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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

0-AR-4228

FMCS: 02-12276

November 27, 2006

Judge / Administrative Officer

Helfeld, David M.

Full Text

Re: Damages and Other Remedial Measures[26]

Union's Remedial Relief on Initial Award January 30, 2006 Agency Submission Concerning Damages March 2, 2006 Union's Submission to Remedial Questions Based on Second Opinion: Brief May 18, 2006 Agency's Second Submission Concerning Damages May 18, 2006 Telephonic Conference Held by the Arbitrator May 25, 2006 Union's Final Objections and Rebuttal Brief: Stage II June 22, 2006 Agency's Rebuttal Brief and Witness List June 23, 2006 Hearing on Damages August 1-3, 2006 Scheduling Agreement fn27 August 4, 2006 Union Submission of Amended Charts August 18, 2006 Agency Supplement to the Record August 18, 2006 Agency's Objections to Union's Supplement to the Record September 1, 2006 Union's Rebuttal to Agency's Supplement to the Record September 1, 2006 Transcript of the Hearing Record October 10, 2006 Agency Closing Argument Concerning Damages October 10, 2006 Union's Closing Argument Brief October 12, 2006 Third Opinion and Award November 27, 2006

Third Opinion

The damages and other remedial measures included in the award are my conclusions after having evaluated the multiple documents submitted by the parties which are listed in the opening page of this opinion. The documents include judicial, administrative and arbitration citations, statutory and regulatory provisions, unsworn statements, multiple briefs and counter briefs, economic studies, a telephonic hearing conference, transcript of the hearing record on damages and remedies, among other items submitted by the parties. In addition, the award is also based on my own research on the few questions not sufficiently covered in the parties' submissions. The award being rendered at this stage of the arbitration is interlocutory and hence not final. The principal reason is that the Union's claims for damages have to be recalculated in the light of rulings made in the course of this Opinion and time must be allotted to the Agency to respond to the Union's recalculations. In addition, it would now be timely for the Union to submit a statement of attorneys' fees and costs incurred in this arbitration proceeding, as of the time of having complied with the terms of the third award.

The Agency's position can be summed up in two statements: the Agency has not violated any provision of the Master Agreement and, even assuming that it has, no damages have been suffered by the members of the bargaining unit. Nothing submitted in this latest stage of the case, supports the Agency's claim of total non liability. Rather, in the course of this opinion, there will be additional analysis of the Agency's contractual and legal violations. And with respect to the Union's remedial claims, the evidentiary record fulsomely establishes, as will be demonstrated, that damages were suffered and that remedies are required to make the grievants whole and to secure future compliance with the Master Agreement. Though the Agency's extreme claim was not sustained that no damages were suffered and that no remedial action was called for, it did submit a number of persuasive documents and relevant arguments on remedial principles and on how they should be applied. In so doing, the Agency was able to affect the outcome of the case in terms of substantial reductions in the damages claimed by the Union and in shaping the non

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pecuniary remedial petitions. A substantial part of the Opinion is devoted to a consideration of the multiple objections of the Agency to the Union's claims for damages.

On its side, the Union did accomplish two objectives: it submitted for the record evidence which served to additionally support the findings of the Initial Opinion and Award with respect to the Agency's contractual and legal violations and, secondly, detailed evidence which in general substantiated its claims for damages and other remedial action. However, with respect to certain claims, the Union did fall short in the quality of the evidence submitted. In certain matters it expanded its remedial claims on the basis of unsustainable arguments. In still others, and this was the weakest part of the Union's case, it failed to recognize the principle of equitable proportionality in shaping the amount of damage claims. In large measure, this Opinion is devoted to determining which of the claims and petitions of the Union should be granted, and to what extent, to secure compliance with the pertinent provisions of the Master Agreement. As indicated, this will entail the need for recalculated damage claims by the Union and time for the Agency to respond

The Legal Theory of this Case

This is more than a simple case of breach of contract and determination of damages. Whether the Agency violated the Master Agreement and, if so, what remedial action should be awarded, is only the starting point in analyzing the facts of record. That is because the Master Agreement includes language which tracks the prohibition against invidious discrimination in Title VII of the Civil Rights Act. Therefore, it must be assumed that the same prohibition was intended by the parties to be incorporated in the Master Agreement. That in turn requires that account be taken of case law, both judicial and administrative, when determining damages in an arbitration case processed under the Master Agreement. Concretely, that means that attention should be paid to how judicial decisions, and as well decisions of the Equal Employment Opportunity Commission and the Federal Labor Relations Authority have dealt with claims for damages based on invidious discrimination in employment and, most relevantly, discrimination cases in federal employment. The EEOC has enacted guidelines for the resolution of cases involving discrimination in employment which also should be considered. That too would be advisable with respect to arbitral awards for damages and other remedial measures in discrimination cases.

None of the extra contractual material which has been mentioned should be considered precedential in the sense that any particular case must be followed, only that it must be taken into account and its degree of persuasiveness will depend on how relevant it is to the grievances in this particular case. The same is true of the weight to be given to non case material, whether statutory or regulatory in nature, and as well, to the guidance which can be found in the general legal literature on damages. Again, it must be stressed that in final analysis all contractual interpretations must draw their essence from the Master Agreement adopted by the parties.

There are two additional factors which make interpreting the Master Agreement in this particular case an exceptionally complex process. First, well over two hundred grievants are involved.[28] In the Initial Opinion there was reference to the systemic violations alleged to have been committed. It would have been more precise to recognize that this arbitration case is similar in nature to a class action. That has had two consequences: it has not been possible to adjudicate each and every grievance on an individual and detailed basis; and the large number of claimants has the effect of limiting the scope of monetary damages because of the impact of an excessively high award would have on this Agency's budget. The first consequence has implications having to do with the burden of proof and will be dealt with in the consideration of each of the claims involving compensatory damages.

The second complicating factor is the

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inescapable duty of the Agency in this case to conduct its relations with its employees in compliance with Constitutional principles. That was folly spelled out in the Initial Opinion and Award with respect to the Equal Protection clause, incorporated in the Due Process clause of the Fifth Amendment to the Constitution, and the tests for determining whether there have been violations. Of course, the Master Agreement does not textually mention the Constitution, but its applicability is implied, without question, in all contractual arrangements between the government and a union representing its employees. Having determined that the Equal Protection clause is applicable to this case, that too is equally true of the Due Process clause of the Fifth Amendment. There was testimony in the evidentiary hearing on damages which raises due process issues. Whether the Due Process clause has also been violated and, if so, whether that should be considered an additional basis for awarding damages, are questions which are addressed next in the Opinion.

Compensatory Damages for Denial of Home Leave

The Initial Opinion and Award determined that ten bargaining unit 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 no such benefits. The precise number of employees presently assigned to MDC in Guaynabo and denied Home Leave, according to the Union, amounts to sixty.[29] 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 refuted 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.[30] 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."[31] The Agency's position is that the grant of discretionary authority trumps any provision of the Master Agreement. That position was held not to be sustainable in the Initial Opinion for good and sufficient reasons. A regulation cannot trump statutory prohibitions against invidious discrimination in employment. Even more fundamental, discretionary decisions cannot stand if they are incompatible with the constitutional principle of the equal protection of the laws which the federal government is obliged to enforce. That is true whether the grant of discretion emanates from a statute or is a regulation based on a statute.

In the course of the hearing on damages, there was testimony which lays the basis for a second constitutional issue with respect to the grant of discretionary authority to the Agency: whether as it has actually been implemented, the Agency has violated the due process guaranty of the Fifth Amendment? The larger question is whether agency discretion to grant a benefit to employees which has economic value is compatible with the American constitutional system? To answer in the affirmative, requires acceptance that the governmental grantor of the benefit is free to act without norms, even willfully, with personal prejudice and prejudice against particular groups, without being accountable to any higher authority. In my judgment, unlimited discretionary authority to grant economic benefits is incompatible with the principle of the rule of law which is embodied in the due process clause.

The relevance of due process principles is manifest in the fact situations of concrete cases which form part of the record in this case. The Initial

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Opinion found that the Agency had denied Fernando Blanco home leave, but had granted it to Findel Hernandez, and that the only apparent explanation for the difference in treatment was discrimination based on national origin.[32] After the hearing on damages, a second possible explanation should be considered: that the difference in treatment was simply due to how Agency officials were exercising discretionary authority. Consider two additional cases. At the outset of his employment as a Correctional Officer in 1997, James Martin received all possible benefits: home leave, PX privileges and ACSS schooling for his daughter. Martin is Caucasian and is one of the ten bargaining unit employees which the Initial Opinion found were receiving such benefits. In the hearing on damages he testified to how and why Warden Pastrana had taken from him all three benefits. If his testimony is credited, it would support a finding that in the first period of his employment he benefited from his classification as Caucasian, but in the second period, as a result of his clash with the Warden, discretion was exercised to deny him the benefits he had enjoyed in the first period.[33] It would also support a finding that the discretionary denial of all benefits previously enjoyed was a denial of his right to fairness in the granting of employment benefits, a right which is central to Constitutional Due Process.

