107 LRP 24133

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.

Federal Arbitration

FMCS: 02-12276

December 29, 2005

Judge / Administrative Officer

Helfeld, David M.

Full Text

Initial Opinion

This case was submitted to arbitration by the Union March 28, 2002. It was not until three and a half years later that the case's multiple grievances were scheduled to be heard. As stated in the grievance, the Union alleges:

"It has been and continues to be a practice of the Federal Bureau of Prisons, MDC Guaynabo management, to discriminate against bargaining unit employees, (particularly local-hired Hispanic employees, Hispanic employees who transferred and relocated to MDC Guaynabo, etc.). The Agency continues to be selective and pick and choose to whom they grant benefits, (i.e.: PX privileges, dependent school enrollment, home leave, etc.). This continues to demoralize and bring undue hardships upon the employees who are not being treated fairly and equitably in all aspects of personnel management."

In October of this year, the parties decided that an evidentiary hearing would not be needed because their differences consisted of opposing interpretations of the master agreement and the pertinent legal and regulatory rules. The parties therefore proposed, and the arbitrator accepted, the following arrangement:

"The initial decision concerning liability will be made based on the submission of written briefs by the Agency and the Union. ... After review of the written submissions, the Arbitrator may decide to hold an in person hearing should any issue require further evidence to be entered into the record. ... The initial issue to be decided will be if any violation occurred, and the issue of damages will be addressed in a separate proceedings, if necessary."

As the parties' agreement worked out in practice, the Agency's brief responded to the Union's initial brief and also presented its own affirmative defense of the management decisions which had been taken. As agreed, the Union then exercised its option to respond in opposition to the Agency's brief. After analyzing the three briefs and their accompanying exhibits, I have concluded that the record is sufficient to render an initial award on the issue of liability, but a further hearing will be required to clarify certain matters and to complete the record. That can be accomplished in the next stage of the case, together with the question of what would constitute appropriate remedial relief.

Threshold Issues

The Agency argues that the grievances should be dismissed on three grounds: failure to comply with the timeliness requirements of the master agreement, the PX issue is precluded because of a prior unfair labor charge submission by the Union and employees no longer matriculate in the DoD (Department of Defense) school and hence the issue of access is moot.

Timeliness Requirements

In support of its timeliness claim, the Agency quotes the language of Article 31, Section d, of the master agreement: "Grievances must be filed within forty (40) days of the alleged grievable occurrence." It further argues that the forty day requirement should be enforced strictly, following the approach of the Supreme Court in *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101 (2002), an Equal Employment Opportunity Commission case. The Agency cites the case as holding that "discrete, easily identifiable employment actions, must be filed within the relevant time frame." But *Morgan* has little or no precedential

relevance to the grievances in this case. *Morgan* does hold that for a discrete act of discrimination, the 300 days time limitation of Title VII should be applied strictly, but would permit going back further in time to recover on the claim of a hostile work environment. More to the point, it is a case of a claim by a single individual, in contrast to the three grievances in this case which in effect are challenging alleged systemic violations of law and the master agreement.

The decisive difference between *Morgan* and this case is that the parties in the master agreement left timeliness issues to the good judgment of the arbitrator. Section e of Article 31 provides: "If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issue." My decision that the three grievances have been submitted to arbitration in timely fashion rests on a number of grounds. First, as stated before, these grievances allege systemic contractual violations. Second, the grievances have yet to be resolved, three and a half years after submission to arbitration. Third, to dismiss these grievances for want of timeliness, would simply postpone a final resolution. The grievances would have to be filed once again, adding to the frustration of the grievants and defeating their reasonable expectations that the grievance system in the master agreement will function with a fair degree of efficiency. Fourth, the measure of delay thus far experienced is not limited to the period since the grievances were submitted to arbitration: the three grievances have been on the agenda of the parties' Labor Management Relations regular meetings ever since July 17, 1997.[1] Not to resolve that the grievances satisfy the test of timeliness would in my judgment do a disservice to the interest of both parties to put to rest the issues submitted to arbitration.

Preclusion of the PX Issue

The Agency seeks to have the PX issue precluded from consideration in this case on the ground that the issue was first raised as an unfair labor practice, prior to the date of submission to arbitration. It relies on 5 U.S.C. section 7116 (d): "... issues which can be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures." It is undisputed that the Union filed an unfair labor charge with the Federal Labor Relations Agency on March 20, 2002. The charge alleged that on "March 20, 2002, the Federal Bureau of Prisons, by the actions of its agent, Jorge L. Pastrana, Warden, repudiated an agreement reached concerning Post Exchange privileges for all the staff at MDC Guaynabo." On June 28,2002, the Union's request was approved by the FLRA to have the charge withdrawn. Apparently the Union had decided to proceed solely on the basis of its March 28, 2002 submission to arbitration.

On this record, section 7116(d) does foreclose the Union from trying in this arbitration proceeding the unfair practice charge filed March 20, 2002, essentially alleging bad faith bargaining. Therefore, in this case the issue of bad faith bargaining cannot be considered. Concretely, this means that the Union's principal document to establish bad faith bargaining, an alleged signed minute between the parties that all employees would have PX privileges, or none would, must be held inadmissible in this arbitration case. Excluding the bad faith bargaining issue and the Union's documentary evidence in support of its position, does not mean that the allegation of discriminatory denial of access to PX privileges cannot be heard as an issue of violation of the terms of the master agreement. *See Association of Civilian Technicians v. U.S. Department of Defense Missouri National Guard*, 55 FLRA 474 (1999). Accordingly, it is the issue of discrimination in authorizing access to the Post Exchange, whether in that regard there has been violation of the master agreement, which will be resolved in this proceeding.

Is the School Issue Moot?

Though not so characterized by the Agency, whether the school issue should be considered moot is also a threshold issue. That is because if the Agency's claim of mootness is upheld, there then would be no need to consider the merits of the issue of discriminatory access to the DoD school by its

employees. Since Agency employees no longer are matriculated in the school, it argues that the issue of the criteria to determine access is presently academic, in effect, that there is nothing left for the arbitrator to decide. It is true that under the present circumstances no relief can be granted by the arbitrator in terms of how access to the DoD school by Agency, employees should be granted. But there still remains for resolution whether in the past the Agency is responsible for denial of admissions to the school on the basis of invidious discrimination. In the submission to arbitration, the Union described the remedial action it was seeking in these terms: "AFGE Local 4052 seeks relief to the fullest extent available under the law for the Agency's wrongful discrimination, to include but not limited to: compensatory damages for the affected employees, employees reimbursed for out-of-pocket expenses incurred due to the discrimination....any other remedy deemed appropriate and necessary by the arbitrator." Hence the issue of alleged past discrimination in determining admission to the school must be resolved on the merits to decide whether compensatory damages, or any other remedial relief, would be appropriate.[2]

We turn now to whether the Union's claims of violations of the master agreement are meritorious and, if so, what remains to be heard in the next stage of this case.

