

their motion should be denied. The clear and unambiguous wording of the filed grievances, and the negotiated agreement between the parties' control.

I. The Union May Only Include Present Bargaining Unit Members

As stated in the Union's motion and their grievances, the grievances were filed on "behalf of all bargaining unit employees". The Union filed and re-filed their grievances on a number of occasions as outlined in the Agency's "Pre-Arbitration Brief" on threshold issues (dated September 12, 2008). In all instances, the Union explicitly filed on "behalf of all bargaining unit employees."

Per the Negotiated Agreement ("Agreement") between the parties, the agreement covers those employees "stationed at Fort Sill, Oklahoma (Article 1.2, see Attachment A). "Stationed" means that they are assigned to work at Fort Sill. This Article does not have any further meaning and does not attempt to include past or retired employees, even if they are presently living in the Lawton-Fort Sill geographical area. In fact, the Article's intent should be interpreted as to exclude any bargaining unit member not currently working for Fort Sill, and their claims.

If the Arbitrator finds that the Agreement does not exclude prior bargaining unit member claims, then the Arbitrator should deny their inclusion since the filed grievances fail to clearly include them. The Federal Labor Relations Authority ("Authority") in a number of cases has asserted that an arbitrator exceeds his authority by awarding relief to persons not encompassed by the grievance; or when the arbitrator awards relief to persons who did not have the union file the grievance for them; see *VA Alaska VA Healthcare System and AFGE Local 3028*, 60 FLRA 968 (2005); *United States Dep't of Defense, Army & Air Force Exch. Serv.*, 51 FLRA 1371 (1996); *U.S. Department of Veterans Affairs and AFGE Local 933*, 40 FLRA 160 (1991); and *Robins Air Force Base and AFGE Local 987* (1985).

If the Union intended to include prior bargaining members, it should have at the very least included in the first paragraph of its grievances, where it identified on whose behalf the Union filed the grievances on, that it intended to file the grievances on behalf of *prior* bargaining unit employees. Prior bargaining unit employees are not clearly encompassed in a grievance where the Union files a grievance on “behalf of all bargaining unit employees.”

That the Union attempted to seek relief, within the same grievances, for past bargaining unit members is irrelevant to their inclusion, as relief may not be sought for individuals not clearly encompassed in a grievance. In subsequent paragraphs of the grievances (usually the third paragraph), the Union asserts that it seeks relief for *retired and past employees*. This is of small consequence, because as established in civil procedure, a party may not seek relief for a party not clearly encompassed in a claim or grievance. The Union should not be allowed to seek relief for prior bargaining unit employees if the grievances were not clearly or unequivocally filed on their behalf.

Also, the Union tries expresses that the Agency should have known of their intention to include prior bargaining unit employees through the Request for Information (RFI) filed on behalf of the Union, which was attached to the grievances. However, a RFI is distinct from a grievance. A grievance requests relief for a claim accrued under a negotiated agreement, whereas a RFI only seeks information. Presumably, a union may request information to determine, among other things, whether or not it should file a grievance at all. So, the fact that the Union requested information on past employees is not indicative of their allegation that they intended to include prior bargaining unit employees within those already filed grievances.

If anything, the Union’s actions, after submitting the RFI, shows their lack of intent to include prior bargaining unit employees in their grievances. When the Agency did provide

certain information in response to the Union's RFIs, the Union did not object to any information provided by the Agency that did not include information on prior bargaining employees. All information provided by the Agency in response to the Union's RFI was primarily focused on current bargaining unit employees, and any information provided on past employees was purely incidental. The Agency only purposely responded to one request that explicitly included prior bargaining unit employees, and that was due to the fact that the particular request was explicit in that it requested information on such members.

As discussed above, the Union's request to include prior bargaining unit members should be denied due to the fact that Agreement between the parties only covers employees stationed at Fort Sill; and additionally due to their failure to clearly file the grievance on behalf of *prior* bargaining unit employees.

II. Response to Union's Case Law and Argument.

The Agency does not argue, per case law, that a past bargaining unit member may never grieve a claim, whether on his/her own or through the Union, if it arose under a negotiated bargaining agreement (especially where the Agreement between the parties does not in any way exclude such claims). The Agency does argue though that the Union may never seek relief for past employees or persons not clearly encompassed by the grievance, nor where the Union did not file the grievance for them. As stated before, the Authority in a number of cases has asserted that an arbitrator exceeds his authority by awarding relief to persons not encompassed by the grievance; or when the arbitrator awards relief to persons who did not have the union file the grievance for them.