Having evaluated the counter testimony of Warden Pastrana,[34] and the documentary material submitted by the Agency,[35] I find Martin's testimony creditable and that of Warden Pastrana not to be credit worthy, for two reasons: first, the facts in the documentary material were in large measure consistent with Martin's hearing testimony, that the essence of the problem with the Warden was over the denial of an identification card to his wife because of her race, and second, in the testimonial transcript there is a statement by Warden Pastrana which puts in serious doubt his credibility. When I questioned him, about whether he was aware that there were a group of bargaining unit employees who had access to the PX, Warden Pastrana replied, "No, I was not aware of that." He was asked that question a number, of times and repeatedly professed ignorance of the fact that during his watch as Warden a group of bargaining unit employees had indeed been exercising the privilege of access to the Fort Buchanan PX.[36] How he could not have knowledge of a fact which was well known, which was discussed regularly over the years, including the five years during which Warden Pastrana was Associate Warden and thereafter Warden, is inexplicable.[37] From Martin's case it is fair to conclude that his is a mix of race discrimination, albeit favorable to him in the first stage, followed by the discretionary denial of his due process rights to fair treatment.

Martin's case requires that a major finding of the Initial Opinion be modified: it is true enough that the Agency has engaged in invidious discrimination based on national origin, but that does not tell the entire story. In light of the evidence received in the hearing on damages it is now clear that the Agency also engaged in the arbitrary exercise of its discretionary authority, in violation of due process, and that the arbitrary result could either be unfavorable or favorable. One case which was and continues to be favorable to the employee is that of Angel Luis Jaime. He transferred from a BOP facility in Miami to MDC in 1991. He was reimbursed for all the costs of moving and was granted home leave benefits and PX privileges, benefits which he has enjoyed since taking up the position of Budget Analyst. He identifies himself as Puerto Rican. How to explain the favorable treatment he has received, as contrasted with the denial of home leave benefits to sixty of his co-workers? In the absence of any explanation in the record, it is fair to conclude that his case is an example of favorable discrimination exercised under the Agency's discretionary authority. Favorable, but exceptional: most of the cases presented in the hearing on damages, testified to unfavorable treatment.[38] A recurring complaint of the Union's witnesses in the hearing on damages is that they never received any meaningful explanation by MDC officials for the denial of home leave benefits.[39]

At this stage of the arbitration, I now conclude

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that grievants whose claims for home leave benefits have been denied for reasons of either invidious discrimination, or for the arbitrary exercise of Agency discretion, are entitled under the provisions of the Master Agreement to be made whole for the lost benefits they have suffered, subject to my rulings which are set out in the next section. In final analysis, at the root of the right "to be treated fairly and equitably", contractually guaranteed in the Master Agreement, are the constitutional values of equal protection of the laws and due process of law.

Rulings on Home Leave Benefits

In response to the Union's claims for awarding home leave benefits and the objections raised by the Agency, these are my rulings:[40]

1. The Union's claim for non pecuniary damages, at the rate of $5,000 per year, for denial of home leave benefits, is denied. Later in this Opinion the question of non pecuniary damages will be addressed and there will be a single award of non pecuniary damages covering in global form the violations of the Master Agreement. The award of non pecuniary damages separately for each of the three grievances, home leave, PX privileges and access to ACSS, would result in a "monstrously excessive" amount in damages.[41]

2. Accordingly, Table E-l in the Union's Closing Argument Brief is ordered to be withdrawn and to be replaced with a table of the 60 employees wrongfully denied home leave. The table should include the name of the bargaining unit employee, the number of years to which he or she is entitled to the benefit (a maximum of five years beginning in October of 2001), each claimant's place of residence prior to reporting to MDC and when he or she reported to MDC. The table should be accompanied by all necessary data for confirming the claimant's right to home leave, as legally determined in the prior section of this Opinion, and as well, substantiating the lightness of the amount claimed.

3. In the award there will be spelled out the opportunity the Agency will have to challenge the accuracy of the data in the Union's substitute for Table E-l.

4. The Union will prepare a substitute for Table E-2, covering MDC employees who have transferred to other institutions, following the directions of the second paragraph above. Benefit claims are to be limited to the precise number years that these employee were bargaining unit members employed at MDC.

5. The Agency's objection that bargaining unit employees at MDC during the period October of 2001 up to a maximum of five years, cannot be considered part of this case because they are now employed at another BOP institution, is denied. The same ruling applies to former employees of MDC during the period 2001-2006 who are no longer employed in a BOP institution. It makes good sense that both groups be represented by the Union for the period during which they were actually employed at MDC. Indeed, it can be considered the Union's duty to represent them for the period during which they were duly paying union members. To require them to process their home leave grievance at their new location, or from outside the jurisdiction of the BOP, for a denial of benefits they incurred at MDC, would have the effect of putting off a final decision on their claims for many years, in addition to the number of years which this case has so far taken. Even more to the point, their claims are a part of a fully developed record and, in fairness, they should reap the results of this case, whether favorable or unfavorable to their interests.

6. Accordingly, Table C in the Union's Closing Argument Brief, covering nine bargaining unit employees no longer employed at BOP, also should be withdrawn and reformulated in accordance with the instructions in paragraphs 2 and 4 above.

7. The Agency's objection to the payment of home leave in a lump sum is denied. The Agency cites 5 U.S.C., Section 6305(a)(3): home leave "may not be made the basis for terminal leave or a lump sum payment." That prohibition obviously applies to employees who were in a position to benefit from

home leave on a regular basis and who failed to act with due diligence. It has no relevance to this case because it was precisely the actions of the Agency which wrongfully deprived the grievants of all opportunity to claim their home leave benefits. This case is about the redress of their grievances. The Agency cannot now block the processing of their grievances by seeking to exempt itself from the consequences of its own wrongful acts.

Damages for the Denial of Access to the Fort Buchanan PX

To sum up the basis for liability with respect to the Agency's denial of PX privileges to over 200 bargaining unit employees: the Agency violated the right to equal treatment as required by the Master Agreement, statutory law and the constitutional right to equal protection; the denial of access to the PX resulted in economic harm to the grievants; therefore, they are entitled to compensatory damages to the extent such damages were incurred during the period 2001-2006. To that summary, there should now be added that the denial of PX privileges to the grievants also violated due process of law. By accepting the eligibility standards of the Department of Defense -- that only MDC employees subject to regular rotation as regular practice were acceptable -- the Agency adopted and applied a standard which was arbitrary and therefore in violation of due process of law. At no time in this proceeding has the Agency explained the rational connection between an employee serving in a position in which rotation is customary and the benefit of having access to the PX. Hence the denial of PX privileges to these grievants is doubly invalid for breach of the equality and fairness provisions in the Master Agreement and the pertinent provisions of statutory and constitutional law. The only question still to be resolved is the extent of the damages incurred by the grievants.

To satisfy its burden of proof with respect to damages, the Union submitted a study which it had contracted for with a Certified Public Account and University Professor, Juan Suarez. He presented the study in the Hearing on Damages and was subjected to detailed interrogation by the parties' attorneys and by the arbitrator.[42] He testified to the assumptions of his study, the sources of information he had collected to compare PX prices at Fort Buchanan with those available in a variety other stores readily accessible in the San Juan and surrounding metropolitan area. His conclusion was that an average family of two adults and two children, if the family would have had access to the PX, would have had an "average estimated savings per family for five years" of "$23,072 approximately."[43]

The position of the Agency is that the Suarez study is so "biased and flawed" that "it should be stricken from the record." Cross examination and questioning by the arbitrator indeed did bring out that the study was flawed with respect to the comparative data on food prices which, in turn, undercut the reliability of the overall estimated savings by a very significant amount. Apparently, the error occurred because Mr. Suarez had not been fully informed that the PX privilege of MDC employees did not encompass the Commissary which offers the broad range of food products of a Supermarket.[44] Mr. Suarez then agreed to redo his calculations, leaving out comparisons with food prices from the Commissary, but including whatever limited food items were being offered in the PX outside the Commissary. His recalculations were submitted in a second report which is dated August 6, 2006. It was submitted to the Agency and to the arbitrator on August 18, 2006.

There are two questions to be decided: what weight should be accorded Mr. Suarez' second report and should any weight be given to his first report? His second report reduces the overall savings for the five year period from $23,072 to $21,522. It is not clear how and why the new item for food was calculated. An even more basic objection to accepting the second report for the record, is that it has not been subject to cross examination by the Agency. The Agency's objection to its admission therefore should be upheld. In contrast, leaving the item of food out of the estimates of savings, the remainder of the first report

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is sufficiently reliable to merit acceptance.

