BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 366, AFSCME, AFL-CIO, DISTRICT COUNCIL 48	:	Case 276 No. 49153 MA-7842
and	:	
MILWAUKEE METROPOLITAN SEWERAGE DISTRICT	:	

Appearances:

Mr. Alvin R. Ugent, Podell, Ugent & Cross, S.C., Attorneys at Law, 611 North Broadway, Suite #200, Milwaukee, Wisconsin 53202-5004, for the labor organization.

Mr. Donald L. Schriefer, Senior Staff Attorney, Milwaukee Metropolitan Sewerage District, 260 West Seeboth Street, P.O. Box 3049, Milwaukee, Wisconsin 53201, for the municipal employer.

ARBITRATION AWARD

Local 366, AFSCME, AFL-CIO, District Council 48 ("the Union") and the Milwaukee Metropolitan Sewerage District ("the District") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the District concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance concerning the meaning and application of the terms of the agreement relating to discharge for just cause. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Milwaukee, Wisconsin on October 15, 1993; a stenographic transcript was provided to the arbitrator and parties on November 4, 1993. The Union and the District filed written briefs on December 29, 1993 and March 18, 1994, respectively. The District filed a reply letter brief on April 4, 1994. The Union waived its right to do the same.

ISSUE:

The parties stipulated to the issue as follows:

Was the termination of Terry D. Ashford for just

cause? If not, what is the remedy?

RELEVANT CONTRACTUAL LANGUAGE:

PART III

A.GRIEVANCE AND ARBITRATION PROCEDURE.

> Only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance under the provisions set forth below.
>
> . . .
>
> 3. Just Cause. Any employee in the bargaining unit who is reduced in status, suspended, removed, or discharged, shall have the right to file a grievance as to the just cause of such disciplinary action.
>
> . . .

B. FINAL AND BINDING ARBITRATION.

> Arbitration may be resorted to only when issues arise between the parties hereto with reference to the interpretation, application or enforcement of provisions of this Agreement. . . .

BACKGROUND:

The grievant, Terry D. Ashford, worked for the District as a belt operator from January 28, 1991 until his involuntary termination on February 2, 1993.

Ashford submitted an application for employment with the District on February 24, 1990. Directly above a signature and date line, under a bold face notice which stated, "Please Read Carefully/Applicant's Certification and Agreement," the application included the following paragraph:

> I hereby acknowledge that the facts set forth in the above employment application are true and complete to the best of my knowledge. I understand that, if employed, falsified statements on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal and employment history and financial and credit record through any investigative or credit agencies or bureaus of your choice.

The application form included a section on Employment Record, which called for the applicant to "list in order, present employer first (Include experiences in Armed Forces.)" Ashford completed this section as follows:

4/76 to 8/88
Company Name A.O. Smith
Supervisor's Name Personnel
Job Title Inspector
Highest Salary Earned $14.00 per hour
Reason for leaving Lack of Work

2/80 to 8/80
Company Name Allis Chalmers Corporation
Supervisor's Name Personnel
Job Title Metallurgical Tech.
Highest Salary Earned $4.00 per hour
Reason for leaving Lack of Work

There were no other employment experiences listed on the application.

Ashford also submitted to the District a prepared resume, which elaborated on his employment experiences at A.O. Smith and Allis Chalmers, and noted his education, including A.A.S. certificates in industrial engineering and metallurgical technology. The A.O. Smith and Allis Chalmers positions, covering the periods April, 1976 to August, 1988 and February, 1980 to August, 1988, respectively, were the only ones noted on the resume.

On October 9, 1990, Ashford had an interview with District managers. On a prepared, standard interview form, question "Ia" called for the applicant to "briefly describe your prior experience." Contemporaneous notes from that interview read, in their entirety, "wk A O Smith welder, floater, Inspector." On January 15, 1991, the grievant was contacted by District personnel officer, to update his application and schedule a physical examination. The personnel officer's contemporaneous notes show the grievant identified A. O. Smith as his present employer.

On January 19, 1991, the District made an offer of employment to the grievant. In accepting this offer, the grievant signed a further form, which read, in its entirety, as follows:

> I understand that I have a duty to supplement and update my application for employment to provide the Milwaukee Metropolitan Sewerage District with information that is correct and complete at the time I accept this offer of employment. I state that the information is still complete and correct and that I have provided in writing all changes that have occurred since I submitted my application regarding my medical history, employment

history, educational background, and conviction record.

I understand and accept the conditions of employment with the Milwaukee Metropolitan Sewerage District as well as acknowledge the seven items as set forth in the attached letter for the position of Operator I - Belt beginning on January 28, 1991 at a starting biweekly salary of $1,046.39.

