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FMCS Case N0. 02-12276-8

To the Attorneys of the Parties:

Enclosed is a copy of my Opinion and Award in the captioned case.

A hard copy will be sent you via U.S. Mail.

My fee amounts to $5,000: four days of study and drafting time, at a daily rate of $1,250, to be equally divided between the parties.

Very truly yours,

David M. Helfeld

David M. Helfeld
Arbitrator

IN THE ARBITRATION TRIBUNAL
OF
DR. DAVID M. HELFELD

In re:
American Federation of Government
Employees, Council of Prison Locals,
Local 4052

And

U.S. Department of Justice
Federal Bureau of Prisons
MDC, Guaynabo, P.R.

FMCS: 02-12276
Grievances: Home Leave,
PX Privileges, and Access to
DoD Schooling

After complying with the decision of the Federal Labor Relations Authority, 66 FLRA No. 19, the case has been resubmitted by briefs to the Arbitrator:
By the Union: November 21, and December 3, 2012
By the Agency: November 12 and December 14, 2012
Opinion and Award: January , 2013.

OPINION

The grievances in this case were first raised in 1997 and finally submitted to arbitration in 2002. They were fully processed in a number of hearings and interlocutory awards, culminating in an award on the merits on November 27, 2006 and an award on Damages and Other Remedial Measures, March 21, 2007. (The opinions and awards total 75 pages, plus appendices.) The entire record is herewith incorporated as relevant background material in this opinion and award. More than four years after the last arbitral award, the Federal Labor Relations Authority rendered its Decision

on August 31, 2011: setting aside "the award of non-pecuniary damages", denying the Agency's exceptions "regarding PX privileges and DoD school access" and with regard to Home Leave, the award was "set aside and remanded to the parties for resubmission to the Arbitrator, absent settlement, to formulate an alternative remedy." After more than a year of fruitless negotiations, the parties have submitted their respective positions to arbitration as ordered by the FLRA.

Six months after the FLRA's decision, between February 13 and March 7, 2012, the Agency made payments to grievants who had been awarded the amounts due them for the denial of PX Privileges and access to DoD schooling. And the grievants learned, after nine years, that the other remedies awarded them were denied by the FLRA. All told ten years have been consumed to resolve the grievances which were decided in their favor. If the five years spent in discussions to settle the grievances are taken into account, the grievance-arbitration-FLRA process thus far has taken fifteen years. My part in the process as arbitrator was less than eighteen months. After submission to arbitration, the case was quiescent and did not actually reach me for three years. On its part, the FLRA took four years to announce its decision. If its decision is appealed, as well as the decision on the present phase of the case, there is no way to anticipate how much more time it will take to reach finality.

The Congress which passed the Federal Service Labor Relations Act of 1978, including its grievance, arbitration and FLRA provisions, would be shocked to learn that the process can take ten years, and still not reach finality, for a grievance to be resolved. That is certainly not what Congress intended. No dispute resolving process involving employment relations should take ten years, or more, whether the forum be administrative, arbitration or the courts. In light of my experience in other cases, the failure in this case to resolve with reasonable timeliness is not that exceptionable. The consequences of such long term delay are all contrary to the stated goals of the

Master Agreement and the purposes for which the FSLA was passed: negative work place morale, lack of trust by employees in management, deterioration of confidence in the capacity of their union to represent them effectively and doubts about the legal system's capacity to assure them fair and timely treatment. In the course of this opinion, I will propose measures which the FLRA can take to mitigate the harmful consequences caused by the excessive years of delay in reaching decision in this case.

To "Formulate an Alternative Remedy": What Should it Entail?

One possible alternative remedy would rely on equitable principles and would take the form of a cease and desist order to the Agency to refrain from discriminating in granting home leave in favor of unit employees who are stateside Puerto Ricans, and recruited from the continental U.S., while denying similar benefits to native born Puerto Ricans, recruited from the continental United States. In my opinion, while acceptable as a remedy, alone it would be insufficient for justice to be done in this case. My reasons follow.

The Arbitrator's Third Opinion and Award, dated November 27, 2006, at pages 36-37, states the facts of discrimination with regard to Home Leave benefits which were adopted as findings of fact:

"The Initial Opinion and Award determined that ten bargaining employees had received the benefits of home leave, while a considerable number of similarly situated employees who had been recruited or transferred from their residences in the United States or the Virgin Islands, had been given so such benefits. The Union demonstrated that those denied Home Leave were discriminated against on the basis of national origin and the Initial Award concluded that the Agency had violated specific provisions of the Master Agreement, statutory law and the equal protection of the laws principle in the Fifth Amendment to the Constitution.