The Union in this instant arbitration, has cited a couple of cases where past employees were allowed to be processed in accordance with the negotiated bargaining agreement. In *Muniz*

v. U.S., 972 F.2d 1304 (Fed. Cir. 1992) the facts are sufficiently different from our case, to take note. In *Muniz*, a past employee (retired) brought suit in the district court. The main controversy surrounding the case before the court was whether or not the suit should have been filed through the judicial or arbitration process. In this case it was the employee, without union representation, who brought the suit on his sole behalf through the judicial process. As part of the analysis in the case, consideration was taken on whether a negotiated grievance would be applicable to a person who had retired, but whose claim arose under a negotiated bargaining agreement. So, as can be noted, the facts are different from the instant grievance and so is the controversy. By no means does it appear to the Agency that the Authority was trying to decide whether or not past employees may be included in a grievance filed by a Union and under what circumstances.

The Union also cites *International Ass'n of Fire Fighters, Local 13 Panama Canal Comm'n Gen. Services Bureau Balboa, Republic of Panama*, 43 FLRA 1012 (1992). Once more the facts in this case are materially different from our own case. In *Panama Canal* the Union filed a grievance on behalf of "past and present pre-Treaty bargaining unit employees." In this case, different from ours, the union explicitly filed the grievance on behalf of prior unit members, and therefore its grievance clearly encompassed past employees. Similarly can be said in regards to the intentions of the unions in both *Bureau of Indians Affairs and the National Federation of Federal Employees Local 243*, 25 FLRA 902 (1987) and *Social Security Administration, Mid-America Program service Center, and America Federation of Government Employees, Local 1336*, 26 FLRA 292 (1987), also cited by the Union.

The Agency is not aware of any cases, similar to our own, decided by the Authority or another court of law where they have allowed relief to past employees where the union

completely failed to indicate that it was filing a grievance on behalf of former or past employees. As stated before, and provided that the Arbitrator deems that Agreement does not exclude claims brought by past employees, the Agency argues that the grievances filed by the Union do not clearly encompass prior bargaining unit members. The Union did not file the grievance on behalf of prior unit members when it filed grievances on multiple occasions.

III. Exclusion of Past Employees From the Grievance Would Not Leave Them Without Relief.

The Union also argues that if past employees were not included in the instant grievance they would be precluded from any remedy by the Agency. This assertion is erroneous.

Article 32.4 of the Negotiated Agreement states, "A grievance may be initiated by the UNION, the EMPLOYER, *an employee*, or a group of employees. Only the Union or representative approved by the UNION may represent employees in such grievances. However, any employee or group of employees may *personally present a grievance* and have it adjusted without representation by the UNION, provided that the Union has the option to be a party to all discussions and the grievance process," (see Attachment B).

As can be clearly seen, our negotiated agreement allows for an employee to file a grievance on his/her own behalf. If an employee so chooses, they may file a similar grievance as the instant one for any claims of rights that accrued during employment under the negotiated agreement, without prejudice of what may come out of this instant Arbitration. It is fair to state that past employees not included in the instant grievance will not be limited in their request for relief or backpay that they may be allegedly entitled to under the Statute.

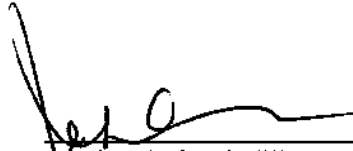
IV. Summation

In summation, the Union should be denied their request to include prior unit

bargaining members in their grievances, as this does not appear permissible under the Agreement and that prior bargaining members were not clearly included in the filed grievances.

Accordingly, the Agency respectfully requests that the Arbitrator deny the Union's Motion to Include Prior Bargaining Unit Employees.

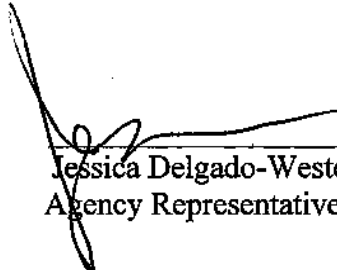
Respectfully submitted,



Jessica Delgado Western
MAJ Joseph Marshall
Agency Representatives

CERTIFICATE OF SERVICE

I certify that I have emailed a true and correct copy of the above and foregoing submission to both the NFFE Local 273 and to the designated Union Representatives, on this 30th day of September, 2008.



Jessica Delgado-Western
Agency Representative

ATTACHMENT A

ARTICLE 1

EXCLUSIVE RECOGNITION AND COVERAGE OF AGREEMENT

1.1. The EMPLOYER recognizes the UNION as the exclusive bargaining representative for all employees included in the bargaining unit as defined in Section 1.2 below.

