
In the Matter of the Arbitration)
Between) Grievance: National Grievance
FEDERAL BUREAU OF PRISONS) (Arbitrability)
"Agency") FMCS No. 13-51599
And)
AMERICAN FEDERATION OF)
GOVERNMENT EMPLOYEES,)
LOCAL 33)
"Union")

BEFORE: Joshua M. Javits, ARBITRATOR

APPEARANCES:
For the Agency: Loretta Burke
For the Union: Jeffrey Roberts

Date of Agency's Motion to Dismiss: January 7, 2013
Date of Union's Reply: April 30, 2013
Date of Agency's Reply: May 1, 2013
Date of Award: July 13, 2013

ISSUES:

- 1) Whether the Union's grievance was timely filed in accordance with Article 31(d) of the Master Agreement, which requires grievances to be submitted within forty (40) calendar days of the time that the Union became aware of a grievable occurrence?
- 2) Whether the grievance was filed at the correct level (national level as opposed to local level)?
- 3) Whether the Union's grievance was procedurally defective due to lack of specificity by failing to provide the Agency with sufficient details as to the allegations in the grievance?

FACTS AND BACKGROUND:

The instant case comes before the Arbitrator to determine whether or not the underlying grievance filed by the Union is arbitrable.

On October 12, 2012, the Union filed a grievance alleging that the Agency had violated the parties' Collective Bargaining Agreement when it asserted in a closing brief (dated September 5, 2012, and filed in a separate, local level arbitration hearing) that Agency management would look at any open disciplinary investigations in deciding whether or not an employee should be promoted.

The relevant section of the Agency's September 5, 2012, closing brief (at a local level arbitration) provides the following:

"A warden considers numerous factors when trying to decide who should be promoted. These factors include factors such as a staff members' duty assignments, collateral duties, involvement in an employees' club, affirmative action, crisis management team, crisis support team, and command center team. He may also consider feedback from the immediate supervisor and Captain. Additionally, he may look at open investigations and disciplinary records."

(Emphasis added).

According to the Union, consideration of open disciplinary investigations in the context of an employee's promotion bid is a prohibited performance practice in violation of 5 U.S.C. Section 2302.

The Agency responded to the Union's grievance on November 9, 2012, claiming that the Union's grievance was being rejected, as it was untimely filed. It is the Agency's position that the Union knew of the alleged contract violation as early as 2010 and, as such, the Union should have filed a grievance at that time.

The Agency further claimed that the Union had filed the grievance at the improper level. According to the Agency's written response, the grievance did not occur at the national level, but rather it merely occurred after the Agency had filed a closing brief in a local level arbitration. The Agency further rejected the grievance on the basis that it did not contain the name of any member of Agency management who allegedly used the improper criteria when deciding whether or not an employee should be promoted. There was, the Agency found, no harm sustained by either the National Union nor any bargaining unit member by the Agency's alleged actions.

On November 26, 2012, the Union invoked arbitration. Shortly thereafter, on January 7, 2013, the Agency filed a Motion to Dismiss the grievance on three (3) separate and independent grounds: (1) that the grievance was untimely filed by the Union; (2) that the grievance was filed at the incorrect level (national level as opposed to the local level); (3) that the grievance lacked sufficient detail of the alleged contractual violation. The matter now comes before the undersigned Arbitrator to determine whether or not the instant grievance is arbitrable.

POSITIONS OF THE PARTIES:

The Agency's contentions:

The **Agency** contends that the instant grievance is not arbitrable. In order to determine whether or not a grievance is arbitrable, the Arbitrator must examine whether the parties, in their Master Agreement, had agreed to arbitrate this particular type of dispute. It argues that arbitration is a matter of contract and, as such, one party may not be required to submit to arbitration any dispute which it has not agreed to submit.

The Agency notes Article 31(d) of the Master Agreement, which states "Grievances must be filed within forty (40) calendar days of the date of the alleged grievable event." This contractual provision continues, "If a party becomes aware of an alleged grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can reasonably be expected to have become aware of the occurrence." According to the Agency, the Union's national grievance was not submitted in accordance with the Master Agreement and should, therefore be dismissed as not arbitrable.

