
IN THE MATTER OF THE ARBITRATION	)	
	(	
	)	FMCS Case No.12-00782
Between	(	
	)	Grievant: Justin Killingsworth
	(	
FEDERAL BUREAU OF PRISONS,	)	
FEDERAL CORRECTIONAL COMPLEX,	(	Arbitrability
FORREST CITY, ARKANSAS	)	
	(	
And	)	
	(	
AMERICAN FEDERATION OF	)	
GOVERNMENT EMPLOYEES, LOCAL 0922,	(	
	)	
	(	

BEFORE: Dineo Coleman Gary, Arbitrator

APPEARANCES:

For the Employer: Wesley A. Pummill
Labor Relations Specialist
LMR-South
U.S. Department of Justice

For the Grievant/Union: Jeffrey Roberts, President
Jay Westbrook, Steward
B. J. May, Steward
AFGE Local 0922

Date of Hearing: August 22, 2012

Location of Hearing: Federal Correctional Complex
Forest City, Arkansas

Date of Award: September 14, 2012

ARBITRATOR'S DISCUSSION, OPINION AND AWARD

Introduction

The above-captioned matter came to be heard on the twenty second day of August 2012, at the Federal Correctional Complex in Forest City, Arkansas. Official record of the hearing was the court reporter's transcript. Post-hearing briefs were timely submitted by the parties on or about September 5, 2012; the record was officially closed September 11, 2012.[1] The parties were afforded the opportunity to examine and cross-examine witnesses, to introduce relevant evidence, to be heard in connection with any objection, and to argue orally. Upon a thorough review of the record, having thoroughly considered the evidence; careful observation of the witnesses, consideration of the arguments of the parties and the post-hearing briefs, the Arbitrator makes the following findings and renders the following Discussion, Opinion and Award.

Parties

Justin Killingsworth, hereinafter referred to as the Grievant, is a Senior Officer and an employee of the Federal Bureau of Prisons, at the Forrest City Federal Correctional Complex (FCC) hereinafter referred to as the Agency or the Employer. The Grievant was represented by the American Federation of Government Employees (AFGE), Local 0922, hereinafter referred to as the Union. The Grievant and the Union contend that the Agency violated the terms of the Collective Bargaining Agreement with reference to the nonpromotion of the Grievant. The Agency contends that the grievance is not procedurally arbitrable.

Issue

Threshold Issue: Is the grievance concerning whether the Agency violated the Master Agreement in relevant Sections of 5 USC by not selecting Justin Killingsworth to a GL-8 Officer, arbitrable.[2]

[1] The "Statement of the Case" section provides information regarding closing of the record.

[2] Although it was firmly established that the first issue of the bifurcated hearing would be concerned solely with the question of arbitrability, the issue as stated and agreed to by the parties at the hearing addressed the merits of

Stipulations

The parties agreed to stipulate as to the following: For internal applications vouchering may or may not be done after the Best Qualified (BQ) list has been established and given to the institution. (Tr. at 162)

Burden of Proof

Inasmuch as the issue as set forth above involves arbitrability of the grievance, the Agency has the burden of establishing, by a preponderance of the evidence, that the grievance is not procedurally arbitrable. Preponderance of the evidence shall mean that evidence which is more persuasive when compared to all evidence, if any, in opposition therewith.

Statement of the Case

The Grievant is a GL-7 Senior Correctional Officer at the Low Institution, a low security Federal Correctional Institution located at the Forrest City Federal Correctional Complex (FCC) in Forrest City, Arkansas and operated by the Federal Bureau of Prisons which is an Agency of the U.S. Department of Justice. The bargaining unit employees are represented by the American Federation of Government Employees, Local 0922. In the spring or early summer of 2011 the Grievant applied for the position of Correctional Officer (Senior Officer Specialist) which represented a grade promotion to GS/GL-8.[3] (Tr. at 117) (Union Exhibit-3)