Jurisdiction and Liability: The Pertinent Principles

Prior to making findings of fact, it is essential to define the scope of the arbitrator's jurisdiction and the principles of liability to be applied to the fact situations which make up the record in this case. That is because the Agency's brief raises two objections which, if sustained, would require dismissal of the grievances without a determination of their merits. The first objection stresses that in the master agreement there is no explicit coverage of home leave, PX privileges or access to DoD schools. The second claims that the submission to arbitration is fatally defective because no mention is made of the particular sections of the master agreement on which the submission relies. Responding first to the second objection, the Agency cannot claim lack of notice of the specifics of what the Union is charging. That is because for the better part of five years prior to the submission to arbitration, in the regularly scheduled Labor Management Relations meetings, the three grievances were discussed repeatedly and in detail. See the Union's exhibit containing the minutes of nineteen LMR meetings, held from July 1, 1997 through March 20, 2002. The Agency has no basis for claiming surprise: it surely knew on what provisions of the master agreement the Union was grounding the three grievances submitted to arbitration.

The answer to the Agency's first objection, i.e., the master agreement's lack of specific coverage of the topics of home leave, PX privileges and access to the DoD school, is given in Article 31, section a, of the agreement: "The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 U.S.C. 7121." An examination of section 7121 of the Federal Labor-Management and Employee Relations Act can lead to only one conclusion: Congress' intent was for contractually agreed on grievance systems ending in arbitration to be exclusive, for arbitrators to have original jurisdiction over all matters related to employment relations, unless the parties agree to exclude particular topics. In section 7121(c) are five matters which are statutorily excluded from arbitral jurisdiction; otherwise all other matters can be negotiated for contractual coverage. This is the consistent interpretation of federal Courts of Appeal. *See, e.g., O'Connell v. Hove,* 22 F.3d 463 (C.A. 2d. 1994); *Aamodt v. U.S.,* 976 F.2d 691 (C.A. Fed. 1992); *Carter v. Gibbs,* 909 F.2d 1452(C.A. Fed. 1990). The interpretation upholding exclusive, primary arbitral jurisdiction has even been followed with respect to constitutional claims. *See Saul v. U.S.,* 928 F.2d 829 (C.A. 9th 1991).

In the present case, Section a of Article 31 of the master agreement simply refers to 5 U.S.C. 7121. The

master agreement contains no exceptions to the original arbitral jurisdiction of the arbitrator. It is therefore reasonable to conclude that the parties intended for the arbitrator's jurisdiction to encompass the entire scope authorized by section 7121. And I do so hold.

There are two sources of principles for determining liability in this case: specific articles of the master agreement and relevant legal provisions. Three provisions of the master agreement are directly related to the three grievances submitted to arbitration:

Article 6b-2 -- Employees have the right "to be treated fairly in all aspects of personnel management".

Article 6b-3 -- Employees have the right "to be free from discrimination based on their political affiliation, race, color, religion, national origin, sex, marital status, age, handicapping condition, Union membership or Union activity."

Article 22 -- "The Employer and the Union agree to cooperate in providing equal opportunity for all qualified persons; to prohibit unlawful discrimination because of age, sex, religion, color, national origin or physical handicap; and to promote full realization of full equality through a positive and continuing effort. The Union agrees to become a positive force in this endeavor and to become a partner with the Employer in the exploration and implementation of ideas and programs whereby equal employment opportunities will be achieved."

The statute most relevant to the three grievances is Title VII of the Civil Rights Act:

Section 703(a)(1)of Title VII -- "It shall be an unlawful practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of the individual's race, color, religion, sex, or national origin."[3]

Title VII's anti discrimination policy is also reaffirmed in the Bureau of Prison's Program Statement 3713.23 and with even broader scope: "Management at all levels will take effective actions to eliminate any internal policy, practice or procedure which results in discrimination on the basis of race, color, sex, religion, national origin, age, physical or mental disability, sexual orientation, or status as a parent."

Neither party mentioned in their respective briefs a constitutional principle which has a direct bearing in the evaluation of the factual record in this case: the equal protection of the law which the federal government is constitutionally obliged to respect in all of its dealings and no more so than in the case of its own employees. That has been the law at least since 1954 when the Supreme Court incorporated equal protection into the due process clause of the Fifth Amendment. *See Boiling v. Sharpe*, 347 U.S. 497. More recently the Court announced a single rule of strict scrutiny applicable to all government entities: "... we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny ... such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests." *See Andarand Constructors v. Pena*, 515 U.S. 200, 227 (1995). In this case, the Union is alleging invidious discrimination based on national origin. It is a reasonable assumption that the Supreme Court's rule of strict scrutiny applies with equal force to governmental acts of invidious discrimination against persons based on their national origin. If the facts of record bear out the Union's allegations, strict scrutiny would then be the method of analysis to determine constitutionality.

A similar analytic approach will be taken, using the principles developed in the jurisprudence of the Supreme Court interpreting whether the anti discriminatory policies of Title VII have been violated. The two approaches complement each other but are not identical. The evidentiary formulas developed by the Supreme Court -- "intentional discrimination" and "disparate impact" -- to determine. violations of Title VII, require a method of

analysis which is comparable but not the same as in the application of "strict scrutiny" in obedience to the constitutional principle of equal protection.[4] Both do seek to ensure the same end: vindication of the principle of equality.

To sum up: the arbitrator has jurisdiction to resolve the three grievances submitted to arbitration. The facts of record in this case are now to be subjected to a battery of tests to determine whether the agency has violated the provisions of the master agreement set forth above and, as well, the statutory and constitutional principles from which those provisions draw their essence. Note will also be taken of particular laws or regulations which are relevant to deciding the issues dealing with home leave, PX privileges and access to the DoD school.

Did the Agency Violate the Right to Home Leave?

The parties present diametrically opposed answers to the captioned question. As the Agency sees it, the policy of home leave which it is enforcing is entirely lawful and in no way conflicts with any provision in the master agreement. The Union's responds that the Agency's policy violates a statutory right which is expressly granted and which no agency is legally entitled to alter or diminish. It also cites a specific case of violation of the right to home leave which it claims is an example of invidious discrimination against Puerto Ricans hired or recruited in Puerto Rico.

The Union is correct in asserting that there is a statutory right to home leave. 5 U.S.C. Sec. 305 provides:

"(a) After 24 months of continuous service outside the United States ... an employee may be granted leave of absence, under regulations of the President, at a rate not to exceed one week for each four months of service without regard to other leave provided by this subchapter.

Leave so granted --

(1) is for use in the United States, or if the employee's place of residence is outside the area of employment, in its territories or possessions including the Commonwealth of Puerto Rico."

The only question is whether the Agency is authorized to modify or diminish in any way the statutory right to home leave. In support of its authority to so act, the Agency cites the pertinent sections of the Code of Federal Regulations. 5 C.F.R. Section 630.601 defines home leave as follows:

"Home leave means leave authorized by section 6305(a) of title 5, United States Code, and earned by service abroad for use in the United States, in the Commonwealth of Puerto Rico, or in the territories or possessions of the United States."

