

IN THE MATTER OF ARBITRATION

BEFORE

NORMAN R. HARLAN, ARBITRATOR

=====

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL IN-
STITUTION - FAIRTON, NJ

AND

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
AFL-CIO

-) CASE NO. FMCS - 09-04056
-) GRIEVANT: DONNELL WHITE
-) DISCHARGE - June 11, 2009
-) HEARING: APRIL 21 & 22, 2010
-) BRIEFS: AUGUST 5, 2010
-) AWARD: AUGUST 23, 2010
-) FINALIZED: NEITHER PARTY FILED AN
APPEAL OF THE AWARD
SEPTEMBER 27, 2010 - UNION GAVE NO-
TICE OF MOTION TO RECOVER ATTOR-
NEY FEES
-) JANUARY 14, 2011 - PARTIES AGREED
TO HAVE MOTIONS/RESPONSE POST-
MARKED***
-) DECISION: MARCH 7, 2011

=====

MOTION ON BEHALF OF THE UNION:

Evan Greenstein, Attorney, AFGE, Office of the General Counsel

RESPONSE FOR THE DEPARTMENT OF JUSTICE:

John T. LeMaster, Attorney, Assistant General Counsel, US Deptment
of Justice, Federal Bureau of Prisons

DISCUSSION

The Arbitrator issued the following AWARD, pp. 57-58. (Quoted)

***The Parties granted the Arbitrator "such time as necessary" to
issue the Decision due to serious illness in the immediate family.

1. The Employer's PROCEDURAL MOTION for alleged violation of Section (a) of Article 22 is denied.
2. The charges of Absence Without Leave (AWOL), Failure to Follow Leave Procedures and Failure to Follow Post Orders are dismissed based upon the Agency's unexplained delay of seventeen (17) months in acting upon the Charges.
3. The Charge of Inflicting Bodily Injury on a Co-Worker is dismissed based upon the overwhelming evidence that the Grievant acted in self defense in an attempt to avoid serious bodily harm or worse from a fellow Officer who had a history of workplace violence and who initiated the altercation. The Agency did not establish just and sufficient cause by a preponderance of the evidence.
4. The Charge of Unprofessional Conduct as part of the Removal action is reduced to a Written Reprimand.
5. SCO Donnell White is reinstated and made whole for all losses, but for the unjust discharge. This includes, but is not limited to backpay, overtime available but for the discharge, allowances such as Annual Leave, Holiday Pay, and full restitution of seniority. Full backpay will be paid within thirty calendar days of receipt of the AWARD.
6. The Grievant will be reimbursed for all out of pocket medical expenses for which he would have been eligible but for the unjust discharge. He will be reimbursed for insurance premiums paid independently, to include deductible amounts, applying the same procedures normally and customarily required by the Agency's Plans.
7. Officer White is to be recalled immediately by Registered mail. It is permissible to contact him by Email or telephone but there must be a a (sic) form of written confirmation. In the event he is employed he is afforded a reasonable period of time to report, not to exceed thirty days unless (sic) this period is extended by mutual agreement or unless Mr. White is temporarily not available for medical reasons.
8. SCO White is required to successfully complete the Agency's standard return to work physical examination.

9. Interest will be paid at a rate agreed to by the Agency and the Union. Absent agreement within fifteen (15) days of receipt of the AWARD the Parties will jointly and expeditiously give the Arbitrator written confirmation which will include each Parties "bottom line," based upon the rate being paid for an eighteen (18) month Certificate of Deposit by banks in the Philadelphia area. The Arbitrator simply wants the Rates, not a Brief nor an explanation. He has resources to do "the math." Apply July 1, 2009 to fix the rate.
10. All Statutory and Contractual deductions will be made, to include but not limited to Union dues.
11. The Arbitrator retains jurisdiction only for the purpose of finalizing the monetary damages.

/s/
Norman R. Harlan, Arbitrator

Montgomery, West Virginia

August 23, 2010

UNION'S APPLICATION FOR ATTORNEY FEES AND COSTS

As shown above the Arbitrator did not award Attorney Fees and costs. On or about November 23, 2010 the Union "filed a motion seeking attorney fees and costs." (Agency Response, Jan. 14, 2010) The Timeliness of the Union's Motion or "application" is not at issue.

The Arbitrator prefers to summarize the Parties' arguments by reorganizing them to save time and reduce costs. However, in this and similar situations it is more efficient to simply quote. Further, accuracy is paramount when the Parties are relying upon common Law, Statutes and arbitration Awards addressing the same Issue.