The Grievant was later notified by the Human Resource Division in Grand Prairie Texas that he made Best Qualified (BQ) group meaning he was qualified to be considered for the GS/GL-8 Senior Officer Specialist position and among those applicants to be considered by the Selecting Official at Forrest City. The Grievant was subsequently notified that he did not receive the promotion and on or about September 12, 2011, he informed the Union Local of his belief that he had been discriminated against due to the amount of sick leave he used. On behalf

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the case. Therefore it is reframed here to in fact reflect the threshold issue of procedural arbitrability as presented in the Agency's Motion to Dismiss. (Tr. at 8-9)

[3] GS-8 and GL-8 seem to be used interchangeably in documentation and during the hearing. It is additionally referred to as GS/GL 8 on the Formal Grievance Form. (Joint Exhibit-2).

of the Grievant, the Union submitted a formal grievance citing provisions of the Master Agreement, United States Code and Human Resource Manual, specifically: Master Agreement, Preamble, Articles 1, 2, 3, 6, 14, 17, 20, 23, and 36; 5 USC 7116, 7114; P. S. 3420.09 Standards of Employee Conduct; Local Supplemental Agreement, Human Resource Manual 3000, 5 USC 5596 U.S. Back Pay Act and FLSA. The grievance dated September 28, 2011, stated in pertinent part:

> Mr. Killingsworth has worked at this institution for over 8 years applying for numerous positions including Unicor, Facilities and GL-8 Officer where he has been in the Best Qualified group.… When he inquired about why he has not been promoted, Dept. Captain Howard explained to him on two separate occasions that under this administration, the Warden would not promote anyone he feels to not have enough sick leave. This is a direct violation of the Master Agreement and will not be tolerated by the local. The entitlement of Sick Leave is the condition of employment. If exercising the condition of employment is used to delineate a subgroup of the employees in which the Agency gives less consideration for promotion and upward mobility, the Agency has clearly committed a prohibited, unwanted personnel practice. (Joint Exhibit-2)

The grievance referred to the Union's failed attempts to informally resolve the issue with the Warden during the week of September 12 and on September 19, 2011. The remedy requested included the Grievant's promotion to a GL/GS-8 correctional Officer with back pay and interest in accordance with applicable pay law, and that the Agency "cease and desist" violating terms of the Master Agreement.

The Warden issued a response denying the grievance on October 28, 2011, stating in pertinent part:

> After reviewing your grievance I was unable to see what violation occurred. Deputy Captain Howard is not the selecting official at FCC Forrest City. I determine who is selected for the positions announced and do not use sick leave as a guide to promote or not promote anyone to any position.
>
> Additionally, in accordance with 5 Code of Federal Regulations (CFR) Section 335.103, while procedures used by an Agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. It is obvious from reading your grievance that the ranking and certification was not in issue and therefore, the selection was made from it properly ranked and certified group of employees. (Joint Exhibit 3)

On November 17, 2011 the Union invoked arbitration and through the Federal Mediation and Conciliation Services (FMCS) the parties selected the arbitrator. (Joint Exhibit-4) The hearing date was set for August 22, 2012.

On August 13, 2012, the Agency submitted a Motion to Dismiss the grievance on the basis that the grievance was not properly before the arbitrator. (Joint Exhibit-5) During the August 15, 2012, prehearing conference call, the parties presented argument regarding the Agency's request for a threshold ruling regarding the Motion to Dismiss. This arbitrator ruled that due to the complexity of the issues, the upcoming hearing would be bifurcated to first determine the arbitrability of the matter. The parties were asked to be prepared to present evidence, testimony and argument addressing the merits of the case following the arbitrability portion of the hearing. Through the Federal Mediation and Conciliation Services this matter was properly brought before the Arbitrator on August 22, 2012.

The record of arbitration proceedings are generally closed with the submission of post-hearing briefs. Notwithstanding this protocol, on September 7, 2012, the arbitrator received an e-mail from the Union President disputing a statement contained in the Agency's brief. Sent by separate e-mail was a supporting document: Labor Management Relations Quarterly Meeting Minutes dated January 19-20, 2011. The arbitrator reopened the record specifying the purpose: to allow the Agency the opportunity to respond which it did, timely, on September 11, 2012. In the interim on September 10, 2012, the Union also submitted a Federal Labor Relations Authority (FLRA) decision for the arbitrator's consideration.

