BEFORE
SEAN J. ROGERS
ARBITRATOR

In the Matter of Arbitration between:

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO

Union

and

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Agency.

DECISION AND ORDER ON AGENCY'S MOTION FOR DISCOVERY AND ADDITIONAL EQUITABLE RELIEF TO ASSURE PROCEDURAL AND SUBSTANTIVE FAIRNESS

APPEARANCES:

On behalf of the American Federation of Government Employees, Council 222:

Michael J. Snider, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

On behalf of the Department of Housing and Urban Development:

Daniel B. Abrahams, Esq., Peter M. Panken, Esq., Frank C. Morris, Jr., Esq. and Shlomo Katz, Esq., Epstein Becker & Green, P.C. – *representing the Agency.*

Norman Mesewicz, Esq., Deputy Director of Labor Relations – *representing the Agency.*

I. PROCEDURAL BACKGROUND

On April 3, 2006, the Department of Housing and Urban Development (HUD or Agency) filed a *Motion for Discovery and Additional Equitable Relief to Assure Procedural*

and Substantive Fairness (Motion) in the above-captioned grievance arbitration involving the Fair Labor Standards Act (FLSA) status of HUD bargaining unit employees represented by the American Federation of Government Employees, Council 222, AFL-CIO (AFGE or Union) (collectively, the Parties). On April 24, 2006, AFGE filed an opposition to HUD's Motion. On April 24, 2006, around 6:05 p.m. ET, HUD's counsel Peter M. Paken, Esq. sent an e-mail to the Arbitrator in the nature of a sur-reply to the Union's opposition. On April 24, 2006, around 7:41 p.m. ET and on April 28, 2006, around 2:57 a.m. ET AFGE's counsel Michael Snider, Esq. sent two e-mails to the Arbitrator objecting to Paken's sur-reply. The only submissions that the Arbitrator called for were the HUD Motion and the AFGE opposition. Therefore, the Parties' e-mails were not considered in the deliberation on HUD's Motion.

II. APPLICABLE STATUTORY AND COLLECTIVE BARGAINING AGREEMENT PROVISIONS

The provisions of 5 USC § 7114 state, in pertinent part:

> (a)(1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the unit it represents without regard to labor organization membership.
>
> (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at –
>
> > (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practice or any other general conditions of employment . . .

The *Agreement between U.S. Department of Housing and Urban Development and American Federation of Government Employees, AFL-CIO* (CBA) states, in pertinent part:

> **Section 22.08 – Right to Representation.**
>
> (1) The Union shall have the right to represent employees at any stage of this procedure. . .
>
> (2) Once an employee has designated a Union representative, Management shall not discuss the grievance with the grievant unless the Union is given an opportunity to attend.

(3) Only the Union, or a person designated in writing by the Union to act for the Union, may represent an employee under this negotiated procedure.

* * *

Section 22.15 – Grievance of the Parties.

(1) Should either party have a grievance over any matter covered by this procedure, it shall inform the designated representative of the other party of the specific nature of the complaint in writing forty-five (45) days of the date or when the party became aware or should have become aware of the matter being grieved. Either party may grieve a continuing condition at any time.

(2) Upon request, the parties shall meet within twenty (20) days to discuss informal resolution of the grievance after notice is given.

(3) Within thirty (30) days after receipt of the written grievance, the receiving party shall send a written response stating its position regarding the grievance. If the response is not satisfactory, the grieving party may refer the matter to arbitration.

* * *

Section 23.05 – Arrangements. Upon selection of an arbitrator in a particular case, the respective representatives shall communicate with the arbitrator and each other in order to finalize arrangements. No ex parte communications shall be permitted on the merits of the case, but both parties may discuss procedural arrangements as necessary. Any disputes on procedures shall be settled by the arbitrator consistent with this Agreement.

* * *

Section 23.10 - Authority of the Arbitrator.

(1) The parties agree that the jurisdiction and authority of the arbitrator shall be confined to the issues(s) presented in the grievance.

(2) The arbitrator shall not have authority to add to, subtract from, or modify any of the terms of this Agreement, or any supplement thereto.

. . .

III. DECISION AND ORDER

A. INTRODUCTION

The record establishes that on June 18, 2003, pursuant to CBA Section 22.15, AFGE filed a Grievance of the Parties (GoP) challenging HUD's alleged pattern and practice of directing bargaining unit employees to travel during non-duty hours without compensation. On December 24, 2003, AFGE filed a second GoP on behalf of all bargaining unit employees claiming that HUD failed to properly classify the bargaining unit employees under FLSA overtime provisions, and failed to properly and fully compensate these employees for overtime work. The Parties agreed to combine the grievances. The grievances were not resolved under the CBA grievance procedure and AFGE invoked arbitration. The AFGE GoP encompasses more than 6,000 bargaining unit employees.

