

Federal Mediation & Conciliation Service

In the Matter of the Arbitration

Between Council of Prison Locals FMCS Case No. 05-05206

American Federation of Government

Employees (AFGE) Local 4052

And

SUPPLEMENTARY FINAL AWARD

United States Department of Justice

Federal Bureau of Prisons

MDC Guaynabo Puerto Rico

(Grievances of Ms. Toro and J. Rivera)

Before: Jerome J. LaPenna, Arbitrator

Appearances: Michael Markiewicz, Advocate for  
Federal Bureau of Prisons, U.S. Dept. of Justice  
Lilliam Mendoza Toro Esq., Attorney for  
AFGE Local 4052, Council of Prison Locals

Dated: 9/07/08

  
Jerome J. LaPenna

This Supplementary Final Opinion and Award is necessitated by the inability of the parties to agree as to the amount of the compensatory damages to be awarded to the two grievants herein, Migdalia Toro and Jorge Rivera and the amount of attorney fees to be paid to the Union herein, AFGE Local 4052 or the grievants Migdalia Toro (Toro) and Jorge Rivera (Rivera) pursuant to an initial Opinion and Award in this case, dated February 6, 2007 by this arbitrator sustaining the grievance herein and awarding compensatory damages and attorneys' fees but allowing the parties to agree, if possible, on the amounts of such damages and fees. The inability to agree on the amounts of such damages and fees required a hearing on those subjects which was held on February 28, 2008 and as stated herein above, necessitating this Supplementary Final Opinion and Award.

The entire said initial Opinion and Award of February 6, 2007 is incorporated herein by reference as if it were fully set forth herein at length.

This Supplementary Opinion and Award will be comprised of a finding as to the amount of compensatory and/or consequential damages, if any, to be awarded to Toro and, in order hereafter, the compensatory damages to be awarded to the grievant Rivera and finally the amount of attorney fees to be awarded to the grievants or the Union.

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Migdalia Toro as the grievant, was awarded compensatory damages in an Opinion and Award by Marcia Greenbaum, issued in 2002. Since the subject grievance of the initial Opinion and Award in this matter involved a virtual continuation of the sexual harassment as to Toro of the case, resulting in the 2002 award which produced a claim of sexual harassment as to Toro and of a hostile workplace environment and retaliation as to both Toro and Jorge Rivera.

The 2007 Award compensatory damages must be determined based upon the physical or mental injuries inflicted upon Toro as a result of the discrimination in the form of the hostile workplace conditions, retaliation and the sexual harassment. We have evidence of such mental and emotional distress injury consisting of the testimony of Toro and evidential exhibits reflecting her forty-four visits to both a psychiatrist, (twenty-three) and a psychologist, (twenty-one), for the mental distress from which she suffered; her testimony that her husband divorced her because of her problems with Lieutenant Daniel Rivera, (Lt. Rivera) which he blamed at least in part on her since she would not let him confront Lt. Rivera regarding the sexual harassment; her testimony that she suffered from a constant fear and terror while on the job with Lt. Rivera as one of her supervisors, contrary to the order of the Opinion and Award of 2002 requiring a ten foot space between

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Lt. Rivera and Toro at all times; and her testimony of her loss of the ability to perform wifely duties and household functions and her sleep deprivation; and collaterally, her claim of physical injuries from her slip and fall on an unmarked wet floor in the Guaynabo facility while she was or may have been consciously occupied with the fear and terror of Lt. Rivera coming into her presence. This aspect of the case will be discussed in the consideration of post-award front pay damages for Toro.

There was no evidence presented by the U.S. Bureau of Prisons, (Agency) directly in opposition to the evidence presented by the Union as to Toro's damages except a general demand for a non-excessive award to Toro and the grievant Rivera for compensatory damages.

There was also significant evidence of the mental and emotional injury to Toro in the form of reports of her psychiatrist and her psychologist that she suffered mental and emotional trauma for the time she worked at Guaynabo MDC with the perpetrator of her sexual harassment and that the results of the damage inflicted and evident away from the facility will be recurring. The report placed no time limit on the continuation of the recurrences. The grievant, Toro was under medication for anxiety and depression apparently for the period of the initial harassment which occurred sometime prior to 2001 and of the hearings resulting in the award of 2002

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and through the last year through at least a part of 2005. Her use of the anxiety medication Paxil was prescribed for her during these years in increasing dosages of from ten milligram to thirty milligrams.