The arbitrator officially closed the record on September 11, 2012. Taking into consideration the Agency's protestation regarding the late submission of documents by the Union, and the generally accepted standard that the record is closed once the closing briefs are received, the arbitrator has not given consideration to any documents submitted beyond the submission of the post-hearing briefs.

Relevant Provisions of the Collective Bargaining Agreement

ARTICLE 5 - RIGHTS OF THE EMPLOYER

Section a. Subject to Section b. of this article, nothing in this Section shall affect

the authority of any Management official of the Agency, in accordance with 5 USC, Section 7106:

2. In accordance with applicable laws:

C. With respect to filling positions, to make selections for appointment from:

(1) among properly ranked and certified candidates for promotion;

Section c. The preferred practice whenever Bureau of Prisons positions are announced under Section a (2) (C), above is to select from within the Bureau of all qualified applicants. This shall not be construed as limiting the recruiting function or any other rights of the employer.

In accordance with 5 Code of Federal Regulations (CFR) Section 335.103, while the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance.

ARTICLE 19 - ANNUAL LEAVE

Section a. The employer and the Union agreed that annual leave is the right of the employee and not a privilege, and should be used by all employees. All employees will be allowed utilization of their annual leave at least to the extent that annual leave carry-over will not exceed the statutory limit for each individual.

ARTICLE 20 - SICK LEAVE

Section a. Employees will accrue and be granted sick leave in accordance with applicable regulations, including:

3. except in an emergency situation, any employee who will be or is absent due to illness or injury will notify the supervisor, prior to the start of the employee's shift or as soon as possible, of the inability to report for duty and the expected length of absence. The actual granting of sick leave, however will be pursuant to a personal request by the employee to the immediate supervisor unless the employee is too ill or injured to do so, for each day the employee is absent, up to three (3) days, provided the supervisor has not approved other arrangements...

Section c. In those instances where an employee was on sick leave in excess of three (3) days and did not require medical attention, the employer may accept a written statement from the employee in lieu of a medical certificate.

Relevant United States Code

5 USC § 2302 - PROHIBITED PERSONNEL PRACTICES

(a)

(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this Section —

(A) "personnel action" means—

(ii) a promotion;

(b)

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under Section 717 of the Civil Rights Act of 1964;

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment,·

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation...

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, of the District of Columbia, or of the United States;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in Section 2301 of this title.

5 USC 7114 -REPRESENTATION RIGHTS AND DUTIES

(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 practices or other general condition of employment or

(5) the rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from-

(B) exercising grievance or appellate rights established by law, rule, or regulation; except in the case of grievance or appeal procedures negotiated under this chapter.

5 USC 7116- UNFAIR LABOR PRACTICE

(a) For the purpose of this chapter, it shall be an unfair labor practice for an Agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

§ 33.103 5 CFR CH. I (1–1–02 EDITION)

§ 335.103 Agency Promotion Programs.

(a) *Merit promotion plans.* Except as otherwise specifically authorized by OPM, an agency may make promotions under § 335.102 of this part only to positions for which the agency has adopted and is administering a program designed to insure a systematic means of selection for promotion according to merit. These programs shall conform to the requirements of this Section.

(b) *Merit promotion requirements.* (1)*Requirement 1.* Each Agency must establish procedures for promoting employees which are based on merit and are available in writing to candidates. Agencies must list appropriate exceptions, including those required by law or regulation, as specified in paragraph (c) of this Section. Actions under a promotion plan—whether identification, qualification, evaluation, or selection of candidates—shall be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, nondisqualifying physical handicap, or age, and shall be based solely on job-related criteria.

(4) *Requirement 4.* Selection procedures will provide for management's right to select or not select from among a group of best qualified candidates.