In furtherance of the resolution of the grievances at arbitration, the Parties have agreed to a hearing on AFGE's claims concerning the FLSA classification of GS-904 (Law Clerk Series) employees on May 8, 9 and June 1, 5, 2006.

In preparation for this GS-904 hearing and any ensuing hearings regarding other bargaining unit employees, HUD seeks to interview, or alternatively depose, the grievants; asserts that AFGE improperly copied internal Government computer materials and seeks the return of these screen prints and other similar documents; requests that the Arbitrator order AFGE to provide HUD with copies of AFGE surveys of the grievants; and requests that the Arbitrator order AFGE to provide HUD with copies of any documents AFGE information the Union intends to use at hearing.

Specifically, HUD's Motion requests that the Arbitrator rule that:

1. HUD counsel may interview, in the presence of Union representatives, the employees on whose behalf AFGE . . . 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.

AFGE opposes each part of HUD's motion asserting as follows:

1. HUD has the right, provided it complies with the CBA, law and regulation, to interview witnesses, but HUD has no right to interview grievants.

2. All information provided by the grievants to AFGE is "run of the mill" data and information normally produced in the course of grievances and arbitrations to unions and arbitrators.

3. HUD has no right to documents from AFGE, particularly grievant-union communications which are confidential and/or privileged, such as surveys of the grievants.

4. HUD has no right documents which it intends to use as pre-hearing discovery that is not mutually agreed upon.

B. HUD'S MOTION TO INTERVIEW OR, IN THE ALTERNATIVE, DEPOSE GRIEVANTS

HUD's Position

Citing *Patent Office Professional Association (U.S. Department of Commerce Patent and Trademark Office)*, 41 FLRA 795 (1991) (*POPA*), HUD asserts the Federal Labor Relations Authority (FLRA) has recognized "parties have a substantial and legitimate interest" in conducting interviews of witnesses. HUD argues that it has the right to interview unit employees in preparation for arbitration provided it follows procedural safeguards described in *Internal Revenue Service and Brookhaven Service Center*, 9 FLRA 930 (1982) (*Brookhaven*).

HUD asserts CBA Section 3.03 supports its right to communicate with employees concerning any grievance so long as the Union is informed and entitled to be present at the communication. HUD argues that since an employee's FLSA status depends on the work actually performed, it would be unfair and wasteful to prohibit or impede HUD from interviewing the grievants. HUD argues that to preserve the necessary balance between its rights and the employees' rights and AFGE's rights HUD must be allowed to conduct noncoercive interviews of the grievants. In the alternative, HUD seeks to obtain information from the grievants through formal depositions.

HUD argues that, pursuant to the Federal Arbitration Act, the Labor Management Relations Act, the Federal Service Labor-Management Relations Act, arbitration decisions, private arbitration rules and the Uniform Arbitration Act, arbitrators may exercise broad

authority and order pre-hearing discovery including interviews by HUD of its employees in preparation for arbitration.

Therefore, HUD requests that the Arbitrator rule that the Agency may interview, or in the alternative depose, the grievants in the presence of Union counsel.

AFGE's Position

AFGE asserts that HUD's misstates the holding in *POPA*. The Union argues that *POPA* is a negotiability ruling on a union's rights to discovery in grievance and arbitration of MSPB-appealable case information. AFGE argues that HUD's proposed interviews and depositions in the instant arbitration are formal discussions pursuant to 5 USC § 7114(a)(2)(A). AFGE argues that HUD has not identified a case precedent which accords an agency the right to interview grievants or the right to documents or the right to the communications between grievants and their counsel.

For these reasons, AFGE asks the Arbitrator to dismiss HUD's motion.

Discussion

The *POPA* decision cited by HUD is an FLRA negotiability determination. In that decision, the FLRA found that a union proposal, that the agency would make the witnesses relied on in MSPB appealable cases available to the union, was negotiable. HUD's reliance on this case to support its claim of a right to interview grievants is misplaced. HUD's reliance on *Brookhaven* is also misplaced. *Brookhaven* involved the application of the Federal Service Labor Management Relations Statute an interview of a bargaining unit employee and not to an interview of a grievant in preparation of the agency's case for arbitration. An agency's interview of a grievant in preparation for arbitration is a matter controlled by the parties' collective bargaining agreement.

