

Subj: **FMCS No. 05-58467**  
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Dear Ms. Gannon, Mr. Boyte et al:

Below is my response and ruling in light of the recent e-mails and the Union's request for a hearing date for this case. The ruling itself is preceded by a number of points that I believe are important for you to keep in mind.

- There is no question that I have the authority to make such a ruling. The most recent (6th) edition of Elkouri & Elkouri How Arbitration Works at p. 307 states, "If the parties cannot agree [on a date and location], the arbitrator or the administering agency will decide. . . . If one of the parties refuses to cooperate in choosing a date for the arbitration hearing after having had sufficient opportunity, the arbitrator must proceed without unnecessary delay to avoid subverting the arbitral process." The Common Law of the Workplace, 1st edition, at p. 11 states, in regard to a postponement, "Once vested with the legal authority by mutual appointment of the parties, the arbitrator may consider it an obligation to move the case forward to hearing and conclusion."
- I have not considered the postponement caused by the snowstorm. As I said earlier, we would not be at this unfortunate point if Mr. Kastner had honored the subpoena at the time of the first hearing. His behavior colors my response.
- I have no reason whatsoever to doubt Ms. Gannon's good faith and nothing in this response should be interpreted to cast doubt on her professionalism. I do not view this situation as one of her creation or choosing. However, it is very clearly an Agency problem. Whether there is an insufficient number of advocates because of legitimate health concerns of some, Agency budget concerns leading to unfilled positions, a combination of these reasons, because of other reasons of which I am unaware, that does not excuse the Agency from meeting its obligation to go forward. Whether this case is tried by Ms. Gannon or by somebody else, I expect the Agency to meet its obligation to participate in setting a date. My ruling below takes into account the Agency's staffing problems--arguably to a great extent than appropriate--but these problems cannot give the Agency the de facto right to have a hearing at its convenience.

With these considerations in mind, the parties are to proceed as follows:

1. On a first come, first served basis, here are my available dates for the six-month period beginning July 16, 2007: July 26, 27, 30, 31; August 1-3, 6-8, 13, 17, 20, 24; September 3-7; October 1-4, 8-11, 15, 16, 22-24; November 5, 6, 8, 12-14, 26-29; December 5-7, 10-14, 17-20; January 7-11, 14-16.
2. No later than 5 p.m. on Friday, August 17, 2007 the parties are to agree on a hearing date and communicate that date to me.
3. If I do not receive an agreed-upon date by 5 p.m. CDT on August 17, then you should expect to find an e-mail from me when you arrive on Monday morning, with the e-mail setting a hearing date from those given above. Expect it to be sooner rather than later. The location will be the training room at FCI El Reno. If during the next month dates that I have set forth above are given to other parties, I shall inform you of the changes. Obviously, the sooner you agree, the more dates you have to select from.

4. If I have to set the hearing date, I shall do so with the understanding that it is always possible that I might have to conduct an *ex-parte* hearing. I have used a six month period in recognition of the Agency's staffing problems and in the hope that this will allow sufficient flexibility to result in your agreement on a date. I view an *ex parte* hearing as an undesirable outcome, but one that, under the circumstances, I cannot rule out.

I expect the parties to accept this ruling in good faith and do what is necessary so that we can move forward with this. Finally, mindful of communications not all that long ago informing me of assigned arbitration cases that had been settled without a hearing, I feel compelled to observe that the best solution of all would be for the parties to sit down and address this grievance in a way that would produce a voluntary resolution of your differences.

Yours truly,

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