Terry F. Ashford /s/ 1/19/91
Signed Date

During the course of his employment, Ashford, a black male, brought an employment discrimination complaint against the District, alleging discrimination on account of race. During a deposition in this Equal Rights Division proceeding, Ashford and District staff attorney Donald L. Schriefer had an exchange about Ashford's employment history, during which the District learned, for the first time, that Ashford had worked at Briggs & Stratton in 1988. 1/

The Briggs & Stratton grievance which Ashford referred to in his deposition had been resolved by the following letter, dated September 6, 1988:

TO: G. Kalmadge
T. Ashford

SUBJECT: Grievance #35765
Terry Ashford
Index 41829

Mr. Ashford's discharge has been rescinded on a non-precedent setting basis. He can return to work on 9-6-88. He will receive no backpay. All time missed will count as a disciplinary layoff for misconduct.

The discharge was rescinded subject to the following conditions:

1. Mr. Ashford will be discharged if he is found guilty of any future misconduct.

1/ The entire deposition exchange has been appended at the end of this Award.

2. Mr. Ashford will be assigned to a different plant.

Scott Langelin /s/
Scott Langelin

On February 1, 1993, the District's Employment/HRIS Manager, Stephen J. Inman, wrote to Labor Relations Manager James L. Johnson as follows:

SUBJECT: Information Missing From Terry Ashford's Application and Employment Records

In following up on the information discovered by Don Schriefer in his disposition of Mr. Ashford, I spoke with Kathleen Tappy, Assistant Personnel Manager with Briggs & Stratton. Ms. Tappy confirmed that Mr. Ashford had in fact worked for Briggs & Stratton for a period of approximately ten (10) months from February 8, 1988 to December 5, 1988 when he was laid off.

Ms. Tappy indicated that Mr. Ashford had a poor attendance record at Briggs & Stratton and in fact was terminated for refusing to do a job and walking off the job without informing the foreman, although the discharge was later rescinded. In October of 1988, he was warned about his attendance and received a five-day layoff. Briggs was also investigating Mr. Ashford's background to determine if his resume/application were truthful, however, this was dropped when his recall rights expired after the December 5, 1988 layoff.

In his disposition testimony, Mr. Ashford claimed he did not list Briggs & Stratton as an employer because it was awkward and confusing to tell employers why his employment with A.O. Smith and Briggs & Stratton overlapped. But his employment with these two employers did not "overlap" in any meaningful sense except for two weeks when he worked for A.O. Smith, he was laid off from that company for all of 1988; his employer in that year plainly was Briggs & Stratton, and his employment with Briggs even continued for several months after the last date given by him for his "employment" by A.O. Smith (8/88 -- this apparently is the date recall rights at Smith ended, but would not be the date "employment"

with the company ceased).

It appears that Mr. Ashford deliberately filed an incomplete application with us in 1990 to preclude us from discovering his poor record at Briggs & Stratton. He plainly filed an application which was incomplete, despite his certification on the application that the facts were true and complete. Because of this omission, Mr. Ashford's pre-employment reference checks were incomplete. It is highly unlikely that Mr. Ashford would have been hired had we known his record at Briggs. Mr. Ashford's failure to list his employment with Briggs is tantamount to falsifying his application, and should warrant disciplinary action comparable to that given to other employees who have falsified information on their records.

On February 2, 1993, Inman wrote to Johnson as follows:

SUBJECT: Investigatory Hearing and Termination of Terry Ashford

On Tuesday, February 2, 1993, I met with Terry Ashford to investigate omissions in his employment record which were discovered during his January 19, 1993 deposition. Mr. Ashford, Ron Czarnecki (Mr. Ashford's supervisor), and Sam Serio (the Local 366 Union Steward), Debbie Guzlecki and I were present.

I opened the meeting by informing Mr. Ashford that the meeting was an investigatory hearing to determine the accuracy of certain facts pertaining to him and that the consequences of the hearing could involve disciplinary action, up to and including discharge. At this point, Mr. Serio interrupted and requested a brief conference with Mr. Ashford, which was granted. After a minute or two, we reconvened. I informed Mr. Ashford that we were concerned about the completeness and accuracy of the pre-employment information he had provided to us on his application form and called his attention to the deposition he had given to our attorney, Mr. Don Schriefer, on January 19th. I asked him if it were true that he was employed by Briggs & Stratton from February to December of 1988. He confirmed that it was.

I showed Mr. Ashford a copy of his employment application (dated February 24, 1990) and asked him to acknowledge his signature on the back of the application attesting to the accuracy and completeness of the information provided. He acknowledged that it was his application, and he had signed in the place certifying its accuracy and acknowledging that false statements shall be grounds for dismissal. I called to his attention the section regarding his employment history and noted to him that he had not disclosed his employment with Briggs & Stratton. He acknowledged that to be true.

I then showed Mr. Ashford a copy of his signed acceptance statement, dated January 19, 1991, which acknowledges his responsibility to

update his application and ensure the information is accurate and complete, and asked him if he has submitted any changes or updates his application. He had not.

I then referred to the District work rules indicating their inclusion of a rule concerning falsification of District records as an intolerable offense. I indicated that, as part of his employment indoctrination, he had received a copy of these rules and signed a statement verifying that he had received, read, and understood them. He nodded his agreement.

