FEDERAL MEDIATION AND CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION

Between

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL # 501

-and-

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

ARBITRATOR'S OPINION AND AWARD
TIMOTHY SMATHERS TERMINATION GRIEVANCE
FMCS # 2005-51098

This grievance was submitted to binding arbitration pursuant to the terms and conditions of the parties Collective Bargaining Agreement and the regulations of the Federal Mediation and Conciliation Service. Pursuant thereto the parties jointly selected the undersigned, **LAWRENCE I. HAMMER**, to serve as the arbitrator.

The individual grievant, Timothy Smathers, a GS-7 Correctional Officer at the Federal Detention Center in Miami, Florida was represented by the American Federation of Government Employees (hereinafter referred to as "the Union"). The employer, the Federal Bureau of Prisons will henceforth be referred to as "the Agency".

APPEARANCES

FOR THE UNIION

Eric O. Young	President AFGE Local # 501
R. Evans	Vice President AFGE Local # 501
Timothy Smathers	Grievant

FOR THE U.S. DEPT. OF JUSTICE

Daniel B. Ritchey	Labor Relations Specialist
Debora Moss-Lopez	Employee Service Manager

HISTORY

A single days hearing was scheduled for March 16, 2005 and was held at the Federal Detention Center located at 33 N.E. 4th Street in Miami, Florida.

Prior to the initial hearing, the Union submitted subpoenas to me for signature, requiring the attendance of R. E. Holt, the Agency's Southeast Regional Director, Kathy Guargilia the Agency's Southeast Human Resources Manager and R. L. Stiff the Warden of the Miami facility.

In addition, a subpoena for the Agency to produce sundry records and documents pertaining to its investigation of the Grievant and leading to his termination. I signed the submitted subpoenas.

The Agency thereafter submitted a lengthy and detailed brief in opposition to the issuance of the subpoenas. A very lengthy telephone conference call was conducted

involving the representative of the Grievant, the Agency and me on March 9, 2005. Following such conference call, I wrote the representative of the parties a letter stating as follows:

> "Confirming our lengthy conference telephone call of earlier today, it is my determination that the subpoenas issued by me on February 23, 2005 pertaining to personal appearances of R. E. Hold and Kathy Guargilia are hereby to be held in abeyance. Their mandated appearances on March 16, 2005 are hereby rescinded.
>
> The testimony of Mr Hold will either have a new date established or be replaced by arrangements to have him deposed at an acceptable, agreeable time and place. The testimony of Ms. Guargilia will either be similarly carried out or by means of a closed circuit television and telephone hookup. The testimony of Mr. Stiff creates no problem as he, as the Warden, is obviously on the premises and available.
>
> The subpoenas pertaining to the production of sundry records and documents is also to be held in abeyance pending a possible amicable resolution between you as discussed during our conference call."

The first piece of business that unfolded was what the parties termed to be "a pre-hearing motion" pertaining to the Agency's witness list. Such a list, pursuant to Article 32 of the Master Agreement was to be provided seven days prior to the start of the hearing. [1] On such submitted list appeared on the names of the Warden (R. L. Stiff) and the Grievant.

On the afternoon of March 15, 2005 the Agency submitted a revised witness list via FAX to the Union, as well as delivering a hard copy just prior to the commencement of the

[1] Article 32 Section F states: "The Union and the Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing. Revised witness lists can be exchanged between the Union and the Agency up to the day prior to the arbitration."

hearing resulting in the Union's motion to preclude any of the additionally named prospective witnesses from testifying.

Merely because the Union officials were out of their offices on March 15th and thus did not personally or physically receive the FAX revising the Agency's witness list, was found by me not to justify a request to bar their testimony, as there is nothing in the contract specifically referring to or precluding any particular form of communications involving delivery of witness lists.

A second "pre-hearing motion" was made to sequester all witnesses. This would involve sequestering Debora Moss-Lopez, who it was alleged, prepared several pertinent documents. Such motion would leave the Department of Justice's Dan Ritchey without the technical assistance of the Agency's Employee Service Manager, unless her testimony was to be taken out of turn. The Department of Justice agreed to proceed with Ms. Moss-Lopez testifying first, out of turn, at the very inception of testimony presentation.

