted by Head Nurse, Penelope Hanson and Chemical Dependency Center, Treatment Coordinator, John McLaughlin.

During G.M.'s interview, he told Hanson and McLaughlin that he had worked at four different treatment programs for 12 to 14 years; he detailed how long he had worked at each program, the positions he had held and the duties he had performed and why he had left each employer. Because the information G.M. gave at his interview did not seem consistent with what Ms. Hanson knew of G.M.'s experience or did not ring true to her, Ms. Hanson made a note on the interview form to check G.M.'s references.

The interview process resulted in G.M. being ranked 5th out of the six applicants, and the position was awarded to another applicant. G.M. initially grieved this outcome but later withdrew his grievance when Ms. Hanson revealed that he (G.M.) did not have the experience that the successful applicant had. Ms. Hanson requested that Ms. Bradford of the Employer's personnel office check G.M.'a references. Bradford's investigation revealed the following conflicting information:

1. G.M. had indicated on his original employment that he had been employed as a counselor performing all 12 core functions at Three Fires Halfway House from March 1986 to August, 1987. At his interview for the substance abuse technician position in 1991, G.M. had stated that he had worked as a counselor for Three Fires for three years. According to Three Fires records, G.M. was paid for only two days' work.

2. G.M. had indicated on his original employment application that he had worked as a full-time Counselor and House Manager at Delta Halfway House from August, 1987 to April, 1989. At his interview, G.M. stated that he had worked at Delta full-time for three years. According to Delta's records, G.M. had actually held a part-time subcontracted position at Delta, working

only 6 or 7 hours on the weekends.

3. On his original employment application, G.M. had stated that he had worked as a counselor from April, 1989 to October 1989 at Sacred Heart Hospital in Detroit, Michigan. G.M., however, had stated in his interview that he had been an admission counselor and group leader at Sacred Heart. In his interview, G.M. stated that he had worked for Sacred Heart for one year. In fact, at Sacred Heart, G.M. had conducted patient assessments and intakes to determine whether patients needed in-or-out patient treatment, completing insurance forms and doing other paperwork. Sacred Heart records indicated G.M. had only been employed at Sacred Heart for three months.

4. On his original employment application, and in his interview, G.M. indicated that he had worked for the Intercity Council on Alcoholism and other Drugs in Milwaukee from March, 1990 to May, 1990. On his application, G.M. stated his reason for leaving this job was "personality conflicts with supervisor" while at his interview, G.M. stated that he left the Council because all his co-workers were taking anti-depressant drugs. In fact, Council records confirmed that G.M. left his employment there because he had failed to pass his probationary period and that he was therefore ineligible for rehire.

At none of these jobs had G.M. in fact performed "all (12) core functions with a full caseload" as he had claimed on his original employment application.

Upon the conclusion of Bradford's investigation and Ms. Hanson's receipt thereof, the Employer discharged G.M. pursuant to Section 5.01 of the labor agreement. G.M. filed a grievance thereon which was then processed to arbitration herein.

In addition, to the above evidence, the Employer put Behavioral Medicine, Program Director Michael Saul on the stand. Mr. Saul testified that in June or July, 1991, he had had a conversation with G.M. in which G.M. had asked Saul if he could make an appointment with Saul to discuss the requirements for Michigan counselor certification, in which G.M. stated, "maybe I could fudge information for the certification." At the instant hearing, G.M. denied using the word "fudge" in any conversation with Saul. 1/

The parties also submitted the following excerpt from the State of Michigan's standards for certification as an addictions counselor:

1/ G.M. was extensively cross-examined by the Employer's counsel. Significantly, G.M. admitted that he had used his "terminology" in listing his prior positions as "counselor" and in counting volunteer time as "experience" on his application. G.M. further stated, when pressed on these points that this was his "interpretation" and that he "didn't read it that fine."

1. Experience - The equivalent of three (3) years of supervised full time experience (6000 hours) paid or volunteer as an alcohol and other drug counselor. This experience must be within eight (8) years prior to application for the CAC.

2. Education - 270 contact hours of OSAS accepted education/training completed within eight (8) years of application for the CAC.

3. Supervised Practical Training - 300 clock hours in the twelve core counseling functions within eight (8) years of application for the CAC.

. . .

Finally, the exhibits contained a position description for the psychiatric technician position which listed Specific Duties, in relevant part, as follows:

. . .

23. Charts factually, concisely and takes responsibility for making entries into record in correct sequence and according to Hospital policy and procedure.

. . .

25. Maintains employment record in accordance with Bay Area Medical Center policy.

26. Acts as a role model in all responsibilities for Psychiatric Technicians.

. . .

Union:

The Union asserted that G.M.'s termination on August 5, 1991 for "falsifying employment application" was unsupported by the evidence. In this regard, the Union noted that G.M. testified without contradiction that after he filled out his original employment application, he reviewed it with Employer agent Struckmeyer and he explained his history of work in the drug and alcohol abuse field to her in detail. Since G.M. was hired thereafter, the Union asserted that G.M.'s application and explanations must have been sufficient for the Employer and its hiring agent, Struckmeyer. The Union also argued that since the Employer did not call Struckmeyer as a witness, G.M.'s testimony that he disclosed and described his work history to Struckmeyer should stand uncontradicted.