I told Mr. Ashford that it appeared that he had deliberately left his employment with Briggs & Stratton off his employment application to mislead the District and preclude any pre-employment reference check regarding his employment with them. I then asked him what his explanation of the omission was.

Mr. Ashford replied that he had left his employment with Briggs and Stratton off his application because he had not noted it on his resume. He implied that the short duration of his tenure with Briggs was part of his reasoning and indicated that he had expected someone from the District to go through his application with him, at which time he "would have" explained his employment with Briggs.

I recessed the meeting for five minutes to consider Mr. Ashford's reply. Having reviewed the interview notes from Mr. Ashford's notes, it was apparent that his application was not discussed. However, his employment history was discussed, and he was given ample opportunity to disclose his employment with Briggs. He was also asked an open-ended question, "Describe your prior experience," to which he could have provided the information regarding his employment with Briggs. Mr. Ashford was not asked specifically about his employment application, line for line, but the record shows he had ample opportunity both before and during his pre-employment processing to divulge the information. I concluded that he had deliberately withheld the information to preclude a pre-employment inquiry of Briggs.

I reconvened the meeting and informed Mr. Ashford of my decision. I explained to him that his omission amounted to falsifying the record in an effort to mislead the District in its pre-employment evaluation of his work history. I indicated that past policy and practice regarding such conduct had resulted in termination of employment, and that, effective immediately, he was discharged from employment with the District.

Mr. Serio interjected that he desired the first step grievance hearing to be held immediately. After clarification that no written submittals were required as would be submitted for this stage of the grievance processing, I turned the meeting over to Mr. Czarnecki to hear the grievance. Mr. Serio noted the Union's objection to Mr. Ashford's termination on the grounds that no just cause was given. Mr. Czarnecki replied that he saw no contract violation in the proceedings or the termination. The meeting adjourned with Mr. Ashford delivered to the security guards to empty his locker and be escorted from the premises, Mr. Serio going to file a grievance initiation form and further pursue the grievance and yours truly returning to usual and customary responsibilities.

Also on February 2, 1993, Inman wrote Ashford as follows:

Dear Mr. Ashford:

It has come to our attention that your original employment application with the District was incomplete and inaccurate. By your own account the deposition given by you on January 18, 1993, you were employed by Briggs & Stratton during 1988, and Briggs & Stratton was, in fact, your last employer prior to coming to work for the District. Independent investigation of this has confirmed your employment with Briggs & Stratton from February 8, 1988 to December 5, 1988. You failed to provide this information on your employment application despite its significance.

On your application, dated February 24, 1990, you certified the completeness of the employment

information provided. At the time you were hired, on January 19, 1991, you again certified the completeness of your application while acknowledging your obligation to update and supplement your application to apprise us of complete and correct information at the time the offer of employment was accepted. Nevertheless, you still did not inform us of your employment with Briggs & Stratton, precluding us from the opportunity to contact them regarding your employment.

From the information available, we must conclude that your failure to list your employment with Briggs & Stratton was a deliberate attempt to mislead us concerning your employment record. The application for employment which you signed specifically states that falsified statements on the application shall be considered sufficient cause for dismissal. Designating A.O. Smith as your last employer and omitting reference to Briggs & Stratton is tantamount to falsifying your application. Falsifying of records also is an intolerable offense under the District's Work Rules for Represented Employees and one which the District views very seriously. The District has consistently terminated employees for similar inaccuracies or omissions on the application for employment.

In light of these circumstances, your employment with the District is hereby terminated effective Tuesday, February 2, 1993. You will be receiving separate information regarding the termination of your employee benefits under a cover letter from Sherry Zaruba, and may inquire separately with her regarding your alternatives.

Sincerely,

Stephen J. Inman
Employment/HRIS Manager

Ashford grieved his discharge on February 2, 1993, claiming he had been improperly discharged without just cause. On March 4, 1993, Johnson denied the grievance, stating as follows:

The evidence clearly substantiates that the

grievant knowingly withheld and concealed his last employer's identity when making application for employment with the District, while interviewing for employment with the District, and upon acceptance of the employment offer from the District. He clearly and intentionally falsified his application for employment.

Pursuant to the procedure provided for in the collective bargaining agreement, the matter was subsequently advanced to arbitration.

POSITIONS OF THE PARTIES:

In support of its position that the grievance should be sustained, the Union submitted as its entire written argument the following:

> The grievant, Terry Dean Ashford, has worked for the Milwaukee Metropolitan Sewerage District since January 28, 1991. The grievant admitted that he did not put the Briggs & Stratton employment on his job application. Tr. 67. Grievant worked at Briggs from February, 1988 until August, 1988. He was laid off at Briggs for lack of work on 12-5-88. The grievant was told by his employer that he was being laid off and in fact, his name was on the layoff list. Tr. 68. The grievant felt that he had nothing to hide about his work at Briggs and did not feel that his work at Briggs was completely relevant to his job at the Sewer Commission. When he applied at the Sewer Commission, his primary employer was A.O. Smith Company. He did indicate his employment at A.O. Smith on the application and he had already received a degree in metallurgy. He felt that he had excellent qualifications for the Sewer Commission job and that if they had any questions about other jobs, they would ask him about it during the interview. The work at Briggs did not stand out in his mind as being important for the work he was applying for at the Sewer Commission. Tr. 70. Grievant could properly feel that if he had put his Briggs employment on the application, it would not have had any effect on his chances of getting a job at the Sewer Commission. Tr. 70.
>
> It appears clearly that the present discharge

case is a direct result of the grievant having filed discrimination charges against the Employer. The employment application matter did not even come up until it came up at the deposition. The Briggs employment did not "slip" out, it was revealed directly and clearly in answer to a question. Tr. 75. Once the Employer found out about Briggs, the Employer felt that it had a good reason to get rid of the Grievant.