"At no time in this arbitration proceeding has the Agency denied the evidence of invidious discrimination based on national origin, or offered any justification for its discriminatory conduct. Nor has it denied that if the literal terms of the statutory authorization of Home Leave were followed, employees recruited or transferred whose residences were in the United States or the Virgin Islands would be entitled to the benefits of the statute. Rather the Agency relies on a regulatory provision of the Office of Personnel Management which it claims authorizes the exercise of discretion in granting Home Leave: 'A grant of home leave is at the discretion of an agency.'"

The FLRA rejected the Arbitrator's reasoning on the ground that it "is contrary to how the Equal Opportunity Commission (EEOC) and the Supreme Court define 'national origin'." It states further: "It is well established that Puerto Ricans comprise one protected class based on national origin" and concludes that the Arbitrator's view that grievants make up a protected 'national origin' is unsupported."

Accepting that the Union and this Arbitrator have committed error in using the term national origin as the category to determine the legal significance of the findings of facts which were that the Agency granted Home Leave to a limited number of employees residing in the continental United States while denying the benefits to a second group, also residing in the United States at the time of recruitment, and the only difference was that the second group all consisted of Puerto Ricans who had been born and raised in Puerto Rico. That Agency practice in my view constituted invidious discrimination in flagrant violation of the Fifth Amendment, and of Article 6 of the Master Agreement—the right "to be treated fairly and equitably in all aspects of personnel management"—and of the right to equal employment opportunity in Article 22. If a case with these facts, that a Federal Agency had discriminated in favor of Puerto Rican raised in the continental United States, disfavoring Puerto Ricans born and raised in Puerto Rico, were presented to the Supreme Court or the EEOC, I have no doubt they would hold that the Agency was guilty of

invidious discrimination and would fashion a remedy to make whole the disfavored group. That is because there can be no justification, compelling or otherwise, for the classification system the Agency established to grant or deny Home Leave.

There is a common thread running through the three grievances regarding PX Privileges, Access to DoD Schooling and Home Leave: in all three the Agency chose to benefit a favored small group of unit employees and to discriminate against employees who were equal to the favored few except that they were born and raised in Puerto Rico. In the case of the first two grievances the FLRA has denied the Agency's exceptions which made possible the compensatory damage payments received by the grievants. That is not legally possible in the case of Home Leave according to the Agency because money awards require a statute in which the Government renounces its sovereign immunity and specifically authorizes money payments for the harm which has been caused. The answer to the sovereign immunity argument is the Federal Service Labor Management Relations Statute and thirty-four years of arbitration practice. It has been assumed from the beginning that the arbitration provisions authorize what is basic to arbitration, that if a provision of a collective bargaining contract is violated, the arbitrator is entitled to fashion an appropriate remedy and that would include, when appropriate, money damages.

The decision of the FLRA "set aside the award of home leave as contrary to law." I would urge the Authority to reconsider on the basis of the following argument. The employees who were awarded compensation because they had been denied home leave were all recruited from the continental United States where they had established residence and, had they been granted home leave, it would have enabled them to have their visits to family and friends subsidized by the home leave program, exactly as those granted home leave who qualified because they were permanent stateside residents. Since those denied home leave did not enjoy its benefits

tangibly, they were entitled to monetary compensation when the arbitration process awarded them that remedy because of the violations of the Master Agreement. The remedy has its basis in a statute, the Federal Service Labor-Management Relations Act. The determination that granting monetary compensation is contrary to law would be decisive, were it not for the fact that the law conflicts with the equality principle in the Fifth Amendment. The classification system established by the Agency, as set forth earlier, constitutes invidious discrimination, which would only be acceptable if a case of compelling justification could be made. I submit that no such case can be made and that my award should be reconsidered and found to be an appropriate remedy.

The Union's Three Proposed Additional Remedies

The first proposed additional remedy has to do with PX privileges. After the FLRA decision of August 31, 2011, the Agency did not cease and desist from its discriminatory policy, arranging for access for a favored minority and against the same unit employees who received payment up to the date of March 21,2007, but rather continued its discriminatory practice. That in my opinion reflects the intransigent attitude of the Agency: an insistence on management's authority to practice invidious discrimination, indifferent to the Master Agreement violations and the Fifth Amendments equality principle. That is why I would urge the Authority not to simply decide not to respond to this proposal to bring the amounts due for loss due for not having access to PX Privileges from the latter date to the present. That would mean that the Union would have to initiate a new grievance and the grievants would suffer many additional years to reach final resolution.