THE ISSUES [2]

The Issues as Proposed by the Agency

1. Was the discipline given against the Grievant severe or was it not given for progressive discipline?

[2] After a lengthy "off the record" discussion, the parties at TR 12-14 set forth what each deemed the issues to be.

2. Was the discipline given and motivated by racial bias?

The Issues as Proposed by the Union

1. Did the Agency have just and sufficient cause for placing Timothy Smathers, the Grievant, in a reassignment from the period of May 27, 2003 to January 4, 2004 and then from May, 2004 to his removal? If not what should the remedy be?

2. Did the Agency violate the contract by giving Officer Smathers unfair, inequitable, disparaging and discriminatory treatment? If so what shall be the remedy?

3. Did the Agency violate the Collective Bargaining Rights as a result of a prolonged reassignment. If so what shall be the remedy?

4. Did the Agency have just and sufficient cause to remove the employee from employment. If not what shall be the remedy?

After some thirty pages of transcribed discussions pertaining to the above issues, the Agency offered what it termed to be a "Pre-Hearing Argument" specifically "that the Union has failed to file this in a timely manner." In line therewith the Agency proposed that the arbitrator initially determine the arbitrability of the matter, specifically deciding **"Was the grievance timely filed?"**

Much discussion was had by and between Mr. Ritchey and Mr. Young pertaining to the initial incident leading to the ultimate discharge or termination of the Grievant, and the continued endeavors to amicably resolve the matter, with emphasis upon the Agency's investigation.

As much as one would like to separate entirely the question of arbitrability from the merits, such is not possible. To fully comprehend the time sequences one must be aware of the entire sequence of events as same transpired.

The parties agreed that the decision on the arbitrability would be reserved and that time permitting the hearing would proceed on the merits, but with the understanding and agreement that no decision pertaining to the merits of the matter would be made unless the arbitrability question was first affirmatively answered. If timely filed, then and only then, would the merits be addressed. [3]

At the conclusion of the hearing it was agreed by the parties [TR 260-261] that while the transcript would be delivered to me and the parties on or before April 1, 2005, the Agency would have until May 10, 2005 to determine precisely which three business days it would grant the Union representative (Mr Young) to be released from his duties to prepare his post-hearing brief, which, along with the Agency's brief was to be transmitted to the undersigned, postmarked by May 16, 2005.

[3] The parties were in agreement that, though the hearing on the merits would commence that day, same could not be completed in one day, and that while future hearing dates (September 14 and 15, 2005) would be scheduled, the decision on timeliness would be issued before such continuation dates, and would determine the need for such dates.

The arbitrator received a telephone call from the Union's representative on May 16, 2005 at about 9:30 PM and was advised that the Union's brief had been delivered to the post office, but after the last pick up time. As a result, the brief would not be post-marked until May 17th. Without obtaining the consent of the Agency's counsel, I advised the Union that I would accept the brief post-marked May 17th rather than May 16th.

The brief of the Agency, timely post-marked was received by me on May 18th, while the brief of the Union, post-marked May 17th was received on May 20th.

The Agency representative on Monday, May 23rd, by telephone contacted me pointing out the fact that the Union's brief was not timely post-marked. I advised him that I would nevertheless accept such document.

CONTRACTUAL PROVISIONS [4]

ARTICLE 31 – GRIEVANCE PROCEDURE

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.

Section d. Grievances must be filed within forty (40) calendar days of the date of the alleged grievable occurrence ... or be filed within forty (40) calendar days from the date

[4] Only those sections of the Master Agreement pertaining to the Grievance Procedure and Arbitration as being set forth in this award, as such sections are the ones relating to the instant award, namely the timeliness or arbitrability of the grievance. Other sections would undoubtedly apply and will apply and be looked into should it be determined that the hearing on the merits go forward.

the party filing the grievance can reasonably be expected to have become aware of the occurrence. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control. ...

Section e. If a grievance is filed after the applicable deadline, the arbitrator will decide timeliness if raised as a threshold issued.

Section f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant or the Union. ...

1. When filing a grievance the grievance will be filed with the Chief Executive Officer of the institution/facility, if the grievance pertains to the action of an individual for which the Chief Executive Officer of the institution/facility has disciplinary authority over.

2. When filing a grievance against the Chief Executive Officer of an institution/facility ... the grievance will be filed with the appropriate Regional Director.

Section g. After a formal grievance is filed, the party receiving the grievance will have thirty (30) calendar days to respond to the grievance.

