In the Arbitration Tribunal
Of
Dr. David M. Helfeld

American Federation of Government Employees Council of Prison Locals Local 4052	*	**FMCS: 08-03493**
And	*	
U. S. Department of Justice Federal Bureau of Prisons MDC, Guaynabo, Puerto Rico	*	

For the Union	**Lilliam E. Mendoza Toro, Esq.**
For the Agency	**Tiffany O. Lee, Esq.**
Arbitrator	**Dr. David M. Helfeld**
Hearing	**January 15, 2009**
Post Hearing Briefs	**April 15, 2009**
Opinion and Preliminary Award	**May 4, 2009**

The Factual Record

At the outset, the two main protagonists in this case should be identified. Officer Jorge Rivera is the grievant. He has been employed at the Metropolitan Detention Center (MDC) since 1993. He is classified at present as an Inmate Systems Officer. Officer Rivera has been a Union official since 1994 and has served as the President of AFGE Local 4052 since 2005. Lt. Daniel Rivera began his career with the Federal Bureau of Prisons in 1990. He currently works in MDC's Correctional Services Department.

Referring back to the arbitration cases antecedent to the present case, on July 19, 2002, Arbitrator Marcia L. Greenbaum resolved a sexual harassment suit in favor of Officer Migdalia Toro. In that case, Lt. Daniel Rivera was held to have engaged in an egregious pattern of sexual harassment. Among other remedies, the award included a prohibition

against taking reprisals against Officer Toro and any of the witnesses who had testified in the arbitration hearing. Grievant, Officer Jorge Rivera, in representation of the Union, served as an advocate on behalf of Officer Toro. For failure to comply with the prohibition against taking reprisals in the Greenbaum award, a second grievance was filed, alleging a continuing pattern of reprisals by Lt. Daniel Rivera, specifically alleging reprisals against Officer Jorge Rivera. In the second case, decided February 6, 2007, Arbitrator Jerome J. La Penna found that the allegations were substantiated by the preponderance of the evidence, both in the grievance of Officer Toro and Officer Jorge Rivera. Subsequently, on September 7, 2008, in a Supplementary Final Award, Arbitrator La Penna awarded compensatory damages to Officer Toro in the amount of $156,000 and $15,000 to Officer Jorge Rivera "as a result of the discrimination and retaliation practiced upon him through repeated false complaints of employment rules and regulations." In addition, attorneys' fees were awarded in the amount of $7,100.

The next incident of record occurred on February 6, 2008, prior to the final La Penna award. It took place in the office of Lt. Rivera. The only other person present was Officer Rivera. Both gave sworn statements of what had occurred and what was expressed. In important respects, the sworn statements were contradictory. Later in this Opinion the February 6 incident will be fully considered for its bearing on the resolution of the Union's grievance.

Since both Lt. Rivera and Officer Rivera in their respective statements had referred to an element of potential violence in what had transpired in the February 6 encounter, the Warden convened a Threat Assessment group which met on February 7, heard both protagonists and concluded that there was no imminent threat of workplace violence. Thereupon, in accordance with the Program Statement of the Agency dealing with disciplinary matters (1210.24), the Warden notified the Internal Affairs Office in Washington, D.C. that in his judgment the February 6 incident called for a Classification 3 investigation to determine whether there had been unprofessional conduct. The investigation was to be conducted by the local Investigative Officer assigned to MDC in Guaynabo. It began on April 2, 2008 under the aegis of Investigator Efrain Rivera who took the sworn statements of both Lt. Rivera and the grievant, and as well, the statement of Correctional Supervisor, Lt. José Rosa. The latter had responded almost immediately to the alarm which had been set off by

grievant in Lt. Rivera's office. Investigator Efrain Rivera submitted his report in April of 2008 and shortly thereafter retired from service with the Agency. His report was found to be wanting by the OIA in Washington and a second investigation was ordered which was held up until Investigator Rivera's replacement, Special Investigative Agent Mark C. Foreman, could take up his duties on September 2, 2008.

Special Investigative Agent Foreman duplicated the procedures followed by his predecessor Agent Efrain Rivera, questioning and taking the statements of the grievant, Lt. Rivera and Lt. Rosa. As in the first investigation, various documents were delivered and signed by the grievant and by Lt. Rivera. They were informed individually of their rights during the investigation of their alleged unprofessional behavior and in another document were "instructed to cease any threatening or violent behavior and that you are reminded that such behavior is prohibited and will not be tolerated." Approximately nine months after the initiation of the first investigation, Agent Foreman submitted his report which was accepted by OIA in Washington. Thereafter, on December 18, 2008, Warden Anthony Haynes notified both the grievant and Lt. Rivera that the investigation had been concluded, that in neither case was the allegation of unprofessional conduct sustained and, therefore, "I hereby consider this case closed."

Going back in time to the start of the investigation into alleged unprofessional conduct on April 2, 2008, it was shortly thereafter that the Union filed the grievance in this case which was received by Southeast Regional Director R. E. Holt on April 23, 2008, and subsequently denied by him on May 16.

I was informed by the FMCS on July 15, 2008, that the parties had agreed to accept me as the arbitrator in the case. Thereafter, there was a flurry of motions between the parties which ended with agreement on the January 15, 2009 date for the arbitration hearing. With respect to the hearing date, the Agency in November of 2008 took the position that it was conditioned on first concluding the investigation into unprofessional conduct: "The attorney for the Agency has advised me that there is an ongoing administrative investigation being carried out which would preclude witnesses from both parties from testifying in the January 15, 2009 hearing." (See the November 20, 2008 letter from the Arbitrator to the legal representatives of the parties.) After hearing the parties and studying

the pertinent documents – the Program Statement of the Office of Internal Affairs dealing with procedures for investigating allegations of staff misconduct and the relevant provisions of the Master Agreement - I decided that the January 15, 2009 hearing would be held as scheduled. My reasoning is set forth in a Resolution which is attached as Appendix "A".

Of great significance to this case is the fact that in claiming that no witness could testify in the arbitration hearing until the OIA investigation had terminated, no matter how long that would take, the Agency relied on an alleged prohibition against testifying which it asserted was in the Program Statement. As a factual matter, there was no such prohibition in the Program Statement. And yet, grievant was informed that if he did testify, he "could face adverse action, including removal." In a sense the issue became moot concerning whether the grievant could testify in the arbitration hearing without being sanctioned for doing so, because a month prior to the hearing the administrative investigation had been terminated. The issue still remains pertinent in this case as evidence of how the Agency was treating the grievant with respect to resolving disciplinary questions arising under the Master Agreement and, as well, how it may affect the arbitration of future cases.

Note should also be taken of what is absent from the factual record in this case. Both parties chose to cut down the number of witnesses which they originally intended to call to testify. All told, each party called only two witnesses. In particular, the nonappearance as a witness of Lt. Rivera had the effect of denying to the arbitrator testimony which might have had great evidentiary impact. In contrast, both parties submitted fulsomely for the record relevant and pertinent documentary evidence. It is a truism of arbitration that it is the arbitrator's responsibility to decide the grievance based solely on the testimony and the documents which the parties choose to submit for the record.

The Issues From The Perspective Of The Parties

The "Formal Grievance Form", filed by the Union in representation of the grievant, consists of multiple issues in the form of alleged violations of Title VII, Civil Rights Act, Agency Program Statements, the Master Agreement and prior arbitration awards. (The Grievance Form is attached as Appendix "B".) The issues to be resolved from the perspective of the

Union are whether the Agency is responsible for having committed the following alleged violations which for clarity of presentation are listed below verbatim and separately:

1. "The Agency, by the actions of Anthony Haynes, Warden, continues to violate the final and binding arbitration awards FMCS #01-12760 & 05-5206".
2. "the Statute and provisions of the parties' Collective Bargaining Agreement which guarantees Jorge Rivera, Union President, the unconditional right to fair and equitable treatment."
3. "The legal right to be free from reprisals and to be free from discrimination based on Union activity and national origin."
4. "Specifically, the Agency showed animus toward Jorge Rivera, by authorizing an official administrative inquiry to determine whether disciplinary action is warranted for Unprofessional Conduct on April 2, 2008."
5. "The Agency continues to grant Daniel Rivera, Lieutenant, unfettered discretionary authority to supervise the grievant, which allows the supervisor to continuously taint the disciplinary process by reporting frivolous actions of misconduct as a form of reprisals."
6. "As a result of the Agency's refusal to take immediate and long term remedial and effective measures, Jorge Rivera continues to be discriminated against based on national origin (Puerto Rican) and Union affiliation."
7. "Therefore, being the only employee of the Federal Bureau of Prisons required to wear a body alarm for protection from a Correctional Supervisor."

