

IN THE MATTER OF ARBITRATION

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American Federation of Government  
Employees, Council of Prisons, Local 171  
AFL-CIO, El Reno, Oklahoma )

Union, )

and )

The U.S. Department of Justice, )  
Federal Bureau of Prisons, )  
Federal Correctional Institution El Reno, )  
El Reno, Oklahoma )

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Employer

Before

Gail P. Anderson  
Arbitrator

FMCS No. 05-58776

Dated this 23<sup>rd</sup>. day of January, 2007

By 

Gail P. Anderson

## **Statement of the Case**

The Arbitration hearing was held October 24, 2006 in the Federal Correctional Institution, El Reno Oklahoma in accordance with the provisions of Article 32, Arbitration of the Master Agreement dated March 9, 1998 through March 8, 2001 between the parties.

The Union filed the grievance on July 76, 2005 asserting among other things that the Agency had failed to follow the Agreement as related to processing grievances. Failing to resolve the grievance, the Union requested arbitration.

Both parties appeared and were competently represented, had opportunity to testify, to examine and cross witnesses present, and to present relevant evidence in support of their respective positions.

At the conclusion of the hearing, the parties indicated their desire to file post hearing briefs. The undersigned subsequently received the briefs and they were duly considered in reaching a decision in the matter.

## **PREAMBLE**

The Federal Bureau of Prisons acknowledges that the participation of its employees in providing input into the development of personnel policies, practices, and procedures which affect conditions of employment, and their assistance in the implementation of policies, practices, and procedures contribute to the effective operation of Bureau facilities. The Bureau of Prisons will develop and maintain constructive and cooperative relationships with the employees, through their exclusive representative, where applicable, the Council of Prison Locals and the American Federation of Government Employees. The parties respect the rights granted to Management, employees, and the Council of Prison Locals by the Civil Service Reform Act of 1978, as amended.

The parties recognize that efficient and effective service is a paramount requirement and that public interest requires the continual development and implementation of modern and progressive work practices to facilitate improved employee performance and efficiency.

Moreover, the parties recognize that the administration of an agreement depends on a good relationship. This relationship must be built on ideals of mutual respect, trust, and commitment to the mission and the employees who carry it out. Therefore, the Federal Bureau of Prisons and the Federal Prisons Industries, Inc., hereinafter referred to as "the Employer" or the "Agency," and the Council of Prison Locals and the American Federation of Government Employees, hereinafter referred to as "the Union" or "exclusive representative," do hereby agree too:

- ( A ) focus on problems and ways to deal with them;

- ( B ) recognize the needs of the other party;
- ( C ) Consider collective bargaining as an opportunity to improve the relationship between the Agency and the Union; and
- ( D ) recognize the employees are the most valuable resource of the Agency, and are encouraged and shall be reasonably assisted, to develop their potential as Bureau of Prison employees to the fullest extent practicable.

This Agreement and such supplementary agreements and memorandums of understanding by the parties as may be agreed upon hereunder from time to time, together constitute a collective agreement between the Agency and the Union.

### **ARTICLE 1 - RECOGNITION**

Section a. The Union is recognized as the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71

### **ARTICLE 3 - GOVERNING REGULATIONS**

Section a. Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.

1. Local supplemental agreements will take precedence over any Agency issuance derived or generated at the local level.

### **ARTICLE 5 - RIGHTS OF THE EMPLOYER**

Section a. Subject to Section b. of this article, nothing in this section shall affect the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:

1. to determine the mission, budget, organization, numbers of employees, and internal security practices of the Agency; and
2. In accordance with applicable laws:
  - a. to hire, assign, direct, layoff, and retain employees in the Agency, or to suspend, remove, reduce in grade or pay, or take any disciplinary action against such employees;

- b. to assign work, to make determinations with respect to contracting out, and to determine the personnel by which the Agency operations shall be conducted;
- c. with respect to filling positions, to make selections for appointment from:
  - (1) among properly ranked and certified candidates for promotion; or
  - (2) any other appropriate source
- d. to take whatever actions may be necessary to carry out the Agency mission during emergencies.

Section b. Nothing in this section shall preclude any agency and any labor organization from negotiating:

- 1. at the election of th Agency, on the numbers, types, and grades of employees or positions assigned to any organizational sub-division, work project, or tour of duty, or the technology, methods, and means of performing work;
- 2. procedures which Management officials of the Agency will observe in exercising any authority under this Agreement.
- 3. appropriate arrangements for employees adversely affected by the exercise and any authority under this section by such Management officials.