1. If the final response is not satisfactory to the grieving party and that party desires to proceed to arbitration, the grieving party may submit the grievance to arbitration under Article 32 of the Agreement within thirty (30) calendar days from the receipt of the final response .....

Section h. Unless as provided in number two (2) below, the deciding official's decision on disciplinary/adverse actions will be considered as the final response in the grievance procedure. The parties are then free to contest the action in one (1) of two (2) ways:

1. by going directly to arbitration if the grieving party agrees that the sole issue to be decided by the arbitrator is, "Was the disciplinary/adverse action taken for just and sufficient cause, or if not, what shall be the remedy?" or

2. through the conventional grievance procedures outlined in Article 31 and 32, where the grieving party wishes to have the arbitrator decide other issues.

ARTICLE 32 – ARBITRATION

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission

and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations, and remedy requested in the written grievance may be modified only by mutual agreement.

Section f. The Union and Agency will exchange initial witness lists no later than seven (7) days prior to the arbitration hearing. Revised witness lists can be exchanged between the Union and the Agency up to the day prior to the arbitration.

Section g. The arbitrator shall be requested to render a decision as quickly as possible, but in any event no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties mutually agree to extend the time limit ....

Section h. The arbitrator's award shall be binding on the parties. However, either party, through its headquarters may file the exceptions to an award as allowed by the Statute.

The arbitrator shall have no power to add to or subtract from, disregard, alter, or modify any of the terms of [1] this Agreement or [2] published Federal Bureau of Prisons policies and regulations.

BACKGROUND

The Grievant, Timothy Smathers, was a GS-7 Correctional Officer at the Federal Detention Center in Miami, Florida.

On May 7, 2004 the Grievant was notified that he would be terminated subject to the Warden's concurrence, no sooner than thirty (30) days thereafter because during April and May 2003 he allowed inmates to make unauthorized telephone calls from the Correctional Counselors unmonitored telephone. The Grievant acknowledged on January 15, 2004 that he did permit such calls to be made, but only because the inmates involved contended they were legal calls, not social calls. These calls were at

no charge to the inmates. This, the Agency contended, constituted a [1] breach of security and [2] the giving a thing of value to an inmate. [5]

On June 9, 2004 the Grievant responded stating "I am aware now, I made a mistake ..." and sought to explain how the situation developed, while assuring the Warden "I was not compromised by any inmate ... I want to make it clear and without ambiguity that I never engaged in any illegal activities with any of these inmates ...."

On July 23, 2004 the Warden decided to terminate the Grievant's employment because of his "breach of security". No reference therein was made to the allegation or charge that his actions constituted "the giving a thing of value to an inmate".

On August 13, 2004, the Agency through the Warden supplemented its prior termination letter writing "on July 23, 2004 you were issued a notice which removed you from your position of Correctional Officer ... for Breach of Security. The charge 'Giving anything of value to an inmate' was inadvertently omitted. This letter is to notify you that both charges outlined in the proposal letter were sustained and considered in your removal ..."

[5] The Inmate Telephone Data Base [ITBD] shows all telephone numbers submitted by inmates and subsequently approved of, so that inmates can have contact with their families and friends. Such calls are generally made from a Housing Unit Telephone and are monitored.

On the Grievant's shift on the dates in question, some 116 calls were made which were identified under the ITDB while an additional 172 calls were made by inmates from the Counselor's Office. Calls made from the Counselors' Office are normally unmonitored.

On August 10, 2004 the Union submitted as per the Master Agreement "an informal resolution memorandum" to the Warden in an attempt to obtain the Grievant's reinstatement. This was unsuccessful, and on August 16, 2004 the Warden denied the proposed resolution.

The Union decided then to grieve the Warden's determination and filed, on September 6, 2004 a formal grievance with the Regional Director, contending "discrimination and disparaging treatment". [6]

On October 5, 2004 an unsatisfactory (to the Union) response was received, resulting in the Union's seeking on November 3, 2004, arbitration.