Toro was, at the time of the hearing of 2008, unemployed and receiving some form of Federal disability retirement funds in the amount of about One Thousand Dollars (\$1,000) per month as the result of the permanent injury and disability resulting from her slip and fall. Prior to the disability retirement, she received workers compensation for a protracted period amounting to 75% of her annual pay of \$36,000 or about \$27,000 per year. Her retirement was formally stated to have been voluntary but after working at the facility in a job permitting her physical restrictions, her assignment was terminated and she was required to apply for retirement because the Agency could not find a permanent job allowing for her disability. She has attempted, since her retirement, to be rehired in a job suitable to her limitation and distant from Lt. Rivera with no success.

It must be noted at this time that there will be consideration given to an award to Toro of two distinct and separate forms of compensatory damages as alluded to herein above since Toro alleged and offered evidence that the mental and emotional injuries suffered by her were constant after the

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initial near violent discrimination by sexual harassment in the period of pre 2001 upon which ostensibly a part of the Award of 2002 was based.

Additionally, this continuation and constancy of mental and emotional distress is claimed to have caused Toro to slip and fall in the facility leading to her ultimate permanent disability. Because of this claim, the grievant Toro, through the Union, claims what is sometimes called "front pay", assumedly to distinguish it from the more well known "back pay" which she also claimed and consists of at least in part, the wages she would have received but for the discrimination by sexual harassment and hostile workplace environment permitted and countenanced by the Agency through its agents, servants or employees which placed her in a mental condition ruled by fear and anxiety and near panic so that she could not make a judgment to avoid the hazardous wet spot on the floor of the facility upon which she slipped and fell.

It is persuasively argued by the Union on behalf of the grievant that the front pay damages as well as back pay sought for Toro as a result of the above asserted causal connection is not to be considered as the same type of compensatory damage as those for violations of the Civil Right Act of 1964 involving emotional pain and suffering, inconvenience, mental anguish and distress, loss of enjoyment of life, marital discord and loss and other non-

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pecuniary losses which are limited to a maximum penalty of \$300,000 as set out by the Act 42 USC #1981 a (b) (3), or as constituting any part of that limitation. The Union cites the US Supreme Court Case of Pollard v. E.I. DuPont de Nemours & Company, 00-763 (US) June 4, 2001 532 US 843, 150 L. Ed 2062, 121 S.C. T. 1946 (2001) in support of this position as well as D. Clark Howel v. New Haven Board of Education, US District Court, Connecticut 3.02 cv 736 (JBA) September 8, 2005, 31 NDLR 70, 105 L.R.P. 45192 among others.

With the above distinction as to damages under Title VII, the Civil Rights Act of 1964 well noted, we are faced initially with a determination of the extent of damages to Toro arising out of the mental and emotional distress and other non pecuniary injuries which she sustained as the result of the discrimination practiced upon her in the form of continuing sexual harassment retaliation and continuing maintenance of a hostile workplace environment for at most, eight years 1997 or for at least considerably more than four years from earlier than 2001 to and through some point in 2005 and limited under 42 USC 1981 a (b) (3) to a maximum of \$300,000.00. There is clearly no dispute as to the fact that Toro did suffer such mental and emotional distress and loss. The only dispute is the amount of money damages to be placed upon that damage and loss.

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In order to place a dollar number on the nature and extent of these injuries and losses, the law requires generally that such award not be excessive or in an amount that would shock the conscience (impliedly referring to high awards but of necessity and equity to include awards which are too high or too low) of a court or a reasonable man and that the party or entity making the award or judgment be guided by earlier cases which closely mirror the facts of the case in question and are thus appropriate to the purpose.

The standard imposed upon an award or judgment maker of not too excessive and conscionable is difficult to follow since it is apparently circumscribed by consideration of past case decisions of courts and agencies. It would further appear to be impacted by the number of years during which the discrimination took place and the injuries were sustained and continue and the specific factors of the case including but not limited to the following:

1. The severity and duration of the discriminatory practices;
2. The time period over which the prohibited practices continued;
3. The severity and duration of the injuries;
4. The extent and duration of the intervention of medical services required to treat the injuries sustained;
5. The extent and duration of damage to the personal life of the

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employee;

and 6. The extent of damage to the economic life of the employee and its duration.

