IN THE MATTER OF ARBITRATION
(Arbitrator: Lawrence Oberdank)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 2510	)	
Grievant	)	
and	)	**FMCS No. 03-03192**
	)	**(William Roach 14 day suspension)**
DEFENSE FINANCE and ACCOUNTING SERVICE	)	
Agency.	)	

REPLY BRIEF ON APPLICATION FOR ATTORNEY FEES AND EXPENSES

The following constitutes AFGE Local 2510's Reply to the DFAS (Agency) Brief submitted in Opposition to the Application for Attorney Fees and Expenses. We vigorously dispute the inaccurate suggestion at the outset of the Agency Opposition that the "arbitrator properly indicated that attorney fees were probably not warranted in a situation such as the instant case," which is further exacerbated by the Agency's misleading of the Arbitrator in the post hearing brief. The Arbitrator merely expressed some doubt that fees are "incurred for the services of an attorney" and raised the issue of the proper standard for reasonableness, based on the unsubstantiated and patently fallacious assertion by Agency counsel in her post hearing brief that fees can not be incurred here to a staff union counsel, and therefore no fees are reasonable unless actually incurred. Despite apparently now abandoning this assertion that fees are not incurred, at section IV of her again unpaginated Opposition Brief, Agency counsel has the temerity to raise the Arbitrator's doubt based on representations she had

wrongly implanted. Agency Counsel then asserts that the arbitrator had followed the guidance of 5 U.S.C. 7701(g) in his decision, when you indeed never cited that section, and never undertook any application of the attorney fee criteria, clearly retaining jurisdiction to fully consider all issues.

Attorney fees here do not constitute a windfall or profit, as Agency counsel unfortunately suggests, nor does she support her assertion regarding legislative history of the Back Pay Act, 5 U.S.C. 5596. As we previously recited, the very terms of the Back Pay Act provide that an employee, "is entitled on correction of the personnel action," to "reasonable attorney fees related to the personnel action which, with respect to any decision relating to an unfair labor practice or a grievance processed under a procedure negotiated in accordance with chapter 71 of this title..., shall be awarded in accordance with standards established under section 7701(g) of this title. The purpose of the Back Pay Act is to "facilitate the retention of counsel by... employees who are the victims of wrongful personnel actions. When such actions are successfully overcome, the Government is required to pay lost income to the employee and to reimburse the costs of litigation." Naekel v. Dept. of Transportation, 845 F.2d 976, 980 (Fed. Cir. 1988)(windfall discussion there only because this was a non-lawyer pro se litigant seeking attorney fees for himself).

Staying at page 1 and top of page 2 of the Agency Brief, Agency counsel again disturbingly states the incorrect judicial review provisions regarding any attorney fee decision by this arbitrator, citing 5 U.S. C. 7703(c)(1) and Sterner v. Dept. of Army. 5 U.S.C.

7703(c)(1) is clearly not the judicial review provision here, as that section applies only to decisions of the Merit Systems Protection Board [MSPB] and those adverse action cases (i.e. removals; suspensions of greater than 14 days) that otherwise could be appealable to MSPB. See 5 U.S.C. 7512 and 7121(f). Here, any review of the attorney fee award would be pursued through the Federal Labor Relations Authority [FLRA], pursuant to 5 U.S.C. 7122, under an analysis as provided at page 3 and 4 of the Union's Application for fees. Moreover, judicial review then conceivably would be available as the underlying arbitrator's award involved unfair labor practices, applying different standards for review. 5 U.S.C. 7123(a). [1]

I. Interest of Justice

The Agency's virtually exclusive focus here is on the "interest of justice" standard, attempting to rewrite the arbitrator's opinion, ignore the unfair labor practice findings, again distort the evidence in this case, and misstate and misapply the relevant case law. In this Reply, we will discuss every case referred to by DFAS in this section of their Opposition Brief. It should be noted that MSPB cases may provide some guidance on application of fee awards, but are in no manner binding on an arbitrator in this 14 day suspension case.

Agency counsel's opening remark here that the interest of justice standard "sets a high bar" is her litigation hyperbole, not a statement in cases, or a reflection of the thousands of

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[1] On the last page of the Agency Opposition, when apparently trying to suggest not following the uniform precedence on market rate fees for union counsel, Agency counsel asserts that the instant case is within the jurisdiction of the 4th Circuit. This assertion gets her nowhere with respect to her presumed argument to reject every reported Circuit decision on market rates, but it is again inaccurate, as review first lies with the FLRA, and then possibly either the D.C. Circuit or 4th Circuit.

cases where fees have been awarded or paid, or the scores of judicial circuit decisions. The MSPB's decision in Allen v. U.S. Postal Service, 2 MSPR 420 (1980), was really the first opportunity of the newly established MSPB to articulate the criteria for a reasoned analysis of an attorney fee application. The MSPB remanded that case to the presiding official for an articulated decision of whether attorney fees are warranted in the interest of justice, having concluded that such attorney fees were appropriate, without engaging in such analysis. In a rather confusing presentation, DFAS then cites several cases on the general issue of interest of justice, without elaborating which of the 6 possible interests of justice standards have been satisfied (Please again review p. 5 -17 of our Application for Fees). [2]