In response to "Request remedy" the grievance seeks a "Cease and desist order; Attorney and legal fees...award of equitable relief to include and not be limited to compensatory damages in the form of pecuniary damages".
In response to the question of dates for the alleged violations, the Union responded on the form "April 2, 2008 and continuing."

The issues presented by the Agency are quoted directly from its Post Hearing Brief at pages 3-4:

1. "Is the grievance moot?"

2. "Has the Grievant attempted to expand the scope of the grievance without the mutual consent of both the Agency and the Union, in violation of the Master Agreement?"
3. "If the grievance is not moot and the scope of the grievance has not been expanded, was the Agency's investigation of the February 6, 2008 incident in retaliation for the Grievant's union activity or based upon his national origin?"
4. "Has the Union proven that each and everyone of the Agency's actions regarding Grievant is in retaliation for his union activity or based upon his national origin?"
5. "If so, what shall be the remedy?"

All told, the parties have submitted eleven substantive issues and a range of remedial requests for resolution. The substantive issues are first addressed, beginning with those which are least complicated and then proceeding to those which require more complex and extensive analysis.

Is the grievance moot? No it is not, for at least two reasons. First, the Agency phrasing of this issue is premised on the assumption that the only issue in this case has to do with the administrative investigation of the February 6, 2000 incident which has been resolved favorably for the grievant and, therefore, there is nothing remedial in nature to be resolved through arbitration. That premise is incorrect. There are multiple grievances claimed by the grievant, other than the manner in which the administrative investigation was processed. Even if the Agency's assertion of mootness were to be upheld, all the other grievance issues would still need to be resolved.

The second erroneous premise underlying the Agency's claim of mootness is that the report and decision made at the conclusion of the administrative investigation is binding on the arbitrator. It is of course binding on the Agency since it is the outcome of a process entirely within its control and to which it is committed to respect. Arbitration in contrast, as defined in the Master Agreement, is a bilateral process which is established through the mutual accord of the Agency and the Union. Both the Agency's administrative investigative process and the Master Agreement's arbitral process have the same purpose which is to determine the truth. But both are independent of the other in carrying out their respective missions. That is not to say that it would be appropriate for each process to ignore the results of the other. In this case that means concretely that as the

arbitrator is this case I am duty bound to make an independent judgment on what transpired in the February 6, 2008 incident, as well as on all matters related to the administrative investigative process. In doing so I will take into account, as I appropriately should, the Agency's investigative report and outcome, in order to determine the evidentiary weight it should receive in this case.

Has the Grievant attempted to expand the scope of the grievance without the mutual consent of both the Agency and the Union? He has not. Article 32, Section a, of the Master Agreement does provide that "the issues, the alleged violations, and the remedy requested in the written grievance may be modified only by mutual agreement". The question to be determined, of course, is whether the Union has sought to expand the scope of the grievance. From the Agency's perspective that is how it evaluates the fact that the Union has submitted for the record the second professional misconduct investigation, having to do with the grievant and Officer Jesus Hernandez, which in time began after the beginning date of the grievance in April of 2008. In my judgment the admission of the latter does not modify or expand the grievance. First, that is because the grievance clearly states that its initial date is April 2, 2008 "and continuing." Second, the testimony and documents related to the second investigation is evidentiary material within the over all claim of the Union that the Agency has been effectuating these investigations to discriminate against grievant and to deny his right to "fair and equitable treatment." If the Agency had been taken by surprise by the introduction of evidence of the second investigation and had been unable to fairly defend its case, it could have requested time to fully prepare its response. But it did not do so. As the arbitrator, I do not find that the Agency has been unfairly prejudiced by the admission into the record of the pertinent evidence related to the second administrative investigation.

Both parties, using different wording, present as an issue **whether grievant has been discriminated against based on national origin?** My decision is that the Union has failed to present probative evidence in support of its claim of discrimination based on national origin. What it has presented can only be characterized as unpersuasive speculation of discriminatory motive. The grievant's claim of discrimination is inferred from the fact that in 2004 the Warden authorized him to wear a body alarm as a protective measure against possible violence by Lt. Rivera in retaliation for his having served as an advocate in the Officer Toro sexual

harassment case. As he states it in the Formal Grievance Form, being a Puerto Rican and "being the only employee in the Federal Bureau of Prisons required to wear a body alarm for protection from a Correctional Supervisor."

On the facts, as he states them, there is no basis for assuming that the motive of the Warden was to discriminate against him because of his national origin. Grievant presented no evidence bearing on the question of motive. I did ask him in the hearing, as a possible alternative, could the Warden have been motivated to protect him from possible physical harm without regard for his national origin? Grievant insisted on his conviction that the motive was discrimination based on national origin. For the question and answer interchange, see Transcript, pages 147-153. The short of it is that assertion alone is not enough: without probative evidence the charge of discrimination based on national origin cannot be sustained.
There also should be clarified whether grievant is "required" to wear a body alarm or is simply authorized to do so. It may well be that the Warden in 1994 required grievant to wear the body alarm as a measure to protect him against possible bodily harm, but it is clear that the Agency's present position is that grievant is authorized to do so entirely at his option. That option the Agency in the hearing made clear is now open for all employed at MDC. See the testimony of Lt. Jose R. Rosa, Transcript, page 212 .

The remaining issues are an interrelated mix of alleged retaliatory actions, violations of the fairness principle in the Master Agreement, alleged illegal intimidation and failures to comply with the remedial provisions in the two awards rendered in the sexual harassment case of Officer Toro. They are phrased in the form of questions which are directed to determining the essential facts of this case.

In the exercise of its functions under the Program Statement for processing disciplinary matters, did the Agency retaliate against grievant for having served as a union advocate in the Officer Toro case or did it accord him treatment which was unfair? It was not until the hearing on January 15, 2009, that the Union learned that the administrative investigative process effectuated under the terms of the pertinent Program Statement had been carried out not only with respect to the grievant, but that identical procedure had been followed with respect to Lt. Daniel Rivera. Both had been involved in the February 6, 2008

incident and both had been accorded identical treatment in the investigation which the Warden had ordered. And the outcome was the same for both: in neither case was the charge of unprofessional conduct sustained. Had the Union been privy to the fact that the Agency was acting procedurally with identical effect toward both protagonists in the February 6, 2008 incident, I would assume that they would not have charged that the Agency had discriminated against the grievant in the investigative process. The fact of the matter is that the only evidence in the hearing record is proof of equality of treatment in the procedures followed. On this evidentiary record, there is no basis for a finding that the Agency had retaliated against the grievant.

Nor does the Union's claim fare better that the Warden manipulated the Program Statement to define the subject of the investigation as one of professional misconduct, and therefore a category 3 violation, so that he could retain control over the investigation through his control over the local investigative agent, whereas if the investigation had proceeded as a Category 1 violation for alleged violent conduct, the investigation would have to be carried out by an agent sent from the OIA's office in Washington, D.C. In the Union's view, an OIA centrically directed investigation would have guaranteed a fairer result.

In my judgment, the Union's position is not supported by the facts in the record. First, the Threat Assessment group found that there was no imminent threat of violence. Second, on the basis of that finding, it was reasonable for the Warden to categorize the subject of the investigation as alleged unprofessional conduct. Third, the evidence of record is that the Warden does not have complete control over Category 3 cases. He makes the recommendation to the OIA in Washington which in turn approves it or adopts a different handling of the case. Fourth, it is the OIA in Washington which passes final judgment on the report of the local Investigative Officer stationed at the MDC in Guaynabo. Fifth, no evidence was presented in support of the Union's contention that an OIA agent directly appointed from Washington would act any differently from a locally stationed agent in the conduct of an investigation. In point of fact, in this case the OIA in Washington rejected the report of Investigative Agent Efrain Rivera and ordered his substitute Agent Mark Foreman to repeat the entire investigative process. After he had complied, the OIA finally approved his report. The short of it is that there is no

evidentiary basis for holding that how the Warden carried out his responsibilities under the Program Statement was retaliatory in nature.