The Agency raises a number of questions about the methods used in the first report, the samples used and other criticisms, but in my opinion Mr. Suarez was a convincing witness in defense of his report, with the exception of the estimated savings on food. In final analysis, this was a comparative study of prices, from a reasonable number of stores and based on estimated expenditures for an average family. Complete precision was not to be expected, even with a greater expenditure of resources in carrying out the study. Accepting the first study, minus the item for food, results in an overall five year estimated savings of $13,275.[45] Doing so is admittedly a conservative judgment, but under the circumstances of the lack of clarity in the second report, erring on the conservative side was required in fairness to the Agency. I considered reopening the hearing on damages to consider further evidence on the question of comparative food prices, but on balance concluded that to do so would be inappropriate at this stage of the case.

Rulings on Compensatory Damages for Denial of PX Privileges

1. The Union's claims for non pecuniary damages and for the loss of estimated savings resulting from not having access to the PX at Fort Buchanan, are denied.

2. Table F in the Union's Closing Argument Brief will be replaced by a table listing bargaining unit employees entitled to their pro rata share of $13,275, depending on how many years they served as employees at MDC during the period 2001-2006.

3. The newly constituted table will be submitted to the Agency and to the arbitrator within thirty days and the Agency will have the opportunity to review it for accuracy.

4. Separate non pecuniary damages for denial of PX privileges would be inappropriate. There will be a single award to globally cover non pecuniary damages for the three types of grievances which make up this case.

Damages for Denial of Access to ACSS Schooling

In the Agency's Closing Argument Concerning Damages, the principal argument advanced is that no damages can be awarded for denial of access to ACSS schooling because the "Arbitrator Cannot Grant Relief in Violation of Statute and Regulations". The statute the Agency refers to is the one governing schooling at established military bases.[46] The Department of Defense regulation referred to states that civilian employees to be eligible for access to DoD schooling must be "employed in a grade, position, or classification subject by policy and practice of the 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."[47] The third reference by the Agency is to the statute limiting the number of years of enrollment: "a dependent of a Federal civilian employee not residing in permanent quarter on a military installation may be enrolled in ACSS for not more than five consecutive school years."[48]

The argument that the latter statutes and regulation preclude the arbitrator from awarding damages for denial of access to ACSS schooling is one which the Agency has repeatedly made from the inception of this case. But the argument misses the mark. The Initial and Second Opinion make clear that it is how the Agency has acted, not the DoD's laws and regulations: the Agency has authorized access to ACSS schooling for certain bargaining unit employees and not others and has done so in violation of the prohibition against discrimination based on national origin in violation of the Master Agreement, statutory norms and the constitutional guarantee of equal protection of the laws. Indeed, as examples described in the Initial Opinion demonstrate, the Agency did not even consistently follow the eligibility requirements of the DoD in the case of non bargaining employees.[49] Once more, as in the case of the home leave and PX grievances, the Agency's actions can only be described as arbitrary, as in violation of the due process fairness which federal

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governmental agencies must constitutionally assure their employees. Again, the record is clear that for the third time, the Agency has violated both equal protection and due process which, to repeat, are at the root of the Master Agreement's requirement that employees be treated "fairly and equitably in all aspects of personnel management."

There is a final misconception of the Agency which needs to be addressed. The misconception has to do with the October 2001 date which has been set as the earliest limit for the award of damages. The Agency has consistently interpreted the October 2001 limit as also implying that testimony concerning violations, for example, those involving denial of access to ACSS schooling, which occurred prior to that date are irrelevant in this arbitration proceeding. That was not my intent in setting the October 2001 date. The intent was to limit the time period for the award of money damages. That limit was set because of the many years the Union had waited before submitting the three types of grievances to arbitration. For reasons of equity I concluded that it would be unfair to allow the Union's failure to act with relative expedition to result in the buildup of an excessively large award of damages. Equitable considerations were also at the heart of the reasons to keep money damages within reasonable limits. The 2001 time limit was not meant to exclude evidence of Agency violations which occurred prior to that date if the purpose was to establish that grievants continued to suffer harmful effects to the present which should be redressed in the form of non pecuniary damages. That is the case of a number of grievants who testified to denials of ACSS schooling for periods prior to 2001. Whether they and others with similar histories of Agency violations are entitled to non pecuniary damages, are questions which are addressed later in this Opinion.

A number of the Union's proposed remedial measures, whether in terms of actions to be ordered or money damages, are simply not supported by the record in this case. In its Closing Argument Brief, the Union requests that the arbitrator affirm that "all bargaining unit employees represented in this grievance and who submitted their unsworn statements are eligible as stated under the statute for enrollment of their dependents for ACSS."[50] This is simply beyond the remedial authority of the arbitrator. The Agency has decided not to certify the dependants of their employees for ACSS enrollment. That decision was taken beginning with school year 2004-2005 and was taken for budgetary reasons. Only if the arbitrator had authority to order the Agency to include in MDC's budget an allotment to cover the cost of tuition for the children of all bargaining unit employees, would it then be appropriate to consider an order to certify those children. But that is without doubt beyond the remedial authority of an arbitrator acting under the Master Agreement. The issue of access to ACSS schooling may surface again in the future, if there is a change in tuition policy by the DoD, or in the readiness of the Agency to include tuition cost in its budget. Depending on the circumstances, whether the Agency is acting in compliance with the Master Agreement might once again become an issue for resolution by arbitration.[51]

As concluded earlier, the Union's claims for damages are not supported by the record: indeed, they are widely off the mark.[52] First, the Union's table is premised on a five year period for assessing money damages when, under the October 2001 cutoff date, the most in money damages which can be claimed is for the three year period prior to school year 2004-2005. Second, it assumes that money damages should include tuition costs which were not incurred because a grievant's child was wrongfully denied certification for enrollment. The assumption is in error. It would countenance giving employees a windfall, in a large number of cases in excess of a hundred thousand dollars, all out of proportion to the injury they have suffered for the discriminatory and arbitrary treatment which adversely affected the education of their children. Therefore, for reasons of equity, this claim must be disallowed. Third, the Union's table does not indicate whether the out-of-pocket expenses listed were incurred during

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the period 2001-2004. Such expenses can only be recovered for those incurred during that time period. Fourth, the Union's claim for non pecuniary damages is disallowed for reasons stated earlier: in my judgment it would be inappropriate to award non pecuniary damages separately for each of the three types of grievances; rather, redress in this case can be achieved most soundly through a single award of non pecuniary damages which takes into account globally the non pecuniary harm caused by the wrongful denial of Home Leave, PX privileges and access to ACSS schooling.

Rulings on the Denial of Access to ACSS Schooling

1. The Agency's objections to the award of damages for denial of access to ACSS schooling, on the grounds of statutory and regulation provisions, and its assessment of the testimonial evidence in the hearing on damages, are denied.

2. The Union's multiple claims for the award of damages in Table G, are denied.

3. The Union will replace Table G with a list of greivants who have suffered out-of-pocket costs for the education of their children, incurred at private and religious educational institutions, during the three year period 2001-2004. The claims of out-of-pocket costs will be supported by documentary proof, either receipts or statements by school administrators.

4. The substituted list will be served on the Agency and submitted to the arbitrator, within 30 days of receipt of the award in this case.

5. The Agency will have 30 days to review the list and to submit objections to the arbitrator in accordance with the procedures to be included in the award.

The Rationale for, and Extent of, Equitable Non Pecuniary Damages

The subject to be considered is non pecuniary harm and whether its effects should be redressed, and if so, to what extent in the context of this case. A good starting point for examination of the subject is to take note of how the parties in their closing briefs have formulated their respective positions on non pecuniary damages.

The Respective Positions of the Parties

The Union's position is that in the hearing on damages it proved non pecuniary injuries to grievants going beyond economic losses due to the denial of the benefits to Home Leave, PX privileges and access to ACSS schooling.[53] It cites five federal employment cases involving discrimination in which non pecuniary damages were awarded for mental suffering. In one of the cited cases, $20,000 for emotional damages was upheld;[54] in two others non pecuniary damages amounted to $5,000;[55] and in a fourth case, the non pecuniary award was for $2,500.[56] In a fifth cited case, $25,000 in non pecuniary damages, the highest amount of all, was upheld[57] and, in the opinion in that case, the EEOC mentions awards up to a maximum of $50,000.[58] These cases are only of limited value in providing insightful guidance for deciding the present case, except for the general principle which has never been in dispute, that non pecuniary damages may be awarded as an appropriate remedial measure. The basic element in all five cases is that they are all fact oriented, that no precise guidelines seem to have been developed to estimate the dollar value to be placed on such types of non pecuniary damages as mental suffering and that there appears to be no uniformity of criteria on what constitutes objective evidence.[59]

Complicating the search for guidance on how to most fairly decide this case is the reality that it differs in three respects from the cases cited by both the Union and the Agency: this is a class action involving a pattern of institutional practices; well over 200 grievants have been harmed by those practices in ways which are not strictly comparable to the non pecuniary damages usually remedied in individual or small-scale employment discrimination cases; and the harm has been continuous over a period of more than a decade.[60] Nonetheless, as additional judicial and administrative case law is analyzed, in the course of this Opinion, its value in providing guidance will be

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manifest. In final analysis, in the absence of cases with factual records closely comparable to the case at hand, the only option was to make analogical use of the existing body of case law.