At the arbitration hearing, as indicated earlier herein, the Agency raised the question as to whether the grievance itself had been filed in a timely manner. [7]

POSITIONS AND ARGUMENTS

The Agency contended that pursuant to Article 31 Section D any grievance must be filed within forty (40) calendar days of the date on which the alleged grievable occurrence took place, and that the filing of the grievance with the Regional Director on September 7, 2004, the date on which the grievance was actually received by the

[6] The filing was with the Regional Director because the grievance was against the facility's Chief Executive Officer, the Warden.
[7] The instant grievance against the Chief Executive of the facility (the Warden) was filed by the Grievant under Article 31 Section F-2 with the Regional Director on September 6, 2004.

Agency, was more than the forty (40) calendar days from the July 23, 2004 termination date.

The Agency argued that the date of the alleged grievable occurrence occurred on July 23, 2004 and not on July 29, 2004 as contended by the Union that being the date on which it, the Union, received a written communication from the Agency advising it of the employee's discharge. Such contention was, by the Agency, based upon the Grievant himself on July 23, 2004 acknowledging in writing his receipt of the termination letter, which stated his termination would be effective at midnight that very same day.

The Grievant and the Union contended that the grievance was filed on September 6 and not on September 7. The Union argued that the time to file a grievance begins to run when it, the Union, gets actual word of an employee's discharge in this case July 29, 2004 and not when the individual employee himself is advised of his discharge. The Agency of course did not agree.

The Union acknowledged that Article 31 of the Master Agreement stipulates that a grievance must be filed within forty (40) calendar days of the occurrence of the grievable event but that certain exceptions or exclusions to the forty day limitation are set forth. Specifically, that where a particular statute provides for a longer than contractual specified filing time, the statutory period would control.

In this vein, the Union argued that under Equal Employment Opportunity complaints there exists a forty-five (45) day filing period and that the Agency's charges against the Grievant involves disparate treatment being imposed for allegedly like offenses, one by a black employee (the Grievant) and in another alleged case by a white employee, certainly comes under EEO guidelines, even though it, the Union, elected to proceed under the negotiated grievance procedure rather than proceeding directly under EEO provisions.

It was argued by the Grievant that based upon his never having been previously disciplined for any offense, a fact not disputed by the Agency, that the Agency's commitment to "progressive discipline" was ignored when he was terminated for a first offense.

The Union, while not agreeing that its filing of the grievance was late, argued that even if it was late, questions of timeliness are not considered where contractual progressive discipline benefits have been violated by an employer.

The Union argued that the grievance could not be ruled solely on whether "just and sufficient cause" for discipline existed, but had to have the sundry other underlying acts considered, specifically those set forth under the "Issues" indicated on page 5 as reason for its processing this matter under Section H-2 of the Master Agreement rather than under Section H-1 thereof.

DISCUSSION AND OPINION

"Was the grievance timely filed?" is the only issued that will be determined herein, even though the parties have already commenced their presentations on the merits of the matter. [8]

There is no dispute over the fact that the Grievant, while assigned as a Unit Officer on April 18-19, 2003 and May 9-10, 2003 as well as on May 17, 2003 permitted different inmates to make telephone calls from a staff telephone and at no cost to the inmate and without authorization resulting in his being charged with "breach of security" on May 7, 2004 and "giving something of value to an inmate".

Equally undisputed was the fact that the Agency notified the Grievant of his termination for "breach of security" on July 23, 2004 (Agency Exhibit H). The Grievant acknowledged receipt of same which included a statement to the effect that his discharge or termination would become effective that very same day at midnight.

It is this document dated July 23, 2004 that the Agency has used to compute the forty day period of time during which the Grievant could seek to file a grievance. There exists no question but that Article 31 Section D of the Master Agreement standing alone requires that a grievance is to be filed within forty calendar day of the date on which the alleged grievable offence occurred.

[8] The first witness for the Union was Debora Moss-Lopez the Agency's Human Resource Manager (TR-142-256].

While Article 31 Section D very clearly states that a grievance must be filed "within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence" there is no justification to delay computing the forty day filing limitation merely because the Union did not immediately learn of the employee's termination. An employee's failure to advise his Union of discipline being imposed, or of a grievable event occurring, does not extend the time for either the Grievant or the Union to file a grievance. The grieving party herein is Timothy Smathers, not his Union, even though the Union physically filed the grievance. It was filed on behalf of Mr. Smathers. The grievance, and time limitations for its filing, begins to toll when the Grievant learns of the occurrence giving rise to the grievance and not when his attorney or union learns of the happening.