But in effectuating the provisions of the Program Statement, has the Agency acted illegally or in accordance with the grievant's right under Article 6, Section b-2 of the Master Agreement "to be treated fairly and equitable in all aspects of personnel management"? In my judgment, it has acted illegally and has not complied with Article 6, Section b-2, for the reasons which follow.

First, the question of illegality goes back to memoranda in the form of motions sent by the Agency's legal representative in November of 2008 while the February 6, 2008 incident was still under investigation by Agent Foreman. Citing Second Program Statement 1210.24(9)(9c), the Agency's legal representative erroneously stated that employees who had been interviewed in the ongoing administrative investigation were not permitted to testify in the scheduled arbitration proceeding and, if they did, that they "could face adverse action, including removal." See Appendix "A", page 2. There is nothing in the Program Statement which prohibits employees who have been interviewed in a still pending investigation from testifying in an arbitration hearing. The asserted prohibition was a simple fabrication. More to the point, it was an illegal fabrication. The Agency has no legal authority to amend the Program Statement as it did. The illegality is compounded by the fact that the fabricated prohibition was used to justify holding off on the scheduled arbitration hearing date, indefinitely, until such time as the administrative investigation had been completed.

Second, the threat to grievant of adverse action, including removal, in addition to being illegal, also violated his rights under the Master Agreement to freely exercise his grievance and arbitration rights, under Articles 31 and 32, without fear of incurring adverse actions. There can be no doubt that the Agency's threat was intimidating, without basis in law and in violation of the Master Agreement.

Third, turning to the question of grievant's "right to be treated fairly and equitably in all aspects of personnel management" under Article 6, b-2 of the Master Agreement, how the investigation of the February 6, 2008 incident was carried out fails to meet the Master Agreement's standard of fairness. What should have been an expeditious investigation took nine

months to consummate. There were only two principal witnesses, Lt. Daniel Rivera and Officer Jorge Rivera, whose statements had to be taken, and that of Lt. Jose Rosa. The first Investigative Agent, Efrain Rivera, completed the investigation rapidly prior to his retirement in April of 2008. His report was rejected by the OIA for what was subsequently revealed in the hearing to be minor matters. See Agent Foreman's testimony, Transcript, pages 278-281. To clear up those minor matters consumed another four months. All told, the grievant had to live nine months with the anxiety of not knowing what the final outcome of the investigation would be and, very particularly, whether the result would entail the imposition of disciplinary action. That simply was not fair to grievant. In my judgment the unfair treatment to which he was submitted was unconscionable. It was, in addition, in clear violation of the Program Statement's requirement that investigations are to be resolved promptly.

In defense of how it has effectuated the Program Statement, the Agency has stressed what it terms as the equality of treatment received by both the grievant and Lt. Daniel Rivera. That is true on the surface of what transpired. But there is ample reason to doubt whether Lt. Rivera suffered anxiety over the outcome of the investigation or that he felt intimidated when informed that he might be removed if he testified in the arbitration hearing while the investigation was still ongoing. From the findings in the two prior arbitration award which fulsomely detail his acts of retaliation and for which no disciplinary action has been taken, it is highly unlikely that Lt. Rivera would have been worried about the outcome of the administrative investigation. Sexual harassment and retaliation are surely more serious infractions than professional misconduct. Having been effectively granted immunity from disciplinary action by the Agency for the former infractions, he most probably did not feel that he would be sanctioned for the latter. He did not testify in the arbitration hearing, making it impossible to have questioned him on this point. On the record in this case, I would conclude that while the grievant was grievously affected by the Agency's illegal and unfair treatment, it is reasonable to infer that no similar grievous impact was felt by Lt. Rivera.

Fourth, there remains to be considered whether the processing of Officer Jesus Hernandez' complaint against the grievant satisfies the Master Agreement's standard of fairness. On the basis of the hearing record, I find that it does not. My conclusion is based on how the two principal documents have been treated by Agency officials. Complying with his

institutional duty, on September 9, 2008 the grievant informed his supervisors that he had observed Officer Jesus Hernandez carrying out his assigned responsibilities in violation of Agency rules. In his statement, the grievant delineated the violations specifically. The grievant's memorandum to his supervisors is attached as Appendix "C". The supervisors he informed were Inmate System Supervisor Maria Diaz, Associate Warden Jose Santana and Case Management Coordinator Juan Segarra. Transcript, page 177.

Subsequently, Officer Hernandez filed a complaint alleging that the grievant had violated the norms of professional conduct in the way he had treated him. That complaint served to initiate an administrative investigation to determine whether the grievant was guilty of professional misconduct in his treatment of Officer Hernandez. See the notice by Special Investigative Agent Mark Foreman to the grievant, dated November 13, 2008, attached as Appendix "D". In his testimony in the arbitration hearing, held on January 15, 2009, Agent Foreman stated that he had not seen or heard of the memorandum which the grievant had submitted to his supervisors. See Transcript, pages 286-289.

There is something more than a little odd about the sequence of facts in this matter. Two months after the grievant reports to his supervisors work performance violations by Officer Hernandez, he finds himself charged with alleged professional misconduct and with having to defend himself in an administrative investigation. Obviously, grievant's report of Officer Hernandez' violations is a critically important document in the investigation to determine the truth or falsehood of Officer Hernandez' charges. Yet two months after the initiation of the investigation Agent Foreman had no knowledge of greivant's memorandum. Somehow this vital piece of evidence failed to be called to the attention of Agent Foreman.

He now knows of it; the only question is what weight he will give to it. Will he see it as a vital piece of evidence, as I do, or will he give it no weight on the ground that his duty is to determine solely whether Officer Hernandez' allegations are sustained by sufficient evidence? Judging by how he investigated the February 6, 2009 incident, the latter will probably be the approach he takes. See Transcript, pages 272-373. From the perspective of this arbitrator, I find that the Agency in processing this particular complaint has not demonstrated a disinterested search for the

full truth of the dispute and, therefore, has not complied with the Master Agreement's requirement of fairness in making personnel decisions.

There are two interrelated issues which go to the heart of this case: **Has the Agency complied fully with the arbitration awards in the sexual harassment cases brought by Officer Toro as they relate to the rights of the grievant and, specifically, has he been subject to retaliatory actions?** Arbitrator LaPenna in his Supplementary Final Award, dated September 7, 2008 did decide that there had not been full compliance, that the grievant had been subjected to discrimination and retaliation and, therefore awarded him damages in the amount of $15,000. The factual findings of discrimination and retaliation cover the time period ending with LaPenna's award which was rendered February 6, 2007. It is the Agency's position that as of the date initiating this grievance, as well as up to the present, that the Agency is in full compliance with the pertinent arbitration awards and that no retaliatory actions have been taken against the grievant.

That was precisely the position taken by Regional Director R.E. Holt in denying the grievance in his letter of May 16, 2008. See Agency exhibit 1. The Agency's position was fully spelled out in the arbitration hearing and summed up in its Post Hearing Brief at page 3: "the Grievant works for Inmate Systems Department while Lt. Rivera works for the Correctional Services Department. Next, Appellant's regular work hours are from 2:00 p.m. to 10 p.m. while Lt. Rivera's shift is from 6:15 a.m. to 2:45 p.m. Third, individuals usually do not work on the same floor of the institution, Grievant on the first floor while Lt. Rivera's office is on the third floor."

It should be recalled that in the Formal Grievance Form the grievant alleges that "The Agency continues to grant Daniel Rivera, Lieutenant, unfettered discretionary authority to supervise the grievant, which allows the Supervisor to taint the disciplinary process by reporting frivolous allegations of misconduct as a form of reprisals." See Appendix "B". In his hearing testimony, the grievant stated that there are times when his shift and that of Lt. Rivera's coincide. When asked how often that happened, he replied, "At a minimum, three times a week, I'm subject to his supervision." Transcript, page 147. This was not challenged on cross examination, or refuted by any witness or document admitted in the record. It is therefore accepted as a factual finding in this case. I assume

that is what grievant in the grievance has termed "unfettered discretionary authority to supervise".

