In the Matter of the
Arbitration Between

Council of Prison Locals (AFL-CIO)	Grievance: FMCS# 06-00765
AFGE Local 3809	Grievants: New, C. & Moore, Z.
Union	
and	Hearing Date: June 7, 2006
U.S. D. O. J. Federal Bureau of Prisons	Brief Date: July 12.2006
Fed. Correctional Inst. Big Springs, Tx.	Award Date: August 18,2006
Employer	Arbitrator: Rhonda R. Rivera

For the Employer: Michael A. Markiewicz

For the Union: Cindy Sanders

Present at the Hearing were the Grievants and Advocates.

Preliminary Matters

The Arbitrator asked permission to submit the award for possible publication. Permission was granted. No sequestration was requested. All witnesses were sworn.

The Advocate for the Grievants stipulated that the Grievance was properly before the Arbitrator, but the Advocate for the Employer objected, challenging the arbitrability of the Grievance. (See Below)

Joint Exhibits

1. Master Agreement: Federal Bureau of Prisons and Council of Prison Locals (American Federation of Government Employees)

2. The Grievance dated September 12, 2005

3. Response to the Grievance dated October 4, 2005

4. Demand for Arbitration dated November 2, 2005

Union's Exhibits

1. U. S. CODE, Title 5: Section 7131 (a)-(d) "Official Time"

2. Management Directive 110: Chapter VII " Witnesses and Representatives in the Federal EEO Process Section C: Official Time"

3. Three e-mails between Grievant New and ESM Cross on August 22, 2006 at 7:56 A.M.,9:34 A.M. and 10:06 A.M.

4. Fax to lawyers for Employer with copies to Grievants from EEOC Administrative Judge dated August 8, 2006

5. Four e-mails between Grievant New and Atty. Michael Rank on August 22, 2006 @ 10:17 A.M., 10:32 A.M., 11:18 A.M., and 1:18 P.M.

6. Memo from Grievant New to Associate Warden dated August 31, 2005 "Informal Resolution Attempt"

7. Memo from Warden Justice to Grievant New dated September 6, 2005

8. Memo from Sandra Paniagua to Clinton & Jacobson dated July 5,2005, entitled: "Official time for EEO Hearing"

9. Request for Leave or Approved Absence made by Grievant New on August 23, 2005

10. Opinion of the Administrative Judge in the case of Grievant Moore versus Alberto Gonzales, AG. (admitted solely for the purpose of examination of the section on damages)

11. Time and Attendance Worksheet of Grievant New for Pay Period 17

12. Time and Attendance Report for Grievant Moore for Pay Period 17

13. Daily Assignment Roster for Federal Correctional Institution of Big Springs, Texas for Monday, August 29, 2005

Employer's Exhibits:

1. Part 1614 Federal Sector Equal Employment Opportunity , in particular 1614.05 "Representational and Official Time"

2. STAR Time and Attendance Report for Grievant New for Pay Period 17

Issues:

1. Were the Grievants obligated to raise the issue of preparation time, requested for the damages hearing , at that same damages hearing, so that their failure to do so, precluded the raising of the same issue by a Grievance under the Contract? If yes, the Grievance is not properly before the Arbitrator.

2. Was the granting of 4 hours to each Grievant a "reasonable time" for preparation for the damages hearing of the EEO issue? If no, what shall the remedy be?

Section I: Is the Grievance Properly Before the Arbitrator?

In the Employer's denial of the Grievance at Item 5 of Joint Exhibit 4, the Employer alleged that the question of official time had already been litigated at the EEO hearing of July 28, 29, and August 1, 2004. However, in testimony taken at the Arbitration hearing and in discussion between the Advocates, this claim of "*collateral estoppel*" [See Elkhouri 6th Edition @ P.387] was withdrawn, when the parties agreed that EEO administrative judge had decided a different official time issue, not the issue of preparation time for the damages hearing that is now before the Arbitrator.

However, the Employer maintained that the Grievance was precluded by the doctrine of " *res judicata*" (see below) because the Employer claimed that the Grievants were obligated to raise the issue of inadequate preparation time for the hearing on damages at the damages hearing itself. The Grievants agreed that they did not raise the issue at that hearing on August 30, 2004.

