

**IN THE MATTER OF ARBITRATION**

**Between**

**UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
FEDERAL CORRECTIONAL INSTITUTE  
FORREST CITY, ARKANSAS**

**And**

**AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL UNION NO. 922  
FMCS 08-01148**

**MOTION TO DISMISS OR IN THE ALTERNATIVE  
A MOTION FOR SUMMARY JUDGMENT**

**Before**

**Mark D. Keyl  
Arbitrator**

**For the Agency**

**Tiffany O. Lee  
Assistant General Counsel  
Employment Law and Ethics  
Branch  
Department of Justice  
Federal Bureau of Prisons  
HOLC Building, Room 818  
320 First Street, N.W.  
Washington, DC 20534**

**For the Union**

**Jeff Roberts, President  
Local 922  
P.O. Box 1075  
Forrest City, AR 72335-1075**

## **BACKGROUND**

The Federal Bureau of Prisons Federal Correctional Complex Forrest City, AR is hereinafter referred to as "Agency". American Federation of Government Employees (AFGE) Local 0922 is hereinafter referred to as "Union".

The instant grievance was presented to the Agency on October 19, 2007. The Agency responded to the grievance on November 16, 2007. The Agency denied the grievance on procedural and substantive grounds. Specifically, the Agency denied the grievance based on timeliness and specificity, pointing out that the Union failed to provide names of alleged affected individuals and failed to provide dates of the alleged occurrences. The Agency also informed the Union the grievance was untimely. On December 4, 2007, the Union invoked arbitration. Subsequently, the parties requested and received a list of arbitrators from the Federal Mediation and Conciliation Service (FMCS), and from that list Mark D. Keyl was selected as arbitrator. Prior to hearing the Agency submitted their Motion To Dismiss Or In The Alternative A Motion for Summary Judgment. The Union responded in a timely manner.

## **ISSUES**

1. The Agency asserts that the Master Agreement between the parties does not define when a party must submit threshold issues. The Agency cites Article 31(e) of the Master Agreement which states: "If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue." The Agency asserts that threshold issues may be raised at the hearing, including that of arbitrability.
2. The Agency asserts that the Union grievance was not timely, and that it lacked specificity, and questions arbitrability.

## **APPLICABLE AUTHORITY**

### **MASTER AGREEMENT PROVISIONS**

### **ARTICLE 31. GRIEVANCE PROCEDURE**

**Section a.** The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

**Section b.** The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

**Section c.** Any employee has the right to file a formal grievance with or without the assistance of the Union.

1. after the formal grievance is filed, the Union has the right to be present at any discussions or adjustments of the grievance between the grievant and representatives of the Employer. Although the Union has the right to be present at these discussions, it also has the right to elect not to participate.....
4. The Union has the right to file a grievance on behalf of any employee or group of employees.

**Section d.** Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence. If needed, both parties will devote up to ten (10) days of the forty (40) to the informal resolution process. If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.....

**Section e.** If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue.

**Section f.** Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. The local President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM through the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided to the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

1. When filing a grievance, the grievance will be filed with the Chief Executive Officer of the institution/facility, .....

**Section g.** After a grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. If the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of this Agreement within thirty (30) calendar days from receipt of the final response; and
2. A grievance may only be pursued to arbitration by the Employer or the Union.

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two ways:

1. By going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?" or
2. Through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.

Section i. The employee and his/her representative will be allowed a reasonable amount of official time in accordance with Article 11 to assist an employee in the grievance process.

#### Article 32- ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement.

Section b. When arbitration is invoked, the parties (or the grieving party) shall, within three (3) working days, request the Federal Mediation and Conciliation Service (FMCS) to submit a list of seven (7) arbitrators.

1. A list of arbitrators will be requested utilizing the FMCS Form R43;
2. The parties shall list on the request any special requirements/qualifications, such as specialized experience or geographical restrictions;
3. The parties shall, within five (5) workdays after the receipt of the list, attempt to agree on an arbitrator. If for any reason either party does not like the first list of arbitrators, they may request a second panel;
4. If they do not agree upon one of the listed arbitrators from the second panel, then the parties must alternately strike one (1) name from this list until one (1) name remains; and
5. The arbitrator selected shall be instructed to offer five (5) dates for a hearing. ....