The record reflects that the discrimination and its resultant mental and emotional distress commenced in or about 1997 at or shortly after the grievant's hire by the Agency; came to a near violent climax shortly before 2001 by the thrusting of his groin by Lt. Rivera virtually and nearly into the face of Toro; and continued, insofar as this case is concerned, even prior to and after the 2002 Opinion and Award and notwithstanding and in violation of that award through to about November 2005, by the apparently continuing intentional violations of the prohibitions and protective provisions of the 2002 award in what was clearly a discriminatory retaliatory policy of the Agency towards Toro based upon the 2002 award.

There is absolutely no doubt of the severity of both the discriminatory and retaliative actions or inactions of the Agency and of the injuries, harm and loss sustained by Toro. The time period over which Toro was required to avail herself of her psychiatrist's services, about two years and of her psychologist's services, about four years; the number of visits to each of these medical service providers, twenty-three for her psychiatrist and twenty-one for her psychologist; and the reports and status notes as to her

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condition over those periods, absolutely establish the mental and emotional distress she suffered over the period prior to and since the 2002 award.

It is evident from her testimony and from the nature and extent of the psychological and psychiatric treatments and medications provided (Paxil) and its continually increasing dosage over that period that Toro suffered extensively from nervousness, sleep deprivation, anxiety fear and depression among other symptoms of mental distress during the three or four year period preceding and following the 2002 award which reflected the ongoing and continued discrimination of harassment and of being placed in a hostile working environment with its fear, anxiety and panic effects.

Toro testified to and readily established without dispute that the mental and emotional distress she suffered from the discrimination and retaliatory actions and inactions perpetrated or effected by the Agency seriously and detrimentally affected her home life and life outside of the facility because of its severe and continuing course of conduct. The ultimate proof of that conclusion is evidence by the testimony of Toro of the divorce by her husband based completely or in large part upon his misconception of what had transpired between Toro and Lt. Rivera. There is no more revealing effect and evidence of the damage to Toro's private life resulting from the discrimination of the Agency than the divorce resulting in, among

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other negative effects, her raising her three teen or pre-teen children alone without a husband and father and with the resultant emotional and economic loss sustained.

The cases submitted by the parties in support of their requests as to damages, reflect the above noted factors. The Union's cases more readily match the facts of the instant case insofar as those factors appear to be present. They are a class of cases resembling the instant case and involving long term discrimination and infliction of mental and emotional harm; lengthy medical and therapeutic services to allay and prevent more severe damage and harm while supporting a steadfast attempt to continue working in a very hostile environment without any significant efforts at surcease by the Agency; repeated damaging incidents resulting in trauma occasioned in the instant case by the placement by the Agency of the grievant into occasions of anxiety and panic from the initial and continuing cause of the distress the presence of the inflictor of her anguish, Lt. Rivera, and the continuance of his authority over her; the effects of a seemingly endless infliction of pain which in this case, is aggravated by the false hope raised by the initial award of 2002 and its despair occasioned by the repeated violations in the following three or more years without relief from the Agency; and the final and disastrously debilitating end results of the

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discrimination in this case reflected by the divorce undisputedly occurring as a result of the discriminatory acts of the Agency and its agents.

The cases offered by the Agency to guide the arbitrator in his calculation of damages all appear to involve singular or short term acts of discrimination and, in some cases, vague and unspecified injuries.

Needless to say, the Agency's cases reflect much lower damage findings than do the Union's but the combination of both parties case submissions provided a wide view of the amounts of damages not deemed to be excessive or unreasonable. As a result of the consideration of all of the pertinent factors set forth herein as to the extent of damages in this case and a thorough review of the cases provided by the parties for guidance,, this arbitrator finds that the grievant in this case, suffered compensatory damages for mental and emotional distress in the amount of one hundred fifty-six thousand dollars (\$156,000.00). This amount is well within the Three Hundred Thousand Dollar limitation placed upon this type of compensatory damage by provisions of the Civil Right Act of 1964.

The claim of the grievant expressed in testimony for damage consisting of the physical injuries sustained from her fall on a wet floor at the facility must be examined at this juncture.