The Agency's positions begin with a reference to a number of statutory norms. There is first the statement that "Punitive damages are not available to parties seeking damages from federal government agency."[61] Since the Union is not claiming punitive damages, it is not an issue in this case. It then interprets the Civil Rights Act as restricting damages for emotional distress to a maximum of $300,000.[62] Actually the appropriate limit is $200,000 as covered in clause (C), since MDC is in the category of 201 and fewer than 501 employees. However, the most sensible interpretation is that the Congress intended for the limits to apply per individual employee. The consequences of accepting the Agency's interpretation would mean that in this case each individual grievant could be redressed for emotionally suffering at less than one thousand dollars. That would be incompatible with the cases previously noted which included awards of up to $25,000 in non pecuniary damages. More to the point, that could not have been the intention of the Congress.

The Agency cites *U.S. Department of Defense, Camp Lejeune Schools, and Lejeune Education Association,* 57 FLRA 12 (2001), at page 11, for two principles: "Damages for emotional distress must meet two criteria : 1) compensatory damages should not be monstrously excessive; and 2) the amounts should be consistent with those awarded in other similar cases."[63] The "monstrously excessive" limit is repeatedly accepted in innumerable cases, but the problem is that it has been applied in such a variety of ways that it lacks precise content. "Prudent restraint" would do just as well as a general principle. In final analysis, whether the adjudicator of first instance has crossed the line and has awarded monstrously excessive non pecuniary compensation is a judgment call which, as it should be, is subject to review by higher authority. The other principle that compensation awarded should be consistent with what has been awarded in similar cases, involves the same problem as the "monstrously excessive" limit: how to determine similarity when there have been such a variety of fact situations and such a range of damage awards. Again it comes down to good judgment with the safeguard of a second or third review.

In still another statement of restriction on the award of non pecuniary compensation, the Agency asserts: "Compensatory (emotional distress damages) are not available in disparate impact cases."[64] That statement is based on a Federal District Court's interpretation of compensatory limits imposed by 42 U.S.C., Section 1981A(a)(1).[65] But it is not all that clear that this controversy could not have proceeded under Title VII as a case if intentional discrimination. It should be remembered that for years in the many labor relations meetings the Union had repeatedly called to the Agency's attention grievances over discriminatory practices and that the Agency nonetheless continued those practices without change. It should be recalled also that at least one Agency high official did agree that the discriminatory denial of PX privileges had to end, but that the resulting agreement between the parties was subsequently repudiated by Warden Pastrana.[66] As a case of intentional discrimination, under 42 U.S.C., Section e-5(g) a Federal District Court is empowered to order "any other equitable relief as the court deems appropriate."

The strongest argument made by the Agency against anything more than the most nominal award for non pecuniary damages is mat in this case the Union failed to prove with substantial evidence that grievants had suffered severe emotional harm. In support of that position, it cites *Susan Resnick v. Thomas J. Ridge, Secretary, Department of Homeland Security,* 2003 WL 22532382 (E.E.O.C.), in which for lack of sufficient objective evidence a $50,000 award for non pecuniary damages was reduced to $2,000. Whether the Union satisfied its burden of proving mental suffering with substantial evidence, is a crucial issue in this case. An analysis of the evidence presented in the hearing on damages, and the weight it

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should be given in this case, are issues which must be addressed and are to be considered later in this Opinion. All other questions related to non pecuniary compensation, in the Agency's Closing Argument Concerning Damages, have been considered in prior sections dealing with the denial of Home Leave benefits and the denial of access to the Fort Buchanan PX and to ACSS schooling.

Additional Sources of Guidance

I have not relied exclusively on the cases and documents supplied by the parties and have carried out a modest amount of independent research. That is because in my opinion this case is not simply complex, but has a number of unique attributes and, therefore there should be a search for guidance wherever it may be found, in fields not covered by the parties and through a revisit to those selfsame fields. For example, the Stein Treatise on personal injury damages reports that a number of state courts have accepted the principle of non pecuniary compensation for the intentional infliction of emotional distress in the context of employment discharge or harassment.[67] The amounts awarded varied, which is to be expected since the factual records varied, but all held to a rigorous standard of proof.[68]

Turning to damages which are recoverable under 42 U.S.C. Sections 1981 and 1983, in *Carey v. Piphus*[69] the Supreme Court recognized the right to recover damages for emotional distress if there was proof that the denial of due process caused such damages.[70] The standard of proof laid down is that the mental suffering must be supported by "competent evidence" which demonstrates "that such injury actually was caused" and that this can be accomplished "by showing the nature and circumstances of the wrong and its effect on the plaintiff."[71] Under Section 1981 there have been a number of cases in the employment context which have a certain relevance to the present case. For example, in *Copley v. BAX Global, Inc.,* 91 F. Supp. 2d 1164 (S.D. Fla. 2000), the Section 1981 case of a Caucasian former employee alleging discrimination based on national origin, the Court upheld a mental anguish award of $120,000 and punitive damages of $350,000.[72] There appears to be developing in the federal jurisprudence interpretative principles from a network of statutes -- Title VII, Section 1981 and the Government Employee Rights Act (GERA) -- which result in essentially the same approach for the award of non pecuniary damages.[73]

The variety of cases in the federal courts, involving claims of mental suffering, only during the course of the present year, is truly impressive. The number is in excess of 50. A sample of four employment cases illustrate three elements common to all, whether arising under Section 1981, Title VII, or another related statute: first, that non pecuniary compensation is an appropriate remedy for mental suffering, sometimes called mental anguish, humiliation, loss of dignity, among other terms, second, the complaining party has the burden of proving the mental harm with competent evidence and, third, there is no fixed, precise formula to measure the dollar value of proven mental harm. What distinguishes these cases from each other, are their factual uniqueness.

Consider, for example, *Vieques Air Link, Inc. v. U.S. Dept. of Labor,* 437 F.3d 102 (1st Cir. February 2, 2006), in which an award of $50,000 for mental anguish which a pilot suffered after being reassigned to a less favorable flight assignment because he had reported to the Federal Aviation Administration that management had failed to determine a plane's weight prior to its flight.[74] The Court of Appeals upheld the $50,000 non pecuniary award for mental suffering based entirely on the testimony of the pilot and his wife.[75]

In Ortega-Guerin v. City of Phoenix, a sexual harassment suit brought under Title VII, the jury awarded plaintiff $850,000 which the Court, in compliance with the statutory cap, reduced to $300,000.[76] With respect to the issue of whether $300,000 was excessive, the Court responded: "Under Section 1981a(b)(3), a plaintiff may be awarded a sum of compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience,

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mental anguish, loss of enjoyment of life, other non pecuniary losses. The Court must view the evidence concerning damages in the light most favorable to the prevailing party. The Court must focus on the evidence of the qualitative harm suffered by the Plaintiff and not simply on the severity of the conduct constituting the harassment."[77] The evidence consisted basically of plaintiff s own testimony which the Court found sufficient to sustain an award, after comparing the factual records and awards in other cases, and concluded that $300,000 is "generous but not so grossly excessive as to shock the conscience of the court."[78]

Two First Circuit Court of Appeals' cases are pertinent to this case because of their holdings on the limited review which should be given to jury compensatory awards in the context of mental suffering. In the first, *Valentin-Almeda v. Municipality of Aguadilla,*[79] a sexual harassment and retaliation case, the Court upheld a combined award of $705,000 which included both secondary economic injuries flowing from loss of earnings and mental suffering "Because of these damages and because of the harassment and threat of reprisals, Valentin suffered various forms of emotional damages and mental anguish, including, inter alia, insomnia, anxiety, guilt and depression. The jury could believe this suffering was real and severe, based not only on Valentin's testimony that it was, but also on the fact of the nervous breakdown and the fact that she received extended psychological treatment from the SIF."[80] The same limited review of the jury's award, was followed in a multiple plaintiffs' suit over discrimination based on political affiliation, *Borges-Colon, et al., v. Roman-Abreu,* [81] in which the Court upheld the award of both compensatory and punitive damages. As the Court explained, quoting from an earlier case: "Therefore, unless we can say that the award is grossly excessive, inordinate, shocking to the conscience of the Court, or so high that it would be a denial of justice to let it stand, we will not overrule a trial judge's considered refusal to tamper with the damages assessed by a jury."[82] In both these cases, the Court also ordered reinstatement of the plaintiffs.