Furthermore, the Union essentially asserted that the Hospital used less than the most reliable and convincing evidence here. In this regard, the Union noted that the Employer used second hand evidence such as business records and telephonic testimony from business office personnel of G.M.'s former employers to attempt to show G.M. had falsified his employment application.

The Union contended that the Employer's insistence that G.M. falsified his employment application when he used the word "counselor" on his employment application was too strict an application of the word, counselor. The Union asserted that G.M. had used the word in its ordinary sense, in a reasonable manner. But the fact that G.M.'s usage of the word "counselor" does not comport with the Employer's definition or use of the term, does not mean that G.M.'s usage was wrong or false.

In addition, the Union urged that the Employer's argument that G.M. was somehow dishonest when he counted his volunteer time in the drug and alcohol field as time worked was misplaced. The Union pointed out that the record reflects that using volunteer time as experience in the drug and alcohol field is common. The Employer's agent had no problem with G.M.s counting time he volunteered to counsel others towards his time/experience in the field at the time G.M. was hired. The Union implied, therefore, that the Employer cannot use any objections it now has to G.M.'s list of his experience as sufficient ground for termination.

Finally, the Union argued, the Employer had not satisfied its burden of proof -- that G.M. falsified his employment application beyond a reasonable doubt. Rather, the Union claimed, the Employer had only proved that its current managers disagree with its former managers regarding the proper interpretation of the word "counselor" as well as whether unpaid time should count toward experience. Therefore, the Union sought reinstatement with backpay for G.M.

Employer:

The Employer argued that it discovered that G.M. had provided the Employer with "untrue" information regarding the amount of time he had been employed by various employers, the positions he had held and duties he had performed, his work hours, his experience in the substance abuse field as well as why he had left one prior employer. In addition, the Employer pointed out that G.M. had given this untrue information to the Employer in a variety of ways involving several different contexts: on original employment application and the material supplied with it, on his applications for open substance abuse technician positions and in his 1991 interview with Ms. Hanson and Mr. McLaughlin.

The Employer contended that the above facts are not belied by G.M.'s

assertions 1) that volunteer time is work time in the drug and alcohol counseling field as evidenced by the State of Michigan's requirements for Addictions Counselor certification, and 2) that he told the Employer's agent, Struckmeyer, that he had listed volunteer time as work time on his employment application. In regard to G.M.'s first defense, the Employer pointed out that Michigan regulations allow individuals to count volunteer time but only if it was supervised full-time volunteer work. The Employer noted that G.M. did not state or assert at the hearing that his work had been either full-time or supervised. In addition, the Employer asserted that G.M. clearly knew the employment application called for disclosure of his employment history, not for disclosure of all his life experiences. The Employer also argued that it stretches credulity for G.M. to have claimed at the instant hearing that such activities as volunteer helper time, time spent at AA meetings and time spent as a painting contractor hiring and working with alcoholics in his painting business, should count as counseling work time.

In regard to G.M.'s second defense, the Employer observed that even if one were to excuse G.M.'s usage of volunteer time as time worked on his employment application, this still does not explain or excuse the numerous other discrepancies the Employer discovered in the facts listed thereon by G.M. (detailed above). Furthermore, the Employer noted that despite his documented periods of unemployment, G.M. never disclosed that he had been unemployed at any time or that he had been functioning only in a volunteer capacity. G.M.'s indication on his employment application of the el of wages he earned at prior employers, supports a conclusion that he was employed continuously. Of course, this was not the case, by G.M.'s own admissions at hearing. The Employer also contended that the fact that G.M. may have told Agent Struckmeyer that he listed his volunteer time on his employment application does not change the proof in this case -- that G.M. thereafter repeatedly changed his story in various contexts over the course of his employment.

The Employer cited several arbitration cases in support of its assertions that an employer ought to be able to rely upon its employees' integrity and honesty throughout their employment. These cases are particularly apt here, the Employer urged, because its technicians must serve as role models for its substance abuse patients who are often deceitful and manipulative regarding their condition and their lives.

Finally, the Employer indicated that the testimony of Mr. Saul independently undermined G.M.'s credibility at the instant hearing. In all of these circumstances, the Employer sought denial and dismissal of the grievance. However, failing such an outcome, the Employer urged that reinstatement without backpay would be appropriate should the Union prevail, due to G.M.'s continuous acts of falsification throughout his employment.

Reply Briefs:

The parties did not file reply briefs. However, the Employer sent a letter, received on February 13, 1992, in which it took issue with the Union's assertion that the Employer's burden of proof in order to sustain the grievance was that it must prove dishonesty "beyond a reasonable doubt." The Employer asserted that in the absence of criminal activity, clear and convincing evidence, as it showed here, is sufficient to support G.M.'s discharge.

