FEDERAL MEDIATION AND CONCILIATION SERVICE
VOLUNTARY LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION

Between

AFGE, LOCAL #3690
Vs.
The Department of Justice,
Federal Bureau of Prisons
Federal Corrections Institution (Miami)

ARBITRATOR'S OPINION AND AWARD

MARVELL BURGESS SUSPENSION GREIVANCE
FMCS#09-00543

The Union submitted a request for attorneys fees and expenses allegedly due on this matter heard as FMCS Case # 09-00543 (Marvel Burgess, Grievant), a decision on which was rendered by me under date of December 15, 2011, and in said award, denied the attorneys' fees requested by the grievant.

After an appeal to the Federal Labor Relations Authority (FLRA) the Union request for attorneys' fees and reimbursement of expenses was made as a motion timely presented.

After a considerable extension of time given to the Agency, due solely by the attorney for the Agency suffering severe eye injury, an extension for her time to reply was granted to mid-January 2013. Said response was received by me on January 16, 2013.

There is no need to go into minute details of the hearing on the subject action, but some aspects of same will have to be commented upon.

The Union seeks $31,109.00 in attorney fees AND $2,338.00 in expenses incurred (and paid), for a total of $33,447.55.

The original suspension imposed upon the Grievant by the Agency called for 14 days, but were then reduced by the Agency to 7 days.

The Arbitration Award set aside the suspension in its totality because same was deemed to be untimely and in violation of the parties Master Agreement, which stated that the parties "endorse the concept of timely disposition of investigations and discipline....." and a further local agreement setting forth a 120 day limitation.

The Union agreed that attorney's fees and expenses are accordingly warranted since the extensive lapse of time involved would preclude the sustaining of the suspension.

The Back Pay Act, under which the instant notion was made, allows an employee to receive retroactive attorney's fees.

Counsel seeks fees for all monies spent on the matter between June 2, 2010 and May 16, 2011 at the rate of $225.00 per hour, and at the rate of $285.00 per hour for the period between June 3, 2011 and September 6, 2011. The petitioner increased the

hourly rate to $317.50 per hour from October 5, 2011 through April 18, 2012 and then again an increase to $355.00 per hour for all hours from October 1, 2012 forward.

The Union contended that the hourly rate represented "the market rate" for attorney's fees in the area of Washington, DC, and that such sums represent what other law firms in the DC area charge for similar services.

The Agency contended that the Grievant actually earned more wages during the period of time in question, then he would have earned had he never been reprimanded or disciplined, and that any loss of wages was not as a result of a prolonged investigation period or the "cease and desist order" OR the time it took for it (the Agency) to implement discipline.

The Agency argued that the Award in granting back pay, corrected any and all losses that may have been suffered by the Grievant.

It was further argued that the request for an increase neither warranted, nor reasonable, as there never was any question but that the alleged incident actually occurred.

That the time expended in the Union's attempt to show that the incident (throwing of the vest) never happened, was a pure waste of time, and never should have been allowed to go forward.

To this consideration, one can only comment that an accused wrong-doer must be allowed to present his or her defense in any manner that he or she deems to be within reason, necessary and proper. The integrity of ones defense should not be questioned. There is nothing wrong in the Grievant or the Union from wanting to start its defense at the beginning, whether the Agency thought rehashing arguments and positions taken under earlier proceedings was necessary or not.

In short, there is nothing wrong in the Union starting its defense in arbitration from the beginning, i.e. whether the conduct actually occurred the time involved the first two days of hearings cannot, for purposes of billing time, be excluded from consideration.

Can one really believe that it would, or should, take the Agency, or any complainant, a two year of period of time to investigate what occurred?

Whether the Master Agreement contains no specific time limitation in which an investigation should be completed, or note, the local agreement between the parties stated to the contrary and must be given careful consideration the time limit was specific.

On October 31, 2006, only days before the incident in question, the Agency issued a directive that stated "for clarification one and two allegations local investigations should be completed and the investigation packet be forwarded to the OIA within 120 calendar days of the dates a local investigation was authorized by the OIA."

The incident in this matter occurred on November 7, 2006. On the same date prison officials issued a "cease and desist" order against the Grievant. The Agency commenced its investigation on November 15, 2006. The decision to impose a 14 day suspension on the Grievant was handed down on June 26, 2008.

Negotiations thereafter ensued, resulting on November 10, 2008, at which time the Warden eliminating the profanity portion of charges against the Grievant, and reduced the suspension to seven days.

Certainly, the mutually sought objectives the October 26, 2006 local directive cannot, nor should they be totally ignored. In setting forth a period of 120 days for the completion of an investigating report, the local parties must have believed that four months was a sufficient time for the parties to complete any investigation.

No matter how one looks at the overall time, in excess of 730 days, is more than a mere violation.

One cannot ignore the fact that instead of having his work locale and shift be restricted, and not be able to work in the same area as his accuser, for 730 days, instead of 120 days, was anything but "reasonable."

If it were not for the October 26, 2006 Agency directive, the position advanced herein by the Agency would have merit and be sustained. But one cannot hold that such directive

is meaningless. When persons use specific words in an agreement, hey are deemed to have a specific meaning and are meant to be adhered to. Words are not used as mere space fillers.

It is interesting to note that the Union, in seeking attorney's fees, at several different hourly rates, mainly from $275.00 to $355.00 per hour, depending upon when, time wise the hours were incurred as the year moved on, the hourly rate increased.

While the Agency made no specific objection to such calculation, same appears too excessive.

When one hires an attorney, or other workmen, at an hourly rate, unless same specifically sets forth in increasing or escalating rate the rate is deemed to be constant. Accordingly the hourly rate to be paid to the Union attorney shall be at the rate of **$225.00 per hour.**

As no specific objection was made for "hours billed" (except as mentioned involving the first two days of hearings) the number of billable hours will be left as submitted.

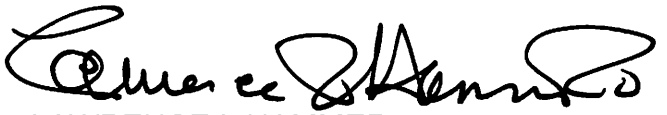
Likewise, as no specific objections to detailed cost of out of packet expenses were raised, they too should be left in tact.

This all boils down to the Agency dragging its feet in moving the grievance to completion. If the shoe had been on the other foot and the Union had dragged its enforcement of an alleged violation, the Agency would have asked to protect its duly negotiated and agreed upon procedure. SO BE IT!

While attorney's fees are generally awarded if a party "prevails" entirely in the proceedings, common sense and justification simply warrants a deviation there from.

IT IS SO ORDERED THIS 27TH DAY OF FEBRUARY 2013.

Respectfully submitted,



LAWRENCE I. HAMMER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MAR 4 2013
GENERAL COUNSEL