The Employer points to the Federal Labor Management Relations Statute Subchapter III Section 7121 (d) that states. in part, " *An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both.*

Grievant Moore choose the EEO forum over the grievance forum for the substantive issue of discrimination and its potential remedy. The Employer's claim is that the choice of the EEO forum to determine the issue of discrimination precluded the Grievants from raising the issue of official time under a contractual grievance, i.e. the issue was *res judicata.*

The Employer cites two cases to support this claim:

(1) ***Kessinger v. Henderson*** EEOC 01976399 (June 8, 1999) 99FEOR 3265

(2) ***Shjeflo v. Johanns*** EEOC 01A55789 (February 27,2006) 106 FEOR 262 106 LRP 11168

The Arbitrator read these two cases very carefully a number of times. These cases do not stand for the proposition that when a complainant "elects" to use the EEOC process to pursue a substantive claim of discrimination that the complainant is barred from using the grievance process to pursue a tangential question of process under the Contract.

Kessinger stands for the proposition (with regard to official time) that the Agency can severely limit official time when the complainant is abusing the system. No such claim has been made about the Grievants in this case. In fact, the warden specifically testified that the Grievants did not abuse the system with unwarranted requests for official time.

Shjeflo stands for the proposition that "*a complainant is entitled to a reasonable amount of official time to work on EEO matters.*" The case relied on EEOC Management Directive 110 that states " *the regulation does not envision large amount of time for preparation purposes ...reasonable with respect to preparation time is generally defined in terms of hours, not in terms of days, weeks, or months*"

Shjeflo has no particular application to this Grievance because both parties agreed that the "reasonable" standard was to be applied and because the Grievants requested 8 hours and 10 hours respectively, not weeks, days, or months. In the ***Shjeflo*** case, the complainant had asked for 80 hours or two weeks time.

What the Employer is claiming is the affirmative defense [See Federal Rules of Civil Procedure Rule 8C)] of *res judicata,* namely that, since the Grievants failed to raise the denial of adequate time to prepare at the damages hearing itself, they were precluded from raising the issue as a Grievance.

Res Judicata ,according to Elkhouri [See 6th Edition @ page 387], applies when the following conditions are met:

"(1) *The issue at stake is identical to the one involved in the prior litigation; (2) The issue has been actually litigated in the prior suit; (3) The determination of the issue in the prior litigation was a critical and necessary part of the judgment in the action; and (4) The party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding.*" [Citing Baxas Howell Mobley, Inc. v BP Oil Co.630 So.2d 07, 209 (Fla. Dist. Ct. of App. 1993)]

The next step is holding this situation under debate against those standards from Elkhouri:

(1) The issue at stake in the damages hearing was the amount and type of damages to be assessed against the Agency for its violation of EEO. But, the issue in this Grievance is one of "official time" for union representatives representing union members in EEOC hearings as well as in other hearings.

(2) The issue of "official time" was not litigated in either the damages hearing or the former hearing on the substantive issue of discrimination. The Administrative Judge, apparently, in the first hearing, ruled on a preparation time issue, but the issue was not litigated, and neither party presented evidence at the first hearing on preparation time.

(3) <u>The issue of preparation time for the hearing on damages is not and was not critical and a necessary part of the judgement on damages.</u>

(4) The evidence is non existent on whether the Agency had a full and fair opportunity to litigate the issue of official time at either hearing. Neither party would want to spend time preparing on the "official time" issue while preparing for a hearing of such importance as the damages issue. Although the Grievants might have raised this issue with the administrative judge, such an action probably would be detrimental to their case because the official time issue was peripheral to their contentions on damages.

Since the situation in this Grievance does not meet the standards as outlined in Elkhouri on *res judicata*, the Arbitrator holds that the Grievants had no duty to raise the issue of "official time" to prepare at the EEO hearing on damages. Therefore, the issue is not precluded from Arbitration.

The Arbitrator finds that the Grievance is properly before the Arbitrator.

Section II:

FACTS (Issue II)

(A) In early 2004, Grievant Moore filed an EEOC claim against the Employer. The Grievant asked for and received Union representation. Her appointed advocate was Grievant New. On July 28, 29, and August 1, 2004, a hearing on the substantive discrimination claim was held before an Administrative Judge. (Union Exhibit 10) At some point, the Administrative Judge decided to bifurcate the hearing and hear the damages issue at a later date.

On Monday, August 8, 2005, a fax was sent to the legal representatives of the Employer and was copied to the Grievants. (Union Exhibit 4)This fax announced that the Grievants had prevailed on the discrimination claim and that the hearing on damages would proceed on Tuesday, August 30, 2005. Neither party presented any evidence as to when this fax was received by either the Employer nor the Grievants. This same fax announced that potential exhibits had to be provided to the opposing party and the judge no later than noon on August 25, 2005.