### **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 f. Formal grievances must be filed on Bureau of Prisons "Formal Grievance" forms and must be signed by the grievant and the Union. The local Union President is responsible for estimating the number of forms needed and informing the local HRM in a timely manner of this number. The HRM, through the Employer's forms ordering procedures, will ensure that sufficient numbers of forms are ordered and provided the Union. Sufficient time must be allowed for the ordering and shipping of these forms.

- 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, or when filing a grievance against the actions of any manager or supervisor who is not employed at the grievant's institution/facility, the grievance will be filed with the appropriate Regional Director.

Section f. 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 arbitration.

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

The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of:

1. this Agreement; or
2. published Federal Bureau of Prison policies and regulations.

#### **ARTICLE 36- HUMAN RESOURCE MANAGEMENT.**

The Union and the Employer endorse the philosophy that people are the most valuable resource of the Federal Bureau of Prisons. We believe that every reasonable consideration must be made by the Union and the Employer to fulfill the mission of the organization.

This will be achieved in a manner that fosters good communication among all staff, emphasizing concern and sensitivity in working relationships. Respect for the individual will be utmost, whether in the daily routine, or during extraordinary conditions. In a spirit of mutual cooperation, the Union and the Employer commit to these principles.

#### **UNION'S POSITION**

The Union's argument revolves around and is centered on the argument that the Warden violated the Agreement when he refused to meet with the Union in an effort to informally resolve issues raised by the grievant including specifically one of the issues, being the Assistant Warden's refusal to meet with the grievant to discuss various issues. The Union contends that it made numerous and repeated attempts to first meet with the Associate Warden who allegedly refused to meet with the grievant and further that the Associate Warden did not convey the totality of the grievance subjects to the Warden. The Union further contends that it attempted to contact the

Warden by way of telephone, e-mail and fax to his office in an attempt to schedule a meeting to discuss the issues. The Warden refused to meet in an effort to try to informally resolve the issues and referred the request for a meeting back to the Associate Warden who was one of the subjects of the grievance the union was attempting to discuss and resolve informally with the Warden. The Union contends, in this case, that the Warden's refusal to meet was a violation of Article 31- Grievance Procedure, Section b. of the Agreement.

The Union also contends that it had no choice but to file the formal grievance at the Regional level due to the Warden's violation of the agreement and further that it is entitled, by the Agreement, to file the grievance at the regional level as provided in Article 31, Section f (2).

In addition, the Union argues that the Agency violated the Agreement when it refused to allow the grievant to exercise his right to Official Time for pay to process complaint which violates Article 11, Official Time, various sections of Article 6, and in addition, further deprived him of his rights under Article 7 as a representative of the Union.

Finally, the Union raised the objection, during the hearing, that an Agency employee and proposed witness who had signed the Agency's final answer to the grievance, whom the Union had advised the Agency would testify for the Union, was not present in the hearing. As result, the Union claims that the Agency had deprived the Union of the opportunity to examine the employee as a witness regarding the reasons the grievance was finally denied.

In concluding its arguments the Union asks that the Arbitrator rule that the Agency be required to provide:

1. A posting stating the violation for no less than sixty (60) days.
2. Union training on the Master Agreement and 5 USC for the Warden and A/W, (Associate Warden)
3. Written apology to the Union from the Warden and A/W (Associate Warden)
4. Back pay and attorney's fees
5. Anything else the Arbitrator deems appropriate.

#### **AGENCY'S POSITION**

The Agency argues in its own words that "The grievance is about the fact that the Associate Warden would not meet with the grievant and the Warden would not meet with the grievant to cover the fact that the Associate Warden would not meet with the grievant."

The Agency argues that the Warden did not violate Article 31 of the Agreement because he had been informed that the grievant had not spoken with the Associate Warden regarding the issues and it was his opinion that the Associate Warden and the Union needed to discuss the issues and

make every effort to informally resolve the matter.

In addition, the Agency argues that the Warden was “under the impression” that his referral of the grievant to the Associate Warden was appropriate because he understood the Associate Warden was ready and willing to discuss any of the issues the grievant had raised including the Unit Manager’s denial of the grievant’s request for Official Time as evidenced by an email from the Associate Warden to the grievant dated May 19, 2005. The email provided that the Associate Warden “would like to get together” and discuss the issues raised by the grievant. The email was “unfortunately” retracted prior to the grievant opening the email and further communications was not attempted by the grievant. The Agency suggests that it had done everything the Agency could to resolve the grievance at the lowest possible level, the Associate Warden level, and that it had not violated Article 31, section b. of the Agreement.

The Agency argues that the Agency was not required to notify employees of the Agency to testify for the Union, but that the responsibility to notify witnesses under such conditions was the responsibility of the Union.

The Agency argues that there was no evidence presented by the Union that the Agency had violated Article 3, Sections (a) or (b). They also contend that the grievant’s request to meet with the Warden was not met with restraint, harassment, intimidation, reprisal, or any coercion against the grievant.