1.2. This agreement applies to and covers all non-supervisory, nonprofessional, appropriated fund employees stationed at Fort Sill, Oklahoma, for which the Commanding General, U.S. Army Field Artillery Center and Fort Sill, Fort Sill, Oklahoma; or the Commanding General, IIIrd Armor Corps Artillery, or the Garrison Commander, Fort Sill; or the Commander, U.S. Army Medical Department Activity, Fort Sill; or the Commander, U.S. Army Dental Activity, Fort Sill, has delegated appointing authority. Excluded are employees covered under other exclusive bargaining agreements and employees of any other organization that are or may be assigned to Fort Sill for which the Commanding General, U.S. Army Field Artillery Center and Fort Sill; or the Commanding General, IIIrd Armor Corps Artillery, or the Garrison Commander, Fort Sill; or the Commander, U.S. Army Medical Department Activity, Fort Sill; or the Commander, U.S. Army Dental Activity, Fort Sill, does not have delegated appointing authority; supervisory and management officials, professional employees, confidential employees; and all personnel whose duty station is other than Fort Sill, Oklahoma.

ARTICLE 2

EMPLOYEE RIGHTS

2.1. UNION Membership. Employees in the unit shall be protected in the exercise of their rights, freely and without fear of penalty or reprisal, to form, join, and assist the UNION or to refrain from such activity. The EMPLOYER shall take such action, consistent with law or with directives from higher authority as may be required in order to insure that employees are apprised of the rights described in this section, and that no interference, restraint, coercion, or discrimination is practiced to encourage or discourage membership in the UNION by anyone acting in a supervisory or other capacity for the EMPLOYER.

ATTACHMENT B

b. After carefully considering the evidence and the employee's response if any and any mitigating factors, the deciding official shall select one of the following options:

- (1). Withdraw the proposed action;
- (2). Institute a lesser action; or,
- (3). Institute the proposed action.

30.10. Final Decision.

a. Letters of reprimand will include a specific time period, in accordance with Government-wide regulations, when the letter will be removed from the employee's official personnel folder. Letters of admonishment or warning shall not be filed in the employee's official personnel folder.

b. In the event an unfavorable final decision is issued, the employee shall be advised that he or she have the right to appeal the decision under the negotiated grievance procedure.

c. In all disciplinary suspension and adverse actions, except removals, the final decision letter shall not be delivered to the employee in less than sixteen (16) calendar days and the penalty not implemented in less than thirty six (36) calendar days from the receipt of the proposal letter, except where the shortened notice period is used under the crime provisions of 5CFR 752. For removals the penalty may not be implemented in less than thirty (30) calendar days, except where the shortened notice period is used. For adverse actions the employee may grieve the decision under the negotiated grievance procedures in this agreement or they may appeal to the Merit Systems Protection Board (MSPB), but not both.

ARTICLE 31

GRIEVANCES

31.1. Common Goal. The EMPLOYER and the UNION recognize the importance of settling disagreements and disputes promptly, fairly, and in an orderly manner that will maintain the self-respect of the employee and be consistent with the principles of good management. To accomplish this, every effort will be made to settle grievances expeditiously and at the lowest level of supervision identified by either the UNION or EMPLOYER, upon request, if the lowest level of supervision is not readily apparent.

31.2. Scope. This negotiated grievance procedure shall apply to matters of concern or dissatisfaction regarding the interpretation, application or violation of law, regulations, or this agreement; conditions of employment; or relationships with agency supervisors and officials, including prohibited personnel practice charges, disciplinary actions and adverse actions. It shall apply to all matters indicated above, whether or not set forth in this Agreement. This grievance procedures does not apply to:

- a. A violation relating to prohibited political activities.
- b. Retirement, life insurance, or health insurance.
- c. A suspension or removal for national security reasons (e.g. revocation of security clearance).
- d. Any examination, certification, or appointment (e.g. selection for a position or appointment).
- e. Classification of a position which does not result in reduction in pay or grade for the employee.
- f. Separation during probation/trial period.
- g. Employee-initiated grievances concerning RIF.
- h. Interpretation of laws, government wide regulations and Agency regulations in effect at the time this agreement is approved.

31.3. Nothing in this section shall prevent employees from processing any prohibited personnel practice appeal defined in law through any appropriate statutory appeals procedure provided that the employee has not filed a formal grievance on the matter in accordance with this Agreement.

31.4. Application. A grievance may be initiated by the UNION, the EMPLOYER, an employee, or a group of employees. Only the UNION or representative approved by the UNION may represent employees in such grievances. However, any employee or group of employees may personally present a grievance and have it adjusted without representation by the UNION, provided that the UNION has the option to be a party to all the discussions and the grievance process.