

ARBITRATION

FMCS #01-08485-3

In the Matter of)	
)	
Federal Bureau of Prisons)	
Forrest City, Arkansas)	
)	OPINION
and)	
)	AND
AFGE Local 922)	
Forrest City, Arkansas)	AWARD
)	
)	
)	
)	
)	

This Arbitration was heard on August 23, 2001 at the Conference Room of the Federal Correctional Facility in Forrest City, Arkansas

The Agency was represented by Betty J. Gannon, Labor Relations Specialist.

The Union was represented by Roger Payne, President of local 922.

Witnesses were sworn and sequestered.

Both parties were afforded a full opportunity to examine and cross-examine witnesses and to present evidence.

At the conclusion of the hearing it was stipulated that both parties would submit post-hearing briefs. Briefs were filed in a timely manner.

SAMUEL D. WANG, ARBITRATOR
2204 BOSTON DR.
FORT SMITH, ARKANSAS 72901

THE FACTS

On May 18, 1999, Freddy J. Garrido filed a grievance on his own behalf without Union assistance. The grievance protested ratings in quarterly evaluations and requested revision of those ratings, along with other requests for action in connection with the matter.

The grievance was directed to actions taken concerning Garrido's job performance as a Supervisory Physician's Assistant, an excluded position not coming within the jurisdiction of the Collective Bargaining Agreement then in effect.

Mr. Garrido had become a member of the Bargaining Unit shortly before filing his grievance which covered a time period of April 1, 1998 through March 31, 1999.

The Collective Bargaining Agreement requires the Agency to notify the Union within two days of the filing of any grievance by a member of the unit without Union assistance. The Agency admittedly failed to notify the Union of the filing of the grievance.

Thereafter, on October 23, 2000 the Union filed its own grievance protesting the Agency's failure to notify it of the original grievance and seeking the relief requested by Mr. Garrido plus other relief.

Of significance to this matter are the following provisions of the Collective Bargaining Agreement which are incorporated herein by reference rather than burden this Opinion and Award with language with which the parties are very familiar:

Article 1 - Recognition
Article 6 - Rights of the Employee
Article 7 - Rights of the Union
Article 14 - Employee Performance and Ratings
Article 31 - Grievance Procedure
Article 32 - Arbitration

These Articles will be identified hereinafter in the Discussion Section of this Opinion and Award.

THE ISSUE(S)

The Union has framed two issues:

1. Whether the Agency violated Article 31, Section C, when it failed to notify the Union within two (2) working days after an employee filed their own grievance without the assistance of the union?
2. Whether the Agency violated Article 31, Section C, when it failed to give the Union a copy of the Grievance Response within two (2) working days after the Employer gave a written response to the employee that filed their own grievance without the assistance of the Union?

The Agency has framed the issue as follows:

Does Management at the Federal Correctional Institution (FCI) Forrest City recognize AFGE Local 922 as the sole and exclusive representative for all bargaining unit employees at FCI Forrest City? If not, what shall be the remedy?

As this Arbitrator views the entire factual situation in view of the Collective Bargaining Agreement, the primary issue is whether or not there was a break down in procedures which resulted in a violation of the Collective Bargaining Agreement and if so what is the remedy?

DISCUSSION

Significantly, Mr. Garrido failed to appear at the hearing and sent word that he was leaving the premises due to illness. Additionally, he notified the Union that he was withdrawing his grievance on April 17, 2001. However, it was recognized that once the grievance was submitted to the Union, the Union is the agency which must determine whether or not to withdraw the grievance.

The Agency had originally objected to the grievance as being untimely. The Union contended that it had only been advised of the matter on September 13, 2000 and had filed its grievance protesting the Agency's failure to notify it on October 23, 2000.

The parties presented evidence on both sides of this issue the Agency seeking to establish that the Union had long been aware of the matter and the Union seeking to prove it only had notice on September 13.

It could reasonably be held that even then the grievance was one day late, depending on how the days are to be counted.

The language of Article 31, Section d provides that "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence." That language does not specify which day is the first to be counted, however, the customary usage is for the first day to be the day of the event when the language uses the word "of" and the first day to be counted is the day following the event when the language provides "from" the event. So within forty (40) days of September 13 would be October 22.

I am not dismissing this grievance on the above basis simply because I feel the parties need to clarify that question of time at the bargaining table.

The Agency also objected to the manner in which the Union filed the grievance with a Lieutenant rather than with the Warden. This is a valid objection. The Collective Bargaining Agreement provides clearly in Article 31, Section f that "the grievance will be filed with the Chief Executive Officer of the institution/facility" and makes no provision for filing it with anyone else.

There is only one Chief Executive Officer. As such that officer is the contractually designated recipient of grievances. No one else is the Chief Executive Officer. A statement once attributed to President Lincoln was: "If you call a dog's tail a leg, how many legs does the dog have? Four! Calling a tail

a leg does not make it a leg." Likewise calling a Lieutenant a Chief Executive Officer does not make him/her a Chief Executive Officer. Just being "in charge" at a given time does not make a Lieutenant the CEO.

So where does this leave us? A grievance of questionable timeliness was filed with an improper person. Nevertheless, the problem does not go away.

A careful reading of Article 14 shows that employees have a right to appeal performance ratings on their own. While the Union and Agency are cloaked with authority to pursue arbitration, the language of Article 14 does not require notice to the Union of this type of grievance. So did the Agency violate the Agreement or not? I think it did.

Technically, it is required by Article 31 to notify the Union of grievances filed by individual bargaining unit members. Likewise the Agency is required to give the Union a copy of its response.

Likewise, the Agency has not followed the best administrative practice in the way grievances have been accepted in the past. If it has been less than efficient, it cannot point a finger at the Union for the same inefficiency.

Finally, the crux of the whole matter is the fact that the initial grievance did not concern either the Union or the labor agreement. It involved a matter not covered by the Collective

Bargaining Agreement and was not grievable in any event.

However, once the grievance was filed, the Agency should have given a copy of the grievance and answer to the Union. The matter was not grievable or arbitrable since it did not come within the coverage of the bargaining relationship.

Hence, while the Agency's action violated the Collective Bargaining Agreement, no harm was done to the grievant or the Union.

In view of those circumstances no award for damages or punitive action is merited.

CONCLUSION

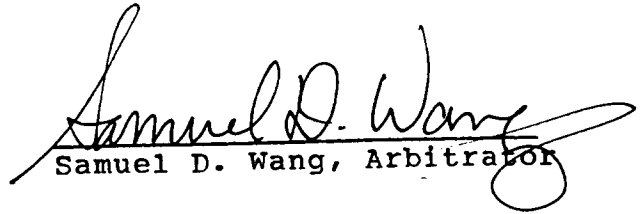
This entire matter arose out of a non-grievable and non-arbitrable set of events. However, the Agency was in technical violation of the Collective Bargaining Agreement in not following the notice requirements of Article 31. Likewise the Agency has not been consistent in the manner in which its Chief Executive Officer receives grievances.

The grievance was probably untimely, and was not filed with the proper authorized officer.

AWARD

The Agency is directed to assure notice is given to the Union in future situations of this nature and is also advised to establish a procedure for the receipt of grievances by the Chief Executive Officer or a designated recipient in his office.

Made and entered this 24th Day of October, 2001, at
Fort Smith, Arkansas.


Samuel D. Wang, Arbitrator