UNION POSITION

1. "The Union submits this application for attorney fees and expenses pursuant to the Arbitrator's Award (the Award) issued August 23, 2010. In the Award the Arbitrator sustained the Union's grievance in part and denied it in part....The Arbitrator mitigated the Grievant's removal from federal service to a written reprimand..." at 1.
2. "The Union is requesting \$14,283.00 in attorney fees and \$542.13 in costs (includes expenses and three days (sic) per diem), for a total request of \$14,825.13." Id.
3. "...[T]he Arbitrator dismissed the Agency's pre-hearing motion, which called for the grievance to be dismissed on the basis that the notice to invoke arbitration was allegedly defective..." Id.
4. "There were five charges against the Grievant, namely: inflicting bodily injury on a co-worker; unprofessional conduct; absence without leave (AWOL), failure to follow leave procedures and failure to follow post orders...All of the charges were dismissed, with the exception of unprofessional conduct and the possible exception of inflicting bodily injury on a co-worker..." Id. 2.
5. The charge of inflicting bodily harm upon a fellow officer was dismissed on the basis of self defense. The other charges were dismissed due to the "Agency's unexplained delay of seventeen (17) months in acting upon the charges." Id.
6. "...The Union submits this application pursuant to the Back Pay Act, 5 U.S.C.5596 (b)(1)(A)(ii)(2003)...The Act generally allows a prevailing employee to recover reasonable attorney fees upon the correction of an unjustified personnel action..."
7. "Section 7701 of Title 5 of the United States Code governs the appellate procedures of the United States Merit Systems Protection Board (the MSPB) or the Board. Section 7701 (g)(1) states in part an arbitrator (and other authority) "may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party...and the Authority "determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." Id. An arbitrator is considered an appropriate authority under the ACT.

8. "The Board's regulations state the initial decision of a judge will become final 35 days after issuance;" here September 27, 2010. Consequently the Union had 60 days to make application for attorney fees, or until Nov. 26, 2010. The Union's Application is timely filed. Id. 4.
9. "An arbitrator's award resolving a request for attorney fees must set forth specific findings supporting determinations on each pertinent statutory requirement." See U.S. Dep't. of the Treasury, IRS & NTEL, Chapter 53 F.I.R.A. 1697(1998)" Id. 5.
10. "...For a grievant to be able to recover under the Back Pay Act, there must be a finding that the grievant was affected by an unjustified or unwarranted personnel action which resulted in the withdrawal or reduction of the grievant's pay, allowances, or differentials. See NavSea, 56 F.L.R.A. at 478-79. Once such a finding is made, the Back Pay Act permits recovery when an award of fees is: (1) in conjunction with an award of backpay to the grievant on correction of the personnel action; (2) reasonable and related to the personnel action; and (3) in accordance with the standards established under 5 U.S.C. Sec. 7701(g), which pertains to attorney fee awards by the MSPB, FEA, 54 F.I.R.A. 733, NavSea, 56 F.I.R.A. 477..." Id. 5-6
11. The Agency violated Section (a), Article 30 of the CBA which resulted in an unwarranted or unjustified personnel action. As a consequence the Grievant lost pay from his removal effective June 11, 2009 until his reinstatement by the Arbitrator August 23, 2010. He was also made whole for all losses.
12. The Union submitted as its Exhibit 2 its Verified Statement of Attorney Fees and Costs...The requested fees are also reasonable. The F.L.R.A. has articulated three factors for arbitrators to use when determining the reasonableness of requested attorney fees: (1) the extent to which the grievant prevailed; (2) whether the number of hours expended were reasonable; and (3) whether the hourly rate sought is reasonable. See generally FEA, 54 F.L.R.A. 773. Id. 7.
13. "...The extent to which a Grievant prevails is perhaps the "most critical factor to consider in determining reasonable attorney fees." Farrar v. Hobby, 506 U.S. 103, 114 (1992) Here the Grievant was discharged, removed, but only received a Written Reprimand. There is no question the Union is the prevailing Party. See also Sterner v. Dep't of Army, 711 F.2d 1563, 1568 (C.A.Fed.1983).