Not every false employment application gives an Employer just cause for discharge of the employee. In this case, the employee already demonstrated his competence as a worker for the Company. The purpose of the application is to find employees who are qualified for the job. The mention of Briggs or failure to mention Briggs employment did not show qualification or lack of same, but even if it did, the employee proved his qualifications for the job by doing the job. Discharge is the most serious penalty that can be imposed upon an industrial employee and therefore, the Arbitrator has a grave responsibility to carefully evaluate the evidence to prevent injustice either to the Employer or to the Employee. Hoffman Industries, Inc. 61 LA 931.

In this case, Management claimed that the Grievant had been disciplined at Briggs or even terminated and that Grievant wanted to keep this information from the Sewer Commission for fear of being denied employment. This assertion by management was not substantiated by any credible evidence.

It is true that the Employer hired the Employee not knowing that he had previously worked at Briggs. What did the Sewer Commission lose thereby? In fact, grievant completed his probationary period with no difficulty and management accepted him as a satisfactory employee. After the Employee filed his discrimination charges, the Employer had reason to dislike grievant and a reason to get rid of him. In this case, the discrimination charge was felt to be frivolous by management and that made them irritated. This was admitted by the Employer in this case. Tr. 42. Since they were irritated, it

is normal to expect them to try to punish the Employee and they did. If it was so important to know about the references, why did it take about one year for the Employer to check on references? Tr. 112. If they really were concerned about references, it would not take a year.

Many arbitrators have considered the question of whether or not a false employment application amounts to just cause. All agree that every case must be considered on its own merits. Does management claim that every statement on an employment application, if false, is just cause for discharge, regardless of what may have been left out or the reason it was left out. Arbitrators have ruled that a false employment application does not give rise to just cause in many situations. United States Postal Service 71 LA 101; Norandex, Inc., 71 LA 1169; Kaiser Steel Corp. 64 LA 195; Horizon Mining Co. 72 LA 1173.

CONCLUSION

The grievance should be sustained. Grievant's discharge was not for just cause and his record should be cleared of any discipline resulting from falsification of his employment application. Grievant should be reinstated with full back pay and all other benefits. The Arbitrator should retain jurisdiction for 90 days to give the parties an opportunity to agree on back pay etc. If they can not do so, additional hearings should be held to allow the parties to offer evidence on the question of back pay etc. and have the Arbitrator rule on the remedy that should be followed.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

The District's decision to terminate the grievant was supported by just cause. At issue is whether applicants for District employment should be able to substantially misrepresent critical information on their employment application with impunity; the certification and agreement on the application indicates unequivocally that they cannot.

The grievant cannot credibly claim that his

omission of his employment with Briggs & Stratton constituted a trifling omission or was the product of simply oversight. While the grievant did include his service at Allis-Chalmers (a decade earlier, and as a coop student), he failed to list his Briggs & Stratton employment, either on the application, or on his resume, or when contacted by District personnel office, or at his pre-employment interview, or when advised prior to his start date of the need to supplement his application with subsequent information.

The grievant deliberately withheld information about Briggs & Stratton because he knew that any inquiries would lead to disclosure of a very dubious employment record there, and that the listing of his dates at Briggs & Stratton would require him to explain the four week absence in August, 1988, thus forcing the disclosure of adverse information. Either way, the grievant knew that listing Briggs & Stratton would make virtually nil his chances of being hired by the District.

The grievant has no credible excuse for providing a false employment record to the District. His varying excuses are internally inconsistent. That the grievant is conscious of having provided a false employment history is apparent from the sheer number and untenability of the lame 'excuses' he kept concocting.

The District has consistently terminated all employes found to have engaged in conduct like the grievant's. Whenever a material misrepresentation on an employment application has been made and discovered, the employe responsible for the misrepresentation has been terminated. This consistent practice underscores the paramount institutional interest which any employe has in ensuring the integrity of the hiring process. If termination is not upheld in the present case and under the present facts, the employer might as well scrap its belief that it is important to carefully evaluate and screen candidates for employment, and select them instead by lottery.

The Union waived its right to file a reply brief. On April 4, the District filed a letter brief taking issue with the Union's argument that the year's delay between the grievant's application and the checking of his references indicated a disinterest by the employer in the references. In its reply, the District stated that, while the application was filed in February, 1990, the grievant "was not actively considered by employment until January, 1991," and that a reference check "was not delayed because this was considered unimportant," but rather was delayed "until the grievant was actually being considered for a position, which did not occur until 1991."