In the instant matter the fortieth day for a timely grievance filing would have been on September 1, 2004, if other contractual provisions did not indicate otherwise which would make a filing on September 6 or 7 untimely.

One cannot, however, overlook or ignore another provision set forth within Article 31 of the Master Agreement specifically Section E which contains a statement to the effect that "if a grievance is filed after the applicable deadline the arbitrator will decide timeliness if raised as a threshold issue".

Obviously for such clause to have some definitive meaning, the parties must have envisioned some instances wherein a strict non-compliance with the forty day limitation could exist.

While the termination letter was received on July 23, 2004 one cannot, however, totally ignore the Agency's letter of August 13, 2004 (Agency Exhibit E) making reference to the July 23 termination letter and stating that while the charge "giving anything of value to an inmate" has been omitted therefrom, and only "breach of security" being indicated as grounds for dismissal, both charges "were sustained and considered in your removal".

When being advised of his termination, and when considering his avenues of appeal, shouldn't the Grievant have been made aware of all of the allegations or charges he had been found guilty of? Obviously he knew only that he had been terminated solely for "breach of security" but not for the "giving of something of value to an inmate".

Under "breach of security" only the Grievant in the current post 9/11 era wouldn't feel confident of filing a grievance under only a single issue, namely "was there sufficient and just cause to discipline the Grievant or if not, what shall the remedy be?" The facts behind the security breach could possibly mitigate the result. This, in fact, is what the Union/Grievant endeavored to do unsuccessfully in its appeals between the date of discharge and the actual filing of the grievance.

Undisputed was the contention of the Union that under EEO cases a grievant would have forty-five days in which to file a complaint while Title VII of the Civil Rights Act of 1964 provides for a 180 day filing period for a charge involving an alleged discrimination against an employee. The Master Agreement incorporates Federal law under its Article 3 Section B which states: "in the administration of all matters covered by this Agreement, Agency officials, Union officials and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect".

Title VII of the Civil Rights Act of 1964 provides for a 180 day filing period, and the EEO allows for a forty-five day filing period for claims involving an employer's alleged discrimination against an employee. Both take precedence over the Master Agreement's forty day limitation. Thus, under the EEO, the Grievant's filing would extend for five additional days to September 6, 2004 and even further into January 2005 under an alleged Civil Rights Act violation.

The argument offered by the Grievant that though he acknowledged receipt of his termination letter on Friday, June 23, 2004 which set forth the date and time of his discharge, same should not be effective until Monday June 26. He pointed to the fact that he was not scheduled to work on June 24 or 25 and that under the Party's "Standard Schedule of Disciplinary Offenses and Penalties" which states ".... all disciplinary suspensions are to begin on the first work day of the employee's next

regularly scheduled work week ..." his penalty could not start as of June 23rd. This is pure nonsense.

Since when is a termination from employment, a discharge or a severance synonymous with a suspension? Under the latter, one still has a job. Under the former he no longer has a job to return to.

As the original forty day filing period would expire on September 1, 2004 the additional five days called for under the EEO's forty-five day filing period, would validate and make timely a grievance filing through September 6, 2004.

Does the fact that the Union filed its grievance by FAX, and only an hour or two before midnight, certainly long after the close of normal business hours, affect the validity or timeliness of the filing? There are numerous arbitration determinations and court decisions that the manner of notification is immaterial; that a FAX or EMAIL transmittal is valid even if sent and received beyond normal business hours.

NOW THEREFORE based upon all of the testimony, evidence and arguments offered pertaining solely to the question of arbitrability and the timeliness of the grievance, based upon the reasoning and rationale set forth herein, I make the following **AWARD**:

1. That the grievance was filed in a timely manner and is arbitrable.

2. That the hearing heretofore scheduled for September 14 and 15, 2005 for the determination of this grievance "on the merits" go forward.

Dated: Boynton Beach, Florida
June 1, 2005

LAWRENCE I.HAMMER

State of Florida)
SS:
Palm Beach County)

On the 1st day of June, 2005, before me came LAWRENCE I. HAMMER to me known and known to me to be the person who executed the foregoing arbitration award and he duly acknowledged to me that the executed the same.

NOTARY PUBLIC STATE OF FLORIDA
OFFICIAL NOTARY SEAL
SANDRA HAMMER
COMMISSION NUMBER
DD111608
MY COMMISSION EXPIRES
MAY 4,2006