

107 LRP 24182

**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

0-AR-4228

**May 15, 2006**

**Judge / Administrative Officer**

**Helfeld, David M.**

**Full Text**

**Second Opinion: Resolutions and  
Schedule<sup>25</sup>**

This case is now over four years old from the filing of the grievance to date. The parties are urged to make every effort to comply with the schedule I have prepared for resolving the issues raised by the parties in their respective January 30 and March 2 briefs which deal principally with remedial questions. The schedule consists of three stages: first, by April 18 the parties' submission to the record of their respective positions on matters required for clarification prior to the date for the hearing, on all remedial questions which cannot be resolved solely on the basis of stipulations and documentary evidence; second, by May 15, the parties' rebuttals to the affirmative positions taken by the other party; and third, an evidentiary hearing and oral argument to be held May 22 and, if necessary, to be continued for the next four days.

Stage I -- By April 18 the Union will submit the following:

1. The names of all bargaining unit employees who claim that their legitimate requests for home leave were denied in violation of their contractual and legal rights, spelling out precisely the basis and amounts of their claims.

2. The method the Union proposes for demonstrating damage claims for denial of PX privileges at Fort Buchanan. How does it intend to deal with the fact that bargaining unit employees did have access to the PX at the Sabana Seca Naval Station? What should the time frame be for damage claims? On the basis of what reasoning?

3. The criteria for determining which bargaining unit employees are entitled to claim damages for having been denied access to enrolling their children in the Antilles Consolidated School System (ACSS). In such cases, how are damages to be measured? What should the time frame be for damage claims? On the basis of what reasoning? Does the Union accept that since School Year 2004-2005, the Agency has not certified any children as eligible for admission to ACSS? The Union cites 10 U.S.C.A. sec. 2164 as the legal basis for its petition that the arbitrator order the Agency to certify the children of bargaining members, previously denied eligibility, as eligible for enrollment in ACSS for School Year 2006-2007 and thereafter for four additional years. The Union's legal reasoning in support of this petition needs to be spelled out fully.

4. The names and positions held by MDC management and other BOP officials which the Union claims were responsible for the discriminatory policies and actions which the Initial Opinion and Award concluded have taken place.

5. With respect to its claim for "General Remedies" including a cease and desist order, notice of violations, training, liability, discipline, retaliation, apology, notification, No Fear Act, Office of Special Counsel the Union should submit whether, and if so, how each of these remedies have been awarded in cases under Title VII and collective agreements in which a federal agency has been the defendant and particularly, if there are cases, in which the Bureau of Prisons has been a party. The issue of compensatory damages is addressed in points one through three above.

6. At what stage in the case does the Union consider it to be appropriate to determine

reimbursement of attorney fees?

7. Disclosure that the Union intends to litigate in the United District Court is noted, but is that a matter which has any bearing on this arbitration case?

8. The Union should serve on the Agency a list of the particular information it needs to satisfy the requirements of the arbitrator and to prepare its detailed remedial claims.

9. The list of Union witnesses and adverse witnesses which the Union mentions in its Remedial Relief Statement should be served on the Agency, together with any additional names which it considers necessary to make its case in the May 22 hearing on remedies.

Stage I -- By April 18 the Agency will act on the following matters:

1. Whether the transferability statements in the position statements of the bargaining unit employees were deleted in 2003 and, assuming that they were deleted, whether the matter is moot from the perspective of this case, has still to be determined. Accordingly, the Agency will make available to the Union copies of the older position descriptions together with any relevant records. If the parties can stipulate as to the facts, discovery will not be necessary.

2. There is a factual disagreement between the parties in the case of James Martin. According to the Union, he is Caucasian and was granted access to the ACCS to Home Leave and to the PX. The Agency states that he is Caucasian and that he had access to ACCS and Home Leave, but not to the PX. If the parties can agree on the facts, they should so stipulate.

3. The Agency's responses to the matters raised by the Union under the heading of General Remedies, are noted. The Agency is invited to amend or modify its position with respect to any of the general remedies as presented by the Union, prior to April 18.

4. There is an apparent contradiction in the Agency's Submission Concerning Damages between two statements. Page three states, "... no acts of discrimination occurred." At page eight, dealing with

ACSS schooling, is the statement: "At best, the employees would be entitled to the difference between what was actually spent on education expenses, and what they would have received if the child had been enrolled in the ACSS." The Agency should clarify its position with respect to damage claims for denial of access to the ACSS. It should be remembered that the Agency's position in its Initial Brief was that access to ACSS was not within the coverage of the Master Agreement.

5. In its submission on remedies the Agency has in effect requested reconsideration on the Initial Award's holding that discriminatory access to the PX at Fort Buchanan, adversely affecting most bargaining unit employees, PX at Fort Buchanan, adversely affecting most bargaining unit employees, violates the Master Agreement, Title VII and Constitutional Due Process. In addition to rearguing its earlier position, the Agency cites a more recent case in support of its position that PX privileges are not a condition of employment and therefore outside the scope of the Master Agreement. *See National Association of Government Employees, Local R1-134 and U.S. Department of Navy, Naval Underwater Systems*, 38 F.L.R.A. 589 (1990). The issue in that case involved the kind of matters which an agency is required to negotiate with the union, made mandatory under the Federal Labor-Management Relations Act.

That is not the issue in this case. The record is clear that management in this case, since July of 1997, in innumerable meetings did negotiate with the Union over access to the Fort Buchanan PX and did in fact make a number of efforts to obtain access for all bargaining unit employees. In effect, management conceded that access to the PX was a legitimate matter for negotiation and it was only in the context of this arbitration that it has assumed the position that access is not a condition of employment and therefore is excluded from the Master Agreement and, particularly, from the scope of the arbitrator's jurisdiction. In my judgment, the Agency's position is simply not persuasive. As analyzed in the Initial Opinion and Award, access to the PX functionally is a

fringe benefit and has monetary value. To provide it to some bargaining unit employees and not others, on the basis of national origin, constitutes invidious discrimination specifically prohibited by the Master Agreement, by Title VII of the Civil Rights Act and, in the absence of a compelling reason, by the equal protection guaranteed by the Fifth Amendment to the Constitution. The decisive principle is crystal clear; the Agency has no legal obligation to grant its employees PX privileges, but if it does, it must not discriminate invidiously. Since it has discriminated on the basis of national origin, the Agency's request for reconsideration must be denied.

Stage II -- April 18 to May 15

1. On April 18, there will be a telephonic conference, beginning at 11:00 a.m., on the status of the case and to resolve questions and proposals which the parties may present. Prior to that date a telephonic conference can be scheduled at the request of either or both parties.

2. During this stage the parties will prepare their final objections and rebuttals to the other party's remedial claims.

3. During this stage and the first stage the parties are urged to meet and/or confer to determine what facts they are prepared to stipulate for the purpose of reducing the amount of testimonial evidence at the May 22 hearing.

4. Whatever problems may arise over discovery of information or over assuring the presence of all witnesses required to be present at the hearing, should be brought to my attention via FAX.

### **Second Award**

1. The arbitrator's decisions, inquiries and instructions are contained in the Second Opinion: Resolutions and Schedule.

2. The arbitrator retains jurisdiction of this case until a final award is rendered.

<sup>25</sup>The pagination and order of footnotes are a continuation of the Initial Opinion and Award.