In all the federal case law it is evident that the most difficult problem courts face is how to assess mental suffering. A candid and wise analysis of the problem is to be found in a case previously mentioned, *Copley v. Box Global, Inc.,* in which the Court accepted that "damages for emotional distress or mental anguish are at best difficult to measure" and, quoting from another opinion, recognized that such damages are "by their nature ineluctable and difficult to measure".[83] It then identified the criteria which a court should follow to assess the appropriateness of an award of compensatory damages: "(1) the size of the award; (2) the rational relationship between the award and the evidence adduced at trial; and (3) awards in similar cases."[84] Following that approach, the Court then gave its reasons, based on the factual record, for remitting the award of $479,692 for mental anguish to $120,308.[85]

A fundamental source of guidance for the solution of the present case is the document entitled "Enforcement Guidance: Compensatory and Punitive Damages", published by the Equal Employment Opportunity Commission.[86] The Commission's interpretation of how the Congressional caps should be applied is of particular relevance to this case:

Section *1981A(b)*(3) provides that the amount of damages "shall not exceed [the caps] for each complaining party." Complaining party is defined as "the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action under [Title VII, the ADA or the Rehabilitation Act]." Section *1981A(d)* (emphasis added). Since each individual who states a claim under one of these statutes is one who may bring an action, each is available for damages up to the cap. This is true even when their claims are joined either in Commission or private litigation brought on behalf of several individuals, or in a class action brought by a private party.

As a policy matter, any other construction would conflict with Congressional intent to make damages

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available to fully compensate persons harmed by discrimination and to deter further discrimination. Moreover, a contrary interpretation would be at least unwieldy, if not unworkable. If the Commission cannot seek damages on behalf of each aggrieved person in a single action, it would have to file numerous individual suits or recommend that each individual intervene in Commission actions.[87]

Citing federal cases, the EEOC's "Enforcement Guidance" sums up a number of principles related to non pecuniary compensation, how it is to be proven and how its dollar value is to be determined:

The Commission will typically require medical evidence of emotional harm in conciliation negotiations. However, evidence of emotional harm may be established by testimony. ... The plaintiffs own testimony may be solely sufficient to establish humiliation or mental distress."... For example, a plaintiff was award $52,644.80 in damages for mental anguish and emotional distress resulting from losing his house and car, marital harmony, and the respect of his children, after he was discriminatorily discharged. ... the plaintiff was awarded $12,402 for "mental anguish, humiliation, embarrassment and stress, $$7,598 in back pay, and $60,000 in punitive damages. The evidence presented was that the supervisor openly manifested racial bias against Blacks by making racially offensive references to the plaintiff. ... under Section 1983 and Section 1981, the court affirmed an award for $100,000 for humiliation and distress. Over a period of years, the plaintiff was consistently passed over for administrative positions and principalships for racial reasons, while less qualified White persons were promoted.[88]

Damage awards for emotional harm vary significantly and there are no definitive rules governing the amounts to be awarded. However, compensatory damage awards must be limited to the sums necessary to compensate the plaintiff for actual harm, even if the harm is intangible.[89]

The method for computing non pecuniary damages ... should typically be based on a consideration of the severity of harm and the time the complaining party has suffered from the emotional harm. ... To determine the severity of the harm consider, for example, whether the harm consisted of occasional sleeplessness, or a nervous breakdown resulting in years of psychotherapy. The length of time that the complaining party has suffered from the harm is also relevant. Of course, a complaining party who has suffered from severe depression for two months will be awarded less money than a complaining party who has suffered from severe depression for a year.[90]

A sample of four EEOC decisions during September of this year, dealing with non pecuniary damage awards confirms that such awards indeed do "vary significantly". In one case, the Commission increased an award from $30,000 to $65,000;[91] in a second case, the complainant's request for $300,000 was found to excessive, but that an award of $10,000 would be sufficient for her non pecuniary losses;[92] in a third case, involving "dejection, stress and emotional pain" remedial action in terms of an award for $5,000 was approved;[93] and in a fourth case the Commission modified the award of the Administrative Judge to $l,500.[94] A final case, *Zula R. Moore v. Alberto Gonzales, Attorney General, Department of Justice,*[95] involving elements of discrimination based on national origin, sex, and reprisal, illustrates the full range of remedial measures which the Commission has at its disposition: the complainant was awarded $32,500 for non pecuniary, compensatory damages; was ordered to be placed in the position she had been denied discriminatorily; to be compensated for 225 hours of overtime which she had been denied; restoration of 56 hours of sick leave and 56 hours of annual leave; the Agency is to provide 8 hours of EEO training focusing on Title VII for officials responsible for the discrimination which had been practiced; the Agency is to consider taking disciplinary action against the officials responsible for the discrimination; a Posting Order; the processing of Attorney's Fees; the Agency's submission of a compliance report; a statement of the parties' right to appeal through a request for reconsideration; notice to

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complainant of the right to file a civil action and of her right to request counsel.[96]

The Evidentiary Record on Harm Suffered

The first question which requires an answer is why is it not sufficient redress to pay grievants the home leave benefits which they are owed, to compensate them an amount in dollars for the denial of access to the PX and to recoup their out of pocket expenses for the denial of access of their children to ACSS schooling? The short answer is that in addition to losses which can be reduced to monetary terms, grievants endured a number of types of mental suffering for which they are entitled to receive non pecuniary compensation. The transcript of the record of the Hearing on Damages, in which nine current and former bargaining unit employees testified, contains examples of mental suffering identical or comparable to that found in the judicial and administrative case law previously considered: pain caused by the harm done to their children, granting and retiring benefits discriminatorily or arbitrarily, marital discord, humiliation, loss of dignity, the felt need to leave MDC and relocate, among others. It is clear that each grievant's mental suffering has personal elements unique to him or to her. These will be considered later seriatim. First, there needs to be considered the mental suffering all the grievants in this class case have in common. That is because the principal basis for the award of non pecuniary damages is grounded on the harm members of the class have suffered in common.

To sum up the common suffering of the class members in this grievance: it is a deeply felt sense of injustice at not receiving fair and equal treatment for the better part of a decade, a sense of injustice which endures up to the present. That it is deeply felt was palpable in the testimony of the Union's nine witnesses. This was expressed in different ways: for example, that the employee felt that he was being treated as a second class citizen, that benefits were lost arbitrarily, that the unfair treatment pressured him to leave his position at MDC. Taking the testimonial record together with the individual unsworn statements, and as well, the record leading up to the submission to arbitration, all the grievants suffered from having to work in an environment of invidious discrimination and the arbitrary exercise of discretionary authority. And their suffering was enhanced, rather than being alleviated, knowing that the Agency's actions were in direct conflict with the fair and equitable environment required by the Master Agreement.

It needs to be emphasized that the evidentiary record is not limited to the documents and testimony submitted in the damages stage of this case. Prior to that, in 1998, the Agency had agreed that it was wrong to discriminate between bargaining unit members with respect to access to the Fort Buchanan PX, that all would have the privilege or none, but that agreement was never implemented and was subsequently repudiated by Warden Pastrana.[97] Conduct of that kind only could have confirmed members of the class that the Agency intended to unfairly discriminate against them. It does not take a psychiatrist to know that the victims of such discrimination do suffer from a variety of undesirable emotions, such as a sense of inferiority and feelings of unworthiness.

The lack of Agency sensitivity on this issue is further confirmed by the failure of the agency to move forward expeditiously on the apparent readiness of the Department of Defense to now permit access to the PX to all bargaining unit employees. To this, there should be added the Agency's state of denial that it has discriminated invidiously, as exemplified in Warden Pastrana's testimony that he was unaware that any bargaining unit employees had been granted PX privileges. Statements of that kind can only serve to exacerbate feelings of resentment over unfair treatment.

The harmful impact on the personal sense of dignity of the individual members of the class was felt on a daily basis. They knew that a small group of bargaining unit employees were receiving benefits which were denied to them. Those entitled to Home

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Leave, but denied its benefits, surely felt the intangible but nonetheless real emotion of unfair deprivation. That must have been equally true with respect to the denial of PX privileges. In the case of unfair denial of access to ACSS schooling, those wounded were not limited to parents of school age children. The culture of invidious discrimination and arbitrary decisions, created by the Agency, also assuredly harmed as well the sense of self worth of all other members of the class. In effect, all class members felt demeaned and they were in fact demeaned.

