

FEDERAL MEDIATION AND CONCILIATION SERVICE  
CASE # 07-52363-a  
GRIEVANT: Class

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IN THE MATTER OF THE ARBITRATION

between

U.S. SMALL BUSINESS ADMINISTRATION,  
Employer.


and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, COUNCIL 228,  
Union,

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Arbitrator:	Michael Wolf
Employer Advocate:	James Cantlon Judy Mitchell
Union Advocate:	Michael Snider

DATE 4/3/07

  
MICHAEL WOLF

## ISSUE

This grievance is currently before me on a preliminary issue. Although the parties have presented written submissions, they have not proposed an “issue” for resolution at this juncture. Having reviewed their arguments, I conclude that the parties have presented the following issue: Does the arbitrator have the authority to schedule a pre-hearing conference to address the discovery, evidentiary and scheduling issues raised by the Union?

## BACKGROUND

The Small Business Administration (“SBA” or “Agency”) and the National Office of the American Federation of Government Employees (“AFGE”) are parties to a collective bargaining agreement. The copy of the agreement presented to me shows an effective date of August 27, 1999.

Council 228 of AFGE filed a grievance in this matter on November 1, 2006, alleging, *inter alia*, that the SBA “violated the FLSA, DOL and OPM regulations, the collective bargaining agreement and all other relevant and applicable law, rule and regulation with regards to Overtime pay to [bargaining unit employees].... Council 228 alleges that the agency failed to properly classify bargaining unit employees as FLSA non-exempt as well as improperly offer bargaining unit employees compensatory time in lieu of overtime.”

Accompanying the grievance was a request that the Agency produce information pursuant to 5 U.S.C. §7114(b). On December 1, 2006, the Agency responded to the document request by denying it in its entirety on the grounds that: (1) the information is not normally maintained by the Agency and/or does not exist, (2) the information is not

reasonably available, (3) the Union has not demonstrated a particularized need for the information, (4) the Agency has countervailing “anti-disclosure interests,” and (5) disclosure would violate the Privacy Act. On December 5 or 6, 2006,<sup>1</sup> the Union filed an unfair labor practice charge, alleging that the Agency violated 5 U.S.C. §7114(b) when it failed to produce any of the information requested; it also alleged that other actions taken by Management constituted ULPs.

After I was selected as the Arbitrator in this case and had proposed several hearing dates, the Union, in an email dated February 20, 2007, requested that “the Parties meet and confer with the Arbitrator prior to setting hearing dates in this case.” The Union explained this “case involves over 1300 employees and allegations of improper FLSA classification and damages dating back over 3 years.” The Union’s counsel further stated that

we anticipate extensive wrangling over the Union’s document production request.... Without essential documents, such as a basic employee list, the Union is simply not prepared to go to hearing. We emphasize that this is due to the Agency’s stonewalling, not to any lack of due diligence on behalf of the Union.

I responded to the Union’s request by email, in which I proposed a date for a telephone conference. The Agency initially responded that its counsel was out of town and that it could not yet commit to my proposal. The Agency subsequently filed a document that opposes the scheduling of a pre-hearing conference and seeks withdrawal of the grievance. The Agency’s arguments in support of this position are set forth below. At my request, the Union responded in writing to the Agency’s submission, which is also summarized below. The Agency then filed a written rejoinder protesting

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<sup>1</sup> The Agency identified December 5 as the filing date, while the Union asserted that the

that the Union's submission had "factual inaccuracies" and that it mis-cited legal precedent. The Union had the last word when it submitted a request that I "strike the Agency's Reply submission as not authorized by the CBA." It further offered to go to a hearing on the merits in May or June if I concluded that a pre-hearing conference should not be held.

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

Based on its written submissions and the precedent cited in support, the Agency's arguments can be summarized as follows:

1. The law does not permit the Union to pursue the dispute over requested information in both an administrative forum and in the grievance process. See 5 U.S.C. §7116(d); U.S Department of Housing & Urban Development, 53 FLRA 1301 (1998). Because the Union filed a ULP to contest the Agency's response to the information request, it is barred from pursuing the same issue in arbitration. I therefore do not have jurisdiction to conduct a pre-hearing conference to address the discovery issues raised by the Union.
2. The collective bargaining agreement does not provide for discovery and does not provide for the resolution of discovery disputes by an Arbitrator.
3. The Union failed to identify a particularized need for the information requested. It therefore failed to satisfy the requirements of 5 U.S.C. §7114(b).
4. Because the Union states that it is unprepared to go to arbitration without the requested information, it's request is nothing more than a "fishing expedition."

5. Because the Union does not have sufficient facts to proceed to a hearing, its grievance “must be withdrawn.”<sup>2</sup>

### **THE UNION’S POSITION**

Based on its written submissions and the precedent cited in support, the Union’s arguments can be summarized as follows:

1. The information requested by the Union “would assist the Council because the matter is properly before the arbitrator and needs the information to prove the facts underlying the grievance, in order to contact grievants and evaluate the liability of the SBA and damages pursuant to the grievance.”

2. A pre-hearing conference is needed to “discuss the case ... discuss how the case can be managed appropriately and timely, and to work out some production issues.” However, the Union is “not trying to end-run the ULP process, but rather manage this litigation in a way that makes sense.”

3. “To the extent that the Union needs information that is subject to the ULP in order to even participate in the hearings, the matter should be continued pending the FLRA’s determination on the ULP. This should be one of the subjects discussed at the meeting.”