In a later section, 630.606, the Code of Federal Regulations, explicitly grants agencies discretion over whether to grant home leave:

"(b) Agency authority. A grant of home leave is at the discretion of an agency."

In the exercise of its discretion, on November 1, 1993, the Agency issued "Bureau of Prisons Policy -- Human Resource Manual, PS 3000.02, Chapter 6", which provides:

"To be eligible for Home Leave, the BOP employee must have completed twenty-four months of continuous creditable service in Puerto Rico and agree to an additional tour of duty of not less than twelve months. ... Home Leave is to be taken in the United States. Leave may not be used in Puerto Rico. ... BOP employees will earn no more the 5 days of Home Leave for each twelve month period. ... Approval of Home Leave will be at the discretion of the Warden and may be approved in combination with other leave of absence."

It is clear that BOP policy substantially modifies and reduces the statutory benefits and the definition of employees who are covered. In so acting, and more to the point, as the Agency's policy has been put into practice, has there been violation of the master agreement and related anti discrimination policies?

The Union's Initial Brief submits two contrasting cases exemplifying how the Agency has enforced its Home Leave policy:

"In 1992, Fernando Blanco was a civilian employee working for a private company in St. Thomas, USVI. He applied for the position of Utilities Systems Repair Operator Foreman in the Facilities Department which appeared in the newspaper -- The San Juan Star, and was hired with the Bureau of Prisons in January 1993. When he was hired to work at MDC Guaynabo, he was a resident of St. Thomas, possessed a valid USVI driver's license and paid taxes to the United States Virgin Islands. He applied for home leave to return to St. Thomas and based his requests as per the language outlined in the statute, 'that home leave can be used in the United States, in the Commonwealth of Puerto Rico, or in the territories or possessions of the United States', however, his home leave was disapproved based on the Bureau's restriction that home leave can only be used in the continental United States. A similar employee, Findel Hernandez was employed in Florida and applied for the position of HVAC Foreman in the Facilities Department. He applied for the position announced in the newspaper. Both employees were hired from areas outside of Puerto Rico but only Findel was granted home leave (per the Bureau's policy that home leave can only be used in the continental United States). ..."

The facts in this contrast of how the Agency has administrated home leave policy are accepted as accurate, since the Agency neither refuted nor denied their accuracy. Why the Agency has chosen to exercise discretion by reducing the scope of home leave benefits and by restricting which employees are entitled to benefit, remains a mystery. The fact is that the Agency has offered neither justification nor explanation in the record of this case to clarify its policy and how it has been administered. At bottom, the Agency's position appears to ground its exercise of discretion on the premise that it is unlimited. That is palpable if one considers the Agency's grant of authority to the Warden to award home leave at his unlimited discretion, the fact that favorable treatment is accorded the employee recruited or transferred from the mainland to MDC in contrast with the denial of home leave benefits to an employee solely on the ground that he was recruited in Puerto Rico and the reduction in the amount of benefits from the level authorized by the home leave statute.

On this factual record only one conclusion is possible: for multiple reasons the Agency's home leave policy and its administration are patently in violation of the master agreement and related laws. Extensive analysis is not needed to demonstrate that this is the truth of the matter.

First, the Agency has violated the master agreement's requirement in Article 6, section b-2, that all employees "be treated fairly and equitable in all aspects of personnel management." Why should two employees who are equal in every respect except the locale from which they were recruited be treated differently with respect to home leave benefits?

Second, the Agency's home leave policy obviously discriminates against employees recruited in Puerto Rico, who are almost entirely residents and citizens of Puerto Rico, and stateside Puerto Ricans and Latinos recruited from the continental United States. The latter may be awarded home leave discretionally, while the former, if recruited from a position outside Puerto Rico, will not be entitled to home leave to Puerto Rico. That is precisely in violation of the master agreement's guarantee in Article 6, section b-3, that all employees have the right "to be free from discrimination based on their ... national origin".[5]

Third, and for the same reason, the invidious discrimination based on national origin also runs afoul of Title VII. There can be no doubt that Title VII does not countenance the discriminatory granting of a fringe benefit depending on where a Puerto Rican was born and raised, whether in Puerto Rico or the mainland. The facts of record demonstrate that the invidious discrimination against Puerto Ricans recruited by MDC in Puerto from the island's permanent resident population, which in almost all case involved employees who had been born and raised in Puerto Rico, with regard to that group the denial of home leave benefits was intentional. The

issue of rights denied on the basis of national origin will be more fully analyzed in the following sections dealing with PX privileges and access to DoD schooling.

Finally, the Agency's policy and actions are completely incompatible with the constitutional principle of the equal protection of the laws. If the Congress were to enact a law with the same terms as the Agency's home leave policy and administrative practices, it would undoubtedly be declared unconstitutional as in conflict with the Fifth Amendment's guarantee of equal protection. What is constitutionally forbidden to the Congress, must be adjudged beyond the authority of any agency in the executive branch of government which the Congress itself has created. Once again it should be stressed that the record in this case is barren of any justification by the Agency which would satisfy the constitutional requirement that for its discriminatory home leave policy to be constitutionally valid, it must demonstrate a compelling governmental interest.

Were PX Privileges Denied to Bargaining Unit Employees In Violation of Their Contractual and Legal Rights?

To answer the captioned question, consideration must be given first to the facts of record. The primary source of factual materials is to be found in the 16 Union exhibits on the efforts of the Union to gain access for its members to Post Exchange privileges at Fort Buchanan, the different positions assumed by management officials of the Agency and the position on access adopted by the Commanding Officer as contrasted with the decision of the Naval official in charge of the Post Exchange at Sebana Seca. The sixteen exhibits cover meetings, discussions and decisions taken over the period March 24, 1997-April 25, 2002. There is no need to analyze in detail each and every exhibit. A summary of the significance of the sixteen exhibits should suffice, that and analysis of particular exhibits directly relevant to answering the captioned question.

Over the course of the five years of discussions and interaction between the parties and entities of the Department of Defense, distinctive positions emerged on which employees should be entitled to receive PX privileges. At the close of the five year period, there were no ambiguities. All parties in interest understood full well all the different positions and their respective supporting arguments. The reason for the submission to arbitration was the fact that the parties had exhausted the negotiation process and that in final analysis there was no possibility of a mutually acceptable settlement. The Union's position was presented repeatedly in letters and meetings with MDC management: under the master agreement and related legal principles all bargaining unit employees should receive the same PX privileges at Fort Buchanan. By arranging for some bargaining unit employees to receive PX privileges, those recruited from the continental United States to serve at MDC, and failing to arrange for similar privileges on behalf of employees recruited in Puerto Rico, the Union contends that the Agency has violated its contractual obligations under the master agreement and related legal principles.