DISCUSSION

The Union has stated that arbitrators "have ruled that a false employment application does not give rise to just cause in many situations," and has cited four cases in support of this proposition. Upon review, I find these cases to be either substantially distinguishable, not on point, or even counter to the Union's argument.

In Norandex, Inc., 71 LA 1168, (Feldman, 1978) an employer was found to have acted improperly in discharging an employe for falsification of an employment application; the alleged falsification consisted of not answering a question concerning being related to a current company employe, even though she was then engaged to an employe and company rules prohibited employment of relatives. The arbitrator found that being affianced was "hardly" the kind of legal relationship which would constitute "being related," and that leaving a inquiry space blank did not constitute giving "false and misleading statements." This case is distinguishable from the one before me, in that the arbitrator found invalid the underlying "violation," namely whether the applicant lied in not stating that she was "related to anyone" in the company's employ. As the arbitrator found that the applicant was, indeed, not related to anyone in the company's employ, she could not have falsified the application in so indicating. In the case before me, there is no question that the grievant did have added work experience that he did not list on his application or reveal in his pre-employment interview.

In Kaiser Steel Corp., 64 LA 194 (Roberts, 1975), and United States Postal Service, 71 LA 101 (Krimsly, 1978), employers were found to have acted improperly in discharging employes who answered in the negative an application question asking whether they had ever been convicted of a crime. Again, the arbitrator found that the underlying facts -- that the applicants reasonably believed that the charges had been dismissed and their record had been expunged -- indicated that the applicants were not, in fact, being untruthful. Again, as in Norandex, these cases are not entirely on point. Further, there is language in Kaiser Steel, at page 195, which cannot be welcome to the Union:

> A deliberate falsification of a material inquiry appearing on an employment application constitutes ample justification for discharge, at least in the absence of condonation or other action on the part of the employer sufficient to create estoppel. This is true because such a misrepresentation goes to the heart of the employment relationship. To put it more directly, where the applicant would not have been hired but for the falsification the prerogative of the employer to discharge upon discovery of the misrepresentation must be honored.

Finally, in Horizon Mining Co., 72 LA 1171 (LeWinter, 1979), a successor employer was found to have acted improperly in discharging an employe for failing to reveal a back injury on an application filed with the predecessor employer, where the predecessor had discovered the falsification following a re-injury but had nevertheless recalled the employe to work and even had its physician certify fitness for duty. The arbitrator held that the original application could not serve as the basis for discharge after the employer had validated the employment relationship by returning the employe to work with full knowledge. In the case before me, there is only one employer (rather than a successor), and that employer has not acted to validate the employment relationship subsequent to the disclosure of the previously unknown facts. I therefore do not find Horizon Mining to be meaningfully on-point for the case before me.

There appears to be a basic consensus supporting discipline in response to an employe falsifying an application or work records. As stated in Morton Thiokol, Inc., 85 LA 834, 837 (Williams, 1985), "arbitrators generally agree that discipline is warranted whenever an employe falsifies employment applications and records." The decision to discipline is not automatically supported, however; as the BNA's Grievance Guide, Sixth Edition, makes clear, arbitrators "generally agree that ... there must have been more than an oversight or a lapse of memory; a deliberate act with intent to defraud must usually be shown."

Arbitrator Williams used a seven-standard test for reviewing an employer's decision to discipline or discharge in response to falsification of an employment application. The distinguished arbitrator Raymond B. Roberts, in a formulation used and endorsed by other arbitrators over many years, devised a four-part test; according to Roberts, the four questions are:

1.Was the misrepresentation deliberate or wilful?

2.Was the misrepresentation material to the

employment at the time it was made?

3.Was the misrepresentation material to the employment at the time of the discharge?

4.Has the employer acted promptly and in good faith? 2/

Was the misrepresentation deliberate? The union says no, asserting that the grievant assumed that if the employer "had any questions about other jobs, they would ask him about it during the interview." The problem, of course, is that the employer did just that -- ask about other employment at the meeting of October 9, 1990. The grievant declined to reveal his experience at Briggs & Stratton at that time, as he declined to reveal this fact on his resume, his written application, in the conversation on January 15, 1991, or in accepting the District's job offer on January 19, 1991. On five separate occasions, spanning eleven months, the grievant had the opportunity to inform the District of his experience at Briggs & Stratton. On two of those occasions he signed documents immediately below a notice stressing the necessity for truthfulness and completeness of the material being submitted. The fact that the grievant failed on all five occasions to reveal his Briggs & Stratton experience leaves me no alternative but to conclude that the misrepresentation was deliberate and wilful. This conclusion is further supported by the fact that the Briggs and Stratton experience the grievant omitted consisted of an uninterrupted ten-month stretch of employment, while the A.O. Smith experience, which the grievant did include, consisted that same year (1988) of only two weeks' work.