I do not take the term to mean that for the overwhelming part of his working time grievant is denying that in fact he is being supervised by supervisors other than Lt. Rivera. What "unfettered discretionary" means is not clear, but I would assume grievant has in mind the imposition of retaliatory actions. Whether such actions were indeed taken is to be considered later. At this juncture the question to be answered is whether there is in the hearing record any evidence that Lt. Rivera in fact did report "frivolous allegations of misconduct as a form of reprisals" against the grievant. There is nothing in the record to that effect and, therefore, that allegation is found to be without supporting evidence.

Also not challenged by the Agency in the hearing was grievant's testimony that in the course of his regular duties he must enter Lt. Rivera's office, whether or not the Lieutenant is on duty. As he stated, that is where requests for overtime assignments are located and the accompanying record is kept and, as well, the "posted picture file" which he is required to consult as part of his duties. Transcript, page 64. Not having been refuted, his testimony in that regard is adopted as a factual finding in this case.

Turning now to the question of whether Lt. Rivera did in fact exercise his supervisory authority to retaliate against the grievant, or whether the Agency institutionally so acted, we look to the evidentiary record. There is one allegation to the effect that grievant's participation as a union advocate in the arbitration cases resulted in his receiving negative performance evaluations. In the hearing, that allegation turned out to be wanting in supporting evidence. His immediate supervisors appeared to have judged him on the merits.

However, there are in the record at least two incidents which qualify as reprisals and perhaps a third and a fourth for which Lt. Rivera has no direct responsibility. The grievant testified that he requested four hour sick leave November 5, 2008, and that the supervisor at the time who had the authority to grant his request was Lt. Rivera and who did indeed deny his request. As a consequence, the grievant was reported as AWOL and lost four hours of his pay. See Transcript, pages 143-145. His testimony was not refuted by an Agency witness, nor by a document admitted as

evidence in the record. Nor was it effectively challenged on cross examination. I therefore conclude that Lt. Rivera did exercise his authority to deny grievant's request for four hours of sick leave. I further find that it is reasonable to infer that the motive for the denial was to retaliate for grievant's participation as an advocate in Officer Toro's sexual harassment cases.

The second reprisal as alleged by the grievant actually led up to the February 6, 2008 incident. According to his testimony, the grievant had signed for an overtime assignment which was scheduled for 6:a.m. on that day. When he arrived at MDC, he discovered that his name had been erased from the overtime list. He asked his immediate supervisor who had erased his name. His reply was that he had not done it, but that the grievant should check with Lt. Rivera. This he did and according to his testimony, Lt. Rivera responded to his inquiry with angry expletives and did not give him a substantive answer. Transcript, pages 64-66. I credit grievant's testimony to the extent of finding that he never received either a yes or a no with respect to the question of whether Lt. Rivera was or was not responsible for erasing his name from the overtime list.

Lt. Rivera did not appear as a witness in the arbitration hearing to refute the grievant's testimony. Neither did the Agency present evidence of any sort on who else other than Lt. Rivera might have been responsible for erasing his name. Harm was done to the grievant by his losing out on the extra income he had expected to earn by the overtime assignment. There was neither refutation nor impeachment through cross examination of grievants testimony by the Agency. Under all the circumstances, I find that Lt. Rivera was responsible for the erasure of the grievant's name and that the motive for so acting was to retaliate against the grievant for his participation as an advocate in the Officer Toro cases. The significance of the February 6, 2008 incident is more fully analyzed later in this opinion.

The third action by the Agency was reprehensible but is debatable as to whether it should be characterized as retaliation or simply as illegal discrimination and intimidation. I refer to the Agency's warning the grievant in November of 2008 that if he testified in the scheduled arbitration hearing that he would risk disciplinary action, including possible removal. To intimidate the grievant, the Agency fabricated a non existent prohibition in the Program Statement. I am assuming that that is not the general practice of the Agency, that it was done only in the case of

the grievant, in which case it was a matter of illegal discrimination whose only possible motive had its source in his having served as an advocate in Officer Toro's cases. Furthermore, I assume that it did not have the same intimidating effect on Lt. Rivera for the reasons given earlier in this opinion. On reflection, I conclude that the conduct of the Agency in this matter could be considered most appropriately to be a hybrid action of illegal discrimination and retaliation.

The fourth matter has been considered previously as a violation of the grievant's right to have all personnel actions comply with the fairness principal in the Master Agreement. The violation took the form of high echelon Agency officials failing in their obligation to see to it that vitally relevant information which the grievant had submitted to them would, in turn, be transmitted to Agent Foreman who was carrying out the investigation of Officer Jose Hernandez' complaint against the grievant for professional misconduct. Whether the violation should also be characterized as discriminatory or retaliatory, depends on whether they would have acted in the same manner in the case of any other employee at MDC. For want of evidence on that point in the hearing record, the answer to that question would have to be speculative. Hence, on reflection, my conclusion must be limited to the finding that the Agency failed to treat the grievant fairly by not ensuring that the Agent Foreman would have access to all relevant elements of the case he was investigating.

The February 6, 2009 Incident

The immediate cause for the filing of the grievance in this case was the February 6, 2008 incident. The sworn affidavits of the grievant and Lt. Rivera, both dated April 2, 2008, giving their versions of what transpired in the incident, are attached respectively in Appendices "E" and "F". **For the purpose of resolving this case, what significance can be distilled from the February 6 incident?** The starting point in responding to the question is the problem of getting at the truth of what happened. In the grievant's version, Lt. Rivera responded to the question of whether he had erased the grievant's name from the Escort Trip scheduled for that morning, by standing up from his desk and speaking the following: "who the fuck are you to question me about any trips in my fucking office." In his hearing testimony, grievant stated that he felt threatened by what he feared to be an imminent threat of physical violence. Transcript pages 69, 298-299. That is his explanation for doing what he describes in his sworn

statement: "I immediately attempted to activate my personal radio body alarm and also activated the triple deuces' alarm in order to notify the Control Center."

This is Lt. Rivera's version of how he responded to Grievant's question: "I told Officer Rivera that I do not work with hospital trip assignments and only the Operations Lieutenant was the one who assigned staff to the hospital trips escort. Officer Rivera state, 'you are the one who does those things'. I informed Officer Rivera once again that I do not deal with medical trips. Officer Rivera stated, 'you want to fuck with me, watch this', and pressed the triple deuces in the 7838 extension phone. Officer Rivera then left the office and Lieutenant Rosa came inside the Lieutenant's Office and clear (sic) the triple deuces and I explained what has transpired with Officer Rivera Jorge (sic)." Lt. Rosa's sworn statement simply reported that he encountered Lt. Rivera alone in his office and is not discussed further because it has no probative effect on the outcome of this case.

In the hearing, I questioned Agent Foreman as follows: "If I understand your testimony you felt that your responsibility was to take the allegations, and determine whether either of the two allegations were true or not, and you found insufficient evidence to reach a conclusion as to the truth, and therefore, you recommended dismissing the matter." To my comment, he responded, "That's correct." Transcript, pages 276-277.

As the arbitrator in this case, I do not feel bound by Agent Foreman's judgment that there was no way to determine the truth. To begin with, he interviewed both protagonists. In the arbitration hearing, the grievant testified, was subjected to cross examination and responded to my questions about what had occurred during the February 6 incident. As the arbitrator I was able to evaluate the credibility of grievant's testimony. The Agency chose not to have Lt. Rivera testify which means that I have to evaluate his credibility based entirely on his sworn statement. A second difference between the investigative process as effectuated by Agent Foreman and the arbitration process as effectuated in this case, is that he considered as irrelevant to his investigation any inquiry which went outside the complaints of professional misconduct as alleged in the sworn statements of both protagonists.

In contrast, I have taken into account the past conduct of Lt. Rivera, very especially as delineated in Arbitrator LaPenna's latest award which he rendered September 7, 2008. It is a fact that for many years Lt. Rivera has been the victimizer-retaliator and his victim has been the grievant. Also taken into account have been the two retaliatory actions which I have found to be Lt. Rivera's doing. It was such considerations which caused me to weigh as I did Lt. Rivera's failure in his sworn statement in which he avoided a categorical yes or no to the grievant's question of whether he had erased his name from the overtime. His explicit failure to deny wrong doing, combined with the Agency's indifference to investigate who else might been the guilty actor, in my judgment was sufficient to conclude that Lt. Rivera was the person responsible.