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Initially, it should be noted that these damages are distinct and different from the compensatory damages attributable to the mental distress upon which the Civil Right Act of 1964 places a monetary limitation of Three Hundred Thousand Dollars (\$300,000) It can be generally classified as consequential damages since it specifically provides for past and future lost income more commonly referred to as back pay and front pay respectively. The grievant seeks back pay for the losses sustained as the result of her inability to work and earn her regular wage and consisting of the difference in monies of the amount of income received from workers compensation benefits and later disability retirement payments and that income which she would have received from the Agency as regular wages and benefits had she not been disabled by the injuries sustained in the fall down incident. Her regular income is said to include her basic wage together with the approximate 11% augmentation for the allowance and her other wage benefits including lost overtime income based upon averages of past overtime work assignments. The back pay would ostensibly cover the period from her injury and placement on workmens compensation benefits of seventy-five percent of her base pay through to the date of her purported voluntary disability retirement after which she receive one thousand dollars per month or an annual disability income of Twelve Thousand Dollars which continued through the date of the hearing in this matter and constituted her only income, according to her testimony. Her claim for front pay calls for payment of her regular employment income and benefits for a future period of twelve years apparently from the date of the hearing in 2008. The twelve year period is based upon the number of years remaining to her having achieved twenty years of employment which would have been her normal working life to retirement entitlement in terms of duration of work time.

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Roughly calculated, these damages would amount to a sum in excess of Four Hundred Thousand Dollars (\$400,000) by the grievant's computation presented in her post hearing brief.

The key to any such back and front pay entitlement would be a determination that the physical injuries suffered from the slip and fall accident of the grievant was the result of the discrimination evidenced by the retaliation and hostile work environment from which she suffered on the date of the accident or to put it into the jargon of personal injury law, whether the discrimination retaliation and hostility was the proximate cause of the accident and the injury.

The only evidence in the case on the subject of causality was the testimony of the grievant. She testified that she was nervous and impliedly suffering from anxiety and panic to an extent that she was impliedly preoccupied with whether she would cross paths with Lt. Rivera during her work and because she was in that state, she wasn't aware of the slippery, wet surface area until she slipped and fell to the floor. There is no other evidence of the cause of her fall. In her report of the incident shortly after its occurrence apparently for reasons of workmens compensation requirements, she merely reported that the cause was, no danger sign placed at the site, warning of a wet floor. She made no reference in the report to her mental or emotional condition as a cause of the fall nor, in fact, any mention at all of

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the condition of her consciousness immediately proceeding or at the time of the slip and fall. Indeed, there is no evidence including the contents of her grievance that she attributed the slip and fall to her mental condition as effected by the discrimination retaliation and hostility prior to her testimony at the hearing.

From the entire case presented by the grievant, the arbitrator finds that there is insufficient evidence that there existed, at the time of the slip and fall, a mental state in the grievant caused directly or indirectly by the Agency through the maintenance of a hostile work place environment which in her consciousness made her unable to register the danger of the wet floor and thus no direct or indirect causal connection between the discrimination retaliation and hostile work place environment and the grievant's physical injuries from the fall. As a consequence, the arbitrator makes no arbitral award of damages for such injuries to the grievant and denies her claim to such damages.

It has been found that the grievant, Jorge Rivera sustained injury in the nature of mental distress as a direct result of discrimination against the said grievant in the form of the several attempts at retaliation by the Agency in the making of false and misleading complaints by Lt. Rivera and other Agency officials and by the belated dismissal of the grievant Rivera's

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complaint of a threat of violent conditions created by Lt. Rivera. The complaints occasioned by Lt. Rivera requested the imposition of severe disciplinary suspensions for a variation of alleged violations including preparing false incident reports and failure to follow instructions. There will be no examination made herein of the alleged facts supporting the complaints but needless to say, they were strongly disputed by grievant Rivera and ultimately were denied by the Warden who effectively dismissed the complaints virtually without comment and refused to impose the proposed discipline on the grievant.

There is also adequate evidence that the grievant's call for a violence threat assessment evaluation was not given adequate or prompt consideration reflecting a discriminatory attitude by the Agency.