Was the misrepresentation material to the employment at the time it was made? Again, the union says no, asserting that the grievant "felt he had nothing to hide" about his work at Briggs & Stratton, and that he "did not feel his work" there was "completely relevant to his job" with the District. The union also relates that the District "claimed that the Grievant had been disciplined at Briggs or even terminated and that Grievant wanted to keep this information from the Sewer Commission for fear of being denied employment," and that "(t)his assertion by management was not substantiated by any credible evidence." From the brief, I am not certain which assertion the union is referring to here. If it is the assertion that the grievant sought to cover-up certain damaging facts for fear of being denied employment, I note only that the evidence of the grievant's actions speaks for

2/ Tiffany Metal Products Mfg. Co., 51 LA 135, 140 (Roberts, 1971); cited in Peoples Gas System Inc., 91 LA 951, 954 (Sergent, 1988); Wine Cellar, 81 LA 159, 163 (Ray, 1983).

itself. If it is the assertion that the grievant was disciplined at Briggs & Stratton, I note only that the union is just wrong. As noted above, the grievant was terminated at Briggs & Stratton, which discharge was rescinded in favor of an unpaid, "disciplinary layoff for misconduct." It is impossible to describe this as anything other than discipline, and very serious discipline at that.

Moreover, contrary to the Union's assertion, the determination of whether or not the Briggs & Stratton experience was relevant was not for the grievant to make, but was properly the employer's.

Did the employer act promptly and in good faith? Inasmuch as the employer first learned of the Briggs & Stratton work experience on January 19, 1993, conducted its investigation, and had an investigatory/disciplinary interview with the grievant at which the termination was announced on February 2, 1993, the union does not challenge that the employer acted promptly. It does, however, challenge the notion of good faith, accusing the employer of retaliating against the grievant for his having filed a discrimination complaint. The union asserts that it "appears clearly that the present discharge case is a direct result" of the discrimination complaint which the grievant filed against the district. 3/ This is a very serious charge, for which the union lacks any credible evidence.

The union asserts that "the discrimination charge was felt to be frivolous by management and that made them irritated. This was admitted by the Employer in this case. Since they were irritated, it is normal to expect them to try to punish the Employe and they did." The entire exchange upon which this aspect of the union's case is built, during the direct and cross-examination of Employment and Human Resource Information Systems Manager Stephen J. Inman, was as follows:

> BY MR. SCHRIEFER:
>
> QCan you describe whether or not -- what is your involvement in disciplinary matters of this type?
>
> AAs the custodian of the records and the person responsible in general for employment, I am usually the first person, either myself or somebody on my staff, who is approached when some discrepancy comes to light. It may come up in a variety of contexts. We have one that came up with

3/ The complaint was subsequently withdrawn and dismissed.

tuition reimbursement, others come up in the labor relations arena and grievances, sometimes they come up in other contexts. But usually the first thing that is done is to check the records and see what we have on file.

QWho made the actual decision to terminate Mr. Ashford?

AI did.

QWere you named -- were you implicated in the discrimination claim which Mr. Ashford filed?

ANo.

QI don't have any more questions.

CROSS EXAMINATION

BY MR. UGENT:

QYou were asked if you were implicated almost like it was a criminal proceedings.

The question was were you implicated in the DILHR case that was filed; you weren't named in there, is that right?

AThat's correct.

QMatter of fact, nobody was named in there; isn't that right?

ANo, I believe there were two individuals specifically named in there.

QWell, let me show you the caption. You see anybody besides the Milwaukee Metropolitan Sewerage District? Does it say et al or anything?

AThis is just a deposition for this case. I haven't seen this before and I don't know whether anybody is named in here or not.

QSo the truth is you don't know who is named in there, is that right?

AI believe I have seen the original complaint and

there are two individuals named in there, David Gadwood (phonetically) and Don Kutz.

QCounsel will bless us with that later. If he named the Milwaukee Metropolitan Sewerage District, that's your employer, isn't it?

AYes, it is.

QDoesn't that irritate you just a little bit when they named your employer and even if they don't name you specifically?

AThat happens all the time.

QWhen I ask you that, that will be a good answer but the question was does that irritate you a little bit?

ANot especially. I mean, when somebody files a complaint there has to be some entity they're filing the complaint against.

QYou believed his complaint to be false and without merit, didn't you?

AYes.

QAnd when people file false claims and claims without merit against your employer, are you telling this Arbitrator that that doesn't irritate you a little bit?

AI don't know whether my personal feelings about that are material to the investigation. I mean --

QWe have a lawyer here that is just excellent and when he thinks it's improper he will let us know.

In the meantime, how about answering the question?

AWell, the initial answer that I would give to you is that any complaint that is filed deserves to be considered, even those that are frivolous. When they are found to be frivolous, I do find that to be rather irritating.

QReally? You do find it to be irritating, is that right?

ASure.

QOkay. That's all I wanted to find out.