Interestingly, the 2 federal circuit court cases that Agency counsel leads with in this section are Massa v. DOD, 833 F.2d 991 (Fed. Cir. 1987), and Steger v. Defense Investigative Service, 717 F.2d 1402 (D.C. Cir. 1983). What Agency counsel neglects to tell the Arbitrator is that, in one of these cases, the Courts of Appeals ordered attorney fees, and in the other, reversed and rebuked the MSPB for denying attorney fees. In Massa, (cited at p. 12-13 of our Application for Fees), the Federal Circuit in interpreting the "substantial

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[2] Please note with respect to DFAS' citation to Abramson v. U.S.,, 45 Fed. Cl. 149 (Fed. Cl. 1999), the Federal Claims Court has no judicial review authority of this case or any disciplinary cases, under either party's assertion of relevant provisions for judicial review. In any event, in denying fees in that litigation concerning overtime entitlement, the Court declared that the case was of the highest degree of complexity, repeatedly credited the reasonableness of the government's theories involving interpretations of overtime statutory provisions, acknowledged the government's "cogent arguments," and its "exercise of sound judgment throughout the proceedings." We have very different circumstances here of a 14 day suspension, including reliance by DFAS on an inapposite and incorrectly interpreted Federal Travel Regulation for the first time at the hearing stage itself.

innocence" standard, stated this section means that the employee is essentially without fault for the charges alleged, finding that the record showed that the Agency lacked sufficient evidence to refute Massa's explanation for his conduct, and awarded attorney fees. In Steger, the D.C. Circuit held that the MSPB's failure to consider whether DOD took a discharge action against an employee, even though it should have known that it would not prevail on the merits, rendered its decision arbitrary and capricious. The third case circuit court case DFAS counsel leads with, Sterner v. Dept. of Army, 711 F.2d 1563 (Fed. Cir. 1983), involved the patently distinct circumstance of an employee being found clearly culpable for some misconduct (indeed admitting engaging in 2 of the 5 charges of misconduct), warranting imposition of a penalty of 16 day suspension, instead of the more severe discharge. The case really dealt with the "prevailing party" concept.

DFAS next cites AFGE Local 2667 and EEOC, 15 FLRA No. 62 (1984), as a "factually similar matter," which is not factually similar at all. It involved 3 charges of insubordination, dereliction of duties and failure to obey an order, and a clear finding of wrongdoing by the employee resulting in the imposition of an admonishment rather than the assigned penalty of a 14 day suspension. Moreover, it is suggested again that DFAS counsel read this decision. While the suggestion that the arbitrator denied the union request for attorney fees is correct, the FLRA decision cited here remanded the case to the arbitrator to write a fully articulated, reasoned decision setting forth specific findings supporting the determination on each pertinent statutory requirement of the Back Pay Act. DFAS' reference

to AFGE and Dept. Of Health and Human Services, SSA, 48 FLRA No. 114 (1993) is also misplaced. This was not a disciplinary case, but a case merely finding that the employer violated the contract by denying union officers official time for attendance at certain parts of the union's national convention. There is no indication of an award of back pay, and the arbitrator found that the Agency's interpretations were plausible. Moreover, the FLRA undertook no analysis of the evidence in this case, merely finding that the Union failed to show that the Arbitrator's award denying fees is deficient under the Statute.

A. Agency Action Lacked Substantial Justification or Clearly Without Merit

As presented at length at p. 5 -8 of our Application, this factor actually has been found to involve 3 possibly distinct aspects of an Agency action: (1) failure to adhere to legal precedent; (2) inadequate initial inquiry into facts; and/or (3) lack of legitimate basis for the agency action.

DFAS counsel cited Lewis v. U.S. Marine Corps, 674 F.2d 714 (8th Cir. 1982), in the section of her brief immediately preceding the one separately addressing this standard, as a case finding charges were not clearly without merit. It should be noted that jurisdiction lies solely in the Federal Circuit for judicial review of all MSPB [or Board] cases (with possible exception of discrimination cases) for more than a decade. (See 5 U.S.C. 7703, discussed above). Notwithstanding, the factual circumstance of that case is strikingly dissimilar to this matter. Lewis was discharged from his housing maintenance inspector position with the Marine Corps for neglecting his duty and endangering lives and property by failing to

respond to a reported gas leak. The Court noted that although Lewis ultimately prevailed, the evidence "create[d] a close question," and in fact the first Board ALJ hearing this case ruled in favor of the Marine Corps (the second ALJ finding in favor of Lewis following a remand from the full Board).