The final position of General Valenzuela, the Commanding Officer of Fort Buchanan, at the close of discussions between the parties, was stated in a letter to Warden Pastrana, January 2, 2002: "I am pleased to inform you that I have granted limited Post Exchange (PX) privileges to U.S. Department of Justice Federal Bureau of Prison employees who are on transportation or mobility agreements, and their families. ... Your employees who are on transportation or mobility agreements and their family members may come to our Welcome Center, building 152, to apply for identification cards. They must bring documentation showing their transportation or mobility agreement." This was consistent with positions taken by different Army officials over the years. As in the case of General Valenzuela, all grounded their decision on access to PX privileges, including the limited scope of access, on "Army regulations".

Over the course of the period 1997-2002 three

different wardens requested that PX privileges be made available on an equal basis to all MDC employees, including Warden Pastrana in a letter to General Valenzuela, dated October 31, 2001. All three petitions for equal access were denied. For the limited access which the General had granted January 2, 2002, Warden Pastrana responded with a letter of thanks, dated February 5, 2002: "This is to express my gratitude for your consideration and approval of Limited PX privileges for our employees who are on transportation or mobility agreements and their family members. This will undoubtedly enhance staff morale and quality of life for them and their dependents." As the Warden made plain in subsequent memoranda to Union president Fernando Blanco, he was convinced that it would be futile to ask for reconsideration of his request for equal access to the Post Exchange and that the privileges which he had secured were all that could be obtained. In essence, his position, speaking for the Agency, is that half a loaf is better than nothing.

In its Initial Brief the Union alleges that the warden did not seek in good faith to secure PX privileges for all employees: "... although letters were being sent to the Base Commander requesting authorization for all staff, phone calls were being made behind closed doors putting limitations on the privileges. A confidential employee working at Ft. Buchanan, who has requested to remain anonymous, has confirmed this information." The Agency has objected to the allegation having any weight in this proceeding on due process grounds. The objection is well taken. It would be improper for the decisions reached in this case to rely on anonymous testimony.

It should be noted that the Agency's final position in 2002 has not been the only one which it has adopted. Some four years earlier it had agreed with the Union that the desirable policy to be followed should be one of equality of benefits. The minutes of the August 19, 1998, Labor Management Relations Meeting state with respect to PX privileges: "It was agreed by both parties that either all employees have the benefit or none of them will." The minutes of the meeting are signed by Mimi Potts, Acting Warden and Fernando Blanco, Union President. Years later, in his April 25, 2002 letter to Fernando Blanco, Warden Pastrana questioned the validity of the August 19, 1998 agreement, especially as it related to supervisors or managers.

As the record in this case demonstrates, the Army and Navy services have responded in contradictory fashion to MDC requests for access to Post Exchange privileges. In a letter dated September 7, 1999, Warden Ed Gonzalez wrote to Captain Bruce L. Drake, Commanding Officer of the Naval station at Sebana Seca, requesting PX privileges for all MDC employees. Captain Drake responded affirmatively on September 29: "I am pleased to grant Bureau of Prisons employees access to the NSGA Exchange under the provisions of DoD Directive 1330.9 (Armed Services Exchange Services). Bureau of Prison employees will thus be entitled to purchase all merchandise and services." Presumably both the Army and Naval services are both equally bound to follow Directive 1330.9 and yet the decisions each service has taken bespeaks a fundamental difference of understanding of the criteria for the determination of access for non-service federal government employees. Nothing in the record serves to clarify what is an evident contradiction in the policies followed by the two branches of the Armed Services, while at the same time both claim to be implementing Directive 1330.9.

The Agency advances two arguments for rejecting the Union's grievance: access to PX privileges is not a "condition of employment" and the criteria for access are entirely in the hands of the military and the implementation of the military's regulations. At this time, only the first argument is considered. As put by the Agency's Initial Brief: "the Federal Labor Relations Authority has held that absent some nexus, union proposals concerning access to facilities or resources during non-duty hours, do not affect the 'conditions of employment' of bargaining unit employees." In support of that principle, the Agency cites *Antilles Consolidated*

Education Association (Union) and Antilles Consolidated School System (Agency), 22 FLRA 235 (June 24, 1986). The Agency then states its understanding of the holding in that case: "In the *Antilles* case, the Authority found that access to base retail, medical and recreational facilities during non-duty hours did not constitute 'conditions of employment'. Similarly ... the issues in the present case concern outside benefits, not conditions of employment, and therefore are beyond the coverage of the Master Agreement."

The Union's response is that the principle in the Antilles case has been revoked: "In 1989, the D.C. Circuit overturned the FLRA on what constitutes a condition of employment, *see AFGE Local 2761 v. FLRA, AFGE Local 2614 v. FLRA,* 866 F.2d 1443 (January 31, 1989). Prior to 1989, the FLRA found that PX privileges on an Army base in Puerto Rico were not conditions of employment. On appeal, the majority of the D.C. Circuit ruled that PX privileges were conditions of employment within the meaning of 5 U.S.C. 7103(a)(14)." The D.C. Circuit concluded that the FLRA's ruling that Fort Buchanan does not have a duty to bargain over employee access to the post exchange was arbitrary and capricious." *(Id.* at p. 1448) In two later decisions involving the Antilles Consolidated School System, the FLRA ruled that proposals concerning post exchange privileges for bargaining unit employees were negotiable under the Federal Service Labor-Management Relations Act. *See Antilles Consolidated Education Association (Union) and Antilles Consolidated School System Fort Buchanan, Puerto Rico (Agency),* 46 FLRA 625 (1992); *American Federation of Government Employees Local 2614 (Union) and U.S. Department of the Navy Antilles Consolidated School System (Agency),* 43 FLRA 830 (1991).

The commonsense of the matter is that access to the post exchange is a fringe benefit. That is how it would be viewed in the private sector and there is no apparent reason why it should be regarded otherwise in the public sector, assuming the Agency is in a position to secure it for its employees. Viewed functionally, access to the post exchange is an economic benefit. Those employees who have access to the Fort Buchanan PX benefit economically and in other ways, while those denied access do not. By its actions for over five years the Agency itself recognized that this was true. In all the Labor Management Relations meetings it did not refuse to discuss access to the PX as a non-negotiable issue. Quite the contrary. Three different wardens sought to obtain access for all employees. In the end, their efforts were only partially successful, but access was obtained for managerial and supervisory staff and, as well, for bargaining unit employees who satisfy the condition of having transportation or mobility agreements. By obtaining PX privileges for some of its employees, the Agency has effectively made the matter a condition of employment which those who are still without the benefit are legally entitled to seek to achieve for themselves.

The issue submitted to arbitration by the Union is whether the concession of access to some bargaining unit employees, and not to others, violates the master agreement and related legal principles.[6] To fully resolve the issue requires that consideration be given to the limits of discretion which the Commanding Officer of Fort Buchanan is legally entitled to exercise and, of equal importance, what is the contractual and legal responsibility of the Agency when it negotiates to obtain access to PX privileges for its employees.