14. "It is settled law that travel hours and costs are legitimately compensable. See Crumbaker v. Merit Sys. Prot. Bd., 781 F.2d 191 (Fed. Cir.1986)... "The presumption...should be that a reasonable attorney's fee includes reasonable travel time billed at the same hourly rate as the lawyer's normal working time." Id. 10.
15. The Union's fees and expenses are itemized and receipts are included in the Exhibits. Union Exhibit 3 is a copy of the LAFHEY MATRIX2003-2010, developed by the UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA. Union Counsel's hourly rate of \$270.00 is drawn directly from the MATRIX.

EMPLOYER POSITION

"In his opinion and award of August 23, 2010, the Arbitrator reversed the Agency's decision to remove Donnell White (Grievant) from federal service for Inflicting Bodily Injury on a Co-Worker, Unprofessional Conduct, Absence Without Leave (AWOL), Failure to Follow Leave Policy and Failure to Follow Post Orders. The Arbitrator in a well-reasoned decision mitigated the Agency's decision to a Letter of Reprimand, returning the grievant to work with back pay and interest. The decision was made final on September 27, 2010, with neither the Union, nor the Agency filing exceptions to the award. The Grievant was returned to work and made whole pursuant to the Arbitrator's decision. The Union on or about November 23, 2010, filed a motion seeking Attorney fees and costs. In response to the Union filing the Agency provides this response in opposition to the Union's motion." p. 1.

ARGUMENT

1. "The Federal Labor Relations Authority's ('Authority') decisions on attorney fees under the Back Pay Act. 5 U.S.C.

('BPA') are guided by decisions of the Merit Systems Protection Board ('MSPB') and the United States Court of Appeals for the Federal Circuit...Under the BPA, an award of attorney fees must be in accordance with the standards established under the Civil Service Reform Act of 1978, 5 U.S.C. Sec. 7701(g)(1)(1982). AFGE Local 1061 and U.S. Department of Veterans Affairs Medical Center, Los Angeles, California, 63 FLRA 105 (2009) The prerequisites for an award of attorney fees under Sec.7701(g) are that: (1) the employee is the prevailing party; (2) the award of fees is in the interest of justice; (3) the amount of fees is reasonable; and the fees were incurred by the employee. U.S. Department of the Treasury, IRS, Phila. Serv. Cir., Phila, Pa., 53 FLRA 1697, 1699 (1998)('I.R.S.')

2. "An award of attorney fees under the BPA and 5 U.S.C. Sec. 7701(g) is not mandatory...." Id. 2. Cite, Id.
3. "Attorney fees 'should not be a windfall at the expense of the public...should be closely scrutinized..." Cite.
4. "The MSPB has articulated five (5) non-exclusive criteria to consider in determining whether attorney fees are 'warranted in the interest of justice.' Allen v. U.S. Postal Service ('Allen'), 2 MSPR 420 (1980): (1) the agency engaged in a prohibited personnel practice (emphasis added); (2) agency actions are clearly without merit or wholly unfounded, or cases in which the employee is substantially innocent of the charges brought by the agency; (3) agency actions were taken in bad faith to harass or exert improper pressure on an employee; (4) agency committed gross procedural error which prolonged the proceeding or severely prejudiced the employee; or (5) agency knew or should have known it would not prevail on the merits when it brought the proceeding. See Allen, at 434-35." Id. 3. The Court made it clear other factors may be considered. "The Union alleged in its Motion that it is entitled to attorney fees because it is the prevailing party and such fees are warranted in the interest of justice under Allen criteria 1, 2, 4 and 5. (Union's Motion)." Id.3
5. In its Motion the Union only states it is the prevailing Party but failed to show the Grievant incurred any costs. In addition it has not shown that awarding attorney fees is in the interest of justice. "The Union has submitted a proper fee petition and the fees and costs herein appear reasonable." Id.
6. "An arbitrator's award of fees may be granted or denied based on any one of the Allen criteria being met. U.S. Dep't. of Def. Def. Mapping Agency, Hydrographic/Topographic Ctr., 47 FLRA 1187, 1194(1993)" Id. 4.