In this section, DFAS also cites Diguilio v. Dept. of Treasury, 66 MSPR 666 (1995); Uhlig v. DOJ, 86 MSPR 660 (1995); Kent v. OPM, 33 MSPR 361; and Barron v. OPM, 47 MSPR 607. Digulio involved a request for attorney fees following a voluntary settlement agreement where appellant accepted a down-grade to a part-time position when the Agency agreed to withdraw his removal from service, which had been proposed for an extended AWOL. The denial of fees on the clearly without merit standard was based on the Agency's reasonable and appropriate reliance on a Office of Workers' Compensation Programs [OWCP] decision to terminate the employee's disability payments. They concluded that disability resulting from injury had ceased in directing the employee to return to duty, based on OWCP's thorough evaluation of employee's medical record as well as medical reports themselves. Thus, the agency could have concluded that the employee was not incapacitated from performance of her duties during AWOL period; moreover the demotion fell within tolerable limits of reasonableness. Uhlig involved the vastly different situation where an Agency unsuccessfully petitioned for review of an initial MSPB decision that mitigated a removal action to a 30 day suspension, again in that case finding the employee culpable of the misconduct warranting discipline. There, the Agency was found to have a reasonable

basis on which to bring a charge of providing false statements in response to investigator's questions regarding alleged misuse of government owned vehicle, based on signed and sworn statement from employee in which he admitted to having to drive government owned vehicle to a softball game, and to lying about the incident in a deposition. Kent involved the unique and clearly different circumstance of a denial of fees to an employee whose application for disability retirement annuity was denied by the Office of Personnel Management (not the employing agency) initially and on reconsideration, and where the MSPB then reversed. In denying fees, MSPB asserted that OPM's reconsideration decision in this retirement disability case would not have been reversed in the absence of additional evidence adduced during the appellate process. Similarly, Barron, involved a request for attorney fees from non-employer OPM based on MSPB's reversal of OPM decision denying law enforcement officer a retirement annuity, noting again, *inter alia*, matters first raised in appellate process.

DFAS counsel then cites an alleged Federal Circuit opinion on Back Pay Act legislative history, while never citing the Federal Circuit decision on which she apparently relies. It is impossible to know the validity of this statement or the context, or the surrounding legislative history. Notwithstanding, this adds nothing to the case law we have cited and developed under this standard, and the legislative history we recited from Naekel. Moreover, the MSPB conducted a thorough review of the legislative history of the "in the interest standard" concept in Allen, supra, 2 MSPB at 598, and discerned that Congress was troubled with the inherent injustice of dragging an innocent individual through expensive and time

consuming legal proceedings

DFAS makes no assessment of the Arbitrator's findings or evidence in this section whatsoever. They offered no response to our presentation of the evidence and findings, as well as pertinent case law, that satisfy the substandards of this clearly without merit standard, i.e. failure to adhere to legal precedent, inadequate initial inquiry into facts, and lack of legitimate basis for the agency action, set forth at pages 5-8 of our Application. The general arguments they advanced, not with respect to this standard, but what appear at the bottom of the 4th page of their Opposition claiming that the agency's actions were not groundless, represent a gross departure from the facts and findings, and a perverse reconstruction of this case.

DFAS counsel first asserts here that the agency reasonably believed, based on its leave and travel regulations, that Roach was AWOL. The fact of the matter is that the Agency never referenced or relied on leave and travel regulations in proposing Roach's suspension, in its decision on the suspension, or in any of the management decisions denying the grievance at various steps. DFAS witnesses who were deciding officials on the Roach discipline conceded that they did not even confer with anyone in travel or pay departments before taking this disciplinary action. Reliance on a travel regulation was a belated counsel strategy to counteract our claims regarding Appendix J, that clearly provide for one day for travel. Moreover, this belated DFAS counsel argument of the significance of JTR C1059 was totally misplaced as that section dealt only with preventing travel from midnight to 6AM, and

even in that circumstance merely suggested that it is *reasonable* for a traveler to depart on earliest available transportation. As the Arbitrator analyzed at page 17 and 18 of the Opinion and Award, the Regulation they cite pertains to avoiding travel between midnight and 6AM, that regulation governs exclusively the computation of travel and per diem allowances, and has nothing to do with compelling employees to travel at any particular times, a point even acknowledged by Ms. Maslanka and others. Indeed, DFAS ignored, at the hearing and at any time in this case, its own Standard Operating Procedure (SOP) on travel. This is an Agency whose function is finance and accounting, governed strictly by pay and other regulations.

DFAS counsel then asserts, in defending its claim that its action was not without substantial justification or clearly without merit, that "it is the agency's position that he [Roach] failed to follow written and oral directions to return on the first available flight." The Agency continues to misrepresent the nature of **Briley's guidance**, and her and Roberts **clearly acknowledged lack of authority** to direct the union officers to do anything. Moreover, as found by the Arbitrator, **Roberts "frankly didn't care if they did or did not [follow his suggestion that they leave earlier than planned.]**(Opinion, p. 16). DFAS continues, to this day, to ignore the clear and overwhelming documentary evidence in terms of approved travel requests, travel orders, approved vouchers, time and attendance reports, Form for Billing Data, etc. authorizing a full day of travel for this return. (Arbitrator's Opinion 13-16). Moreover, they still continue to refuse to acknowledge the blatant disregard and inconsistency of treatment with respect to Roach's other union travel activities before

and after this travel as a full day of travel, and the patent disparate treatment in handling Roach's travel versus other Council officials at other locations. The Arbitrator ruled, in no uncertain terms, that "absence was authorized for three full days" and "such discipline has an ex post facto quality to it that is capricious and offends the notion of fundamental fairness that is just cause."(Opinion, p. 16).

