IN THE MATTER OF ARBITRATION
BEFORE ARBITRATOR SEAN J. ROGERS

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO Union, -and- U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	)	Issue: FLSA Exemptions

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S MOTION FOR DISCOVERY AND ADDITIONAL EQUITABLE RELIEF TO ASSURE PROCEDURAL AND SUBSTANTIVE FAIRNESS

On behalf of the United States Department of Housing and Urban Development ("HUD"), we respectfully request the Arbitrator rule that:

1. HUD counsel may interview, in the presence of Union representatives, the employees on whose behalf AFGE (the "Union") has brought the instant arbitration or, alternatively, HUD may schedule and conduct depositions in the presence of Union counsel of these employees;

2. The Union return any HUD data or information that it has improperly obtained from the Government, and all copies thereof, regardless of the format in which such data or information was obtained;

3. The Union produce copies of any survey answers that HUD employees prepared in connection with this case outlining the position and factual contentions of the employees on whose behalf the Union has brought the instant arbitration ("grievants"); and

4. The Union produce copies of any document they intend to introduce at hearing in this case.

I. PRELIMINARY STATEMENT

The key issue in the hearing scheduled for May 8th and 9th, as well as the remainder of the upcoming hearings on liability, is whether the grievants are in fact exempt under the applicable law. Of course, making such a determination requires examining the tasks actually performed by these employees as well as the amount of time they spend performing such tasks. In this regard, last Thursday, the Union took the indefensible position that the Government cannot even talk to its own employees. On Sunday, the Union relented and asked only that Mr. Snider be present at any interviews. However, this has proven to be an ephemeral position, as it was then asserted that Mr. Snider will be unavailable for weeks at a time as the hearing looms, thereby practically preventing the interviews and improperly forcing HUD to proceed in a trial by ambush fashion.

In addition, although the Union claims that the Government must provide it with every conceivable document in its possession, the Union refuses to share documents it intends to use in the proceeding. However, the complexity of this case and the intense factual investigation required to reach a fair conclusion mandate that the Arbitrator set fair ground rules for the exchange of documents and other information. Moreover, ascertaining and sharing the facts helps facilitate possible settlement opportunities. Conversely, leaving only one side without the pertinent information effectively forecloses any realistic settlement opportunity. Furthermore, the sharing of information would also help to expedite the hearing process.

Accordingly, we respectfully request the Arbitrator to promulgate fair procedures for additional disclosure in this proceeding including, but not limited to,

allowing the Government to conduct employee interviews and to obtain documents in the Union's possession. Further, we respectfully request the Arbitrator issue a written order with respect to the matters raised herein so that the record clearly reflects that the Government sought the due process and equitable relief indicated above and, in the unlikely event of an adverse ruling, can take all steps necessary to safeguard the Government's rights and to protect the public taxpayers' interest.

Arbitrators enjoy the inherent authority to direct and facilitate a fair process for the resolution of disputes brought before them. Therefore, in reaching a decision, we urge consideration of the following:

1. The public policy issue of assuring exempt and non-exempt employees are paid in accordance with the law balanced to take into account the statutory requirements of the public laws to avoid fraud and unjustified demands upon public funds;

2. The taxpayer interest in arriving at a just result by a fair and simple process;

3. The likelihood that sharing information will speed potential settlement of the case by discouraging unreasonable demands which do not comport with the facts;

4. The likelihood that sharing information will speed up the hearing process and prevent it from being unreasonably delayed by having to rebut items raised first at the hearing; and

5. Sharing information fairly will facilitate the use of stipulated evidence and discourage excessive cumulative presentation of evidence by either or both parties, saving unnecessary expenditure of taxpayer funds in the hearing process.

II. HUD HAS THE RIGHT TO INTERVIEW ITS EMPLOYEES IN PREPARATION FOR THIRD PARTY PROCEEDINGS

A. The Federal Labor Relations Authority's Decisions Support HUD's Right To Interview Its Employees

As the Federal Labor Relations Authority ("FLRA") has recognized, "parties have a substantial and legitimate interest in conducting prehearing discovery interviews with the witnesses of the opposing party. These interests are consistent with the purposes and policies of the [Federal Service Labor-Management Relations Act], in particular, the encouragement of amicable settlements of disputes and the promotion of effective and efficient Government." Patent Office Professional Assoc. (U.S. Dep't of Commerce Patent and Trademark Office), 41 FLRA 795 (1991) (citing 5 U.S.C. § 7101).

