In the Matter of the
Motion to Dismiss

Filed by the Federal Bureau
of Prisons, Federal Correctional
Institution, Seagoville, Texas

Respondent

American Federation of Government Employees,
Local 1637

FMCS 12-52469

Filed April 16, 2012

<u>For the Agency</u>

Ms. Loretta A. Burke
Labor Relations Specialist

<u>For the Union</u>

Mr. John M. Sullins
1st Vice President

The Issue

The Agency's Motion to Dismiss seeks the arbitrator in the pending arbitration (FMCS 12-52469_ to bar the Union from filing a grievance in regard to the same issue, as the grievance filed on December 1, 2011 was preceded by an Unfair Labor Practice filed on November 18, 2011. The Agency requests the grievance be dismissed as procedurally defective and not arbitrable.

In response, the Union maintains the Unfair Labor practice was never filed with the Federal Labor Relations Authority.

Discussion and Conclusions

The Agency maintains that on November 18, 2011, the Union, Local 1637, served a charge against the Federal Correctional Institution, Seagoville, specifically Trina Weginton, Human Resource Manager. The charge stated that 5 USC 7115 (a) 1, 5, and 8 were violated.

In effect, it appears the charge centered around rotating the alignment of Unit Team Members. The Union sought to negotiate the procedures for this move. After hearing the Union's concerns and proposals, management apparently stated that they saw no valid impact and implementation issues and that they were

moving forward with their decision to move the employees.

Management gave the Union no counter proposals nor did it address any of the concerns the Union had on the impact of the charge on the affected employees. (Taken from the alleged filed charge with the FLRA)

In support of its position, the Agency refers to 5 USC 7116 (d) of the Statute in argument,

> 5USC 7116 (d) of the Statute provides that issues which may be raised under a negotiated grievance procedure ma, in the discretion of the aggrieved party, be raised under the procedure or as an unfair labor practice, but not under both procedures. For a grievance to be precluded under Section 7116 (d) by an earlier filed unfair labor practice charge, all of the following conditions must be met. (1) the issue which is the subject matter of the unfair labor practice, (2) such issue must been earlier raised under the unfair labor practice procedures, and (3) the selection of the unfair labor practice procedures must have been in the discretion of the aggrieved party.
> (page 5, Agency's Position)

In this respect, the Union filed a grievance over this matter on December 1, 2011, within the 40 day time frame from the grievable event that occurred on November 9, 2011.

In response to the Agency's Motion, the Union points out that it notified the Agency on December 1, 2011 during the Labor Management Relations meeting that it was withdrawing the ULP. The Union sincerely apologizes for any confusion it may have caused the Agency by using the verbage "withdrawn"

during the meeting, but the ULP was never filed.

The Union further stands that, when filing a ULP with FLRA, the Authority responds with a notice to both parties with instructions and an assigned case number for the complaint.

Also, the Union states that if the Agency can produce a copy of the notification from the Authority with a case number assigned and a copy of the complaint stamped received by the Authority, the Union agrees that the grievance should be considered not arbitrable. Simply put, the Agency cannot produce these documents because they don't exist. The complaint was never filed. Therefore, the grievance was timely filed and is properly before the Honorable Arbitrator.

In reviewing the evidence and argument as presented by the parties, the Agency (tab 11) included the Charge Against An Agency to the FLRA, dated November 18, 2011, and signed by John Sullins. Such charge details the events leading to the charge. The charge also reflects that a copy of the change was received by FCI Seagoville, Human Resources Department on November 18, 2011.

In response, Sullins stated that the charge had been withdrawn, and the Agency so notified, further stating that if the Agency can produce a copy of the notification from FLRA with a case number assigned and a copy of the complaint

stamped received by the Authority, the Union would agree that the grievance should be considered non arbitrable.

To this, the Agency refers to 44 FLRA 1291 (1992), IAMAW, Lodge 39 and US department of the Navy, Naval Aviation depot, Norfolk, Virginia, by noting that the decision there is that the FLRA has consistently held, "that an issue is raised within the meaning of Section 7116 (d) of the Statute at the time of the filing of the grievance or a ULP charge, even if the grievance or ULP charge is not adjudicated on the merits."

For the record, the Agency included Sully's November 10, 2011 charge, which reflected the wording Withdrawn, signed apparently by Sullins, with a date of December 1, 2011, (the date of the filing of the grievance).

In that referred to FLRA decision, the Agency states in part,

> ...We find no merit in the Union's contention that the ULP charge could not be a bar to the Arbitrator's consideration of the grievance because the ULP charge was withdrawn and never adjudicated....

This case finally then rests with the issue of whether Sullins, on behalf of the Union, ever filed the ULP charge with the FLRA. The Agency in its brief states in agreement,

> ...that an issue is raised within the meaning of Section 7116 (d) of the Statute at the time of the filing of the grievance or a ULP charge.

In sum, there is no evidence presented by the Agency that indeed the Union actually filed the ULP charge with the FLRA. Although the Union typed up a charge to be filed, there is nothing offered to support the fact that the Union actually filed the charge with the FLRA. That's the defining distinction. Merely typing up a proposed charge does not meet the requirements of 7116 (d). Such apparently was never filed, and the Union obviously changed its mind and decided to use the arbitration process by filing a grievance over the subject matter on December 1, 2011, rather than to file a ULP with the FLRA. The Union's position in this matter is on point.

If, later on, the Agency can submit evidence that in fact a charge was filed with the FLRA, the Union will apparently agree that the grievance should be considered not arbitrable.

Decision

There is no evidence of record to conclude that the Union ever filed a ULP charge with the Agency.

Accordingly, the grievance can proceed to arbitration.

May 11, 2012
Dallas, Texas

John B. Barnard, Arbitrator