DFAS counsel then goes on to assert:

> His [Roach's] deliberate failure to inform his director of what really caused his delay (forming the basis for the lack of candor charge) kept the agency from performing a thorough investigation. Notwithstanding, Mr. Roach's lack of candor, Mr. Gates independently investigated Mr. Roach's allegations by directing an employee to verify his story with the travel agency and determined it to be false. Mr. Roach failed to help his own situation because he provided Mr. Gates with incomplete information, thus hindering the investigation.

What kept the Agency from performing a thorough investigation of this charge was their obstinance, their tunnel vision to get Roach, their total disregard for their own regulations regarding investigations, their violation of clear conflict of interest tenets by Gates pursuing this minuscule inquiry (not an investigation, independent or otherwise, in any sense of those terms). In fact, the testimony was that when Gates reported back to Roach the statement from the airline travel agent, a matter different than the supposed inquiry, Roach attempted to explain all the circumstances, but Gates refused to listen, claiming that Roach lied to him and he would hear no more about it. A more detailed discussion of the sham of any investigation conducted in this case is presented in the next section at pages 14 - 19 of this Reply Brief. Moreover, DFAS counsel's position flies directly in the face of the Arbitration Award. The

Arbitrator found that when Gates approached Roach in his union capacity during a labor-management meeting, Roach brought up his concerns about being charged AWOL:

> Gates didn't inquire into the facts but simply asked Roach for the flight numbers and exact departure times...Roach gave him the information and nothing more was said about the matter....The meeting with Gates was not called to investigate the AWOL charge brought against Roach and was not part of the grievance procedure. Nor was Roach being questioned about his reason for not taking an earlier flight. On the contrary, the meeting was called to discuss other matters of importance to the agency and union. (Opinion and Award, p. 19, 20).

See further discussion below.

B. Employee is Substantially Innocent of the Charges Brought

DFAS sets out the substantially innocent standard as a subset of the "clearly without merit" standard (labeling it as section A. 1) when it is not such; but a separately evaluated standard. See pages 11-13 of our Application.

Here, Agency counsel first cites Van Fossen v. MSPB, 788 F.2d 748 (Fed. Cir. 1986), which was cited in our Application for Fees at page 12. The Agency does not disclose however that Van Fossen was awarded attorney fees in this removal mitigated to a 30 day suspension, even where all 3 charges against the employee were sustained. DFAS counsel then cites Yorkshire v. MSPB, 746 F.2d 1454 (Fed. Cir. 1984), which we cited in our Application at pages 11 and 12. What Agency counsel again neglects to indicate is that the Court of Appeals held that employee Yorkshire was entitled to an award of attorney fees, in view of ruling by presiding official that the agency had presented no credible, probative evidence to support its charges, and employee was substantially innocent under this standard.

Agency counsel then cites Wise v. MSPB, 780 F.2d 997 (Fed. Cir. 1985), which upheld the MSPB's denial of fees. Wise, an air traffic controller was removed, along with many fellow employees, for engaging in a strike called by his union PATCO, in clear violation of federal statute and following the admonitions of the President of the United States. Wise claimed he contacted his Congressman and informed him he wanted to cross the picket line, but missed by one day the return to work amnesty deadline provided by the President. The Court noted that the presiding official specifically found that Wise participated in the PATCO strike and failed to report his scheduled shift during the amnesty period, and that Wise deliberately withheld a letter from his Congressman to the chief appeals officer of the Board's Regional office. The Court found it highly likely that the Agency would not have effectuated his removal, if the arrangement between the Congressman and another DOT official had been brought to the attention of the deciding official. DFAS counsel then cites Boese v. Dept. of Air Force, 784 F.2d 388 (Fed. Cir. 1986), conveniently again ignoring that the Court ordered fees in this removal case, despite finding employee misconduct justifying a severe 90 day suspension. (See p. 12 of our Application). DFAS then cites Thompson v. MSPB, 772 F.2d 879 (Fed. Cir. 1985), also cited by the Union in its Application at page 12. Again, DFAS counsel neglects to inform the Arbitrator that fees were awarded in this removal case, where employee misconduct also was found to warrant the imposition of a suspension. Finally, DFAS counsel cites the Federal Claims Court decision in Abramson, supra, which we have previously addressed.

Agency counsel then engages in an attempt to rewrite the arbitration award and engage in a post hoc rationalization of DFAS conduct, never acknowledging the findings of ULPs in their withholding of critical documents, barring Roach from the facility, or the real truth about their lack of investigation. DFAS counsel maintains that Roach "intentionally" prevented the deciding official from deciding the matter without full knowledge of the relevant facts. This was neither the finding of this Arbitrator nor does it vaguely comport with reality or this record. DFAS counsel asserts that "it was not unreasonable for the deciding official to discipline Mr. Roach based on the *information available to her at that time*." DFAS counsel then states that the deciding official had the "Headquarters Email *directing* employees to return on the first available flight , and information from the travel agent," thus why did she need anything else. Moreover, DFAS counsel says that the "Charleston Site Director [Gates] investigated the merits of the charge to the *best of his ability* based on the information provided by the grievant."