7. "The Arbitrator Did Not Find And the Record Does Not Contain Evidence That The Agency Engaged In A Prohibited Personnel Practice." See Allen, 593-94 and 5 U.S.C.A Sec. 2303. Id. 5, underlining by the Agency.
8. The Agency could not anticipate that the Arbitrator would consider the events of October 26, 2007 as untimely seventeen (17) months later. He cites Article 30(d) but "discounts the delay caused by the second and more serious investigation into White's misconduct." Id. 6. (Oct. 26 refers to the AWOL charge.)
9. The information available to the Agency during its investigation did not show CO Jackson had a history of workplace violence. "An open investigation absent support does not constitute a history. The relevant determination in the case where the Union is seeking attorney fees is was the Agency's (sic) appropriate in light of the information available to it at the time of its decision...[T]he Agency had every right to believe its decision to remove the Appellant from federal service would be upheld." Id. 7.
10. "The Arbitrator Did Not Find And the Record Does Not Contain Evidence That the Agency's Actions Were Clearly Without Merit Or Wholly Unfounded Or That The Grievance Was Substantially Innocent of The Charges." Id. underlining by the Agency.

The Grievant was not "substantially innocent since he hit CO Jackson on the head with a flashlight. Consequently the charges made by the Agency were meritorious. See Allen.

11. "First, five allegations of misconduct were sustained against this grievant as a result of the investigation and at the decision stage of the Agency's disciplinary process. The Grievant under oath admitted to the elements and/or misconduct in each of the five charges. Thus, it is clear that the grievant was indeed at fault and cannot be deemed 'substantially innocent.' "

Second, the record establishes that the discipline was mitigated on other than substantive grounds. The Arbitrator mitigated the punishment as discussed supra for timeliness and/or Jackson's purported history of violence." The finding of self-defense based upon Jackson's purported history of violence, at the time of the incident the history had yet to be written...In the instant case the testimony was clear White..used in inflammatory language in his verbal exchange with Jackson escalating the tension." Id. 9.

12. In similar situations Authority has held the arbitrator mitigated the penalty rather than reversing it. See Brent D. Williams v. Department of the Air Force, 7 Fed. Appx. 935 (Fed Cir.2001) and American Federation of Government Employees, Local 2718 v. Department of Justice, Immigration and Naturalization Service, 768 F.2d 348, 350(Fed.Cir.1985. Id. 10.
13. "The Arbitrator Did Not Find And The Record Does Not Contain Evidence That The Agency's Actions Were Clearly Without Merit Or Wholly Unfounded." See Allen. "As applied to the facts under current review, because the grievant admitted to the misconduct with which he was charged and for which the Arbitrator held a Letter of reprimand appropriate, no finding could be-or was-made that the Agency's charged were without merit or wholly unfounded." Id. 11.
14. "The Arbitrator Did Not Find And The Record does Not Contain Evidence That The Agency Committed Gross Procedural Error Which Prolonged The Proceeding Or Severely Prejudiced The Employee." Id. The Union relies upon the Warden's knowledge of the events and in particular the memorandum of Ms. Kenny "imposing guidelines""to arrive at its Timeliness objection. "...[A]n award based on Allen criterion 4 would not be warranted in the interest of justice." Id. 12.
15. "The Arbitrator Did Not Find And The Record Does Not Contain Evidence That The Agency Knew It would Not Prevail on the Merits." Id.

"The fifth Allen criterion is whether the Agency knew at the time of its original action that it could not sustain the charges on appeal. Dunn, 1313. This criterion concerns an Agency's reasons for disciplining an employee in the first instance. Yorkshire v. MSPB, 746 F.2d 1454, 1457(Fed.Cir.1984)('Yorkshire')...Id. The Record does not show the Agency knew or should have known it would not prevail at arbitration.

"Under Yorkshire and the considerations that are to be weighed in determining whether attorney fees are warranted in the interest of justice under criterion 5, the Arbitrator correctly denied attorney fees." Id. 13.

16. "The Opinion and Award of the Arbitrator is silent as to attorney fees and or costs. The Agency relied on the award's silence in its decision not to file exception to the award."

"The well-reasoned opinion of the Arbitrator clearly defined the terms of the award in eleven (11) points." Id. 13.

The Agency stresses:

- a. No exception to the Award was filed.
- b. The Record is closed. The Arbitrator retained jurisdiction only over the backpay.
- c. "[T]he Agency maintains its actions were justified and within reason at the time they were taken." Id. 13.
- d. "...[T]he Grievant admitted to each of the five (5) charges...had the Arbitrator awarded fees and costs, or had the Union filed its motion prior to the decision becoming final the Agency would have challenged the award as a whole as not warranted in the interest of justice." Id.

"CONCLUSIONS" at 14.