Clearly, this is a weak reed upon which to build an assertion of discriminatory retaliation. 4/

In support of its claim of good faith, the District cites other occasions when it has discharged employes for falsification of applications. On July 22, 1980, the district's acting personnel director sent the following certified mail to William Fojut:

Dear Mr. Fojut:

> This is to confirm your termination as an employe of the Sewerage Commission of Milwaukee effective the close of business July 21, 1980. You were orally advised of this decision following the hearing held by me on that date.
>
> This termination is made during your probation period. This termination is made as a result of your providing false information concerning your being related to a District employe during the process of your applying for employment. The District policy prohibits, with certain exceptions not here pertinent, hiring immediate family relations as defined in the policy statement.
>
> Sincerely,
>
> Stephen L. Boehrer
> Acting Personnel Director

On August 20, 1985, the district issued the following Discharge Notice to Ronald Tyler:

DISCHARGE NOTICE

. . .

Nature of Offense

4/ Tr. pps. 39-42.

> Your Application for Employment contains the following Applicant's Certification and Agreement: "I hereby certify that the facts set forth in the above employment application are true and complete to the best of my knowledge. I understand that if employed, falsified statements on this application shall be considered sufficient cause for dismissal."
>
> A minimum of one year of college with coursework in Chemistry, including quantitative analysis was a requirement of the Laboratory Technician position for which you applied. Earlier this month, it came to my attention that your Employment Application contained falsified statements regarding your college coursework. Specifically, you deliberately included false information about having taken Quantitative Analysis 221, with a grade of A. A thorough investigation, including review of your college transcripts, revealed that you never completed the Quantitative Analysis course as you had alleged.
>
> The fact that you deliberately supplied false information regarding your educational background, which was a requirement for the position for which you applied, is sufficient grounds for dismissal.

On October 26, 1988, the district terminated Henry Lee Brown, Jr., for a series of offenses, including abuse of sick leave (claiming illness when he was in fact engaged in false imprisonment and battery), poor attendance, and the falsification of his employment application (namely the deliberate failure to disclose criminal convictions for attempted murder and other serious offenses). In informing Brown of his termination, Human Resources Manager Pam Falvey wrote, in part, as follows:

> Your adult criminal record and the subsequent investigation of public records reveals, for the first time, that you lied on your application for employment and failed to disclose to the District a series of criminal convictions which substantially related to employment. You signed the employment application indicating you had truthfully and honestly disclosed all of your adult conviction record.

....

> The last paragraph of the application form which was signed by you, provided that misstatement or omissions of material facts would constitute grounds for termination of your employment.

....

> Refusing to fully disclose information the District had a right to know about is a serious, deliberate and intentional act contrary to the honest conduct the District requires from all employes. Upon a determination of such intentional and substantial falsification of a material matter (such as your convictions) on an employment application, the only appropriate discipline is termination. Therefore, I conclude your employment should be terminated for the intolerable offense of falsification of your criminal conviction record of your application for employment.

Clearly, these three cases can all be distinguished from the one before me, in that the falsification itself was, in part, subsumed by other issues of qualifications more clear-cut than appear in the instant grievance. That is, the truth about Tyler's lack of academic credentials, or Fojut's relative, would have disqualified them from consideration more absolutely than would knowledge of the grievant's work record at Briggs & Stratton; while the grievant's work record at Briggs & Stratton might well have made it less likely that the district would offer him a job, the work record would not have had the absolutely disqualifying impact that a lack of academic qualifications or violation of the nepotism policy would. 5/ Of greater relevance, though, is that the communications from the district indicate that the employer considered these primarily as cases of falsified applications, and responded in that context.

The employer has thus shown three cases, spanning 14 years, in which it responded to the discovery of falsified applications with prompt discharge. The union has offered no evidence of any employe similarly situated to the grievant -- a post-probationary employe whose application falsification consisted of the deliberate omission of relevant work history -- given lesser

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4/ I leave unanswered the question of the degree to which Wisconsin's fair employment laws, particularly Sec. 101.31, Stats., would have permitted the district to take Brown's arrest and conviction record into account.

discipline than the discharge imposed here. Accordingly, I must conclude that the employer acted both promptly and in good faith.

Finally, I turn to the question of whether the misrepresentation was material to the employment at the time of the discharge. As Roberts explains, this questions examines the extent to which "time may have healed the prejudicial effect of the misrepresented matter," such as a medical condition having healed or a good attendance record overcoming the significance of a prior discharge for chronic tardiness. Tiffany Metal Products Mfg. Co., 56 LA 135, 140 (Roberts, 1971).

At hearing, the record as to the grievant's work record for the district was only partially developed, through this questioning of Employment and Human Resource Information Systems Manager Inman:

> MR. SCHRIEFER:
>
> What would have occurred if disclosure had been made in the present case?
>
> AWell, we would have investigated the employment record with Briggs & Stratton and having obtained the information regarding his employment record with Briggs & Stratton, we would have hired somebody else.
>
> QDid we have problems with Mr. Ashford as an employee?
>
> AYes, we did. We had significant problems related to his attendance and to some extent insubordination.
>
> MR. UGENT: Does this have some relevance? I mean, it has nothing to do with the termination as far as I know.
>
> MR. SCHRIEFER: Sure it does. The material or the information which Mr. Ashford failed to disclose was plainly highly relevant information because the problems which we had at the District with him were precisely the types of problems that we would have known about in advance had we been able to make a check.
>
> MR. UGENT: And if you were firing him now because of his attendance, you wouldn't hear me talking but apparently it had no part in the discharge. I thought he was being

terminated because of a material omission in his employment application which even if he turned out to be the finest employee the District ever had, you would still be firing him, wouldn't you?