4. “[T]o the extent that the Union needs information from the Agency to proceed with this case, and that information is relevant, necessary and reasonably available, it can be ordered to be produced by the Arbitrator outside of, and despite, the ULP

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<sup>2</sup> In its reply submission, one of the Agency’s topic headings is “dismiss grievance,” although it then states that “the matter must be withdrawn.” It is not clear whether the Agency is asking me to dismiss the grievance or whether it is merely asking the Union to withdraw it. I will assume that the Agency wishes me to dismiss the grievance on the merits, and I address that proposal below.

process. It is true the Arbitrator would have no power to actually make the Agency turn over any information, but he would have the ability to draw an adverse inference.”

5. Because of the complex nature of this case and the large number of Grievants, a pre-hearing discussion involving the Arbitrator and the parties “makes sense.”

6. The Arbitrator has the legal authority to “run the hearing and prehearing.”

7. The collective bargaining agreement does not preclude an Arbitrator from conducting a pre-hearing conference.

8. “[P]roceeding willy-nilly to a hearing when the matters are not clearly arranged and the Union does not have vital information to present at hearing would be a huge waste of resources.”

### **FINDINGS AND CONCLUSIONS**

The “conduct of the arbitration proceeding is under the arbitrator’s jurisdiction and control,” subject to compliance with statutory, regulatory and contractual limitations. 29 CFR §1404.13. Nothing in the governing statute, regulations or collective bargaining agreement precludes me from conducting a pre-hearing conference. Moreover, the scheduling of pre-hearing conferences is often recommended in complex cases. See National Academy of Arbitrators, The Common Law of the Workplace, §1.10 (2d ed., 2005)(“Cases that might become exceedingly long or raise unusual issues, such as extensive document subpoenas or deposition questions, may be expedited by a prehearing conference with the arbitrator in person or by telephone conference call, involving the representatives of all parties.”)

The Agency contends that I would be violating FMCS regulations if I were to schedule the pre-hearing conference, since Article 40 of the collective bargaining agreement “does not provide for discovery or discovery disputes.” The Agency continues: “Article 40 does not provide for paying costs to an Arbitrator to meet with the parties and resolve a discovery dispute.” I believe the Agency has it backwards. Nothing in the collective bargaining agreement precludes my conducting a pre-hearing conference, while the relevant FMCS regulation states that I have the authority to “control” the “arbitration proceeding.” In my opinion, this case will best be “controlled” by a face-to-face meeting of the parties to discuss scheduling and the related issues addressed in this interim decision.

I have the authority under the collective bargaining agreement to ensure that a fair, efficient and orderly arbitration takes place. It is my decision that this objective can best be achieved by a pre-hearing conference. I therefore reject the Agency’s effort to prevent such a conference from taking place. In reaching this decision, I am not pre-judging the question whether the Union has any right to discovery. I am merely providing a forum for further discussion of this issue.

The Agency also opposes my consideration of issues specifically raised by the Union’s request for information pursuant to 5 U.S.C. §7114(b). It contends that my consideration of the statutory request for information is barred by the Union’s election to file a ULP, rather than a grievance, over the alleged non-compliance with the request. The Union’s response to this argument sends some mixed signals. On the one hand, the Union concedes that I have no authority to compel the Agency to produce the requested information. It then argues that I have some inherent authority outside of the

ULP process to order the SBA to produce information and that, if it fails to do so, I may draw an adverse inference against the Agency. Of course, drawing an adverse inference is traditionally viewed as an alternative form of enforcement in discovery, since it imposes negative consequences for a party's non-compliance with a discovery request. It is therefore unclear from its submissions whether the Union does or does not believe I have the authority at this juncture to compel the SBA's production of information that is covered by the ULP.

In view of this lack of clarity, one of the items to be discussed at the pre-hearing conference will be what the Union describes as "some document production issues." I am cognizant of the limitations imposed by 5 U.S.C. §7116(d) and intend to respect them. However, if the Union wishes to present arguments regarding its "document production issues" and how I may address those issues without contravening Section 7116(d), I will consider such arguments. By placing this item on the agenda, I am not deciding whether the Union has the right to the any of the information requested and I am not intending to bypass or duplicate the ULP process.

The document production issues will also be discussed insofar as they may bear upon the scheduling of a hearing on the merits. On this point, the Union has made somewhat conflicting statements. In one filing it suggested that the requested information is needed "to prove the facts underlying the grievance;" in its most recent filing, it suggested going to hearing in May or June even in the absence of the requested information. Both parties need to flesh their positions out with respect to proceeding with a hearing on the merits and the date for such hearing.

The Agency also argues that the grievance should simply be dismissed because “the facts are clear, the Union filed a grievance with no evidence....” The only thing clear is that I have no “facts” before me with respect to the merits of the case. As an arbitrator, the only facts I can consider in deciding a grievance are the facts placed on the record. Counsel’s arguments and representations in their briefs do not constitute facts of record material to the merits of the grievance. The Agency’s proposal that the grievance be withdrawn or dismissed on the merits is therefore premature. However, that issue can be revisited at the pre-hearing conference so that I can better understand the parties’ positions.

Finally, the Union’s submission makes extended reference to what it characterizes as Management’s improper interference in the employees’ and Union’s bargaining rights (e.g., direct discussions between supervisors and employees over terms and conditions of employment). Those matters are not properly before me. They are not the subjects of this grievance. I therefore do not address them here and will not consider them at the pre-hearing conference.

#### **INTERIM AWARD**

The Union’s request for a pre-hearing conference is granted. In addition to discussing the scheduling of a hearing or hearings in this matter, the parties should be prepared to discuss the issues above. I propose that the conference be conducted on April 23 or 24, 2007. If those dates present conflicts, the parties should promptly propose alternative dates by email.