"The Agency opposes the Union's Motion seeking fees and cost. In order to receive an award of attorney fees, the grievant must be the prevailing party and the award must be warranted in the interest of justice. Both elements must be met. The foregoing discussion demonstrates that although the grievant is the prevailing party in this case, an award of attorney fees is not warranted in the interest of justice. Additionally, it is clear from the Arbitrator's decision that the record does not contain any evidence that satisfies any of the Allen criteria. In tandem therewith, the Arbitrator in his Decision does not make any findings that satisfy any of the Allen criteria. Accordingly, attorney fees are not proper because said fees, under Sec. 7701(g), are not warranted in the interest of justice.

In light of the foregoing discussion and applicable law, the Agency respectfully requests that the Union's Motion for Fees and Costs be denied." Id.

/s/ _____ January 14, 2011
John T. LeMaster, Ass't. Gen. Counsel

The Arbitrator regrets the length of the preceding but his reason is stated, supra.

DISCUSSION

The Agency concedes:

- a. The Union is the prevailing Party.
- b. The Union's Fees and Costs are reasonable.

What is left to be decided is whether the awarding of attorney Fees and Costs to the Union is Warranted in the interest of justice? supra, p. 10.

"As amended, the Back Pay Act provides that:

5 U.S.C. 5596(b)(1)(A)(ii):

Reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with Chapter 71 of this title, shall be awarded in accordance with standards established under Section 7701(g) of this title.

This provision incorporates by reference the 'standards established under Section 7701(g)' of Title 5, which governs the award of attorney fees by the Merit Systems Protection Board.

5 U.S.C. 7701(g):

(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit." FEDERAL ARBITRATION ADVOCATES HANDBOOK, Celmer, Esq. & Creo, Esq. LRP Publications(Ax0n) Ft. Washington, PA & Alexandria, VA,, 1989, p. 221.

"The FLRA clarified the kinds of findings it expected to make in Naval Air Development Center, Warminster, PA and AFGE, Local 1928, 21 FLRA No. 25, 21 FLRA 131, 86 FLRR 1-1513. Chairman Calhoun, in his lead opinion, remarked that the Merit Systems Protection Board had generated a substantial body of case law interpreting the criteria for awarding attorney fees in the federal sector and that the Authority had tended to adopt the Board's precedent. However, he cautioned:

This inclination by the Authority to cite Board precedents should not, however, in my judgment, be interpreted by parties to future proceedings as an absolute adoption by the Authority of MSPB case law. Likewise, I would not limit or restrict the Authority or arbitrators to awarding attorney fees only in those cases that are analogous to MSPB appeals. Id.

Chairman Calhoun listed five requirements that must be met for an arbitrator's award to be supportable under 5 U.S.C. 7701(g)(1):

- (1) Fees must be incurred for the services of an attorney.
- (2) Fees may be sought only by the prevailing party.
- (3) The award of fees must be warranted 'in the interest of justice.' (underlining added)
- (4) The amount claimed for attorney fees must be reasonable.
- (5) The award of fees must be set out in a fully articulated, reasoned decision." Id.

Chairman Calhoun continues his analysis. Firstly he addresses In-
rence of attorney Fees, which is not at issue her. Secondly he ad-
dresses Prevailing Party, which is not at issue either. Thirdly he
addresses Interest of Justice.

"The MSPB in Allen [Allen v. U.S. Postal Service, 2 MSPB 582, 80 FMSR 7015] held that the interest of justice standard includes, but is not limited to, cases involving prohibited personnel practices, agency actions taken in bad faith to harass or exert improper

pressure on an employee, agency gross procedural error which prolonged the proceeding or severely prejudiced the employee, and cases where the agency knew or should have known it would not prevail on the merits when it brought the proceeding. I believe that in defining and applying the parameters of the 'interest of justice' standard, arbitrators should consider these factors as further clarified and augmented below. This compilation of factors, however, is not intended to be all inclusive, rather, additional considerations should be applied where relevant and appropriate to individual cases and arbitrators are to be guided by both equity and logic. Illustrative examples gleaned from MSPB and court cases are as follows:

- a. -----
- b. -----
- c. -----
- d. Instances where the employee is ultimately found to be substantially innocent of the charges brought by the agency. This determination is made on the basis of the result of the appeal rather than on the evidence and information available to the agency at the time the agency effected the action. See Boese v. Air Force, 784 F.2d 388 (Fed. Cir. 1986), 86 FMSR 7019; Yorkshire v. MSPB, 746 F.2d. 1454 (Fed. Cir. 1984), 84 FMSR 7050)....." Id. 222.