In fact, Director Gates did not even verify the one thing he said he would look into, let alone conduct some sort of investigation on the merits of the charge. He clearly interjected himself into this matter, and was the key witness on the lack of candor charge. As such, he had no business even conducting an investigation (although his so-called investigation was incredibly marginal and narrowly focused), and even he acknowledged his perception of a conflict in his acting as a deciding official in the grievance process. DFAS counsel deflects responsibility of DFAS to conduct even a semblance of an impartial and adequate

investigation based on their alleged lack of knowledge until the hearing that the union had meetings scheduled into the early morning, that Roach had asked his wife to look into earlier flights, and that she had changed them without his authorization.[3]

The fact is that the Agency clearly violated its own regulations and policies regarding a thorough and impartial investigation. No statements were obtained from Roach before initiating this disciplinary action. The Agency never even attempted to interview Roach before proposing his suspension, as part of any investigation, because they didn't care what he had to say. Indeed, they could have required him to cooperate in any investigation; if indeed he refused to cooperate in an investigation, this would constitute separate grounds for discipline LaChance v. Ericson, 118 S. Ct. 753 (1998). No investigation of any sort was conducted. Personnel Specialist Maslanka and other DFAS officials were compelled to concede, and the record reflects, no inquiry whatsoever was made of the treatment of official time or leave of other union officials traveling under identical travel orders as Mr. Roach.

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[3] Incredibly, while arguing that this information would have been critical, presumably altering the deciding official's decision to move forward to suspend Roach, DFAS counsel states immediately thereafter: "In any event, this story, even if true, would not excuse his failure to follow a Headquarters director and to stay later without his supervisor's approval." DFAS still refuses to accept the arbitrator's ruling, that Roach had already received and did not need any further supervisor approval for travel that day, or acknowledge any inappropriateness in pursuing this suspension. These continuing assertions remain fundamental to the belligerency of this Agency and failure to acknowledge the reality of their evidence. **It was their witnesses Briley and Roberts, as found by the Arbitrator, who readily acknowledged, even on their own direct examination, that this Memo was mere guidance, and they had no authority to direct Roach's travel plans.** Moreover, while suggesting that this information could possibly have led to further discussions, and perhaps resolution, it denies the adamancy and intensity of their strained relationship with Roach.

DFAS officials in Charleston could not care less whether union officials were meeting that evening to discuss a response to management briefing, they were solely and myopically focused on the Briley memorandum, as the means to get Roach. If this was at all germane to them, (which it was not, as they viewed this as the union business, not on official time) they could have conducted an inquiry into this by merely speaking to Charles Warlick, the Local President at the time, still working at this facility and who they planned to call as a witness. They could have interviewed any of the union officials attending this meeting. This was no secret, and in fact Roach had told Gates and other management officials of this upon his return. The fact is DFAS would not, and did not, bother to examine circumstances of Roach's other union related travel preceding and subsequent to this travel, to manifest clearly inconsistent treatment and a wholly divergent message to Roach and others regarding their travel. No contact was made, nor statements taken, from other union officials, or managers on this trip, nor were statements obtained from supervisors or labor relations/human resources personnel as to their actions in this matter. No notes or statements, sworn or otherwise, from Director Gates, were offered voluntarily or taken though an independent DFAS investigation on a critical charge dealing with a very fact specific and probing issue of lack of candor. No production was made by DFAS at the hearing of even the travel requests, travel orders, or work authorization schedules, or time and attendance reports, travel vouchers. (as further set out in 2-5 of our Post Hearing Brief).

Regarding the alleged significance now of whether Roach told anyone prior to the

hearing of these matters, DFAS again completely disregards the Arbitrator's findings.

> **[Roach] was not placed in the position of having to explain himself until the meeting of March 21, when Gates accused him of lying about his ability to return on the morning flight. At that time, Roach readily admitted he was originally scheduled to return on the morning flight but his wife changed the reservation after he told her union officials were getting together to discuss strategy after the conference with management on February 27th and that their meeting was expected to last into the "wee hours of the morning."** He tried to book a seat on the original flight after the union meeting but was unable to do so because the plane was full. **Indeed, Gates admitted Roach told him he tried to book a seat on the 8:45AM flight out of Washington**. Nothing, therefore, suggests Roach intentionally misrepresented material facts or tried to conceal them during the March 21st meeting. **Gates simply didn't want to believe them and never conducted an investigation to learn whether they were true.** Lack of candor is not established, in my view, considering one statement in a vacuum. (Opinion and Award, p. 20, 21).

Indeed, when DFAS tried to call a so-called rebuttal witness on whether Roach's wife had authority to make his travel arrangements, the Arbitrator rejected this as not being germane to any of the charges or issues in this case. The suggestion now that Roach claimed that his wife changed his plans without his authorization is fallacious both in terms of having any significance to the decision here and as to what was actually maintained. Indeed, the Arbitrator recognized, at footnote 8 of the Award, that "the union does not argue Roach should be exonerated because his wife cancelled the earlier flight without his knowledge or permission and this fact was not considered in reaching my decision."Moreover, Roach testified, without contradiction, that management had been aware for year or more that his wife, a DFAS travel person, was making his travel arrangements when performing union business. He had engaged in many trips and submitted many travel requests and vouchers