DISCUSSION:

The facts of this case demonstrate that the Employer essentially stumbled upon the inconsistencies in the grievant's prior statements regarding his work history. Had G.M. not applied for and been interviewed for the full-time Substance Abuse Technician opening which occurred in 1991, it is highly questionable whether the Employer would have discovered the false statements G.M. had made on his original employment application. However, having objective reason to suspect that G.M. had made untrue statements regarding his work history, Head Nurse Hanson requested that an investigation be conducted by a member of the Personnel Department. Ms. Bradford of the Personnel Department made oral and written contacts to representatives of G.M.'s former employers and received information which confirmed that G.M. had not revealed to the Employer the facts regarding his work history.

Upon the conclusion of the Personnel Department's investigation, Hanson considered the facts educed by the investigation and decided that G.M.'s conduct violated Section 5.01(c) of the effective labor agreement. That provision allows the Employer to discharge an employe immediately without prior warnings or disciplinary actions having been taken, if the employe has engaged in "falsifying . . . personnel and/or other records, including . . . employment applications . . . ."

Hanson conducted an interview with G.M. and his Union representative at which G.M. essentially admitted the charges against him but explained that he had never intended to mislead anyone, that he was not very good with dates and that whether he was in paid or non-paid status at his former jobs, it was open to interpretation whether non-paid work time should be counted toward experience. After G.M. gave his explanations, Hanson discharge him and this grievance was then filed and processed.

In regard to the appropriateness of the Employer's use of Section 5.01(c), it is important to note that as a general matter employers should be able to count on their employes' truthfulness from the very inception of the employer-employe relationship and throughout the employment relationship. Thus, I find Section 5.01(c) is a reasonable rule necessary to the operation of the Employer's business. In addition, the facts herein showed that the Employer specifically listed in the position description for G.M.'s Psychiatric Technician position that such an incumbent "acts as a role model. . ." for patients. This supports the Employer's assertions that Psychiatric Technicians (like G.M.) must be relied on to render consistently truthful service to the Employer and to set an example for manipulative addicts who may be denying the significance of their condition and/or actions. In addition, I note that no evidence was offered here to show that the Employer did not fairly apply Section 5.01(c). In all of the circumstances of this case, the rule embodied in Section 5.01(c) is necessary to the efficient and orderly operation of the Employer's business and describes conduct which the Employer could reasonably expect employes (including G.M.) to render consistently.

The issues raised by the Union in this case revolve around the Union's attacks on the fairness of and/or objectivity of the Employer's investigation

and whether the discipline meted out suited the "crime". In regard to the former issue, the Union asserted that the evidence proffered by the Employer was not the "best evidence" of G.M.'s performance/record at each former employer. However, the Employer did not seriously attack G.M.'s job performance at his former employers so that evidence of G.M.'s duties and performance were not placed squarely before me. Thus, the telephonic evidence from the recordkeeping employes of G.M.'s prior employers was sufficient to prove that G.M. had falsified information on his employment application with the Employer and that he had made false statements thereafter to the Employer regarding his work history.

I note that, on cross-examination, G.M. admitted and/or corroborated the truth of virtually all of the information the Employer had gathered against him. 2/ In addition, evidence regarding the State of Michigan's likelihood of crediting volunteer time does not weigh on the Union's side. Clearly, the State of Michigan requires that volunteer time be supervised, full-time work and, as such, G.M.'s volunteer work would not qualify for credit under Michigan's rules. In all the circumstances and especially in light of the fact that a disinterested employe of the Personnel Department had conducted the investigation into G.M.'s employment history, I am not persuaded by the Union's evidence on these points. Rather, I find that the Employer's investigation was fair and its evidence of falsification was strong. 3/

In regard to whether the punishment suits the "crime" here, I note that Section 5.01(c) specifically allows the Employer to take the action it took. Also, the number and nature of the many differences between verified fact and what G.M. wrote on his employment application and what he disclosed in his 1991 interview, demonstrate the seriousness and depth of the discrepancies, and lead one to conclude that the grievant must have deliberately falsified his application and made false statements to Hanson and McLaughlin in his 1991 interview.

A reasonable person would conclude that the overall record evidence in this case supports the Employer's discharge decision. Justice and fair dealing have been adhered to in this case and under the facts G.M.'s actions were not defensible. Notably, there was no evidence offered to show that the penalty assessed by the Employer was out of line visa vis prior disciplinary cases. No evidence was proffered to show that the Employer possessed any animus against G.M. or that it or its agents had any ulterior motives for discharging G.M. Thus, I am convinced that based on this record, the Employer possessed just cause for discharging G.M., that it processed G.M.'s discharge fairly and objectively and that the discharge should therefore be sustained.

Based upon the relevant evidence and arguments in this case, I make the following

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2/ I credit Mr. Saul over G.M. Saul had no apparent reason not to tell the truth about his contact with G.M. In addition, I find that on the whole, G.M.'s testimony supported the Employer's case, not the Union's.

3/ I agree with the Employer that this is not a case where its proof of G.M.'s wrong doing had to meet the "beyond a reasonable doubt" test.

AWARD

The grievant was discharged for just cause pursuant to the collective bargaining agreement. The grievance is, therefore, denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 2nd day of April, 1992.

By _____
Sharon Gallagher Dobish, Arbitrator