MR. SCHRIEFER: I would guess so. I'm not really qualified to answer that.

THE ARBITRATOR: So Mr. Ugent, are you saying that all testimony and evidence as to work performance at the District is irrelevant?

MR. UGENT: Yes, because it doesn't, it played no part in the termination. It's my understanding they claimed to have a strict rule that if you make a false or if you omit a material fact on your employment application, you will be terminated. And as I say, if this employee were excellent, he would still be terminated. So it just seems to me it's irrelevant.

MR. SCHRIEFER: I would say the information bears significantly on the relevance of the particular nondisclosure here.

MR. UGENT: Well, I mean, he didn't disclose it because he knew he was going to have an attendance problem after he started work there? That's a pretty good one. You're telling me you're not offering this testimony to show that in the larger scheme of things that he wasn't that good of an employee anyway and he doesn't have any particular meritorious claim to the job?

MR. SCHRIEFER: I guess it shows that the offense, it shows -- it's a factor which aggravates the offense.

THE ARBITRATOR: Well, just a minute. What is the -- is it the District's position that an employee with an exemplary ten year record whom you discover to have materially falsified his or her employment application would be summarily discharged?

MR. SCHRIEFER: Can I ask the witness that question?

THE ARBITRATOR: Yes.

BY MR. SCHRIEFER:

QYou heard the statement just made by the Arbitrator. Has that ever occurred at the District?

AWell, I would say that there are two cases that are analogous that would answer that question in the affirmative and I don't have the exact dates but we had an employee who was terminated during a probationary period ten or twelve years ago who failed to disclose his status as a relative at the time when we had a policy against hiring relatives. That employee was by all evaluation of performance fine. He was discharged.

We had another employee who it came to light had indicated that he had completed successful course work in quantitative analysis who was a Laboratory Technician and subsequently applied for tuition reimbursement for that same course. And that employee was also terminated without regard to any performance. I don't recall any particular performance problems that he had.

So in both of those instances the voracity of the information and the breach in the confidence that we held the employee information were sufficient grounds for termination.

THE ARBITRATOR: For the time being I am not going to let you go into the matters of Mr. Ashford's work performance on the basis of that. 6/

While this exchange hints at what the employer suggests the evidence would show, this testimony did not put on the record a significant amount of evidence regarding the grievant's work experience for this employer, beyond the employer's testimony -- neither corroborated nor refuted -- that Ashford had "significant problems related to his attendance and to some extent insubordination."

It would have been helpful to have substantial evidence on the record on this point, to help me address the question of

6/ Tr. pps. 31-34.

whether the misrepresentation was material at the time of the discharge. To a degree, I believe I erred in sustaining the union's objection to this line of questioning. But I do note that it was the union which objected to this aspect of inquiry. The questions thus arises as to whether the grievant should benefit from the skimpiness of the record on this point.

I conclude not. I have answered the three other questions in a manner contrary to the union's hopes -- that the misrepresentation was wilful; that the misrepresentation was material to the employment of the time it was made; that the employer acted promptly and in good faith. The employer sought to offer evidence, and in fact commenced testimony, answering the fourth question, seeking to show that the misrepresentation was material to the discharge. The employer began offering such evidence, when the union, through its objection which I sustained, successfully foreclosed further testimony on this point. Given this course, I cannot conclude that the misrepresentation was not material to the employment at the time of the discharge.

When considering applicants for employment, employes have a legitimate right to know the truth about relevant, work-related matters. One such matter about which an employer has a legitimate right to know is an applicant's prior work experience. Deliberately concealing elements of a prior work history prevents the employer from making a complete and comprehensive inquiry into an applicant's credentials and qualifications. An employer whose inquiry is thus hampered cannot make a fully informed decision. Given the protections which accrue to an applicant upon hire, and especially upon the passage of probation, it is important for the initial decision to hire to be as informed as possible.

The employer here has sought to ensure accuracy and candor in the application process by the "Applicant's Certification and Agreement" on the application, and by a related statement on the form accepting the employment offer. To the extent that the employer argues that any and all violations of these disclosure statements justify immediate discharge, I do not agree. There may well be situations in which an omission, due to inadvertence, mitigation, amelioration, or other reasons, would not justify discharge.

Here, however, I have found the facts do justify such action. I am convinced the misrepresentation was willful; that it was material to the employment at the time it was made; that it was material to the employment at the time of the discharge; and that the employer's investigation was prompt and in good faith.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin this 10th day of June, 1994.

By Stuart Levitan /s/

Stuart Levitan, Arbitrator