Indeed, the FLRA has repeatedly acknowledged the Government's "right to interview unit employees in preparation for third-party proceedings" so long as certain procedural safeguards are satisfied. Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982) ("Brookhaven") (establishing procedural safeguards: "(1) management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee's participation on a voluntary basis; (2) the questioning must occur in a context which is not coercive in nature; and (3) the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights"); see also Dep't of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, 31 FLRA 541 (1988) (employer's failure to give "Brookhaven assurances" not per se violation of FSLMRA so long as circumstances in which the interviews occur are not coercive).

B. The Parties' Collective Bargaining Agreement Confirms HUD's Right To Interview Its Employees

Section 303 of the parties' Collective Bargaining Agreement ("CBA"), which was cited by the Union's counsel in his April 9, 2006 e-mail to Arbitrator Rogers, recognizes the right of the employer to communicate with employees:

> "concerning any grievance, personnel policies and practices and other general conditions of employment"

(emphasis is added), so long as the Union is informed of and entitled to be present during such communications.

In the instant case, because the key to each grievant's exempt status depends upon the nature of the work actually done by each grievant, it would be unfair and wasteful to prohibit or impede the Government's ability to ask the grievants what they did as HUD employees in the HUD Office of General Counsel. Thus, in order to preserve "the necessary balance between the rights of management and the rights of employees and their exclusive representatives," Brookhaven, the Government must be allowed to obtain information from the grievants though non-coercive interviews.

In the alternative, or if the Union tells the grievants not to cooperate, the Government should be allowed to obtain information through formal depositions.

III. ARBITRATORS MAY ORDER PRE-HEARING DISCOVERY AND THE ARBITRATOR SHOULD DO SO HERE

The authority cited in the previous section, which clearly establishes the Government's legal entitlement to interview its own employees in preparation for third-party proceedings, is fully consistent with the proposition that arbitrators enjoy broad authority to order appropriate discovery in connection with the arbitral proceedings over which they preside. Indeed, the broad authority granted to arbitrators has been

unanimously recognized by various statutes, court decisions, arbitration decisions, private arbitration rules, and even model arbitration rules.

A. The Federal Arbitration Act

Section 7 of the Federal Arbitration Act ("FAA") provides that arbitrators "may summon in writing any person to attend before them ... as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case." 9 U.S.C. § 7. Courts have construed this provision as granting arbitrators the power to order parties to submit to pre-hearing discovery as well. See, e.g., Stanton v. Paine Webber Jackson & Curtis, Inc., 685 F. Supp. 1241 (S.D. Fla. 1988) ("arbitrators may order and conduct such discovery as they find necessary ... Plaintiffs' contention that § 7 of the [Federal] Arbitration Act only permits the arbitrators to compel witnesses at the hearing, and prohibits pre-hearing appearances, is unfounded."); In re Technostroyexport, 853 F. Supp. 695, 697-98 (S.D.N.Y. 1994) ("Arbitrators govern their own proceedings ... [w]hether or not there is to be pre-hearing discovery is a matter governed by the applicable arbitration rules ... and by what the arbitrators decide.").

B. The Labor Management Relations Act

Indeed, "[t]he same principles underlying the Congressional decision to create an enforcement mechanism for arbitration discovery under the FAA apply to the arbitrations pursuant to collective bargaining agreements even when those arbitrations do not fall under the application of the FAA." Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm. v. Troha, 328 F.3d 325, 331 (7th Cir. 2003) (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 (1987) ("Federal courts have often looked to the Act for guidance in labor arbitration cases, especially in the wake of

the holding that § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U.S.C. § 185, empowers the federal courts to fashion rules of federal common law.")); see also American Fed'n of TV & Radio Artists v. WJBK-TV, 164 F.3d 1004 (6th Cir. 1999) (relying on FAA for guidance in enforcing arbitration subpoenas under § 301); Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre, Local 120, 559 F. Supp. 875, 882 (M.D. Pa. 1982) ("[P]ursuant to the authority embodied in section 301, subpoenas issued by labor arbitrators are, in appropriate circumstances, enforceable in the federal district courts.").

C. The Federal Service Labor-Management Relations Act

Likewise, an arbitrator conducting arbitration pursuant to the FSLMRA may issue subpoenas to compel witnesses to appear at an arbitration proceeding. See AFGE, Local 922 v. Ashcroft, 354 F. Supp. 2d 909, 914 (W.D. Ark. 2003) ("This Court finds, as a matter of first impression, that Congress, when it provided in § 7121 [of the FSLMRA] that any negotiated grievance procedure shall be subject to binding arbitration, intended that the arbitrator have the power to compel witnesses to appear at the arbitration proceeding."). It is significant that the lone court to consider the issue explicitly relied on the FAA for guidance in reaching its conclusion. AFGE, Local 922 v. Ashcroft, 354 F. Supp. 2d 909, 914-15 (W.D. Ark. 2003) ("this Court finds that the FAA is instructive in fashioning federal common law to determine the arbitrator's subpoena powers pursuant to § 7121 [of the FSLMRA]") (citing Teamsters Nat'l Auto. Transporters Indus. Negotiating Comm. v. Troha, 328 F.3d 325 (7th Cir. 2003)).