The Parties negotiated the CBA arbitration procedure at Section 23 is separate and apart from the grievance procedure at Section 22. While the latter is intended to provide an opportunity of informal, bilateral dispute resolution, the former constitutes a formal third-party litigation process. Agency interviews during the processing of a grievance, although subject to 5 USC § 7114(a)(2)(A), permit and encourage candid communications between and among the parties, union and management witnesses and grievants.

The grievance procedure provides for the filing of a broad scope grievance of the parties concerning a dispute over "a continuing condition at any time" and by either HUD or AFGE. The instant case is a grievance of the parties in which every bargaining unit employee is a grievant represented by AFGE in its capacity as the exclusive representative. The parties failed to resolve the instant FLSA grievance of the parties and AFGE invoked arbitration.

The record developed by the parties in this motion and opposition cites no precedential case, CBA arbitration procedure provision or statutory provision which affords the right to HUD to interview the grievants. Pursuant to Section 23.10, the Arbitrator is expressly prohibited from and has no power to "subtract from, or modify any of the terms of" the CBA and find such a right for HUD to interview grievants.

Furthermore, the information HUD seeks, a description of the work actually performed by the grievants, is available from the managers and supervisors of the grievants. Numerous arbitration awards and FLRA decisions credit the testimony of supervisors as regards an employee's performance, reasoning that the supervisor is in the best position to evaluate an employee's performance since the supervisor knows the work that the employee actually performs.

In addition, this dispute concerns HUD's determinations of the grievants' FLSA status which involves discerning the work the employees performed in years past. Critical elements and standards, annual performance appraisals and supervisors' testimony, which are readily available to HUD, are as relevant, material and probative of the work actually performed by the affected employees as documents and testimony from the grievants.

Therefore, for all these reasons, the Arbitrator finds that, absent the consent of AFGE, HUD has no right to conduct interviews or depose the grievants. HUD's motion for a ruling that it may interview or depose the grievants is denied.

C. HUD'S MOTION FOR THE RETURN OF DATA OR INFORMATION THAT AFGE OBTAINED FROM THE GOVERNMENT

HUD's Position

HUD asserts, with the cooperation of employees, AFGE improperly copied internal computer materials from its computers. HUD argues that AFGE has admitted that it made copies of screens, known as screen prints, and other documents from the Agency's computers. HUD argues that AFGE has taken this information improperly and surreptitiously, and AFGE's assertions that the information is not confidential is insufficient justification for the Union's conduct. HUD seeks an order from the Arbitrator to AFGE to return the information to the Agency.

AFGE's Position

The Union asserts HUD's allegations that the AFGE possesses HUD data or information improperly obtained from Government computers is slanderous and preposterous. AFGE argues that the screen shots were not improperly obtained HUD data and the information provided by the grievants to the Union is "run of the mill data" and other information normally produced during the Parties' grievance and arbitration

processes.

Therefore, AFGE asks the Arbitrator to dismiss HUD's motion.

Discussion

AFGE does not deny or challenge that information was taken off HUD computers. In a previous hearing, AFGE admitted screen prints were taken and argues in its reply to HUD's motion that the information is "run of the mill." AFGE has misapprehended the gravamen of HUD's motion concerning the information the Union took from the Agency's computers.

In the instant dispute, AFGE is entitled to substantial, HUD might argue unlimited, information from the Agency pursuant to the Union's rights at 5 USC § 7114(b)(4). However, AFGE is not entitled to self-help regarding data in the Agency's computer system or any other data system or system of records which might be accessible to grievants as part of their official duties. By engaging in self-help, the Union has breeched HUD's computer system and retrieved data intended for use in the conduct of Government business. Whether the information is "run of the mill" or the Union's retrieval of the information has been routine in past grievances or if the breech was *de minimus* is immaterial.

The Union's self-help to Agency data contained in HUD's computer system was improper. The Union must return the data and may not use the data or any information obtained from the data without the consent of the Agency. Consistent with this determination, HUD's motion is granted.