Beyond finding that Lt. Rivera was responsible for the erasure of Grievant's name from the overtime list, in good confidence I cannot make additional credibility findings, either in favor of the grievant or Lt. Rivera. What gives me pause is the fact that the February 6 dispute is simply the final incident in what has been an ongoing feud in which, as I have characterized it, Lt. Rivera has been the victimizer-retaliator and the Grievant, as the weaker party, has been his victim. In a situation of that kind, one cannot expect either party to be experiencing emotional equanimity and, therefore when testifying to tell the unvarnished truth. In addition, when both parties are the only witnesses to what went on in a meeting between them, as in this case, and there is no additional reliable evidence bearing on either one of their versions of what happened, it becomes almost impossible to determine the truth. Hence, in good conscience, I cannot make findings regarding whether either party used profane or threatening language toward the other, or whether objectively there was any danger of physical violence.

Violence Objectively Considered And As Perceived

When I speak of whether there was any objective danger of physical violence, I have in mind the facts of record with regard to whether either of the two arbitrators who adjudicated the sexual harassment cases had found Lt. Rivera guilty of acts of physical violence. It is my understanding that they did not. His conduct may be characterized as psychological violence, but there is no finding that he exercised physical violence against Officer Toro or the grievant. The fact is, then, that

however deplorable his conduct has been over the years of the two arbitration cases, his misconduct had not included physical violence.

How to explain this? One possible answer is that rational self interest has triumphed over the desire for revenge. The Agency may have been lax or indifferent in dealing with Lt. Rivera's sexual harassment misconduct, but he most probably believes that it would not be permissive were he to engage in overt acts of physical violence. As the Agency's February 7, 2008 cease and desist order states, served on both Lt. Rivera and the grievant: "you are hereby instructed to cease any threatening or violent behavior and you are reminded that such behavior is prohibited and will not be tolerated." Whatever anger and resentment he bears toward the grievant, Lt. Rivera is a professional, assuredly takes pride in his position and his sense of rational self interest has been sufficiently strong to keep him from overstepping the bounds of risk free behavior. It is surely reasonable to assume that he knows from experience that he may commit acts of sexual harassment and reprisal and not risk his position, but that engaging in physical violence could well cause the end of his career with the Agency.

That is not the way the grievant sees it. The fear he feels of possible violence from Lt. Rivera and the resentment he bears toward him was manifest in his testimony in the arbitration hearing. I find that his fears and how they are affecting him are genuine and are clearly palpable in his testimony related to the February 6 incident and, as well, to his feelings in general toward Lt. Rivera. For example, in one instance of a number to the same effect, when I asked him to describe his feelings after entering Lt. Rivera's office and questioning him about the erasure of his name, he testified that the Lieutenant stood up from his desk and cursed him: "Lieutenant Rivera is about six foot four, six four and a half, over two hundred and thirty, two hundred and forty pounds. I weigh a hundred and sixty pounds soaking wet. So this is a big difference." Among the many fears he expressed, he stressed his fear of "getting my ass kicked". Transcript, page 298.

The following testimony of the grievant sums up how he perceives his situation in general: "it's been eight years of consistent pressure from the agency, pressure from this supervisor...being a victim of unprofessional conduct from the supervisor, being a victim of having multiple wardens condone this type of behavior, having been a victim of his own colleagues,

other supervisors condone this type of behavior, look the other way, putting me in a position where damned if I do, damned if I don't...I wake up in the middle of the night, and I got this chest pain, and when I go to the doctor, he wants to give me pills, and I don't want to take pills; I don't want to depend on pills. All I ask for is for this individual to leave me alone. That is it." Transcript, pages 154-156.

I should stress again that is how the grievant perceives his situation *viz a viz* Lt. Rivera and the management officials of MDC. I find his expressions of emotional anguish to be genuinely felt, that is truly how he feels it. But that is only the beginning of the inquiry which must be made. His feelings are a reality which should be taken into account. But they have to be checked against objective facts and those objective facts have to be limited to events and actions which are within the time period covered by the grievance in this case. The grievance was filed in April of 2008. Its coverage is from the LaPenna award on February 6, 2007 until January 15, 2009, the date of the hearing in this case. Findings were made in earlier sections of this opinion to the effect that Lt. Rivera still exercises supervisory authority over the grievant, albeit limited in time periods, and probative evidence supports a limited number of retaliatory, discriminatory and illegal actions.

On the other hand, complaints of the grievant have been found not to be supported by evidence, for example, whether his supervisors fairly evaluated his job performance or whether the Warden discriminated against him in effectuating the provisions of the Program Statement. A further point: what the grievant asserts about past Wardens may be true, but no evidence was presented for the record in this case that the present Warden has condoned retaliatory, discriminatory or illegal acts. The short of it is that objectively appraised, the grievant's account of his situation *viz a viz* Lt. Rivera, and the Agency in general, is a mix of proven and unproven allegations. How the mixed state of the evidentiary record bears on shaping the appropriate remedies to be awarded is considered in the following section.

What Remedies Should Be Awarded In This Case?

In most labor arbitration cases, once the arbitrator makes his findings of fact, the determination of what constitutes an appropriate award is usually not a complicated or difficult issue. For example, in cases of unjust

discharges the remedies usually include an award of reinstatement, back pay and, perhaps, an order to cease and desist from a practice which violates the collective bargaining agreement. Similarly, if the issue in dispute involves contractual interpretation, the award determines the correct interpretation and orders whatever remedial measures may be needed to undue the harm caused by the erroneous interpretation. In the general run of cases the guiding remedial principle is to make the grievant whole, in short, to do equity.

That too is the guiding principle in employment discrimination cases, but in such cases implementing equity tends to be a far more complex process and even more so if once the grievance has apparently been resolved, there is an aftermath of retaliatory actions. In this particular case, shaping an appropriate award, in terms of equitable objectives, is especially hard if those objectives are broadly conceived. This means, in my opinion, that more must be accomplished than making the grievant whole for the injuries he has suffered, and ordering the cessation of prohibited practices: urgently needed, in addition, is a remedial prescription which would have a good chance of truly putting an end to this dispute. This has been an ongoing dispute since before 2002; there have been multiple arbitration awards; this third case is about to culminate in an award. It should seek as the ultimate equitable objective to lay the groundwork which would restore the mutual respect and trust between the Union and the Agency which the Preamble to the Master Agreement defines as the basis of a good relationship.

Defining mutual respect and trust as the ultimate objective should not blind us to the obstacles which stand in the way of its achievement. Perhaps the biggest obstacle is the fact that each party tends to insist on seeing only its side of the case. For example, it is essential for the Agency to accept that it has not fully implemented the LaPenna award which orders that "Lt. Rivera shall not supervise Officer Jorge Rivera directly or indirectly and under any circumstances", but it is equally essential that the Union recognize that the Agency has implemented substantial measures, in terms of assignment to working units and working shifts, to separate the two men.

A second contrasting example should suffice to emphasize the point: the Union and the grievant should understand that by wrongly asserting that grievant's supervisors had unfairly evaluated his job performance, that

assertion would almost certainly create ill will toward him by the Agency's supervisory staff, whereas, by creating a false prohibition against testifying, the Agency almost certainly confirmed the grievant in his belief that the intention was to intimidate him and that the underlying motive was to retaliate for his having served as a union advocate in the Officer Toro case.

The tendency to see only one side has been fortified by the fact that hostility has hardened over the years between these two men. Each one attributes the creation of a hostile environment to the other. That was the essence of Officer Rivera's testimony in the hearing. That also was Lt. Rivera's assertion in his sworn statement: "Officer Rivera is invading my work area and is provoking me, thus creating a hostile work environment for no reason." Also complicating efforts to shape remedial measures which might restore normal relations between the Union and Agency, is the fact that the grievant is the Union President and it is palpable that each side tends to defend its own and to score points against the other.