where he never used the DFAS "MUMA" that supposedly handled travel, as he explained that they would not make travel arrangements without a travel order which as in this case, he was not even presented with until he had undertaken the travel, and was given to him in metropolitan Washington. Management could not care less who changed Roach's travel plans, his wife or the man in the moon; they would not examine or consider anything other than Briley's Memo or the sanctity of Gates' position. This finance and accounting Agency, that could not be bothered with the actual terms of Roach's approved travel request, work schedule request, travel orders, forms for billing data, time and attendance report, travel vouchers, leave and earning statements, nowhere calling for specific travel times and all clearly authorizing a day of travel here (and having ignored past treatment of Roach's travel, or treatment of others for this travel), can not be heard now to claim with a straight face that knowledge of his wife's actually calling in his travel time change to the airlines would have influenced their decision to take this discipline (indeed however, the Arbitrator's finding, however is they were told of this).

The Agency never cared to conduct an independent, impartial or thorough investigation, when they had a predetermined outcome? Why allow those nasty little facts get in the way and permit disparate and inconsistent treatment to be readily exposed? [4] DFAS

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[4] At the hearing, the Arbitrator was furnished a copy of a recent Arbitration decision involving DFAS and AFGE Local 1411 (Arbitrator James Martin, January 27, 2003, Chesteron, Indiana, Frierson Removal), to which even their Headquarter Labor Relations specialists claimed to be unaware of. The Arbitrator reduced a removal to a 30 day suspension for charges of filing a false travel voucher (which employee admitted according to the Arbitrator) and for lying to the investigator. The Arbitrator found, with respect to the second charge of lying, that furnishing part

readily ignored their own regulations and instructions, and no immaterial information, even if withheld (which it clearly was not) would change this.

It is the Agency that blatantly violated its own directives with respect to a proper investigation:

> **DFAS Corporate Supervisor's Handbook Re: Investigations (Union Exh. 12)** When an employee engages in misconduct, you will **very likely need to conduct some sort of investigation**. The purpose of this investigation is twofold: (1) to obtain as complete a set of facts as to what happened as is possible, and (2) to document the misconduct....If other employees witnessed the misconduct, you **would obtain written statements from the employees as to what they witnessed. You would also obtain other relevant documentary information in your investigation...In most cases, you will need to discuss the incident or alleged misconduct with the employee before initiating any disciplinary action.**
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> **DFAS Reg. 1426.1 "DFAS Discipline and Adverse Actions"(Union Exh. 13)**
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> > **Ch. 2C.3.- "Authority to take Disciplinary Actions"**
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> > **Prior to taking disciplinary actions, the supervisor will receive advice and assistance from an Employee Relations Specialist. This must be done to assure regulatory compliance and consistency of disciplinary actions.**
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> > **Ch. 3A.1 - "Supervisory Procedures When Initiating and Deciding Disciplinary Actions**
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> > **Prior to initiating disciplinary action, the supervisor will obtain all available information concerning the incident, and discuss the incident with the employee, if available.**

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of the **Investigative Report** to the union was "**farcical**," and cannot be used to support the charge against the grievant. This decision, interpreting the same contractual provisions and DFAS Regulation 1426.1, is significant in several respects. As it applies to this section, it is clear that in a case of "lying" about travel related matter, or in this case of "lack of candor," an independent investigation and resulting report is imperative, and is the regular practice. No such investigation or report was issued in this case. There was no effort or desire to get the whole story or get at the truth. It is significant also as to a pattern of unlawfully withholding documents.

Moreover, DFAS' assertion now that had Roach been more forthcoming in disclosing information, it could have evaluated its mission requirements and acted accordingly, is a bunch of gibberish. The post facto imposition of the 4 hours AWOL had nothing to do with mission requirements, and there was no testimony in that regard. DFAS counsel then goes off on another fanciful tangent, albeit wrongfully conceived, that if Roach had called his supervisor Arnold and properly requested leave, she could have evaluated the agency's mission requirements and either granted the leave or informed him that he was required to return.. DFAS apparently still does not get the import of the travel vouchers, travel authorizations, work orders, communications, and clear findings of the Arbitrator in this case, and the lack of any need to request leave under these circumstances.

The cold hard fact is DFAS can not claim, with any integrity, what Roach in fact refuted or presented, when they never interviewed him or even prepared this required oral reply summary conducted by the decision maker, and/or unlawfully withheld it (see Union post hearing brief, p. 9), and when they withheld the decision maker's required "narrative report" regarding Douglas factors, supervisory notes of meetings and other employee travel vouchers. (See Union Post Hearing Brief, p. 10-16). Again, DFAS disregards the Arbitrator's Opinion.

> **Agency regulation 1426.1 compels the supervisor designated as the deciding official to prepare a memorandum for the record of any oral reply** [to the proposed suspension]. That individual was Joyce N. Booth in this case. **But, Booth never prepared or produced such a document, although it was requested in the union's letter of August 30, 2002**. ... [Moreover] Regulations require Booth to prepare a **narrative report**

> **explaining the factors she used in selecting the 14 day suspension** in this case. Booth prepared the document but it was never given to the union... It should have been provided to the union upon request." (Opinion and Award, p. 25, 26).