Grievant Rivera was the advocate for the grievant Toro and the Union in the earlier case which resulted in the 2002 Arbitration Award favoring Toro and it was argued that the disciplinary complaints and other discriminatory acts against the grievant Rivera were motivated by a strong desire by Lt. Rivera to retaliate against grievant Rivera for successfully trying the earlier arbitration case which found that Lt. Rivera discriminated against grievant Toro by acts of sexual harassment and intimidation.

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The injuries alleged to have been inflicted upon the grievant Rivera as the result of the retaliatory actions of Lt. Rivera and his superior officer associates included depression; anxiety; loss of hair, impairment of husbandly and family duties, damage to reputation as correctional officer and as a Union official and post hearing heart medical problems requiring emergency health professional intervention and hospitalization at least on one occasion in 2008.

The events including and surrounding the issuance of the complaints; their dismissal; and the nature and extent of the mental and physical injuries to the grievant Rivera were not assertively disputed by the Agency and the arbitrator finds that the discrimination by retaliation and the resultant injuries and damages sustained were well established by more than a preponderance of the evidence including considering the posthearing physical heart injury damage allegation.

The arbitrator awards the grievant Rivera damages for mental distress and related physical injury in the amount of Fifteen Thousand Dollars, (\$15,000.00).

As to the claim of grievant Rivera for damages for loss of income due to his outwardly voluntary but essentially forced promotion out of the correction officer class and into a position where there existed no overtime

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income possibilities or shift differentials which occurred as a result of his ongoing and continued fear and anxiety of further retaliatory actions by Lt. Rivera and the superior officers of the facility in support of Lt. Rivera, the arbitrator finds an insufficiency of probative or persuasive evidence that fear and anxiety of continued retaliatory acts by Lt. Rivera was the proximate cause of his application for or his acceptance of the higher paid promotion position although it might be argued that some impetus in the acceptance of the position change by the grievant Rivera might be attributable to a sought after avoidance of future and continued hostility by Lt. Rivera who was not in his line of supervision after the promotion. Thus, the claim for front pay by the grievant Rivera is denied.

The sole remaining issue is the Award of Attorney fees to the Union.

The Attorney of Record has submitted her affidavit of services and value of services to the Arbitrator and to the Agency's counsel. There has been some dispute or opposition raised by the Agency as to the amount of Attorney's fees asserted in the Affidavit by reason of no showing of comparative hourly rates of attorneys in the area. The amount is \$7,100.00 and the Arbitrator finds that amount to be reasonable considering the hourly rates of \$125.00 and \$140.00 to be nominal and reasonable for the nature of

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the specialized service performed in the area of Puerto Rico or any other area of the United States.

As a consequence of the above finding the Arbitrator awards \$7,100.00 as compensation for attorney's fees in this matter to the Union, herein Council of Prisons Local AFGC Local 4052.

The basis for the Award of attorney's fees is the fact that this arbitration process including the hearings and other administrative services, was occasioned and necessitated by the Agency's intentional failure or refusal to comply with the Arbitrator's Award of 2002 by Marcia Greenbaum, Esq., and the fact that the Agency was fully aware or should have known that it could not prevail in the matter as reflected by the evidence and the record in this case. Attorney's fees are awarded in this case in the interest of justice.

It should be noted that the Agency has asserted that the Federal Labor Relations Authority (FLRA) is governed in its appeal jurisdiction as to the grant of attorney's fees by among others, arbitrators, by the provision of the Federal Labor Management and Employee Relations Act and its provision 5 USC Sec. 7701 (g) which places certain conditions on the Award of attorney's fees such as 1) The employee must be the prevailing party; 2) case must be one in which a prohibited personnel practice was engaged in by

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The Arbitrator denies the claim of grievant Jorge Rivera for damages of back pay and front pay alleged to have been occasioned by his promotion out of the Corrections Officer class which allegedly occurred as a result of the discrimination and retaliation practiced upon him through repeated false complaints of employment rules and regulations.

The Arbitrator awards to the grievant Jorge Rivera for out of pocket expenses of Twenty-Five Dollars (\$25.00) for a hospital visit caused by stress of the discrimination and retaliation practiced upon him by the Agency.

The Arbitrator awards attorneys' fees to the Union as the representative of the grievants in this matter the amount of Seven Thousand One Hundred Dollars, (\$7,100.00).

Dated: 9/07/08



Jerome J. LaPenna

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