Though the Department of Defense is not a party to this arbitration case, how the Commanding Officer has exercised his authority under Directive 1330.9, governing post exchange privileges, must be evaluated to the extent his actions affect decisions taken by the Agency in its capacity as employer. At one extreme, it is clear that the Commanding Officer has great discretion with respect to granting access to Fort Buchanan's post exchange to non-military civilian federal government employees, whether to authorize full or partial access or to deny access totally. He also has broad discretion to condition access, but his discretion is not unlimited. It must be

exercised rationally and if the conditions he sets conflict with an Agency's contractual and legal responsibilities, the Agency has a duty to bring the conflict to his attention and if the offending conditions remain unaltered, the Agency should not accept a grant of access so conditioned by the Commanding Officer. If on the contrary the Agency accepts the grant with its offending conditions, it makes those conditions its own and in so doing violates its contractual and legal obligations. It cannot assume the comfortable position that it is innocent, arguing that it is the Commanding Officer which has set the conditions. Once it accepts conditions which result in violations of the master agreement and related legal principles, it must accept the consequences of its own actions.

The question, then, comes down to the legality of the Commanding Officer's grant of access to the post exchange as it has affected bargaining unit employees. The first question which needs to be addressed is why mobility or transportation agreements have been made the prerequisite for access to PX privileges? The Commanding Officer set the prerequisite and the Agency has made it its own. But neither the Commanding Officer nor the Agency have explained or justified why this prerequisite should be accepted as the condition for dividing bargaining unit employees between those who have access and those who do not.

As the prerequisite works out in practice, fourteen bargaining unit employees qualify for PX privileges, of which thirteen are employees who transferred from the continental United States, while 201 bargaining unit employees, all recruited in Puerto Rico, do not have access to PX privileges.[7] The stated ground for denying the latter group access is that its members do not have transportation or mobility agreements. In contrast, with few exceptions, 45 out of 52 of non-bargaining unit employees, whether transferred or hired locally, do have access to PX privileges.[8]

As in the case of the Home Leave grievance, with respect to access to PX privileges the Agency has committed multiple violations of the master agreement and related legal principles. First, by obtaining access for some bargaining unit employees, and not for others, the Agency has violated the rights of those denied access, specifically their right "to be treated fairly and equitably in all aspects of personnel management", as required by Article 6-b-2 of the master agreement. This is especially so, as in this case, when the Agency has not justified the rationality of requiring a transportation or mobility agreement as the prerequisite for obtaining access to PX privileges.

Second, that same lack of rationality has resulted in the failure to comply with the equality principle which is guaranteed in Article 6-b-3 of the master agreement: employees have the right "to be free from discrimination based on ... national origin". The only difference between employees having access to the PX, and those denied the privilege, is that in the case of the former, thirteen of fourteen bargaining unit employees are transferred employees, while in the case of the latter, 201 in number, all were recruited in Puerto Rico. In making this distinction, based on place of recruitment, and especially without offering any justification, the Agency has not complied with its contractual obligation under Article 6-b-3. Neither transportation or mobility agreements, or place of hire, can be accepted as justification for the Agency's discriminatory policy adversely affecting 201 bargaining unit employees. Nor has it fulfilled its commitment in Article 22, Section-a of the master agreement: "to promote full realization of equal opportunity through a positive and continuing effort."

Third, whether considered as a case of disparate impact or intentional discrimination, the Agency's classification arrangement which distributes a fringe benefit on the basis of place of hire, conflicts with Title VII of the Civil Rights Act. That is because the discrimination is not only arbitrary, but because at its root it is based on discrimination for reasons of national origin. The Union has made a persuasive case that the Agency disfavors Puerto Ricans recruited in Puerto Rico as compared with Puerto Ricans and other Hispanics recruited from the

continental United States. The effect is to divide Puerto Ricans into two groups, residents of Puerto Rico who for the most part were born and raised on the Island, and Puerto Ricans and other Hispanics whose residence is on the mainland and who in large part were formed there.[9] What makes the division run afoul of the law is that it results in the discriminatory distribution of a fringe benefit depending on to which of the two groups an employee belongs. A result of that kind is clearly the kind of invidious discrimination which the Congress intended to prohibit in Title VII. The agency's policy that half a loaf is better than nothing cannot stand given the denial of equal rights to over 200 bargaining unit employees.

Independently of the Agency's violation of Title VII, it has also failed to comply with the equality principle in the Fifth Amendment to the Constitution. To justify the discriminatory policy which the Agency has established, it would have to demonstrate that the favored treatment accorded Puerto Ricans or other Hispanics those who were transferred or recruited from the mainland of the United States, was justified to satisfy a compelling interest of the MDC. The Agency has not introduced into the record either documentation or argument to demonstrate a compelling interest. Indeed, it has presented neither explanation nor justification of its own, of any kind, for either the prerequisite of a transportation or mobility agreement, or for the discrimination based on national origin. In final analysis the Agency rests its defense on its reliance on the conditions set by the Commanding Officer of Fort Buchanan. As has been noted, its reliance is misplaced because those conditions have resulted in invidious discrimination in violation of the Agency's contractual and statutory obligations. The result is the same when the consequences of the Agency's policies for securing PX privileges are tested against the equal protection of the laws guaranteed by the Fifth Amendment.

There remains an issue of fundamental importance to be decided which in fairness to the Agency should not be resolved on the record as it stands presently: to what extent have bargaining unit employees been denied PX privileges on the basis of personnel decisions by the Agency which failed to recognize that their position statements did indeed include a transferability or mobility statement or personnel decisions altering position statements to exclude transferability or mobility? The Union's Initial Brief, in a footnote at page 2, refers to how it sees the problem:

"The Union has not been able to obtain copy of the position descriptions on the positions herein mentioned. However, up until 2003 the position descriptions included a transferability or mobility statement. It was not until 2003 that the Agency decided to delete the transferability statement."

Consideration of the PX issue has thus far proceeded on the assumption that none of the 200 odd bargaining unit employee denied access had position descriptions which included transferability or mobility statements. If the assumption should prove to unfounded, additional analysis would be needed, especially with regard to the fashioning of appropriate remedial measures. These are the questions to be answered in the second stage of this arbitration: first, is the Union's statement of the problem factually correct, specifically, were there 200 bargaining unit employees with transferability or mobility statements and, if so, until what date and were those statements deleted and, if so, why; second, if such personnel actions were taken, what significance does that have to the issue of the Agency's liability and the fashioning of appropriate remedial relief? It should be understood that these same questions are equally applicable to the issue of access to the DoD school, which is the issue remaining for consideration.

Were Bargaining Unit Employees' Children Denied Access to the DoD School In Violation of Their Contractual and Legal Rights?