(d) *Grievances.* Employees have the right to file a complaint relating to a promotion action. Such complaints shall be resolved under appropriate grievance procedures... While the procedures used by an agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, nonselection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. There is no right of appeal of OPM, but OPM may conduct investigations of substantial violations of OPM requirements.

Relevant Provisions of the Human Resources Manual

335.1 MERIT PROMOTION PLAN

1. PURPOSE AND SCOPE. This Section prescribes the procedures to be used to implement federal merit promotion policy.

15. DETERMINING THE BEST QUALIFIED GROUP. Promotion board members will determine which candidates will be included among the best qualified group. The best qualified applicants are those eligible candidates who rank at the top when compared to the other eligible candidates for promotion.

16. SELECTION PROCEDURES

d. Action by the selecting official. The selecting official may:

- Select any best qualified applicant;
- fill the position through some other type of placement action; or
- decide not to fill the position.

18. QUESTIONS, COMPLAINTS AND GRIEVANCES

C. Matters not appropriate for consideration as a grievance. Formal grievances may not be based on;

- failure to be selected for promotion when proper promotion procedures are used, that is, non-selection from a group of properly rated, ranked, and certified applicants…

Position of the Agency

The Agency advances the following arguments and contentions to establish that the grievance is not properly before the arbitrator and should be dismissed. Article 5, Section C and 5 CFR 33 5.103 set forth that non-selection from a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance. The promotion selection process is comprised of two distinct and separate steps which are first to rank and certify candidates, a process which occurs in a centralized Human Resource Division in Grand Prairie, Texas. The second step involves the selection of candidates to be promoted which occurs at the institution once they receive the list of the best qualified candidates from Grand Prairie. Under the Master Agreement and the U.S. Code, improprieties in the ranking or rating of candidates are grievable however; the Union is not alleging that the Grievant's non-selection was made from an improperly ranked and certified list of candidates.

Controlling U.S. Code provides that the "selection of candidates - shall be made without regard to political, religious, or labor organization affiliation or nonaffiliation, marital status, race, color, sex, national origin, non-disqualifying physical handicap or age, and shall be based solely on job-related criteria." The use of sick leave would fall under the classification of "staff reliability" which is not listed in the U.S. Code and logically falls under job-related criteria. A job-related criterion is not subject to the negotiated grievance procedures.

The Union relies on a statement they attribute to a second line supervisor to support the assertion that the Warden uses sick leave as a deciding factor. The Warden is on record stating that he did not use sick leave is a standard for the selection or non-selection of candidates. As the deciding official, the Warden has broad discretion and made his decision using all information available to him while ensuring not to violate U.S. Code. The selection of the successful candidates was made from a properly rated and ranked Merit Promotion Board in accordance with rules and regulations including 5 USC, 5 CFR and the Agency's Merit Promotion Plan.

The Union presented no evidence or testimony to indicate any special preference or that any advantage was given to any individual. Testimony from Union officials gave no credible evidence to prove that the selection criterion was not in accordance with applicable law, rule or regulation. The Union's attempts to introduce argument that selection procedures are not available to applicants in writing are false; the Grievant's application lists the criteria needed to qualify for the position for which he applied. Any further written procedures would directly interfere with management's right to hire, promote and control their budget. The Agency did not violate the Grievant's rights to representation under 5 USC 7114 nor did the Agency commit an unfair labor practice as defined under 5 USC 7116. The selection process was fair, equitable and within policy, regulations and the law and no violations have been proven by the Union. The Agency requests that the arbitrator find the grievance to be not arbitrable and dismiss the grievance.

Position of the Grievant and Union

On behalf of the Grievant, the Union advances the following arguments and contentions to assert that the grievance pertaining to the Grievant's removal is not barred from arbitration. After receiving the best qualified list from Grand Prairie the Agency proceeded to eliminate candidates utilizing additional factors. An employee's entitlement to sick leave is a condition of employment. This entitlement has been inappropriately used by the selecting official to prevent the promotion of and therefore upward advancement of unit employees. Sick leave has been used to delineate a subgroup of employees in which the Agency gives less consideration as candidates for promotion.