Ten years have already been spent on this issue. It needs to be permanently resolved with the minimum of additional delay. In mitigation of the negative consequences of past delay, and in the

interest of justice, the Authority should be urged to adopt extraordinary measures. To that end, it should adopt the Union's additional proposed remedy, subject to the measures necessary to insure fairness to the Agency. The Agency should be directed to check the accuracy of individual claims in the Union's Table A, "PX Privileges-Prorated Share from 2007 to Present", appendix to the Union's December 3, 2012 "Reply to Agency's Motion". If the parties disagree on the amounts claimed, or to whether a particular claimant's qualifications have merit, such issues would have to be referred to an arbitration hearing.

The Union's second proposed remedy brings up to date Home Leave claimed as detailed in Table B: "Employees Entitled to Home Leave Currently at MDC Guaynabo From 2001 to Present" and Table C: "Employees Entitled to Home Leave No Longer at MDC Guaynabo", appendices to the Union's December 3, 2012 "Reply to Agency Motion". Its motion makes clear who would qualify:

"The Union contends that employees hired and/or recruited from abroad (Continental United States) to Puerto Rico, are entitled to Home Leave Benefits in the manner consistent with the definitions offered by the Office of Personnel Management (OPM) in 5 C.F.R. 630.605 (a) and Program Statement 3000.03, Human Resource Manual. The benefits in accordance with the Authority's ruling shall exclude employees recruited and hired from Puerto Rico, to work locally at MDC Guaynabo and who may now find themselves working abroad in the Continental United States."

I find that this proposed remedy has merit and urge that it be adopted, subject to the same measures recommended regarding PX Privileges, to secure with respect to Home Leave the Agency's right to assure accuracy and substantive merit. Its adoption depends on the Authority's decision to reconsider its ruling on Home Leave.

The third proposal seeks an "Order for collective bargaining over the procedures and appropriate arrangements" related to the termination of access to DoD schooling for all unit employees, going back to 2004. This issue is very far removed from the core issues considered thus far which all have to do with the invidious discriminatory practice of Agency management in granting fringe benefits and whether the victims of such discrimination were entitled to compensation measured by the damages inflicted. I am unable to identify any useful purpose which would be served by granting the Union's motion at this time in the record of this case.

AWARD

In the opinion, I have mostly directed my argument and recommended actions to the FLRA directly on the basis of the assumption, based on the actions of the parties thus far, that the Agency will take exception to my decisions which disfavor its position and take an appeal to the FLRA and the same course of action can be expected from the Union. It represents my effort to deal with these grievances realistically in terms of how this case is most likely to play out to its final conclusion. Hence the terms of this Award should be considered both directives to the parties and recommended actions to the FLRA.

1. The Agency is directed to cease and desist from its present discriminatory practices with respect to Home Leave and access to PX Privileges.

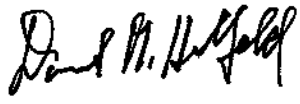
2. The Agency will pay the amounts to the employees in Table A-"PX Privileges-Prorated Share From 2007 to Present", table attached to the Union's December 3, 2012 "Reply to Agency's Motion", subject to the Agency's right to determine accuracy of the individual amounts claimed and their substantive merit.

3. The Agency will pay the amounts to the employees in Table B- "Employees Entitled to Home Leave Currently at MDC Guaynabo From 2001 to Present" and, as well, the employees in Table C- "Employees Entitled to Home Leave no Longer at MDC Guaynabo", appendices to the Union's December 3, 2012 "Reply to Agency's Motion", subject to the Agency's right to determine the accuracy of the amounts claimed and their substantive merit. This directive depends on whether the FLRA responds affirmatively to my recommendation that it reconsider its August 31, 2011 with regard to Home Leave.

4. The Union's request for an order requiring the Agency to bargain collectively over the termination of access to DoD schooling is denied.

5. There is pressing need to bring to the attention of the Congress and the pertinent executive agencies and officials how excessive delay has harmed the efficacy of the arbitration process in federal labor relations in so many negative ways. The parties are instructed to take such action. They are also instructed to bring my comments on excessive delay in the arbitration process to their respective national headquarters and my recommendation that there is a need for a study on the causes of delay and consideration of possible measures of reform. On its part, the FLRA should consider sponsoring a study of the causes of delay and possible measures of reform.

Opinion and Award by:



David M. Helfeld
Arbitrator