Turning to the Union witnesses in the Hearing on Damages, a sample of their testimony should suffice to illustrate the range of mental suffering which was endured. In the case of Fernando Blanco, he has been living the consequences of the Agency's discriminatory and arbitrary policies for the better part of 13 years: his mental suffering consists of his feeling that he has been treated as a "second class citizen", that for the education of his children he had to relocate his family to Lares, that the situation contributed to his divorce and that he has deep feelings of personal frustration over not having been able thus far to obtain fair treatment.[98] In appraising his demeanor and the content of his testimony, I was thoroughly convinced that his mental suffering was genuine and sincerely described. His testimony on his suffering remained unimpaired under cross examination.

I came to the same conclusion in the case of James H. Martin. His treatment at the hands of Warden Pastrana was analyzed earlier.[99] His testimony convinced me that he was still indignant and was still suffering from the effects of the discriminatory reprisal which he had endured and that this was true even though in 2004 he had transferred from MDC to another BOP institution on the mainland.[100]

A common thread in recounting their mental suffering was the anguish felt by employee-parents over seeing how they were unable to obtain for their children access to ACSS schooling. One witness, in describing his suffering was almost in tears.[101] Still another was manifestly depressed remembering how his children had received ACSS schooling for two years and then access was denied without any rational explanation being given.[102] Another theme is how the problem of their children's schooling resulted in the decision to relocate their families to other areas of the Island more conducive to an acceptable school environment,[103] or simply to transfer to an institution on the mainland or to another federal agency which would provide access to ACSS schooling.[104] One problem which was profoundly stressful to family life and especially painful to a parent whose children were denied access to ACSS, was the consequences of having sufficient resources to send only one child to a private school.[105]

The pain and suffering observed in these cases was undoubtedly genuine, but was not in all instances directly caused by Agency action. For example, if a child's access to ACSS was terminated because of the DoD's rule fixing the outside limit of attendance to five years, the resulting harm to the child and the parent was beyond the Agency's capacity to prevent.[106] Although Union witnesses testified truthfully, in a minority of instances factually false assertions were made part of the record. Specifically, a number of Union witnesses testified falsely that two Agency managerial officials still had their children in ACSS, even after the decision was taken that MDC would no longer certify children beginning with school year 2004-2005.[107] This the Agency characterized as "rumor testimony" which was, unquestionably, to the discredit of the Union.[108] The discredited false testimony is surely blameworthy, but in no way detracts from the larger truth that Agency invidious discrimination and arbitrary decisions indeed did cause deep and long term mental suffering to most of their employees

These individual cases of mental suffering have not been analyzed in all their details because of a decision which had to be made with respect to how to shape the award for non pecuniary damages, whether to do so on a case by case basis, or on the basis of the

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mental suffering all members of the class have in common. In my judgment, the first option would require individual evidentiary hearings. On the basis of the time it took to hear the small number of Union witnesses, individual hearings for each and every member of the class would require upwards of 55 to 60 hearing days. For practical reasons, I decided in favor of the second option. In addition, there is this to be said for the second option: it would be very difficult, if not impossible, to distinguish between the intensity of mental suffering of well over 200 individual cases; the task is far more manageable, if non pecuniary damages are to be calculated on the basis of the mental suffering common to all members of the class.

Non Pecuniary Damages in This Case

Multiple judgments have gone into the determination of the non pecuniary damages which the grievants making up the class should be awarded. First and foremost is how the mental suffering has been evaluated: the sense of injustice at having to work in an employment culture of invidious discrimination and arbitrary decision making, caused deeply felt suffering, profoundly wounding to each employee's sense of dignity and personal worth. Second, the harm caused by the mental suffering of tide class members is equal, at the very least, to the harm described in more serious cases of individual mental suffering which have been considered in prior sections of this Opinion.[109] Third, because the sense of injustice pervades the working culture, the sense of injury has been felt on a daily basis. That sense of injury has persisted unabated for at least since 1998 when a high official of the Agency recognized that the benefits of access to the PX should be granted to all or to none of MDC's employees. Fourth, when the Agency failed to rectify its invidious and arbitrary practices thereafter, that exacerbated the mental suffering of the class members. That is a factor which should be taken into account in calculating the amount of damages. The same is true of the apparent current lack of diligence on the part of the Agency with respect to negotiating arrangements for access to the PX for all MDC employees.[110]

All the case law analyzed in this opinion counsels that an award for non pecuniary damages should be tempered by considerations of prudence and equity. It is for such reasons that the Union's overall claim amounting to over 26 millions must be denied as being clearly "monstrously excessive". Equally unavailing is the Union's effort to divide the emotional suffering of the class members into three separate and distinct claims which would have the unacceptable effect of inflating the overall amount in damages. In fairness to the Agency's budgetary resources, it makes more sense to consider the class members' non pecuniary harm as the consequence of the overall culture of invidious discrimination and arbitrary decisions which are made manifest in the denial of benefits to Home Leave, PX privileges and ACSS schooling. There was similar overreaching by the Union in its request to include in the award the cost of ACSS schooling in the form of money damages to be granted to the parents whose children were denied access. To have acceded to the request, would have increased unacceptably the overall amount of the damages to be awarded. In addition, in my opinion, it should be denied as an unjustifiable windfall.

The rulings made in this Opinion on the denial of benefits to Home Leave, PX privileges and access to ACSS schooling are based on two principles: the class members are entitled to be made whole for the damages they have suffered and the extent of the damages must be kept within proportions compatible with equitable norms. This Opinion has recognized two types of damages: out-of-pocket losses caused by the denial of home leave benefits, PX privileges and costs incurred by parents which have enrolled their children in private schools in lieu of ACSS schooling. Those are damages which can be calculated in dollars. The non pecuniary damages for mental suffering are to be estimated on the basis of the fourfold criteria adopted at the outset of this section: the seriousness of the mental suffering, the duration of the suffering, comparable awards in other cases and Agency

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conduct which exacerbated the mental suffering of the class members. And the final amount awarded must be shaped by considerations of equitable restraint. The factor of equitable restraint is manifest in the rulings on Home Leave, PX privileges and access to ACSS schooling. It is also evident in the ruling made at an intermediate stage of this case to take into account the full record of contractual violations, but to limit the award of damages to the five year period 2001-2006.

On the basis of the process of balancing all the relevant considerations, I have concluded that non pecuniary damages should be awarded to each member of the class in the amount of $10,000 a year. That means that a grievant will receive $50,000 if he has been employed at MDC for the full 2001-2006 period, or a lesser amount on a pro rata basis depending on the number of years he or she may have served. That would not be out of line with awards upheld by the E.E.O.C, federal and state courts in comparable cases of mental suffering.[111] If account is taken of the amounts required by the rulings on Home Leave, PX privileges and out-of-pocket schooling expenses for children enrolled in private schools, most class members will receive something less than $65,000 and the maximum award in a very few cases could possibly reach $100,000, or slightly higher.[112] These figures are well below the cap of $200, 000 fixed by the Congress for Title VII awards.[113] They would, in my judgment, go a long way toward making the class members whole for the violations of the Master Agreement which they have endured.

Additional Remedial Relief

Redress in the form of money damages would not be sufficient to fully make whole the grievants who make up the members of the class. That is because the grievants are entitled to assurances that there will not be repetition of the same violations of the Master Agreement in the future. To that end, the Union has proposed a number of remedies which are essentially equitable in nature. To all the proposed remedies, the Agency has presented its objections. There follows my rulings:

1. A cease and desist order would be appropriate. If the Agency in the future should repeat the violations of the Master Agreement which it has committed in this case, expedited remedial action would be available. Instead of filing a grievance, the Union could seek redress by petitioning for a court order to effectuate the terms of the award. The Union's request for a no-retaliation order would be superfluous, if terms of the cease and desist order are drafted broadly to cover direct as well as indirect violations.

2. It would be appropriate to order the posting of a notice in prominent places in the MDC in which the Agency would confirm that violations of the Master Agreement had occurred and that it had taken measures to prevent future violations. The E.E.O.C. posting model should be followed. From the perspective of making the class members whole, the posting of such a notice is a highly effective remedial measure. That is because its message to all employees is that that the rule of law works and that it protects employees when the Agency fails to abide by its commitments under the Master Agreement.

3. Whether it would be appropriate for the arbitrator to order the Agency to punish officials responsible for the contractual violations committed in this case, or to require that those officials be required to take sensitivity training, are debatable remedial measures. More to the point, it would be, in my opinion, simply unwise. Hence, instead of an order, I recommend that the Agency take such action to strengthen the Agency's official commitment to equality in the work place.