The only way employees can fairly compete for promotion is by process of applying on USA jobs, resulting in an unmodified Best Qualified list. With over 270 employees in the unit it is

impossible for the Warden to know all employees, therefore after the Best Qualified list is compiled recommendations are made from the direct line supervisor. Once the Agency places additional constraints, such sick leave balances, the list becomes tainted. The candidates are therefore no longer properly ranked. The testimony of the Union witnesses and the submission of an affidavit serve to corroborate the Union's premise that as an ongoing practice the Agency has used sick leave in the selection process. Unable to rebut the Union's evidence regarding the Warden's use of sick leave, the Agency has argued that use of sick leave to determine staff reliability is a permitted personnel practice. As it affects promotional opportunities, employees are not afforded the opportunity to address their sick leave balances with the Warden.

The Agency's motion to dismiss is untimely having been filed almost a year after the grievance was filed. The Agency's action of filing the motion at the last minute reflects that the motion in and of itself is disingenuous. The Agency has failed to meet its burden of proof; therefore, the Union requests a finding that the Grievant's case is arbitrable. The Union additionally requests that all costs related to the Motion to Dismiss be paid by the Agency.

Discussion and Opinion

The Agency contends that the grievance is not properly before the arbitrator which gives rise to a bifurcated hearing to first address the threshold issue of procedural arbitrability. The arbitrator recognizes that consideration of arbitrability reasonably delves into aspects related to the merits of the case. During the hearing a number of such elements were argued and testify to, however, as an issue of arbitrability, the scope of the issue and therefore the resultant decision is narrow. The arbitrator is asked to determine if the grievance is properly before her and therefore any argument, evidence or testimony deemed to be pertinent only to the merits of the case will not be discussed or resolved here. Any case law or arbitration awards submitted to the arbitrator before the closing of the record have been studied and carefully considered however, they may not be referenced if not particularly germane to the issue of arbitrability.

When arbitrators are called upon to determine whether a grievance is arbitrable it must be considered that the complaining party is appealing for an opportunity to be heard; a right secured and preserved by the parties' negotiated agreement. Arbitrators are vigilant not to infringe upon the

negotiated rights of the parties. Therefore the burden of proof standard of a preponderance of the evidence prevails here to ensure that no rights are being denied by a determination not to proceed with the merits of the case.

Article 5 Section c of the Collective Bargaining Agreement establishes, "In accordance with 5 Code of Federal Regulations (CFR) Section 335.103, while the procedures used by an Agency to identify and rank qualified candidates may be proper subjects for formal complaints or grievances, non-selection from among a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance." (Joint Exhibit-1) The question therefore becomes: does the use of sick leave as a criterion tarnish the "properly ranked and certified candidates" list? This arbitrator believes that a blanket disqualification of a certain group of employees, that is those with less than one hundred hours of sick leave, could in fact encroach on the integrity of the ranked and certified candidates list. The grievance is therefore arbitrable as it is a dispute between the parties as to "the meaning, interpretation and application" of a provision of the collective bargaining agreement.

Selection Process

The Human Resources Manager described in detail the promotion process at the complex. Once there is a vacancy the Warden decides whether to fill the position. If the vacancy is to be filled the HR Manager is charged with announcing the position's board. Using the Warden's criteria of announcing it for reinstatement eligibles, transfers or a local announcement, the HR Manager prepares a Vacancy Announcement Information Form. The completed form is sent to the centralized Human Resource Division at Grand Prairie, Texas at which point Grand Prairie takes information and creates an announcement to post on the USA Jobs website. That online posting satisfies the rule that everyone has equal access to apply for the position which usually stays open for fifteen working days. Once it closes, Grand Prairie processes the information retrieved from the Federal website. They rate and rank, and certify the certificate which is returned to the institution. At that point the institution prints out the Best Qualified (BQ) list which goes to the Warden. When asked what Grand Prairie takes into consideration the HR Manager delineated:

> …your knowledge, skills, and abilities, your awards, and evaluations, and they come up with a scored list. And then they go by how many people, the

> vacancies we requested, the number, and then they generate a BQ list based on the number.
>
> Then when they send it to the institution, the numerical system is taken off. The Warden has no idea who scored what. All you get is an alphabetical listing of staff that made BQ list. And that is forwarded to the institution. (Tr. at 18 – 19)

Once it comes to the final decision, the Warden considers a number of factors when making the selection for promotion and "… any factor he has *personal knowledge or records of* can be used *to evaluate an employee's work performance, ability, aptitude, or general qualifications, character, loyalty, or suitability*." (Agency's Brief at 4 – 5)

Witness Testimony

The Union presented several witnesses to establish the prison-wide knowledge of the sick leave standard. Senior Officer Jay Westbrook, testified that during a 2010 Annual Refresher Training (ART) class the Warden made statements concerning the use of sick leave. Specifically, "He told us as a class that unless we have one hundred hours of sick leave that we had nothing coming. We were not going to be promoted. We were not changing jobs. He said we have to be at work and unless we had one hundred hours established that we weren't getting a promotion." (Tr. at 94) He added "It was kind of a shocking stance from the Warden that unless we had sick leave over a hundred we were not getting promoted." (Tr. at 95)[4]

Bobby "B. J." May a GS-8 Senior Officer Specialist testified during cross examination, "It was stated in 2010, 2011 during the employee conduct part that the Warden does, that if you do not maintain a hundred hours of sick leave you will not be promoted." (Tr. at 112) He went on to say that the Warden told him that his low sick leave was the reason he was not promoted to Assistant Health Services Administrator. (Tr. at 113-114) The Grievant in this matter provided testimony regarding a conversation with the Deputy Captain concerning his sick leave balance in which he was told that he had nothing coming in the way of promotion because he did not carry a hundred hours of sick leave. (Tr. at 118-119)

[4] Annual Refresher Training is a week long course given to staff with the purpose of refreshing staff in regards to a variety of matters including inmate diversity, self-defense techniques; inmate religious and health issues. The warden instructed a separate training section. (Tr. at 94, 95)

Sick Leave and Staff Reliability

The Warden's pronouncements during ART sessions could have had a disturbing prohibitive effect if employees with low sick leave balances were discouraged from applying for promotions. Such a consequence would then have a bearing on the ranking and certification segment of the selection process. If employees are explicitly told that without at least one hundred hours of sick leave they would have no chance of being promoted, they could predictably be discouraged from applying for open positions. This would have a self-eliminating affect whereby, exclusion from the group of candidates to be considered for the Best Qualified list could reflect an impropriety in the ranking and certification process.

The arbitrator found it interesting that the Agency cites extensively from the 2010 decision of arbitrator Richard D. Fincher which is referred to as the "USP Atwater Decision".[5] (Agency Brief at 8-9) Arbitrator Fincher expresses, "Any arbitration which concerns promotional criteria and non-selection involves complex issues." And "I find that 'staff reliability' is a valid job criterion for use in promotional decisions." Both are assertions with which this arbitrator concurs. However I must question, is the accumulation of sick leave the best and only barometer of an employee's reliability? The Agency makes the distinction that USP Atwater Warden did use sick leave and FMLA as criteria in the selection process finding sick leave to be a job-related indicator of staff reliability. In the instant case the Warden specified in the Grievance Denial letter that he does not use sick leave as a guide to promote or not promote employees. However corroborated testimony severely challenges the statement.