That was evident in the way each party presented its version of the case and how it sought to demolish the other side's version of the case. That also is the significance I would give to the testimony of Mr. Eric Young, South East Regional Vice President of the Council of Prison Locals who related his discussion with South East Regional Director R. E. Holt. The subject of discussion was an effort to resolve the ongoing problems between the grievant and Lt. Rivera. No agreement on a solution was reached, with each side sticking to its position. Transcript, pages 35-38.

To overcome the latter obstacles, there will be included in the award remedial orders which are not typical, precisely because this is an exceptional case. It will also include a number of recommendations which are intended to fortify the objective of reaching a final solution, but which I have concluded are beyond the remedial authority of the arbitrator to cast as orders under the terms of the Master Agreement. Herewith is my reasoning in support of the remedial measures and recommendations which are included in the award.

1. The preponderance of the evidence in the hearing record fully supports the conclusion that the through its officials the Agency has violated the rights of the grievant in manifold ways. The grievant has suffered from discrimination and reprisals which are prohibited by Title VII of the Civil

Rights Act, the Agency's failure to fully implement Arbitrator LaPenna's awards and the Master Agreement's guarantee of fair and equitable treatment. Remedies must be designed to eliminate these and any other Agency practice or action which have served to create a hostile environment in which the grievant has had to work as an employee and as President of the Local Union. But as we have seen from past experience ordering the elimination of these practices is no guarantee that they will cease entirely to exist.

To assure full compliance, which means to assure that grievant will have peace of mind, to carry out his work and his union responsibilities free from retaliation, discrimination or indignities of any kind, two further remedies will be needed. First, the Agency will be instructed to develop and to propose a new work protocol under which all relations between the grievant and Lt. Rivera will be separated without any possible exception. Concretely that would mean the following: in addition to maintaining the present arrangement under which the grievant and Lt. Rivera work different shifts and are assigned to different departments, the protocol will instruct Lt. Rivera that under no circumstances is he to supervise the grievant or to take any personnel decision with respect to him. Furthermore, if for any reason he must enter Lt. Rivera's working area, the grievant will be accompanied by a management official designated by the Warden. And if a personnel decision affecting the grievant is required to be made which normally would fall to Lt. Rivera sphere of responsibility, in an exceptional situation, it will be made by the management official designated by the Warden.

On behalf of the Agency, the Warden will prepare the protocol and submit it to the arbitrator, with a copy to the Union. The Union will then submit its comments on the protocol. Once the protocol is adopted in an award, there will be in place a system of regular reports by the Agency and the Union. After a reasonable period of full fledged compliance, the regular reporting requirement will cease to have effect. This is an extraordinary remedy and is only justified by the Agency's failure to fully implement the awards in the prior arbitration cases. Its duration will depend on the Agency. A reasonable period of compliance with the protocol would justify lifting the reporting requirement.

The next remedial question to be resolved is whether the grievant is entitled to compensatory damages for the mental anguish which he has

suffered. Under the provisions of Title VII of the Civil Rights Act and pertinent case law, he would, ordinarily, be awarded compensatory damages for his suffering, subject to the sound discretion of the adjudicator. Section 102(a) of the Civil Rights Act of 1991, 42 U.S.C. Section 1981a provides that "the complaining party may recover compensatory and punitive damages" "against a respondent who engaged in unlawful intentional discrimination" which would certainly cover the retaliatory acts of Lt. Rivera. Arbitrator LaPenna's Supplementary Award, rendered September 7, 2008, exemplifies how arbitrators usually award compensatory damages for mental suffering in employment discrimination and very particularly when reprisals are involved.

In my judgment, compensatory damages were entirely justified, as set forth in the LaPenna award, but should not be awarded in the present case. The reasons are multiple. The key word in Section 1981a is "may" which I take to mean that the arbitrator has discretion, as does a judge, to weigh all pertinent elements of the case to reach an equitable decision on whether to award compensatory damages. On the one hand, there is the finding that the grievant has suffered mental anguish. On the other, one of his principal complaints—"The Agency...allows the Supervisor to continuously taint the disciplinary process by reporting frivolous allegations of misconduct as a form of reprisals".—was not supported by evidence. There is in fact a total lack of evidence in the hearing record of a pattern of Agency supported or allowed retaliatory actions. What the hearing record supports are two basic findings: first, that for limited time periods grievant had to work under Lt. River's supervision and, second, that there were two retaliatory actions, one illegal action and one unfair action. From the date of Arbitrator LaPenna's award on the merits, February 6, 2007, until the January 15, 2009, the hearing in this case, is a period of two years. For that period of two years, the Union failed to introduce evidence of the pattern of retaliatory conduct alleged in the formal grievance form.

Also weighing on the side of not awarding compensatory damages is the finding that the grievant failed to prove the charge that his supervisors had unfairly evaluated his job performance and did so as a form of retaliatory action. The hearing record demonstrates that the charge was without foundation. As noted, the result is to create ill will and make it more difficult to reestablish a normal working environment. The same is true with respect to the unfounded claim of discrimination to the effect that

only the grievant was investigated under the procedures of the Program Statement when in fact Lt. Rivera was subjected to the same procedures.

It is of course not possible to determine how much of grievant's present emotional suffering is due his having been supervised intermittently by Lt. Rivera and to the four instances of retaliatory actions and illegal and unfair decisions taken by the Agency more recently, and how much is caused by a continuance of suffering resulting from retaliatory conduct during the period covered in Arbitrator LaPenna's award. The heart of the matter is whether his claim for compensatory damages has merit in light of his own failures to fully act responsibly as the grieving party in this dispute.

Having weighed the relevant equities, I conclude that it would be inappropriate to award the grievant compensatory damages. In the hearing he made clear that what was most important to him was to be free from the hostile conditions caused by his having to interact with Lt. Rivera. That is a right to which he is entitled, as decided earlier in this opinion. With the full implementation of the terms of the Protocol, as delineated previously, his right to a normal working environment should effectively be assured.

Equity also requires that the grievant be made whole for any pecuniary losses he may have suffered from retaliatory acts for which the Agency should be held to account. There are two of those kinds: the four hours of pay which for which he was docked as AWOL and the hours of pay he would have received if his name had not been erased from the overtime list.

The recommendations herewith presented are just that, recommendations, which the parties should implement in the exercise of their good judgment. I make them in the exercise of my good conscience belief that more may be required to reach a just and final end to this dispute between the Union and the Agency than can be achieved by an arbitration award. As stated previously, the following are cast as recommendations because I consider them to be proposals which are not within the remedial authority of the arbitrator under the terms of the Master Agreement.

First, it would be advisable to send this Opinion and Award to the Director of the Bureau of Prisons and to the President of the American Federations of Government Employees. There are two reasons for this recommendation. They may see this dispute as exceptional, one which

requires attention and, ideally, their mutual consultation to assure that this dispute is decently resolved. There is a second consideration: the prevention of what may become a tragedy. Although the Warden has thus far contained the possibility of violence between the two principal protagonists with his desist order, there still remains the potential for physical violence. That could very well occur, if the protocol being ordered fails to be effective. The situation is potentially explosive because of the deep felt antipathy the two protagonists feel toward each other. It would be wise to remember the recurring tragedies reported in the press of workplace violence caused by an aggrieved employee whose emotional control has snapped.

The two remaining recommendations are addressed to the immediate parties. They may recognize that it would be desirable to meet and confer for the purpose working out their differences. For example, it would surely be a positive step in right direction, if the parties could reach an agreement on the precise terms of the Protocol. The parties also may choose to try mediation as their preferred method for resolving their differences. As the arbitrator, I would welcome whatever proposals the parties can agree to for the purpose of returning their relations to normalcy.

Preliminary AWARD

1. The Agency claim that the grievance is moot is denied.

2. The Agency claim that the grievant has unilaterally expanded the grievance is denied.

3. The grievance is upheld with respect to the following claims of violation of law, the LaPenna award and the Master Agreement, as determined in the Opinion of this case: the Agency has not completely arranged for Lt. Rivera to have no supervisory authority or personnel decision making over the grievant; and grievant has been victimized by a limited number of retaliatory, illegal and unfair actions for which the Agency has the ultimate responsibility.

4.. For want of probative evidence, the following grievances are denied: the claims of discrimination for reasons of national origin; the claim of retaliatory discrimination in the evaluation of grievant's work performance; the claim of a pattern of reporting frivolous allegations of

misconduct as a form of retaliation; and the claim of discriminatory implementation of the Program Statement.