4. My ruling is the same with respect to the Union's petition that the Agency be ordered to send to each class member a letter of apology, signed by the Director of the Bureau of Prisons. Even assuming that the arbitrator has the power to issue such an order, an apology imposed through an order would be singularly ineffective. However, if the Director on her own initiative should decide to apologize, to demonstrate recognition of past errors and commitment to a change in the workplace

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environment, that would bode well for the future of labor relations at MDC.

5. If it would be desirable for the Agency to apologize, in the interest of promoting better labor relations, the same recommendation applies to the Union. Union witnesses in the Hearing on Damages submitted testimony which falsely alleged that the Human Resources Manager's children were still enrolled in ACSS. It would be a demonstration of good faith for the Union to apologize to him and to the Agency, as an indication of its readiness to work to achieve more collaborative labor relations.

6. To work toward better labor relations, it would make good sense to begin to implement Article 22 of the Master Agreement which in section a provides: "The Employer and the Union agree to cooperate in providing equal opportunity for all qualified persons; to prohibit unlawful discrimination...and to promote full realization of equal opportunity through a positive and continuing effort."

7. The time is ripe for the Union's legal representative to file her statement of attorney's fees and costs related to this case. The E.E.O.C. guidelines for the submission of attorney's fees should serve as a model to be followed.

Third Award

1. This is an interlocutory award. Hence, the arbitrator retains jurisdiction of this case until such time as the final award is rendered.

2. Within 30 days of receipt of this award the Union will implement the rulings in this opinion related to "Home Leave Benefits", "Compensatory Damages for Denial of Access to the Fort Buchanan PX" and "the Denial of Access to ACSS Schooling", and serve on the Agency, with copies to the arbitrator, the newly constituted tables, with all the required back up information.

3. The Agency will have 30 days to review and object to the newly constituted tables of damages. The review and objections will not be understood to be a waiver of the Agency's positions with respect to liability and damages. Within 15 days after the 30-day period for review, the parties will confer over any differences with respect to each of the tables. Fifteen days thereafter, if unresolved differences remain, the parties will submit to the arbitrator briefs setting out their respective positions, for final decision by the arbitrator.

4. Within 30 days of receipt of this award, the Union will prepare a table of the members of the class entitled to pecuniary damages, following the criteria for entitlement, as set forth in the last paragraph of the opinion's section on "Non Pecuniary Damages in This Case". The same time periods fixed in prior paragraphs for service on the Agency, and submission to the Arbitrator, for the Agency to review and object, for inter party conferences and for final decision by the arbitrator, will prevail.

5. The Agency will cease and desist, directly or indirectly, from violating the following provisions of the Master Agreement: Article 6 -- Rights of Employees -- Section b.2 and 3.

6. The Agency will post an E.E.O.C. type notice, for 120 days in public areas of MDC, setting out the violations committed and the steps being taken to assure compliance with the Master Agreement.

7. The parties will inform the arbitrator within 30 days of their decisions with respect to the recommendations in paragraphs 3, 4 and 5 of the last section in the opinion on "Additional Remedial Relief.

8. Within 30 days after having implemented the terms of this award, the parties are directed to meet and confer for the purpose of fully effectuating the provisions of Article 22 of the Master Agreement on "Equal Employment Opportunity".

9. Within 30 days the legal representative of the Union will file with the arbitrator and the Agency a detailed fee statement and a statement of the costs to the Union in this case. The Agency will have 30 days to file its objections with the arbitrator.

[26]The pagination and footnotes are a continuation of the Initial Opinion and the Second Opinion: Resolution and Schedule.

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[27]The Scheduling Agreement specifically provides: "The parties agree that the Arbitrator may go beyond the thirty day period to issue a decision, due to the complexity and scope of this matter."

[28]The Union states that it is representing 267 current and former MDC employees.

[29]Union Hearing Exhibit 3; Union Closing Brief, tab 8, Table E-l.

[30]See Section 6301 of Title 5, United States Code.

[31]Section 630.606(b).

[32]Initial Opinion, pages 9-10.

[33]For Martin's account of his problems and how the Warden had treated him, see Transcript of the Hearing on Damages, August 1, 2006, page 123 et seq. The problem, as he describes it, was over the denial of an identity card to his wife to enter Ft. Buchanan because her skin color is black.

[34]For Warden Pastrana's testimony, see Transcript of the Hearing on Damages, August 3, 2006, page 4, et seq.

[35]The Agency's position questioning Martin's credibility, and the documents on which it relies, are found in the Transcript of the Hearing on Damages, August 1, 2006, page 135 et seq., Agency Exhibits 2 and 3, and in its Closing Argument Concerning Damages, pages 16-18.

[36]See note 33, *id.,* at pages 34-35.

[37]Warden Pastrana was Financial Manager at MDC from 1991 to 1995 when he was appointed Associate Warden, a post he held until 1997; he returned to MDC as Warden in June of 2000 and held the position until February of 2003. Thus, he had ample opportunity to know the nature of the grievances being discussed in the numerous labor-relations meetings and of the grievances submitted in this case on March 20, 2002. Furthermore, it is reasonable to assume that he had access to the Initial Opinion and Award, decided December 29, 2005, in which a central finding has to do with the group of bargaining unit employees who were enjoying benefits being denied to most other bargaining unit employees.

[38]See, for example, the case of Mark A. Hernandez, who was denied home leave without being given any reason for the denial, but who was allowed to matriculate one of his sons in ACSS for two and one half years, after which he was denied the schooling benefit. A second son was never certified for admission to ACSS. To secure the education of his sons, especially the son in need of special education, Henderson opted to leave MDC and take up a position with the Department of Homeland Security which would make possible the provision of quality education for his children. See Transcript of the Hearing on Damages, August 2, 2006, page 114 et seq.

[39]See the testimony of Salvador Aponte, Jose Crespo, Jr. and Pedro Guilloti, *id.* Transcript, at pages 151, 167, and 182, respectively.

[40]My rulings are in response to the claims and dollar amounts in the tables included in the Union's Closing Argument Brief and to the objections presented in the Agency's Closing Argument Concerning Damages.

[41]In all the jurisprudence in this field, both administrative and judicial, there is consensus that non pecuniary damages cannot be allowed to be "monstrously excessive". Why restraint is called for is spelled out later in this Opinion.

[42]See Transcript, August 2, 2006, pages 25-114.

[43]See Union Exhibit 8, Hearing on Damages, August 2, 2006. Mr. Suarez' report then continues: "This is for the items selected in the sample. The price comparison was based on regular prices, no discount prices were considered. This amount will vary depending on the composition of the family, number of children, age and consumer behavior of the family."

[44]See Transcript, August 2, 2006, pages 86-91.

[45]The $13,275 figure for five years of estimated savings is obtained by subtracting the $9,797 estimate for food from the overall estimated savings of

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$23,072.

[46]See 10 U.S.C., Section 2164.

[47]The quoted language is from the ACSS's "Application for Enrollment of Children Not Residing on a Military Installation in Puerto Rico", the section dealing with eligibility.

[48]10 U.S.C. 2164(c)(2)(A).

[49]See pages 23-24 of the Initial Opinion.

[50]Union's Closing Argument Brief, page 19.

[51]Equally unavailing is the Union's petition that the arbitrator "order the Agency to engage in collective bargaining over the issue of the employees' dependants' education." *Id.* at page 20. Without the possibility of budgetary support, there would be no point in bargaining: it would be an exercise in futility. Nothing in *U.S. General Services Administration and American Federation of Government Employees, AFL-CIO,* 106 FLRR 2-47 (March 20, 2006), changes that assessment.

[52]Table G in the Union's Closing Argument Brief lists for each employee claimant an amount for discrimination, the tuition value of his children's tuition costs, the total of both items for five years, plus out-of-pocket expenses.

[53]See Union's Closing Argument Brief, pages 10-15.

[54]*Alicia Sinnott v. Perry, Secretary, Department of Defense,* 97 FEOR 3022 (1996).

[53]*See Regina Taylor, Danzig, Secretary, Department of the Navy,* 100 FEOR 1281 (2000); *Carlos Trevino v. Ashcraft, Attorney General, Department of Justice,* 102 FEOR 1249 (2002).

[56]*See Calvin N. Wolfe v. Henderson, Postmaster General, U.S. Postal Service,* 100 FEOR 1244 (2000).

[57]*Kelliann Dixon v. Alberto Gonzales, Attorney General, Department of Justice,* 105 FEOR 410 (2005).

[58]*Id.,* page 4.

[59]On this point, *see Bertley C. Willis v. Dalton, Secretary, Department of the Navy,* 97 FEOR 1107 (1996).

[60]As determined earlier, although the cut off year for awarding damages is 2001, the discriminatory and arbitrary practices prior to that year remain a part of the factual record in this case.