Nor does DFAS acknowledge that the main focus of the proposed suspension for 14 days was a charge of unacceptable performance, and that later abandoned charge formulated the primary discussion in the oral reply by Roach. Nor does DFAS acknowledge the unlawful withholding of documents, including the supervisory notes that may have confirmed some of these discussions with Roach, or copies of similarly situated records. (Arbitrator's Opinion and Award, p. 24-27). The Agency ignores these ULPs, which independently justify an award of fees. i.e. Dept. Of Justice, Bureau of Prisons, FCI Ray Brook and AFGE Local 3882, 32 FLRA 20 (1988).

C. The Agency Knew or Should Have Known The Charges Were Without Merit Through Reasonably Diligent Investigation

DFAS ignores the four established subsets of this standard that justify an award of attorney fees here, which we presented at pages 13 - 17 of our Application: (1) lack of reasonable inquiry; (2) disregard of legal precedent; (3) regulatory errors and/or (4) negligent presentation of the case. As the Federal Circuit set forth in Yorkshire, supra, this category is established when the agency never possessed any credible, probative evidence to support the action taken. At its core, DFAS's sole reliance in this case was upon a Labor Relations Memo, they continually portrayed as a supervisory directive, when they always knew it was no more than mere guidance by an individual with no authority to govern or override Roach's

travel orders.

Here, DFAS counsel again cites Wise v. MSPB, 780 F.2d 997, which we addressed at length at pages 12-13 of this Reply. DFAS counsel also repeats her frivolous claims of Roach withholding this same alleged potentially exculpatory evidence, which we refuted at length at pages 11- 20 of this Reply, citing in detail the actual evidence, DFAS regulations, contractual provisions and the Arbitrator's findings in his Opinion and Award. DFAS repeats its ill-conceived refrain here that "Roach failed to provide the agency with sufficient information that would trigger the agency's duty to investigate further the merits of the 2 week suspension." The fact is however, absent anything less than an admission of alleged misconduct by Roach, DFAS had an obligation in initiating and proceeding through this discipline to take Roach's statement, take Gates' statement, take Arnold's statement, inquire as to who prepared Roach's travel request or voucher or contacted the travel agent (indeed the travel agent's suggestion was that either Roach contacted her or someone on his behalf) if they claim it indeed made a bit of difference (but in fact, they had this information from Roach before taking any decision), contact the travel authority, inquire of other employee's travel on that occasion, review Roach's travel orders, vouchers, etc). Their action was imbued with arrogance and indifference from its inception and continues through this date.

D. Agency Exhibited Ill-Will or Negligence in its Actions (Bad Faith)

E. Agency Took Action in Disregard of Prevailing Laws, Regulations, Contract Provisions or Federal Policy; and

F. Pursuit of Matter Results in a Service or Benefit to the Public

DFAS counsel completely ignored our claims that fees are warranted in the interest of justice under these 3 independent categories, set out at pages 8 - 11, 11, and 17 respectively of our Application. Presumably they had no retort to these assertions.

II. Prevailing Party

DFAS concedes that we were the prevailing party.

III. Attorney Fees Actually Incurred

DFAS apparently now concedes that attorney fees were incurred in this case.

IV. Reasonableness of Fee

In opposing the "$75,000 attorney fee request" here, [5] DFAS confuses the analysis by interjecting the interest of justice standard here. A party requesting an award of attorney fees and costs need only show that the amount claimed, including the billing rates and the number of hours expended (lodestar figure) were reasonable. See Thomson v. MSPB, 772 F.2d 879 (Fed. Cir. 1985). In Weaver v. Dept. of Army, 29 MSPR 254 (1985), the Board observed that reasonableness of fees is determined, in part, by the quality and length of the work product rather than the strength or weakness of the position defeated.

While the defense of a typical 14 day suspension case would likely not result in the

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[5] As set forth in our Application, absent a discussion and agreement on our invitation to discuss a resolution of Attorney Fees and Expenses, to which there was no response, we would be submitting an additional request for attorney fees for preparation of this Reply. Undersigned counsel **devoted an additional 12.5 hours reasonably and necessarily expended in preparing this reply**, including further research of cases cited by DFAS counsel, and additional cases researched in response to DFAS claims: September 16: 5 hours; September 17: 4 hours: September 18, 2002: 2 hours; September 22, 2002: 1.5 hours. At the rate of $225/hour, we are seeking an **additional $2812.50 in attorney fees.**

expenditure of such time, the nature of this case involving the Union President, and the Agency's obstinate conduct and delays, coupled with cavalier and negligent presentation, was anything but typical. Moreover, this case involved not simply the 14 day suspension, but unfair labor practice issues involving the barring of Roach from the facility, and the unlawful withholding of documents. Union counsel was involved very early in this case at the grievance stages, and had to submit many lengthy and detailed letters, citing a wealth of case authority, and specifying particularized needs, when requested and necessary documents were repeatedly and unjustifiably withheld. Union counsel's appearance in this case began over a year ago, and every request was met with resistance and acrimony. DFAS' lack of cooperation resulted in a great exchange of correspondence. DFAS counsel raised an issue of arbitrability, which we met with a request for elaboration, only to be ignored and the issue abandoned at the hearing; needlessly dictating our preparation for a response. As developed, the Agency resisted timely producing of witnesses; although all agency witnesses (an unusually large number of 10 witnesses called by the Agency) and 5 union called witnesses (as well as many additional potential witnesses and counsel officials) were interviewed by Union counsel, as provided under the contractual provisions, and preparation was necessary for their examination. Efforts to locate an expert witness for the Union and then interviews of that selected expert on several occasions by undersigned counsel were necessary, as well as time to prepare for the Agency's travel expert witness. This case dictated research and review of massive federal travel regulations and supplements, and the Agency's own travel