The Agency argues that Article 7, Section (a) (b) and (c) was not violated since no evidence was presented at the hearing to prove any violation of the Article. The Agency further argues without contradiction, that the Union failed to provide any evidence that the Agency had violated any section of Article 11 and because of all of the above the grievance should be denied in its entirety.

## **DISCUSSION**

The Union acknowledged in its testimony that it did not “have a grievance” if the Warden had simply been willing to meet with the grievant to try to informally resolve the grievance. In this case, the Arbitrator believes the Warden showed good faith when he referred the grievance back to the Associate Warden believing that the Associate Warden had been attempting to meet with the grievant in an attempt to resolve the issues. The Warden testified that he believed that the Associate Warden was the “lowest appropriate level” to resolve the issues. The Agreement does not define the meaning of “lowest appropriate level”

However, the Arbitrator also believes, based on the testimony in the hearing, that the Warden made that decision without full knowledge of the particulars or criticalness of the grievance. The Warden testified that he was not aware that the Associate Warden was “part of the problem” that the union wanted to discuss directly with him until the formal grievance was received. The Warden testified that he was simply informed that the reason the grievant wanted to meet with the Warden was that he “wasn’t getting a favorable response” from the Associate Warden.

However, the evidence submitted by the Union detailing the communications with the Warden's office clearly highlights that among the issues the grievant wanted to discuss with the Warden was the Associate Warden. The Warden testified to the magnitude of correspondence he receives daily. He further testified that his assistant usually reviews and forwards the vast majority of non-critical correspondence to an appropriate subordinate to proper handling. As result, the Warden must rely on his subordinates to communicate with him fully on issues that are critical and those that require his personal attention. The grievant had already attempted in various ways to communicate that critical fact to the Warden

Following the Warden's refusal to meet with the Union, the Union testified that the only pathway they were left with to resolution of the grievance was arbitration. As a result of the Warden's refusal to meet they filed a request for arbitration with the Regional Director in accordance with the provisions of the Agreement. The grievance was answered by a regional employee who the Union requested to appear at the hearing. The employee did not appear as requested and did not testify. Although, the employee did not appear as requested by the Union, the Union did not ask the arbitrator to issue a subpoena nor did they request a recess until the employee could appear. It is unfortunate that the employee did not appear because the absent employee's testimony could have shed additional light of the facts surrounding the denial of the grievance that may have influenced the decision and unfortunately the Arbitrator was deprived of that testimony. Regardless of the absence of subpoena power by the arbitrator, the parties are usually willing to and provide both data and testimony relevant to the issue. That did not happen in this case.

Collective bargaining is not merely the negotiation of new agreement or renegotiation of an existing agreement. Some arbitrators have referred to the grievance machinery in the written agreement as the "lifeblood" of the agreement or relationship. How the parties process grievances reflects the direction and quality of the relationship an employer has with the union representing its employees. The process is not nearly as important as the attitude the parties have toward the grievance process which results in either its success or failure to help resolve legitimate disagreement or misunderstandings. When the process breaks down, or one or both parties do not exercise good faith, the process fails and grievances become magnified and more difficult to resolve. Communication between the parties is critical to the success of a grievance process and is key in determining whether or not the process is working.

The Agreement provides that the Arbitrator has no power to add to, subtract from, disregard, alter, or modify any terms of the Agreement or published policies and practices of the Federal Bureau of Prisons. Thus, the arbitrator has no authority to substitute his judgement for either party in this matter. Because of this limitation, coupled with the lack of testimony, the Arbitrator has no basis for sustaining the majority of the grievant's claims. The grievant himself testified that the grievance was without merit had the Warden simply met with him to try to resolve the issues.

However, the Arbitrator is convinced that the Agency did not follow the provisions of the Article 31, Grievance Procedure, section b. when the Warden refused to meet with the grievant and Union, regardless of the information provided him by his subordinates, and attempt to



informally resolve the grievance with the grievant. The Arbitrator is not convinced that a reasonable and concerted effort was extended by the Warden when he refused to meet and attempt informal resolution of the grievance. His refusal to meet with the grievant presented the union with one of two choices. The Union could either drop the grievance or proceed with a formal grievance to the Regional office. They chose the later.

After reviewing the arguments and testimony in extensive detail the Arbitrator finds the following:

**AWARD**

1. The Warden violated the Article 31, Section b. of the Master Agreement when he failed to meet with the grievant and union and attempt to informally resolve the grievance. The arbitrator directs the parties to meet and discuss the intent of the grievance process and how the existing process and communications can be simplified and improved..
2. All other charges of contract violation are denied.



Gail P. Anderson  
Arbitrator

Dated: JAN. 23, 2007