OVERVIEW

The Arbitrator has reviewed the Record in detail. It is his understanding he is required to give a detailed summary for his reasoning in addressing the request for attorney fees and costs by the AFGE.

Grievant Donnell White was hired as a Corrections Officer (CO) in December, 2000. He worked without incident until Oct. 20, 2007, when he left his Post about an hour early after making arrangements with a fellow Officer to cover him. However, he did not have authorization from the Duty Officer and he was aware of this requirement. He was

charged with being Absent Without Leave (AWOL), Failure to Follow Leave Procedures and Failure to Follow Post Orders. No disciplinary action was taken. On Dec. 16, 2007 he became involved in a cursing and shouting match with CO John Jackson. CO White is African American and CO Jackson is Caucasian. Jackson was not at the Hearing but was described by Witnesses as being a much larger man. Jackson's assault included racial slurs. Jackson put his hands on White; White fought back and Jackson got White in a head lock. White was being forced to the floor. He managed to swing a flashlight upward in a circular motion and hit Jackson on top of the head, breaking the skin. An Agency photograph shows this. Jackson is bald and the photo showed blood. Another Exhibit supplied by the Agency to the Union (upon request) shows White's face was bruised.

White was placed on paid home leave for a few months. He was returned to regular in early 2008 and performed without incident. Officer Jackson was taken to a local medical facility, treated for a minor injury and returned to work. Some months later he received a medical retirement. The reason for the medical retirement had nothing to do with the altercation.

On Feb. 2, 2009 CO White was advised the Agency proposed to remove (terminate) him for:

- "Charge I: Inflicting Bodily Injury on a Co-Worker
- Charge II: Unprofessional Conduct
- Charge III: Absence Without Leave (AWOL)
- Charge IV: Failure to Follow Leave Procedures
- Charge V: Failure to Follow Post Orders" AWARD, p. 8.

On March 2, 2009 the Agency and the Union met to discuss the Charges. CO White attended. Charges III, IV and V (supra, p. 14) were not at issue. Mr. White spoke and was remorseful. The Union strongly argued he acted in self defense during the altercation with CO Jackson. On April 16, 2009 Warden Schultz wrote to Officer White, advising him he supported a "Reprimand for the use of profane language..." Id. 9. On June 11, 2009 Warden Schultz wrote CO White, advising he would be removed from service "at midnight, June 11, 2009." Id. Mr. White grieved and the Grievance was denied.. On August 12, 2009 the Union invoked arbitration.

The Agency lodged a Procedural Motion for the first time). It states in part:

- "4. "The Union failed to properly invoke arbitration since it failed to include the issues, violations and remedies. '...In the grievance the Union...alleges violations of federal statute, the creation of a hostile work environment, civil right (sic) violations, racial and religious discriminate treatment, and retaliation.' The Union did not provide evidence to support the allegations."
5. "The notice to invoke filed by the Union concerns the termination of Mr. White from Federal service...." and references "just and sufficient cause..." Id. It adds the lack of due process is a new issue which was not included in the grievance. By changing issues from the Grievance to the letter of invocation the Union placed the agency at a disadvantage."
6. "The Union's position is that one should read the grievance and the notice of invocation together....The Union's notice of invocation is clearly defective; thereby, barring the Arbitrator from considering the merits of the case." Id. 11 & 12.

The Parties entered numerous Exhibits related to the Motion. It was addressed in detail. Id, pp. 29-44. In rejecting the Agency's Motion he found in part:

DECISION

The Union's request to be paid Attorney Fees and Costs is warranted in the interest of justice. The Agency agrees the Fees and Costs are reasonable. Even so, the Arbitrator reviewed Union Counsel's Fees based upon the LAFHEY MATRIX (UX-3) and found its hourly rate consistent with the MATRIX and the amount of hours billed reasonable. The Expense receipts were reviewed and found to be reasonable.

UNION FEES (UX-2)	\$14,283.00
UNION COSTS (UX-9)	592.13
	<u>\$14,825.13</u>

The Agency is directed to make payment to the:

AFGE Legal Representation Fund

The Account Number and other relevant information appear on page 2 of Union Exhibit 2. AFGE supplied the Agency with a copy of its APPLICATION FOR ATTORNEY FEES AND COSTS and its Exhibits. The Arbitrator chooses not to publish the details related to the AGGE Legal Representation Fund.



Norman R. Harlan, Arbitrator

Montgomery, West Virginia

March 7, 2011