5. Within thirty days of the receipt of the Award, the Agency will submit to the Arbitrator the terms of its proposed Protocol, following the guidelines as defined in the Opinion at page 23 in the section entitled, "What Remedies Should Be Awarded in This Case?" On the same date, the Agency will make available a copy to the Union. The Union will submit its comments on the proposed Protocol to the Arbitrator within thirty days. The parties are urged to meet and confer to determine whether they can reach an agreement on the terms of the Protocol. If necessary, a hearing will be held on the matter. The final version of the Protocol will be transmitted to the parties in the form of an award.

6. The Agency will make the grievant whole for pecuniary losses he experienced as the result of the four hours of pay he was docked for AWOL and the pay lost for the hours he would have worked if his name had not be erased from the overtime list on February 6, 2008.

7. The Union's claim for compensatory damages for mental suffering by the grievant is denied.

8. Union Counsel's petition for attorney's fees is upheld on the ground that the grievant has prevailed with respect to a number of his grievances related to Title VII of the Civil Rights Act. The claimed fees are appropriate in the "interest of justice". 5 USC 5596. The procedures to be followed are set out in 29 CFR 1614.501 (e) (1) (ii) and (e) (2) (i).

9. With respect to the two recommendations at pages 25-26 of the Opinion, the parties will take action which they deem to be appropriate.

10. This is not a final award. The Arbitrator retains jurisdiction of the case to ensure that all instructions in the Opinion and Award are duly implemented.

Opinion and Preliminary Award by:

David M. Helfeld
Arbitrator

Appendix "A"

DR. DAVID M. HELFELD
P.O. BOX 22712 UPR STATION
RIO PIEDRAS, PR 00931
OFF.: 787-764-0000 X-2508
RES.: 787-731-5961 • FAX: 787-287-8884

12-26-08

Tiffany O. Lee, Esq.
LMR Specialist
Federal Bureau of Prisons

Lilliam E. Mendoza Toro, Esq.
Legal Representative, AFGE
MDC, Guaynabo, PR

By Fax and Mail

Re: Case Number FMCS 08-03493

To the Legal Representatives of the Parties:

In my Resolution of November 20, 2008, the January 15, 2009 hearing date in the captioned case was confirmed, "unless there is countervailing superior legal authority which would require an arbitrator to hold his hand until the administrative investigation has been completed." In determining that no countervailing superior legal authority has been presented by the Agency, account has been taken of the following motions and documents:

1. The Agency's motions of November 20 and 28, 2008.
2. The Union's motions of November 25 and December 8, 2008.
3. The Program Statement of the Office of Internal Affairs dealing with procedures for investigating allegations of staff misconduct, No.1210.24, 5/20/2003.
4. The Master Agreement between the Parties.
5. The contents of the "Formal Grievance Form", April 19, 2008

As the arbitrator, my analysis necessarily starts with the Master Agreement. Article 31, Section a, states as its purpose "to provide employees with a fair and expeditious procedure covering all grievances properly grievable". The grievance was filed April 19, 2008 and the arbitrator notified the parties on July 15 that he had been designated to hear the case and the date of the hearing was set for January 15, 2009. The latter date, in my judgment, complies with the Master Agreement's requirement of "expeditious procedure". The only question to be decided is whether the Agency has presented a convincing argument to justify delaying the hearing beyond the date of January 15, 2009.

To: Tiffany O. Lee, Esq + Lilliam E. Mendoza Tow, Esq.

Turning to the Agency's position, it consists of three points: first, "the underlying basis for the instant grievance is under investigation" by the OIA; Second,Program Statement 1210.24(9)9c) provides that "Employees who are interviewed may not discuss the subject matter with individuals other than the employee's representative; and third, employees who discussed such subject matter in an arbitration hearing "could face adverse action, including removal." Points one and two do not stand in the way of the scheduled arbitration hearing. It is the third point as stated by the Agency that does. But there is nothing explicit in the Program Statement that prohibits employees in an arbitration hearing from testifying to matters about which they have previously given testimony in the course of an OIA investigation. In its November 20 motion, the Agency stated mistakenly that the prohibition against discussing included "or testifying", but the latter words were added and are not in the text of the Program Statement. On its face, the only prohibition is against discussing with individuals the subject matter which forms part of an OIA investigation. There is no prohibition against testifying in an arbitration hearing. There is a world of difference between discussions in general which can corrupt the integrity of an investigation and testifying under oath in a hearing in which due process safeguards prevail.

Indeed, if an explicit prohibition against testifying had been included, especially if it was enforced as a legitimate obstacle to holding an arbitration hearing without any time limit, at the discretion of the Agency, it would be open to legal challenge as an arbitrary exercise of power and, as well, as in violation of its contractual obligations under the Master Agreement. But that imaginary horrible is clearly not the case. Rather what we have are two independent systems, two tracks for getting at the truth: OIA's Program Statement and the Master Agreement's arbitration procedures. Both can and should coexist; neither trumps the other; in both testimony is under oath; and the coexistence of both requires a modicum of mutual accommodation. And it should be noted that both explicitly recognize the importance of timeliness and the avoidance of delay. Thus it is that the Master Agreement directs the arbitrator to decide within thirty days after the close of the hearing (Art. 32, Sec.g) and the Program Statement requires all cases "to be tracked to ensure they are resolved promptly (Program Objectives

To: Tiffany O. Lee, Esq. & Jillian E. Torre, Esq.

g). On the factor of timeliness, Section 9c provides: "OIA will be sent a status update every 60 days on local investigations which staff are unable to complete within the sixty day time frame." It is particularly noteworthy that the Agency has failed to explain why it is that after eight months from the inception of OIA's investigation, it still has not rendered its final report.

Finally, and decisively in my judgment, is the Agency's failure to demonstrate that the scheduled hearing date, even though it may cover partially or totally matters being covered under the OIA's investigation, would somehow adversely affect the integrity of that investigation. The contrary seems to me to be the case. The arbitration hearing will produce a record of sworn testimony, subject to cross examination and the documentary evidence which is adjudged to be relevant to the grievance. The hearing record will be available to the OIA investigators to check against their own potential findings and recommendations. Indeed, assuming that the OIA has not rendered a final report by January 15, 2009, the arbitration hearing record may open up additional lines of inquiry for the OIA and, as well, permit its investigators to make a final evaluation of their preliminary findings and recommendations.

Therefore, the parties are instructed to present their respective cases in the hearing to be held January 15, 2009. In accordance with Article 32, Section d-2 of the Master Agreement, "the Employer will determine the location of the arbitration hearing". Notice will be given to the Union's Representative and to the arbitrator, by FAX, at least three days prior to the date of the hearing. As required by Article 32, Section f: "The Union and the Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing."

David M. Helfeld

Resolution Adopted by Arbitrator David M. Helfeld

BP-S176.037 **FORMAL GRIEVANCE FORM** CDFRM
MAY 1994
U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

1. **Grievant(s)** Jorge Rivera	2. **Duty Station:** M.D.C. Guaynabo, Puerto Rico
3. **Representative of Grievance(s)** Attorney to be named	4. **Informal resolution attempted with** Anthony Haynes, Warden

5. **Federal Prison System Directive, Executive Order, Statute violation:** Title VII, 1964 Civil Rights Act , Program Statement .3713.23 Discrimination Retaliation & Complaint Process, Master Agreement, Arbitration Awards FMCS # 01-12760 & 05-05206, Any other applicable rule, regulation or policy

6. **In what way were each of the above violated? Be specific.**
The Agency, by the actions of Anthony Haynes, Warden, continues to violate the final and binding arbitration awards FMCS #01-12760 & 05-5206, the Statute and provisions of the parties' Collective Bargaining Agreement which guarantees Jorge Rivera, Union President, the unconditional right to fair and equitable treatment. The legal right to be free from reprisals and to be free from discrimination based on Union activity and national origin. Specifically, the Agency showed animus toward Jorge Rivera, by authorizing an official administrative inquiry to determine whether disciplinary action is warranted for Unprofessional Conduct on April 2, 2008. The Agency continues to grant Daniel Rivera, Lieutenant, unfettered discretionary authority to supervise the grievant, which allows the Supervisor to continuously taint the disciplinary process by reporting frivolous allegations of misconduct as a form of reprisals. As a result of the Agency's refusal to take immediate and long term remedial and effective measures, Jorge Rivera continues to be discriminated against based on national origin (Puerto Rican) and Union affiliation. Therefore, being the only employee of the Federal Bureau of Prisons required to wear a body alarm for protection from a Correctional Supervisor.