In many ways the USP Atwater case is on point with the instant case. It in part addresses the arbitrability of a grievance regarding the use of sick leave balance to disqualify candidates after the ranking process. Arbitrator Fincher found the grievance to be arbitrable stating, "This grievance involves an issue of promotional criteria, not of non-selection." He further equated the use of sick leave and FMLA as improper as non-selection for race or for whistleblowers. When one considers that in the instant case several witnesses testified under oath that the Warden repeatedly stated that employees with less than a hundred hours of sick leave would have little chance of promotion, this case becomes hauntingly analogous to USP Atwater. Certainly a nexus exists between the two cases

[5] American Federation of Government Employees, Local 1242 and Federal Bureau of Prisons, U. S. Penitentiary Atwater, California. Federal Arbitration: 09-04082 (September 3, 2010) (Richard D. Fincher)

that lead to the reasonable conclusion that the instant case is an issue of promotional criteria as well. As such it is ripe for resolution through the parties' negotiated arbitration process.

Motion to Dismiss

The Union argues that the Agency's motion to dismiss was untimely as it was submitted the week before the hearing. The arbitrator disagrees. Unless expressly prohibited by the Collective Bargaining Agreement issues of arbitrability can be introduced any time during the grievance process. It must be noted as well that the Agency raised its objection to the legitimacy of the grievance in the Grievance Response dated October 28, 2011 stating: "…, non-selection from a group of properly ranked and certified candidates is not an appropriate basis for a formal complaint or grievance." (Joint Exhibit-3) The arbitrational authority of Elkouri & Elkouri establishes an even narrower timeline specifying, "The right to contest arbitrability is usually held not waived merely by failing to raise the issue of arbitrability until the arbitration hearing"[6]

In its closing brief the Union requests that costs associated with the Motion to Dismiss be paid by the Agency. The authority cited was FMCS Case No. 11-51313-3[7] Arbitrator Guttshall held the Agency responsible for paying the arbitrator' fee for an "…additional unneeded scheduled hearing day" in a case where after two days of hearings and over the Union's objection management requested an additional two hearing days of which only three hours of the third day were used and none on the fourth day. In the case before us the Agency was within its right to raise the issue of arbitrability and make use of the scheduled hearing day to argue its Motion. The arbitrator rejects the Union's request for the Agency to absorb the costs associated with the resolution of the arbitrability issue.

Conclusion

Clearly the decision here is not to determine if the grievance has merit, rather, whether it is possible that within the terms of the collective bargaining agreement it can be argued. If "Best

[6] Elkouri and Elkouri, *How Arbitration Works*, Sixth Edition, (BNA, Washington, D.C., 2003). p. 209.

[7] Federal Bureau of Prisons, Federal Correctional Institution, La Tuna, Texas and Counsel of Prison Locals, American Federation of Government Employees, Local 83, FCI La Tuna, Texas. FMCS Case No. 11-51313-3 (July 20, 2012) (AlmaLee P Guttshall

Qualified" list employees with low sick leave balances are eliminated from consideration for promotions, the perception is as the Union argues; a subset of employees are automatically and routinely disqualified from consideration. The grievant was a member of this identifiable classification of employees. As in the USP Atwater case, this promotional criterion should be subject to the scrutiny of an arbitration hearing. Furthermore, the potential for self-elimination perpetuated by an undocumented minimum sick leave requirement could call into question the procedures used by the Agency to identify and rank qualified candidates. According to the parties' Collective Bargaining Agreement, Article 5, Section C and 5 Code of Federal Regulations (CFR) Section 335.1 0 3, these are the procedures that "… may be proper subjects for formal complaints or grievances…"

Award

Based on the foregoing evidence, findings, reasoning, conclusions, rulings and determinations, the Arbitrator rules the appeal of the Grievant is SUSTAINED. Accordingly, the parties are ordered to proceed with the arbitration hearing on the merits of the above-captioned matter at 9:00 AM on Thursday, September 20, 2012, at the Federal Correctional Complex, Forest City, Arkansas.

Jurisdiction is Retained

The Arbitrator retains jurisdiction of this matter for sixty (60) days after the issuance of this decision in order to clarify or assist in the implementation of the Award, if either party requests in writing prior to that date to do so. Any such request if not made jointly should be forwarded to the other party so that an opportunity is afforded to all parties for the full expression of their positions and arguments on the questions or issues raised.

Issued at Dallas, Texas, the 14th day of September 2012

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Dineo Coleman Gary, Arbitrator