(a) On August 22, 2005 at 7:56 A.M., Grievant New, in her role as Advocate for Grievant Moore, e-mailed the Employer and asked for 10 hours for herself and 8 hours for Grievant Moore to prepare for the August 30, 2005 hearing. (Union Exhibit 3)

(b) At 9:34 A.M.,Employee Services Manager (ESM) Michael Cross replied: " as discussed with Michael Rank, four hours of official time should be granted to both [Grievant] New and [Grievant] Moore for Monday August 30 (sic) and the whole day for August 30,2005." (Union Exhibit 3)

[c.] At 10:06 A.M., Grievant New replied " I do not believe four hours will be sufficient to interview and write questions for three witnesses. I request reconsideration of the request of 10 and 8 hours for my self and [Grievant] Moore. (Union Exhibit 5)

(d) At this point, Grievant New received an e-mail from Mr. Rank, the opposing council, that said: "Please tell [Grievant] New that I understood the Judge to say she already had more than enough time to prepare for this hearing including the damages portion. Based on what the judge stated, four more hours for each of them seems more than reasonable." (Union Exhibit 5)

(e) [Grievant] New replied: " Why is it that the person who we are opposing in the hearing is getting to decide how much official time I get to prepare for the case. He is certainly not a neutral decision maker. I have never done this type of hearing before and have been consulting with the AFGE attorney and researching the law. I plan to work most of my weekend even if I am given the 10 hours on Monday. I think it is only fair and reasonable that the agency give one day for preparation time on this to me and the Complainant." (Union Exhibit 5)

(f) Attorney Rank replied at 11:18 A.M. on the 22nd. "The Judge made it clear that she believed you and [Grievant] Moore had more than sufficient time to prepare for this hearing already. Therefore, an additional four hours for each of you to prepare testimony seems more than reasonable. The Agency has already accommodate your request to move the hearing day and we have agreed to roster Ms. Moore. The Agency's position will remain the same on these issues unless a substantial change in circumstances occurs." (Union Exhibit 5)

(g) At 1: 18 P.M. on August 22,2005, Grievant New replied to Attorney Rank. " Just the portions of the Chapter of Hadley EEO regarding damages is over 200 pages which surely must be required reading if someone is representing an EEO Complainant to the best of their ability. I am not that fast of a reader.

" I remain committed to the fact that I am going to need more than four hours of official time to represent my Complainant to the best of my ability. I was trying to get an AFGE attorney to come here but one is not available. Prior to the hearing, I must familiarize myself with the required damages documentation. familiarize myself with over 100 pages of exhibits, prepare more specific questions and re-interview [Grievant] Moore, his (sic) husband and her mother. I see nothing reasonable about the four hours offered.

She continued: " I do not have the legal background nor representational experience to prepare for this hearing in four hours. ....." (Union Exhibit 5)

Subsequently, both of the Grievants requested and received Annual Leave on August 29, 2005 to use for preparation. (Union Exhibit 9)

On September 12, 2005, the Grievants filed a Grievance under the Contract with regard to the refusal of the Employer to grant more than 4 hours of preparation for the hearing on the damages. (Joint Exhibit 2)

On October 4, 2005, the Employer denied the Grievance. (Joint Exhibit 3) On November 2, 2005, the Union invoked the right to Arbitration. (Joint Exhibit 4)

(B) At the hearing, former ESM Michael Cross testified. Mr. Cross stated that he did not know whether Grievant New had legal training or not, that he had no knowledge of the complexity, if any, of damages hearing, and that he was unaware of how difficult her case was. He stated that he spoke to Mr. Rank, the Agency attorney, and relied on him to determine what number of hours of Official Time was "reasonable."

The current Warden, David Justice, also testified. He did not make the original decision of how many hours were to be granted to the Grievants, but he did decide the subsequent Grievance against the Grievants. He testified that he was unaware of the e-mail correspondence between Grievant New and ESM Cross and Attorney Rank. He said he was also unfamiliar with the book Hadley on EEO with 200 pages on damages, unfamiliar with the transcript of 514 pages bearing the testimony of 13 witnesses, and that he relied on Mr. Rank as to what was "reasonable".