D. HUD'S MOTION FOR AFGE TO PRODUCE COPIES OF SURVEY ANSWERS THAT HUD EMPLOYEES PREPARED IN CONNECTION WITH THIS CASE

HUD's Position

HUD asserts that AFGE asked the grievants in a series of questionnaires how they spent their work time. HUD argues the questionnaires are critical to the proceedings concerning the exempt status of GS-904's. HUD argues that it is entitled to the information because it is not protected by any privilege. HUD says it is entitled to the questionnaires for several reasons: the information may expedite the hearing and reduce the number of witnesses; HUD has been cooperative with the Union's requests for documents so the Agency should get the questionnaires as a matter of fairness; and the questionnaires should be shared with HUD just as the Union received HUD's preliminary position description evaluations of the affected jobs. HUD seeks an order from the Arbitrator to AFGE to produce copies of survey answers that HUD employees prepared.

AFGE's Position

AFGE asserts that agencies are not entitled to information from unions. The Union argues that its grievant/employee surveys are confidential and privileged. AFGE argues the communications are protected activity under several case precedents. AFGE says union representatives have a statutory right to maintain confidentiality of their conversations with bargaining unit employees without agency interference pursuant to 5 USC § 7116(a)(1). Furthermore, since its survey interviews were conducted by attorneys and paralegals, the communications are privileged attorney work product.

Therefore, AFGE asks the Arbitrator to dismiss HUD's motion.

Discussion

It is axiomatic that AFGE's collection of information by union representatives in aid of its FLSA grievance pursuant to its CBA is protected activity. Consequently, the information collected is confidential and protected, as well. The Union cannot be compelled to release the information. For this reason, HUD is not entitled to the information.

Having concluded that the Union's survey activity and the information collected thereby are protected, the Arbitrator need not determine if the information is privileged attorney work product.

HUD's motion for an order for AFGE to produce copies of the survey answers that HUD employees prepared for the instant arbitration is denied.

E. HUD'S MOTION FOR AFGE TO PRODUCE COPIES OF ANY DOCUMENT IT INTENDS TO INTRODUCE AT HEARING

HUD's Position

HUD requests that the Arbitrator promulgate fair procedures allowing it to obtain documents the Union intends to introduce at hearing.

HUD argues that arbitrators enjoy the inherent authority to direct and facilitate fair dispute resolution processing. HUD argues that the Arbitrator should direct a fair process in consideration of: public policy, taxpayer interest, likelihood of settlement, speeding up the hearing process, and the use of stipulated evidence saving taxpayer funds. For these reasons, HUD asserts that the Union should be ordered to produce copies of any documents it intends to introduce at hearing.

AFGE's Position

AFGE asserts that the CBA has no discovery provisions as urged by HUD. AFGE argues based on CBA Section 23.10 that "[t]he arbitrator shall not have the authority to add to, subtract from, or modify" the CBA. AFGE argues that additional discovery could and would establish a dangerous precedent.

Therefore, AFGE asks the Arbitrator to dismiss HUD's motion.

Discussion

CBA Section 23.09 requires that the Parties exchange witness lists no less than seven days before the arbitration hearing. Other than this CBA section, there is no other CBA provision covering the pre-hearing discovery such as the sharing of documents a party intends to introduce at arbitration as urged by HUD. However, under CBA Section 23.05 the Arbitrator may settle any disputes on arbitration procedures, subject to the limits of CBA Section 23.10 which constraints the arbitrator's authority to the terms of the agreement. Therefore, the plain language of the CBA establishes that the Parties provided for discovery of witnesses no less than seven days before the hearing, but did not provide for any other discovery processes. The Arbitrator concludes that when the Parties wanted to establish discovery processes, they did. Conversely when the Parties did not want discovery processes, they did not provide for them. Therefore, the canon of construction *expressio unis est exclusio alterius* applies to the Parties' arbitration discovery processes and the Arbitrator is without authority to establish other procedural arrangements as regards discovery.

HUD's motion for a ruling that the Union produce copies of any document it intends to introduce at hearing is denied.

IV. CONCLUSION

Based on the record developed by the parties and for the reasons discussed above, HUD's Motion to interview the grievants is denied. HUD's motion for the return of screen prints or other documents AFGE copied from HUD's computers is granted and AFGE may not use these documents or information contained therein without HUD's permission. HUD's motion for the Union to produce any survey answers prepared by HUD employees in connection with the arbitration is denied. HUD's motion for the Union to produce documents that it intends to introduce at hearing is denied.

ORDER

HUD's motion for the return of screen prints or other documents AFGE copied from HUD's computers is granted and AFGE may not use these documents or the information contained therein without HUD's permission. In all other respects, HUD's motion is denied.

Sean J. Rogers, Esq.
Alexandria, Virginia
May 1, 2006