D. Labor Arbitration Decisions

Labor arbitrators have repeatedly recognized their right to issue arbitral orders of discovery. See, e.g., E&G Eng'rs, 71 LA 441, 444-45 (Jones, Jr., 1978)

(parties in arbitration may be "subject to arbitral discovery" in that the "obligation of disclosure to a proper degree and in proper circumstances is implicit in the contractual grievance procedure"); Kroger Co., 115 LA 15 (Wolff, 2000) (employer entitled to subpoena items from union indicating names of employees allegedly denied rest periods and documents relied upon for that allegation); Avis Rent-A-Car Sys., 99 LA 277 (DeLoach, 1992) (failure to disclose documentary evidence at the earliest possible time constitutes a denial of due process rights and requires the exclusion of evidence).

E. Private Arbitration Rules

Private arbitration rules such as the American Arbitration Association's National Rules for the Resolution of Employment Disputes ("AAA's Employment Rules") give arbitrators broad authority to order appropriate discovery. Section 7 of the AAA's Employment Rules, for example, provides: "The arbitrator shall have the authority to order such discovery, by way of deposition, interrogatory, document production, or otherwise, as the arbitrator considers necessary to a full and fair exploration of the issues in dispute, consistent with the expedited nature of arbitration."

F. The Uniform Arbitration Act

Pursuant to the Uniform Arbitration Act ("UAA"), "[a]n arbitrator may permit such discovery as the arbitrator decides is appropriate in the circumstances, taking into account the needs of the parties to the arbitration proceeding and other affected persons and the desirability of making the proceeding fair, expeditious, and cost effective." UNIF. ARBITRATION ACT § 17(c) (2000).

IV. DOCUMENT DISCOVERY ISSUES

Upon information and belief, the Union asked the 109 grievants in the instant matter to answer a series of questionnaires indicating how they spent their

working time. Upon further information and belief, these documents were subsequently amended after the Union officials reviewed them. The questionnaires are clearly critical to the proceedings concerning the exemption status of the Legal Interns.

The Government is entitled to the questionnaires because the answers contained in the documents are discoverable facts not protected by any privilege. In addition, allowing the Government to inspect the questionnaires could potentially expedite the hearing by focusing the scope of the Government's discovery and by reducing the number and/or duration of employee interviews. Moreover, the Government is entitled to these documents as a matter of fairness because otherwise it will not be able to properly prepare for the hearing. Finally, the Government should receive the questionnaires because it has been cooperative with the Union's requests for documents.

After the arbitration started, in preparation for the arbitral hearings, HUD specialists did preliminary evaluations based solely on position descriptions of the exempt and non-exempt status of certain HUD jobs and provided them to the Union. These materials are similar to the series of questionnaires that the Union obtained from the grievants in the instant matter. Thus, in order to have a full and fair proceeding with expedition and efficiency, the questionnaires should be shared with HUD just as the Union received HUD's preliminary evaluation of position descriptions of affected jobs during the course of these proceedings.

In addition, we have been informed that the Union has copied internal computer materials from the Government. For example, the Arbitrator will recall that the Union representative admitted to making copies of some Government computer screens

but stated that they did not contain confidential information. Taking Government materials surreptitiously is not proper and may well be illegal. Moreover, the Union's bold and brazen assertions that the materials are not confidential is insufficient to justify taking non-public items away from the government.

If the Union wants to receive information, it must follow the proper procedures by asking for the materials instead of simply taking them without permission or arbitral direction. Accordingly, we respectfully request that the Arbitrator order the Union to immediately return to the Government any improperly obtained information and all copies thereof.

V. CONCLUSION

For the forgoing reasons, we respectfully request the Arbitrator issue a written ruling directing the Union: (1) to allow the agency to interview grievants and not to interfere with those interviews or, in the alternative, to direct depositions of grievants who refuse to participate in the interviews; (2) to return all documents and copies thereof which were obtained without proper authorization from the Government; and (3) to allow inspection of the surveys completed by grievants in this case.

Dated: April 11, 2006

Respectfully submitted,

EPSTEIN BECKER & GREEN P.C.

/s/ Peter M. Panken

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Certificate of Service

I hereby certify that a copy of this United States Department of Housing and Urban Development's Motion For Discovery And Additional Equitable Relief to Assure Procedural and Substantive Fairness was sent to Michael J. Snider, Esquire on April 3, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/ Peter M. Panken
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