As noted in the section on threshold issues, the Agency has notified the Superintendent of the Antilles Consolidated School System (ACSS) of a

change of position with regard to certifying dependent children of its employees as eligible for admission to ACSS: "At this time, the Bureau of Prisons will not certify any children as eligible for enrollment during SY 2004-2005." The letter then goes on to state, "Should an event occur to change our position, we will notify your office."[10] The Agency has not introduced in the record any explanation for why it decided to cease certifying all children of its employees as eligible for admission to ACSS. However, from the exhibits introduced by the Union related to access to ACSS by the children of Agency employees, the explanation is sufficiently clear. In the minutes of the Antilles Consolidated School System Partnership Summit, held February 6, 2001, the legal representative of the Department of Defense, informed the parents of enrolled children about legal requirements for collecting tuition:

"Mr. Sutemeier made very clear that the Secretary of Defense had total discretionary authority to seek reimbursement from the agencies before the child had been enrolled in the system less than five (5) years, but after the five years, payment was mandated by Congress and they must collect tuition. Therefore, since many of the agencies complain about their budgets and not having sufficient time to plan for these disbursements, DoD has decided to give until SY 2003-2004 to start collecting tuition for those students within the five years of enrollment."

In the same minutes the schedule of tuition fees is given which bears out how valuable a fringe benefit access to ACSS has been to those MDC employees who prior to SY 2004-2005 have had their children certified as eligible for enrollment:

"Pre-Kinder $5,520

Kinder (full day) $11,040

First-Sixth $11,040

Seventh-Eighth $11,620

Ninth-Twelfth $12,202"

The Agency's decision not to certify children for enrollment after 2004 is also explained by the unsuccessful petition of Warden Pastrana to secure a waiver to allow the children of fourteen staff members to continue their studies at ACSS after having been enrolled for five consecutive years.[11] His petition was finally denied by the Director of the Federal Bureau of Prisons, Kathleen Hawk Sawyer: "... after the 2000-2001 school year, employees who have dependent children have the responsibility to locate educational options elsewhere."[12]

Given the Agency's policy since 2004 of not certifying the dependent children of any of its employees, in this arbitration the question of liability for denying access to ACSS necessarily must be limited to the period before that year. Whether liability is found, depends on whether the Agency is adjudged in violation of the master agreement and related legal principles. Prior to reaching the merits, as with the issue of PX privileges, a number of questions need to be resolved. To the extent that the questions track the same type of facts and arguments as in the matter of the PX, in this part of the opinion they can be resolved summarily without the need for extensive analysis. More in depth consideration can then be given to questions related solely to the issue of access to ACSS.

As in the matter of PX privileges, the Agency's contention that access to ACSS is not a condition of employment, is not sustainable in light of the record. The issue of access to ACSS was on the agenda of Labor Management Relations Meetings for years before the Agency took the position that it was not negotiable. More to the point, it was the Agency which took the initiative in seeking and in obtaining access for both its managerial and supervisory staff, and for a select group of bargaining unit employees, thus making it a condition of their employment. From a functional perspective, tuition-free access to the high quality of education provided by ACSS is a fringe benefit of great value which also can be measured in monetary terms.[13] Under the Federal Labor Management Relations Act, employees denied certification to obtain access to ACSS for their children, claiming to be no different from employees who have been certified, were employees entitled to

seek the same benefits through negotiation and, failing to achieve those benefits, the Union under the master agreement is authorized to grieve the issue and, finally, to submit it to arbitration.

As in the PX matter, the Agency again claims innocence with respect to the consequences of implementing the standards for obtaining access to ACSS, alleging that the standards have been fixed by the Department of Defense, and that it has simply implemented those standards. Does the claim square with the record of facts in this case? Consideration should be given first to the standards of the Department of Defense for securing enrollment in ACSS. As stated in Agency exhibit 2, the official instructions for enrollment of ACSS, these were the standards applicable to MDC employees claiming eligibility:

"Part A...1...C. Children of foil-time civilian employees of the Federal government in Puerto Rico not residing in government quarters on a military installation. The employee is employed in a grade, position or classification subject by policy and practice of this agency to transfer from Puerto Rico to areas where English is the language of instruction in schools normally attended by the children of Federal employees."

The second page of ACSS' instructions are directed to the local head of the agency who has responsibility for certifying that the applicant is a full-time civilian employee of the Federal government stationed in Puerto Rico and that "the employee is employed under the conditions specified in Part A, Section 1(c) of this application".[14]

In addition to the ACSS' instructions for certifying applicants, the Agency added its own guidelines:

"After careful review, it has been determined that Bureau employees may meet the Department of Defense's 'practice and policy' requirement in only three instances:

1) Where a mobility requirement is specifically noted within the position description;

2) Where a signed mobility statement exists as a requirement for entrance into a position;

3) Where a specific requirement in the law exists that requires of the Bureau a transfer of a specific employee from Puerto Rico to an area where English is the language of instruction in schools normally attended by the children."[15]

The Agency's certification guidelines are obviously more demanding than the "policy and practice" policy of the Department of Defense. Their effect is to make eligibility more difficult to achieve. This the Agency accomplished in spite of the contrary directive of the DoD which was circulated to all Agency heads six years earlier:

"I would like to make it clear that this office does not require a transportation agreement as a condition for an employee's dependents to attend ACSS under 20 U.S.C. 241(c). This does not, of course, waive the eligibility requirement of a federal agency/department to have a policy and practice...to transfer routinely personnel stationed in Puerto Rico."[16]

What should be stressed is that the DoD, acting through ACSS, relied entirely on agency heads to submit eligibility certifications in accordance with its "policy and practice" requirements.[17] There was no scrutiny by the DoD itself to verify whether or how agency heads were effectuating the eligibility requirements. The certification form submitted by the BOP for employees certified as eligible includes the statement, "Our agency does practice transferring employees in each category represented by the above listed employees", and is signed by the Bureau's Personnel Director.[18]

A review of the certifications submitted to ACSS demonstrate a range of compliance with DoD requirements. Most give an "expected rotation date" of five years, but there are eight certifications giving expected rotation dates of from seven to twelve years.[19] The data provided by the Agency do not indicate whether the expected rotation dates actually materialized in timely rotations. In the case of

certifications for correctional officers, most included expected rotation dates of five or less years. With respect to certifications for bargaining unit employees, the data provided by the Union demonstrate that the Agency favored bargaining unit employees transferred from the continental United States: of the ten who were certified, nine were transferees.[20] None of the other 200 odd remaining bargaining unit employees were certified as eligible to have their children admitted to ACSS. It is fair to conclude that the certification data presented for the record does not bear out that the Agency has satisfied the literal words of DoD's policy of requiring that there be "a policy and practice ... to transfer routinely personnel stationed in Puerto Rico." Perhaps that is why it phrased the eligibility certifications as it did: "Our agency does practice transferring employees in each category represented by the above listed employees".