[61]Agency Closing Argument Concerning Damages, page 2. See 42 U.S.C., Section 1981A(b)(1).

[62]See 42 U.S.C., Section 1981A(b)(3)(D).

[63]Agency Closing Argument Concerning Damages, pages 2-3.

[64]See Agency Closing Argument Concerning Damages, page 3.

[65]*See Pollard v.Wawa Food Market,* 366 F. Supp. 247, 253 (E.D. Pa. 2005).

[66]See Initial Opinion, *supra,* page 3, and for more detailed information, pages 12-13.

[67]See 2 Stein on Personal Injury Damages Treatise, Section 10:37.1 (Third Edition), pages 3-4.

[68]For example, the Connecticut Supreme Court upheld an award of $115,000 for emotional distress caused by an unfair termination and found there to be substantial supporting medical evidence, *Sorrentino v. All Seasons Services, Inc.,* 245 Conn. 756 (1998); and the varied factual contexts and standards of proof in *Wal-Mart, Inc. v. Stewart,* 990 P. 2d 626 (Alaska 1999); *Bradley v. Hall,* 720 N.E. 2d 747 (Ind. Ct. App. 1999); *Nicholas v. Allstate Ins. Co.,* 739 So. 2d 830 (La. Ct. App. 2d Cir. 1999); and *Dillard Dept. Stores, Inc. v. Beckwith,* 989 P.2d 882 (Nev. 1999).

[69]435 U.S. 247 (1978). *Cf. Norfolk & Western Railway Company v. Freeman Ayers, et al.,* 538 U.S. 135 (2003), in which the Supreme Court held that mental anguish damages resulting from fear of developing cancer could be recovered under the FELA.

[70]See 2 Stein, note 66, at Section 5:15, "Compensatory Damages Under Section 1981", pages 1-2.

[71]435 U.S. 247, 264 (1978).

[72]The Court remitted the original jury award of

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$500,000 and punitive damages of $1,000,000 to $120,308 and $350,000, respectively, and commented that if the case had been brought under Title VII, the award would have been limited to a total of $320,000. *Id.,* pages 1173-1174. The connection which the Court drew between Section 1981 and Title VII suits, is relevant to this case. *See also El-Hakem v. BJY Inc.,* 262 F. Supp. 2d 1139 (D. Or. 2003) which deals with the criteria an employer has to satisfy to overcome the presumption of vicarious liability for the harassment actions of a supervisor.

[73]*Ibid.* With respect to how GERA has been interpreted, *see Board of County Commissioners, Freemont County,Colorado v. E.E.O.C,* 405 F.3d 840 (10th Cir. 2005).

[74]The statute which the defendant violated was the Wendell H. Ford Investment and Reform Act, 49 U.S.C., 42121(a), which provides a remedy in cases of retaliation for whistleblowing.

[75]See 437 F. 3d 102, 110.

[76]2006 WL 2403511 (D.Ariz.). The reduction was obligatory as required by 42 U.S.C., Section 1981a(b)(3)(D).

[77]*Id.* at page 3 of the slip copy.

[78]*Id.* at pages 5-6 of the slip copy.

[79]447 F.3d 85 (1906).

[80]*Id.,* page 103.

[81]438 F.3d 1 (2006)

[82]*Id.,* page 21. The quotation is from *Segal v .Gilbert Color Sys., Inc.,* 746 F.2d 78, 80-81 (1st Cir. 1984). With respect to the award of punitive damages, the same short shrift was given to defendants' objections.

[83]97 Supp. 2d 1164, 1171 (S.D. Fla. 2000). The quotation is from *Urseth v. City of Dayton,* 680 F. Supp. 1150, 1156 (S.D. Ohio 1987).

[84]*Id.,* page 1172.

[85]As noted earlier, the Court also remitted punitive damages from $1,000,000 to $350,000, giving special weight to the judgment of the Congress on the need to set caps on damage awards. See note 71, *supra,* and 42 U.S.C. 1981a(3).

[86]See www.eeoc.gov/policy/docs/damages, pages 1-28, as of September 28, 2006.

[87]*Id.,* pages, 16-17. Since MDC employs more than 200, but less than 500, the cap would be $200,000 per grievant, as set by Section 706(g) of the Civil Rights Act of 1964.

[88]*Id.,* pages 5-9. Case names and citations are omitted.

[89]*Id.,* pages 9-10. "Enforcement Guidance then proceeds to give examples ranging in damages from $10,000 to $300,000.

[90]*Id.,* page 10.

[91]*Tewililager v. Chertoff, Secretary, Department of Homeland Security,* 2006 WL 2714186 (E.E.O.C.). Based on the record the emotional harm suffered by plaintiff, the Commission concluded that the agency's award was insufficient."

[92]*See Hedgepeth v. Dirk Kempthorne, Secretary Department of the Interior,* 2006 WL 2647572 (E.E.O.C.).

[93]*See, Wilson v. Jo Anne B. Barnhart, Commissioner, Social Security Administration,* 2006 WL 2851545 (E.E.O.C).

[94]What is surprising about this case is that the complainant had endured discrimination for 19 months. *See Muse v. John E. Potter, Postmaster General, United States Postal Service,* 2006 WL 2714108 (E.E.O.C).

[95]2006 WL 3052485 (E.E.O.C).

[96]*Id.,* pages 7-10.

[97]See Initial Opinion and Award, *supra,* pages 3 and 13.

[98]Transcript of the Hearing on Damages, August 1, 2006, pages 28-97.

[99]*Supra,* pages 38-39.

[100]Transcript, August 1, 2006, pages 123-151.

[101]See the testimony of Jose Crespo. Jr., *Id.,* pages 167-182.

[102]See the testimony of Pedro Guilloti, *Id.,* pages

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182-194.

[103]See the testimony of Salvador Aponte who relocated his family to Juana Diaz, *Id.,* 151 -166. This was also true in the case of Fernando Blanco.

[104]See the testimony of Ivette Chabrier. She transferred to an institution in Florida. *Id.,* pages 98-122. In the case of Mark A. Hernandez, he transferred to the Department of Homeland Security so that his son could have access to ACSS schooling. Transcript, August 2, 2006, *Id.,* pages 3-22. To achieve the same objective, Tommy Serrano went on leave from MDC to go on active duty with the Army. See Transcript, August 3, 2006, *Id.,* 39-58.

[105]See the testimony of Melissa Garcia, Transcript, August 2, 2006, *Id.,* pages 151-169.

[106]See, for example, the case of the mental suffering of Ivette Chabrier whose child needed psychiatric care following his withdrawal from ACSS after five years of matriculation. Transcript, August 1, pages 98-122.

[107]Human Resource Manager Angel L. Morales, in his testimony, thoroughly rebutted the false rumors and clarified the truth of the matter. See Transcript, August 3, 2006, pages 73-101.

[108]Why the Union failed to get its facts straight is not explained in the record. Apparently, the state of relations between the parties is such that there is a low level of transparency and mutual sharing of information.

[109]See, for example, the cases cited in notes 67, 71, 73, 75, 78, 87, and 90.

[110]The Agency has failed to submit for the record a lull account of its efforts to act on the DoD's apparent disposition to now permit access to the PX for all MDC employees. The following is the Agency's statement for the record: "The Union also requests that certain representations be made to the Commander at Fort Buchanan, concerning employee eligibility ...The Arbitrator has no authority to order the Agency to interact with another federal department in this manner. Relief is limited to the MDC Guaynabo alone." See "Agency Submission Concerning Damages", August 2, 2006, page 13. It is clear that the Agency has decided to await the outcome of this case, before arranging for access or for deciding to deny access to all employees: "that 'all or none' determination lies within Agency discretion, and will not be made until the litigation is complete." *Ibid.* Compare the latter statement with the position taken by the Agency about a month earlier: "during the teleconference, there was discussion concerning the Department of Defense (DoD) allowing all employees of MDC Guaynabo access to the PX, regardless of mobility status within the Agency. DoD has issued conflicting guidance concerning PX access, which the Agency is attempting to clarify. The parties will be informed of the status of PX privileges, as appropriate." See Agency Rebuttal Brief and Witness List, June 23, 2006, pages 2-3.

[111]See note 109, *supra.*

[112]The figure of less than $65,000 is premised on the fact that the majority of class members will qualify only for the $50,000 award for non pecuniary damages, plus $13,275 for the denial of PX privileges. The figure of less than $100,000 would cover the case of an employee who has worked at MDC during the period 2001-2006 and who may be entitled to Home Leave benefits amounting to $25,000, in addition to the PX award of $13,275. Depending on the out-of-pocket expenses for schooling, the total could reach $100,000 and, perhaps in a very few cases, slightly more than the latter amount.

[113]See note 86, *supra.*

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