7. **Date(s) of violation(s)**
April 2, 2008 and continuing.

8. **Request remedy (i.e., what you want done)**
Cease and desist order; Attorney and legal fees incurred in the processing and preparation of the grievance and arbitration. The award of equitable relief to include and not be limited to compensatory damages in the form of pecuniary damages. Any other remedy deemed appropriate and necessary by the arbitrator.

9. **Person with whom filed** K. E. Holt	10. **Title** Southeast Regional Director
11. **Signature of recipient** Rebecca Holt	12. **Date signed** RECEIVED APR 23 2008 certified signature receipt

I hereby certify that efforts at informal resolution have been unsuccessful.

13. **Signature of Grievant(s)**	14. **Signature of Representative** Attorney to be named

Record Copy - Agency; Copy - Union Local; Copy - Council of prison Locals; Copy - Grievant
(This form may be replicated via WP) This form replaces BP-
176(37) Dated October 1994

Agency Attachment
A
6 of 13-(7)

Appendix "C"
U-8

From: Jorge Rivera
To: Diaz, Maria T.; Santana, Jose A.; Segarra, Juan
Date: 9/9/2008 7:30 PM
Subject: ISM Concerns:

I request that the following issues be addressed with J. Hernandez, ISO. Mr. Hernández refuses to follow the procedures, rules, regulations and established protocols that are outlined for the ISM Department. Mr. Hernandez has engaged in phantom counts by not submitting accurate count slips while having inmates housed in the R&D area. The officer has also failed to identify inmates who return from court, resulting in delays of the 4:00 PM count. These delays are further compromised when the Officer fails to separate the newly committed inmates from the rest of the population, resulting in escorting inmates to housing units without being properly screened and medically evaluated. In addition, the officer refuses to identify incoming inmates by having the Rear Gate officer escort court returns to the ISM area. As a result of such violation of procedure, all inmates, court returns, special housing unit inmates and newly committed inmates are placed in the same cell. Furthermore, while conducting strip searches, the officer engages in religious prayers with the inmate population. Causing unnecessary risk and security concerns to me in the ISM department. Therefore, I request that these issues be discussed and properly corrected.

Thank you for your attention to this matter.

Appendix "D"
11-13

BP-S191.012
AUG 01

WARNING AND ASSURANCE TO EMPLOYEE
REQUIRED TO PROVIDE INFORMATION CDFRM

U.S. DEPARTMENT OF JUSTICE **FEDERAL BUREAU OF PRISONS**

...is is an official administrative inquiry regarding misconduct or improper performance of official duties.

This inquiry pertains to: Unprofessional Conduct (involving Jesus M. Hernandez)

The purpose of this interview is to obtain information which will assist in the determination of whether administrative action is warranted.

You are going to be asked a number of questions regarding the performance of your official duties.

You have a duty to reply to these questions and agency disciplinary action, including dismissal, may be undertaken if you refuse or fail to reply fully and truthfully.

Neither your answers nor any information or evidence gained by reason of your answers can be used against you in any criminal proceeding, except that if you knowingly and willfully provide false statements or information in your answers, you may be criminally prosecuted for that action. The answers you furnish and information or evidence resulting therefrom may be used in the course of agency disciplinary proceedings which could result in disciplinary action, including dismissal.

If you are a member of the bargaining unit and you believe your rights are being threatened, you may request the presence of a representative. If you desire a representative, no further questioning will take place until your representative is present. However, if your representative is not available within a reasonable period of time, questioning may proceed without a representative being present.

ACKNOWLEDGMENT

I have read and understand my rights and obligations set forth above:

Employee Signature Jorge L. Rivera, Inmate Systems Officer	Date 11-13-08
Signature of Bureau of Prisons Official Conducting Inquiry Clark C. Foreman, Special Investigative Agent	Date 11/13/08

This form may be replicated via WP

This form replaces BP-S194 dated AUG 93

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

Appendix "E"
P.S. 1380.05
August 1, 1995
Attachment J, Page 1

United States Department of Justice
Federal Prisons System
AFFIDAVIT

Commonwealth of Puerto Rico
County of San Juan

I, Jorge Rivera, Inmate System Officer, at MDC Guaynabo, P.R., make the following statement freely and without any promise or assurances:

On February 6, 2008, at approximately 6:00 a.m., I reported to J. Rodriguez, Operations Lieutenant, in order to assist on a scheduled Medical Escorted Trip. Lieutenant Rodriguez informed me that he did not recall observing my name as schedule for the purpose of assisting in the scheduled local Hospital Escort. Lieutenant Rodriguez also mentioned that he had covered the schedule trip with Officer Vidro, Tool Room Officer. Lieutenant Rodriguez also denied erasing my name from the schedule trip and claimed that he was unaware if anyone had done so.

At approximately 6.55 a.m., I entered into the Lieutenants Office and approached the scheduled Local Hospital Escort Trip assignment area. As I observed the remaining scheduled trips for the week, I asked Lieutenant D. Rivera if he had erased my name for the Escort Trip scheduled for Wednesday, February 6, 2008. Lieutenant D. Rivera stood up and said "who the fuck are you to question me about any trips in my fucking office." I immediately attempted to activate my personal radio body alarm and also activated the triple deuces' alarm in order to notify the Control Center. As I exited the Lieutenants Office, Lieutenant J. Rosa entered the area and cleared the alarm.

I then proceeded to inform the Acting Warden of the above mentioned events.

Upon being asked whether I used the "F" word or any other unprofessional language toward Lieutenant Rivera, I responded negative.

I have read the foregoing statement of 4 pages and it is true and correct to the best of my knowledge and belief.

Signed

Subscribed and sworn before me, Efrain Rivera, Special Investigative Agent, under the authority of Section 303 of Title 5, United States Code, this 2 day of April, 2008

Efrain Rivera

Appendix "F"

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

P.S. 1380.05
August 1, 1 995
Attachment J, Page 1

United States Department of Justice
Federal Prisons System
AFFIDAVIT

Commonwealth of Puerto Rico
County of San Juan

I, Daniel Rivera, Lieutenant, at MDC Guaynabo, P.R., make the following statement freely and without any promise or assurances:

On February 6, 2008, at approximately 7:00 a.m., while performing duties as day watch Activities Lieutenant and while in the Lieutenant's Office performing duties, all of the sudden Rivera Jorge, I.S.O., and also Union President, walked in to the Lieutenant's Office and began checking on the medical trips clip board. While checking the clip board he turned around and asked me if I erased his name from the escorted trips. I told Officer Rivera that I did not work with the hospital trips assignments, and only the Operations Lieutenant was the one who assigned staff to the hospital trips escort. Officer Rivera stated, "you are the one who does those things". I informed Officer Rivera once again that I did not deal with medical trips. Officer Rivera stated, " you want to fuck with me, watch this", and pressed the triple deuces on the 7838 extension phone. Officer Rivera then left the office and Lieutenant Rosa came inside the Lieutenant's Office and clear the triple deuces and I explained what has transpired with Officer Rivera Jorge.

By the arbitration decision I am not to supervise Officer Rivera Jorge in anyway. I do not go to Officer Rivera's work area to avoid any contact with him, however Officer Rivera is invading my work area and is provoking me, thus creating a hostile work environment for no reason.

I have been working day watch for the past year to avoid any contact and misinterpretation with Officer Rivera, but he keeps on invading my work area.

I was not unprofessional toward Officer Rivera Jorge, and I did not used "F" words.

I am willing to take a polygraph test regarding any allegations made by Officer Rivera Jorge.

I have read the foregoing statement of 1 pages and it is true and correct to the best of my knowledge and belief.

Signed

Subscribed and sworn before me, Efrain Rivera, Special Investigative Agent, under the authority of Section 303 of Title 5, United States Code, this 2 day of April, 2008.

Efrain Rivera

Agency Attachment D