Some detailed analysis serves to bring out what in reality has been the Agency's policy and practice in certifying eligibility. Consider, for example, the case of Sandra H. Serrano: she was initially assigned to duty in Puerto Rico in 1993; her position classification is cook supervisor; her three children were certified as eligible for admission to ACSS; and her expected rotation date was November of 2005. These facts hardly square with the DoD requirement of a policy and practice "to transfer routinely personnel stationed in Puerto Rico". The reason for the requirement should be remembered: it is to protect the children of employees stationed in Puerto Rico from having their education broken up by a number of years using the Spanish language and then finding themselves in an English speaking academic environment. The DoD's policy and practice requirement played no role in the Serrano case. The ACSS schooling of her children is best explained in. terms of a valuable fringe benefit which the Agency was able to provide her and, to make that happen, it included the necessary statements in the eligibility certification. This explanation is borne out in the reasons given by Warden Pastrana to convince upper echelons of the Agency to grant a waiver so that the children of fourteen of his staff could continue their education at ACSS.[21]

The satisfaction of similar interests serves to explain why the Agency sought and obtained access to ACSS schooling for nine bargaining unit employees, all of whom were recruited or transferred from the continental United States to positions at MDC. Until 2004, when the Agency decided to no longer submit eligibility certifications, there was, however, one profound difference between non-bargaining and bargaining unit employees with respect to the availability of ACSS schooling: only bargaining unit employees recruited or transferred from the mainland received the benefit from having been accorded eligibility certifications. The children of all other bargaining unit employees, approximately 200 employees in number, with one exception to be discussed later, were effectively denied all possibility of admission to ACSS by the Agency's decision that none of the 200 would be rotated to positions in BOP institutions on the mainland. The effect was to create two classes of bargaining unit employees, a favored minority consisting of Puerto Ricans and other Latinos ("Hispanics") whose children were able to benefit from the superior education provided by ACSS, and the overwhelming majority of bargaining unit employees whose children were ineligible because the Agency had decided to classify them as employees not subject to rotation. That exclusionary classification apparently was based on a decision of policy by the Agency that none of the 200 bargaining unit employees were qualified for rotation, or if there were those who did qualify, they still would not be rotated. That is my conclusion on the basis of the record which includes no explanation by the Agency for the decision to disqualify for purposes of rotation the 200 bargaining unit employees recruited in Puerto Rico.

The one apparent exception is the case of Correctional Officer James Martin who was apparently recruited in Puerto Rico and assigned to duty at MDC June 8, 1997, whose daughter was

admitted to ACSS and whose expected rotation date is given by the Agency as June of 2004.[22] Though the Union characterized James Martin as an exception to the Agency's policy of not filing eligibility certifications on behalf of bargaining unit employees recruited in Puerto Rico, the Union's Attachment A to its Initial Brief lists him as a parent whose child was receiving ACSS schooling, but also as the beneficiary of PX privileges and Home Leave. Thus, the information provided is contradictory. As discussed earlier, Puerto Rican residents, recruited in Puerto Rico, would not be entitled to Home Leave. Hence the precise status of James Martin, why he received all possible benefits, including one which appears to contradict Agency policy, stands in need of clarification.[23] Accordingly, it will be on the agenda of matters to be considered in the next stage of this arbitration.

Also to be included will be consideration of the allegations in footnote I of the Union's Initial Brief which were discussed in the prior section on PX privileges: "... up until 2003 the position descriptions included a transferability or mobility statement", referring to bargaining unit employees. The footnote then states that "it was not until 2003 that the agency decided to delete the transferability statement." If untrue, the allegations can be dismissed from consideration in this case. On the other hand, if true, the Agency should answer why it acted to classify Puerto Ricans recruited in Puerto Rico as ineligible for rotation. It should because ineligibility had negative consequences in terms of eligibility for fringe benefits. It should also present for the record whether bargaining unit employees at MDC have been, and continue to be, treated differently than their peers employed in BOP institutions on the mainland.

As the Agency evaluates the data on certifications, it claims to have complied with DoD's policy and practice requirements and, if anything, that the data demonstrate that the certification results have. favored Hispanics over non-Hispanics. The evidence of record simply do not support the Agency's claims. What the facts demonstrate, as analyzed earlier in detail, is that the Agency utilized the DoD's policy and practice requirements to secure preferred treatment for employees which its personnel policies sought to benefit. Furthermore, the Agency's analysis in terms of treatment of Hispanics compared to non-Hispanics is misconceived. What the Union has demonstrated with factual material which fully proves its case, is that the Agency has discriminated against bargaining unit employees recruited in Puerto Rico, employees who are almost entirely persons born and raised in Puerto Rico, as compared with Puerto Ricans and other Hispanics who were recruited or transferred from the continental United States. In short, the Union proved its case that the Agency has discriminated against the grievants in this case based on their national origin and that the Agency's countervailing defense should be held to be unpersuasive. *See St. Mary's Honor Society v. Hicks,* 509 U.S. 502 (1993).

The multiple violations committed by the Agency related to access to ACSS schooling track those committed with respect to access to PX privileges.

First, denying bargaining unit employees ail possibility of rotation, except for ten employees, nine of whom had been recruited or transferred from the mainland, had the effect of depriving 200 odd employees of their right "to be treated fairly and equitably in all aspects of personnel management", as required by the master agreement, Article 6-b-2.

Second, the Agency's policy of excluding 200 odd bargaining unit employees from the possibility of rotation, which resulted in making their children ineligible for certification for ACSS schooling, a valuable fringe benefit, deprived the grievants of their right "to be free from discrimination based on their ... national origin", as guaranteed by the master agreement, Article 6-b-3.

Third, the disparate impact of the invidious discrimination practiced by the Agency violated Title VII of the Civil Rights Act as interpreted in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971). Though a good deal of the precedential strength of *Griggs* was

sapped in *Ward Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), its effect was largely overturned by Congress two years later in the Civil Rights Act of 1991 which found that "(2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio* ... has weakened the scope and effectiveness of Federal civil rights protections; and (3) legislation is necessary to provide additional protections against unlawful discrimination in employment".[24] As in *Griggs,* in this case the Agency's, "business necessity" defense missed the mark. The need to encourage recruitment and transfers to MDC cannot justify discriminatory distribution of fringe benefits, when the discrimination impacts invidiously bargaining unit employees based on their national origin.

Finally, the latter conclusion is even more in order if the constitutional standard of strict scrutiny is applied to the Agency's policy of establishing a subclass whose members are denied benefits on the basis of their national origin, benefits which employees recruited or transferred from the mainland are granted. Under the standard of strict scrutiny it is entirely inconceivable that a reviewing court would accept that the Agency had a compelling interest which could only be satisfied by the policy which it adopted, in short that there was no alternative but to sacrifice the constitutional right to the equal protection of the laws of over 200 bargaining unit employees.

Initial Award

The arbitrator retains jurisdiction to resolve the issues to be heard in the next stages of this case. At this initial stage, the following issues have been decided:

1. The grievances in this case were submitted to arbitration in timely fashion.

2. The issue of denial of access to PX privileges is arbitrable.

3. Whether bargaining unit employees' dependent children were illegally denied eligibility certifications for admission to ACSS schooling is an issue which is not moot.