#### DISCUSSION AND OPINION

The Agency asserts that the Master Agreement between the parties does not define when a party must submit threshold issues. The Agency cites Article 31(c) of the Master Agreement which states: "If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue." The Agency asserts that threshold issues may be raised at the hearing, including that of arbitrability.

The Agency encouraged the Arbitrator to look within the four corners of the Master Agreement. In doing so, the answers are quite clear. The Master Agreement does allow for the Arbitrator to address threshold issues at the hearing. In addressing those issues, this Arbitrator has chosen to make a separate ruling on the Agency Motion, so as to keep these issues separate from the Final Award.

The Agency asserts that the Union grievance was not timely, and that it lacked specificity. In looking at the timeliness issue, Section 31 d, a grievance must be filed within 40 days of the date of occurrence, however "If a party becomes aware of an alleged grievable event more than 40 calendar days after its occurrence, the grievance must be filed within 40 days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence." Furthermore, the Master Agreement even allows for a grievance to be filed within the life of the Master Agreement. It is clear that timeliness is not a factor that would be any hindrance in the pursuit of resolving a grievance. The contracts language is very positive in encouraging both parties to resolve their differences.

In the instant case, it appears that the Union had some questions concerning overtime in the Health Services Department. Mr. Foreman, as Union President, requested certain overtime records from Ms. Bozeman on June 26, 2007. The request was submitted again in August 2007, and a third time on September 18, 2007. (Affidavit-AFGE Local 0922) The Union received overtime authorization forms on September 19, 2007. The Union did not receive overtime assignment records, which would have allowed for a proper audit. The Master Agreement requires the Agency to keep overtime records for two years. (see Article 18 Section p.2.) At no time did the keepers of the records question specificity. Mr. Foreman's request of June 26, 2007, specifically requested overtime records from both the low and middle facilities, including sign up lists, offers made by the employer for overtime and all overtime assignments for two years from the date of this request. A plain reading of this record in 2007 would seem to be from June 26, 2007 back to June 26 2005. This is the time period being investigated by Mr. Foreman. Upon receiving part of the records by September 18, 2007, Mr. Foreman filed within 40 calendar days from the date that the grievant could reasonably be expected to have become aware of the occurrence. The request for records was

specific, as was the grievance itself. The Union could not determine what the specific charges would be without benefit of auditing the overtime records, and they were never provided all of the records requested. The parties went through the proper grievance process and selected an arbitrator in accordance with the Master Agreement. There is no question that this is an arbitrable matter.

I note that the argument of arbitrability, timeliness, and specificity are a long standing issue with the Agency, as Arbitrator Mooreland discussed in his Award of October 27, 2010. (see United States Department of Justice Federal Bureau of Prisons Federal Correctional Institute Forrest City, AR and American Federation of Government Employees Local Union No. 922, FMCS #07-01054, 10/27/2010). I concur with Arbitrator Mooreland's analysis of those issues.

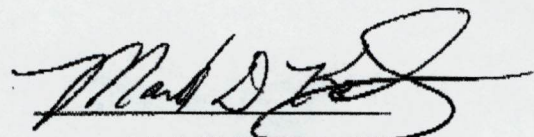
I am concerned that it took over 4 years to schedule an arbitration hearing knowing that records subject to that hearing were being destroyed. It would appear that similar practices as observed by Arbitrator Mooreland continue to be the norm for the Agency.

**DECISION ON THE MOTION TO DISMISS OR IN THE ALTERNATIVE**  
**A MOTION FOR SUMMARY JUDGMENT**

The Agency Motions are hereby Denied.

The Arbitrator's costs shall be borne equally by both parties, pursuant to Article 32, Section d, of the Master Agreement.

Signed this 10<sup>th</sup> day of July, 2012, in Petal, Mississippi.



Mark D. Keyl

Arbitrator