Grievant New testified that both she and the Complainant expected to represented by an AFGE lawyer who had promised to do the case. However, shortly before the 22nd, she became aware that no lawyer was going to appear and that she would have to be the advocate for the hearing on damages. She testified that she had actually spent 3 hours on Monday, August 22nd, reviewing the 150 pages of Hadley (Chapter 21), 2 hours on Tuesday, August 23rd, reviewing 50 pages of Hadley, and 4 hours on Thursday, August 25th , preparing and faxing 80 pages of exhibits for the hearing. All these hours were spent on her own time. (Union Exhibit 6)

Grievant New testified that on Monday August 29, 2005, the day before the hearing, she spent 12 hours preparing. (Union Exhibit 6) She used the four hours of official time, she took 4 hours of Annual Leave, and spent 4 hours of her own time. On August 29th, Grievant Moore took four hours of official time and four hours of Annual Leave, and her own time for the remaining 4 hours.

The Agency introduced no witnesses. However, in the Agency's closing brief, the Agency agreed that to be "reasonable" the decision can not be " *arbitrary, capricious, or unreasonable or made in bad faith.*" (Agency Brief at p.4) See also U.S.C. Title 5 Section 7131 (d) "*reasonable, necessary, and in the public interest.*"

The Agency alleged tardiness on the part of Grievant New because she waited until August 22 to make a request for official time. Grievant New testified that her delay was caused by her belief that she had that the AFGE would be sending a lawyer to handle the damage hearing. Moreover, subsequently, she

reported that she worked on the 22nd, 23rd, and the 25th. The Agency noted that she only asked for the official time for the 29th. The Exhibits reveal that when she asked for official time, she never stated how she would allocate her time. One can readily see, however, that her request for 10 hours was an understatement of her actual hours consumed. No doubt, she should have requested more hours. However, the last communication from Mr. Rank indicated that the Agency's position would not be changed. (See underlined section of Union Exhibit 5 above.) All of this discussion is ,of course, speculation after the fact.

The core issue is whether the decision of Mr. Cross to limit the Official Time to four hours for each of the Grievants was " reasonable" under the circumstances.

In making his decision, former ESM Cross admitted that he personally had no empirical data upon which to make his decision, so, he relied exclusively on Mr. Rank. As Grievant New pointed out in her e-mail, Mr. Rank was her opposing council. Even if Mr. Rank acted totally in good faith in giving his opinion, a clear cut appearance of impropriety resulted.

The Agency stated that 4 hours of preparation for a five hour hearing "would seem to be reasonable." (Agency Brief @ Page 5) As an attorney, the Arbitrator takes notice that attorneys usually spent at least double the time in preparation as the expected hours of a hearing. Moreover, the Arbitrator notes that Grievant New was not, and is not, an attorney.

DECISION

The Arbitrator finds that the decision of ESM Cross (and concurred in by Warden Justice) was arbitrary and capricious in light of his lack of evidence upon which to base his decision. Moreover, the choice of Mr. Rank as the expert calls into question the good faith of that decision and raises the appearance of impropriety and bias.

REMEDY

The Arbitrator finds that the Employer must provide Grievant New payment in straight time for the hours that she actually expended, namely, 21 hours. (See USDA Rural Development and AFSCME Local 3870, 60 FLRA 527 (12-30-2004) to wit, " *It is undisputed that the grievant is entitled to be paid for the time she spent performing duties for which she should have been official time.*") She is to have her Annual Leave returned and to be paid straight time for the remaining hours. (See US DOT, FAA & National Air Traffic Controllers

Association 59 FLRA 530 December 19, 2003, to wit: " *where official time authorized by the provisions of a collective bargaining agreement is wrongfully denied and the representational functions are performed on non-duty time, Section 7131 (d) entitles the aggrieved employee to be paid at the appropriate straight time rates for the amount of time that should have been the official time.") [* Citing to US DOD, Defense Contract Audit Agency 47 FLRA 1314,1322 (1993] The total amount of time, as calculated in money, is to be at interest, using the usual rate under the Back Pay Act. (See US Code Title 5 Section 5596(b) (2))

The Arbitrator finds that the Employer is to provide Grievant Moore with 12 hours of time, restoring the Annual Leave used, and paying her straight time for the remainder. The monetary value of the 12 hours is to be at interest, under the Back Pay act. (See US Code Title 5 Section 5596 (b) (2))

The Arbitrator finds that no attorney fees can be awarded since none were expended. "*Only those who hire lawyers are entitled to recover attorney fees,* the Supreme Court said, *even if the self- represented prevailing party is a lawyer* [Kay v. Ehrler] (See Primer on Equal Employment Opportunity, 6th Edition, at page 212)

The Arbitrator retains jurisdiction solely to make sure the correct amounts are paid to the Grievants.

8/18/2006 — Rhonda R Rivera

August 18, 2006
9/9/06 RRR

Rhonda R. Rivera, Arbitrator
FMCS #2593
Member, National Academy of Arbitrators