4. The Agency has violated the right to Home Leave.

5. PX privileges at Fort Buchanan were denied to Agency bargaining unit employees in violation of their contractual and legal rights.

6. Dependent children of Agency bargaining unit employees were denied access to ACSS schooling in violation of their parents' contractual and legal rights.

7. To complete the record on liability, the Agency will submit two statements: the first is its response to the issues raised in footnote 1 of the Union's Initial Brief and the second are its answers to the question raised in this initial opinion related to the treatment accorded James Martin by the Agency. Both statements are to be submitted within thirty days.

8. Within the same thirty-day period, the parties will submit their respective positions on all matters related to remedial relief. In advance of a scheduled hearing to determine remedial relief, the arbitrator will rule on how the hearing process is to go foreward.

[1]See the Union's exhibit providing the minutes of the LMR meetings during the period July 17, 1997 through March 20, 2002.

[2]It also should be noted that under the terms of the letter from Keith E. Hall, Assistant Human Resource Management Director, on behalf of the BOP, to the Superintendent of the Antilles Consolidated School System, dated March 26, 2004, whether children of employees at MDC will be certified as eligible for enrollment after school year 2004-2005 is left open. The letter states: "At this time, the Bureau of Prisons will not certify any children as eligible. ..." The possibility of a change in position in the future is another ground for denying the claim of mootness.

[3]It should be noted that in the remedial section of the form for submission of grievances to arbitration, the Union made reference to "EEOC guidelines".

[4]It should be remembered that Title VII is constitutionally grounded on the Commerce Clause

and that before 1964 private employers could practice invidious discrimination without running afoul of the/aw. *See The Civil Rights Cases*, 109 U.S. 3 (1883), which the Supreme Court has never revoked.

[5]In the case of Ferdinand Blanco, he was recruited in Puerto Rico at a time when his residence was St. Thomas, USVI. The Agency denied his request for home leave, but in contrast has granted it to "Hispanics" recruited from states in the continental United States to work at MDC. See Attachment A in the Union's Initial Brief. The information in the Attachment was neither denied or refuted by the Agency. Hence it is accepted in this proceeding as reliable and accurate.

[6]Not addressed in this opinion is whether it would be legal for the Agency to obtain PX privileges solely for its managerial and supervisory personnel. That is because in my judgment a decision on that issue is unnecessary for reaching an award in this case.

[7]The numbers are taken from Union Attachment "A". Since the Agency did not object or refute the statistical breakdown prepared by the Union, the document has been accepted as providing reliable data.

[8]*Ibid.*

[9]The term national origin figures in each of the three grievances submitted to arbitration. As used in this opinion, arbitral notice is taken that there is in a sociological sense the nation of Puerto Rico, that the people of this island see themselves as a distinct people, with their own culture, language and national identity. One of many examples is the fact that Puerto Rico participates in the Olympic Games as a separate and distinct national team. When Puerto Ricans migrate to the mainland, with time, and certainly after the first generation, though they still may identify with the Puerto Rico of their origin, or that of their parents, they take on a different identity, a mixture of the old and the new, but with stateside culture and language tending to predominate. It should be stressed that the Puerto Rican component of their makeup may survive for generations, as has been true of other national groups. However, confusion results from lumping Puerto Rican on the mainland with the variety of Latino peoples under the heading "Hispanics", which may be convenient for combining a large number of Spanish speaking national peoples, for the purposes of the Census, and the formulation of certain federal policies, but fails to recognize significant cultural differences between the national groups making up the "Hispanics". The point of these comments is that "national origin", for the purpose of determining whether there has been invidious discrimination, should start with the recognition that there are two Puerto Rican groups, those born and raised on the island, as contrasted with those reared on the mainland. Whether as between these two national groups invidious discrimination has been practiced, in any particular case, is of course a matter of proof.

[10]The letter originates in the Central Office of the BOP. It is dated March 26, 2004 and is signed by Keith E. Hall, Assistant Director, Human Resources Management.

[11]Warden Pastrana's memorandum is dated December 1, 2000 and is directed to R.L. Mathews, Regional Director, Southeast Regional Office of the Federal Bureau of Prisons.

[12]For the complete memorandum which is actually addressed to Regional Director Mathews, see the Union's exhibits dealing with ACSS, exhibit S.

[13]Arbitral notice is taken of ACSS' reputation for excellence in the educational community as compared with the quality of public school education in Puerto Rico.

[14]ACSS' instructions track the official statement of the DoD's certification policy, and the certification form to be submitted by the agency. *Supra* note 11, exhibit K.

[15]The guidelines are included in a Memorandum entitled "Eligibility to the Antilles Consolidated School System, authored by Human Resource Manager, G. Joseph Kelley, Jr., and circulated to all

MDC employees, August 13, 1999. *Id.*, at exhibit F.

[16]The memorandum is to heads of federal agencies; the subject is "Clarification of Application Procedures for Tuition-free Education at the Antilles Consolidated School System"; it is authored by Hector O. Nevarez, Director, DoD Stateside Dependents Schools and is dated July 20, 1993. *Id.*, at exhibit E.

[17]See memorandum by the Superintendent of ACSS, dated April ?, 2000, to heads of agencies: "... you are advised to review each category that you certify to ensure that each certified employee is in a category that is subject to transfer and that your agency actually has a practice of transferring such employees according to your agency transfer policy." *Id.*, at exhibit K.

[18]*Id.*, at exhibit U. The certifications covered in this exhibit are for the period October 26, 1994 through January 2002.

[19]*Ibid.*

[20]See Union's Initial Brief, Attachment A. This data apparently is for the years immediately prior to the filing of the submission to arbitration, March 28, 2002.

[21]*Supra*, note 11, at exhibit L. Other examples for which the same analysis applies are the cases of Carlos A. Rivera and Jose A Colon. The former held the position of Financial Manager; he had one child admitted to ACSS; he was initially assigned to duty in Puerto Rico September 17, 1995; and his expected rotation date in the eligibility certification is given as September 17, 2006. In the case of Jose A. Colon, he was initially assigned to duty in Puerto Rico June 28, 1992; his position classification is Correctional Counselor; he had one child admitted to ACSS; and his expected rotation date is given as June of 2002.

[22]*Ibid.*

[23]There are two additional questions to be clarified. First, is James Martin correctly classified in Union Attachment A as a "Caucasian"? It should be understood that Martin is a not an uncommon surname in Puerto Rico. Second, was he in fact rotated in June of 2004 as his eligibility certification states?

[24]See Civil Rights Act of 1991, Public Law 102-166; 105 Stat. 107. For how one federal court has interpreted Congressional intent, *see Lanning v. Southeastern Pennsylvania Transp. Authority (SEPTA)*, 181 F3d 478 (3d Cir. 1999).