operating procedures, and Comptroller General and court decisions interpreting these regulations. The Agency also raised overtime and other pay regulations that dictated research and review. The Agency raised claims of privileges and Privacy Act protections in resisting production of documents and testimony in some areas, that required research and analysis, many of the cases we furnished were relied upon and recited by the Arbitrator in the Opinion and Award. Case research was also necessary on the substantive charges of AWOL, lack of candor (and related falsification and misrepresentation arguments advanced by DFAS) and penalty issues. The length of time for DFAS presentation of its case, and the arguing at the case over privileges and documents withheld, resulted in this case being heard over a period of 5 days, at 2 different time frames. Because of scheduling and the Agency pursuit of a simultaneous removal of Roach (which they alluded to in their post-hearing brief) this case was not set back in for completion of the hearing until approximately 7 weeks later, which dictated preparing witnesses again for resumption of hearing, and for further cross-examination. At the hearing, DFAS repeatedly engaged in delays, including taking hours to simply agree on scheduling of briefs.

Indeed, the only specific suggestion by Agency counsel of excessiveness of any aspect of the hours expended in this case to which she invited further scrutiny by the Arbitrator, are the hours attributed to "research," although not setting forth which of these hours she believes is not reasonable. The amount of time provided in our Statement of Services rendered for research was necessary and reasonably expended, as set forth above, in

preparing the grievance, seeking production of documents, preparing legal briefs for the hearing, for the hearing itself, for preparation of the lengthy post hearing brief and the Application and Reply Brief on Attorney Fees. Any reductions in a fee request are not to be arbitrary or unreasoned. Crumbaker v. MSPB, 781 F.2d 191 (Fed. Cir. 1986), modified 827 F.2d 761 (Fed. Cir. 1987) (noting there is no indication here that the government offered any evidence or reasoned analysis in support of its contention that the number of hours claimed was excessive; there is not even any evidence of the amount of time the government spent on the case).

DFAS counsel's argument about satisfying some public interest in establishing the reasonableness of this fee is entirely misplaced. The discussion of public interest in Naekel was because Naekel claimed there was a broader public policy beyond the Back Pay Act that authorized him to get attorney fees as a non-attorney pro se litigant. While no independent public interest need be found, in fact there is overwhelming public interest in discouraging this Agency from further chilling bargaining unit employees in the exercise of their rights to join and participate in unions and collective bargaining, without interference by management and without retaliation, in violation of 5 U.S.C 7102 and 7116, as found by the Arbitrator. 5 U.S.C. 7101, which we also cited, which sets forth the findings and purpose of this entire chapter, repeatedly provides that employee participation in labor organizations of their own choosing safeguards the public interest, and labor organizations and collective bargaining are in the public interest.

The further assertion that undersigned counsel "has not established that some of his attachments relate to attorney fees in the Atlanta area," is indeed perplexing and incorrect. If DFAS counsel is referring to the attached affidavits of three other counsel practicing in this field, they clearly provide that their practice is in the Atlanta metropolitan area. Moreover, as we set forth in the Application, the relevant hourly rate is the locale of attorney's office and practice, not the site of the hearing. The other attachments and references to case awards are clearly identified in every pertinent respect.

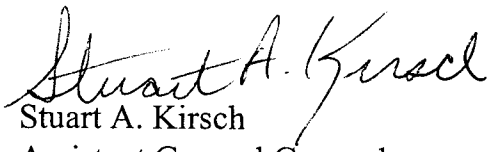
With respect to DFAS counsel's claim that undersigned counsel "argues for an 'enhanced market rate' based on his experience in the labor law field," this is another erroneous assertion. We have made a request for attorney fees at $225/hour based on the market rate, as established from a survey and evaluation of attorneys practicing in this field in this area. As we set forth, based on those surveys, the market rate for attorneys of similar experience (notwithstanding possible questions of expertise) is at or greater than the market rate actually sought by undersigned counsel. We have said nothing about an enhanced market rate, although in some circumstances that could be appropriate.

DFAS counsel then engages in an interesting historical analysis of the cost-plus attorney fee analysis, however DFAS counsel ultimately concedes (notwithstanding her surprise), that attorney fees are to be awarded under the market rate analysis. (See Federal Circuit decisions we cited in Raney and Willis, and FLRA cases).

Conclusion:

Attorney fees and expenses as requested and set forth in the Application and this Reply are fully warranted and appropriate.

Respectfully Submitted,



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Certificate of Service

I hereby certify that a copy of the foregoing Reply to Opposition to Application for Fees and Expenses, has been served by first class mail this 24th day of September, 2003, upon the following:

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