According to the Agency, the Union's grievance in this case is dated October 12, 2012, and the alleged date of the contract violation is listed as September 5, 2012, the date that the Agency's closing brief was filed in a separate local level arbitration. In its grievance, the Union claims that the basis

for its grievance was a closing brief filed by the Agency in a separate arbitration hearing. However, the Agency maintains that the Union knew as early as September 2010 (in yet another local level arbitration hearing) of the alleged selection criteria used by Agency management in making promotion selections. During that arbitration hearing in 2010, an Agency Warden testified that one of the selection criteria he uses in deciding whether or not to promote an employee is whether he/she has any open disciplinary cases pending. It was incumbent upon the Union to grieve the issue at that particular time, rather than wait for a further two (2) years, the Agency contends.

According to the Agency, the Union was required to file a grievance within forty (40) days of becoming aware of this particular selection basis or, alternatively, within forty (40) days of the arbitrator's decision in that arbitration hearing. Given that the arbitrator in question issued her decision on September 3, 2010, the Union was compelled, at the very latest, to grieve the issue within forty (40) days of that particular date. Instead, the Union chose to wait for over two (2) years before it finally filed its grievance on October 12, 2012. For that reason, the Agency insists that the Union's grievance is ultimately untimely and, therefore, must be rejected for being procedurally defective.

The Agency argues that the Union violated the parties' Master Agreement by filing its grievance at the wrong level. It notes that the National Union filed a national grievance with the Chief of the Labor Relations Officer claiming that management violated rules regarding employee promotion selection based. According to the Agency, the Union's grievance in this case is based on a closing brief filed in a local level grievance that was arbitrated over two (2) years ago. The Agency notes that the allegation in instant grievance regards the actions of a Labor Relations Specialist, but it notes that the alleged violation did not occur at the national level.

The Agency further notes that the matter was considered in a local arbitration by a local level arbitrator. Clearly the matter was considered a local issue to be reviewed by a local level arbitrator. Now, the Union is attempting to have an issue that was already considered at the local level progressed to the national level. This, however, was a local issue that was placed before a local arbitrator. It is not something that happened at the national level and is not properly a national level grievance, the Agency argues. According to the Agency, the Union is improperly attempting to elevate this grievance to the national level by claiming it was somehow related to a National Labor Management Meeting in January 2011.

The Agency asserts that the Union violated Article 32(a) by failing to properly invoke arbitration. Under Article 32(a), the party invoking arbitration must do so in writing and provide the issue, the alleged violations and the requested remedy. According to the Agency, the Union has failed to provide sufficient information necessary and, therefore, is defective. The Agency further contends that the grievance does not specify in detail the alleged violations of law and/or contract which supposedly occurred. Instead, the Union submitted a grievance which was devoid of specific information.

According to the Agency, the Union's national grievance failed to identify the specific individuals who were allegedly injured, how those individuals were injured, where these alleged violations took place, and which member of management was responsible for taking these decisions.

The Agency argues that the Union clearly had more specific information than this and should, therefore, have drafted the grievance with greater specificity. In effect, the Agency is being asked to defend against a grievance where it has not been told the identity of the affected employees and not told which institution within the BOP which was directly affected. Reading the national grievance as a whole, the Agency is not able to determine what specific activities the Union is complaining about, what employees were affected, or even what facilities were affected. For that reason, the Agency insists that the grievance should be dismissed for its complete lack of clarity.

The Union's Contentions:

The **Union** notes at the outset that the party which raises an affirmative defense to arbitrability has the burden of proof. In this case, as the Agency is the party asserting arbitrability issues in its motion to dismiss the instant grievance, it has the burden of proving the procedural defense which it has raised.

The Union insists that the national level grievance was timely filed, contrary to what the Agency has argued. The Union dismisses the Agency's assertion that it knew about the underlying issue as early as 2010.

While the Union accepts that there was some testimony in a local level arbitration in June 2010 from an Agency Warden that he would consider whether an employee had open disciplinary investigations against him/her when deciding whether or not to promote that individual, it notes that it initially brought the matter up and discussed the issue with management at the National Labor Management forum in January 2011. During this meeting, Agency management assured the Union that the Agency's policy does not allow selecting officials to exclude from consideration for promotions any employee with pending allegations of misconduct.

Minutes from the National Labor Management Forum shows that the issue was discussed and resolved as follows:

"Item 6. Allegations: When you have allegations made against you, what

effect does that have on your career, if any? Does the BOP have a reference check question for supervisors to fill out on bargaining unit staff – who rate the best qualified? Has the staff member been disciplined in the last two (2) years? Does this prevent an individual from being transferred? Does this prevent staff from receiving awards and/or promotions?

Resolution: Policy does not allow selecting officials to exclude employees from considerations for promotion reassignment, transfer or awards on pending allegations of misconduct. Policy does not allow selecting officials to exclude employees from consideration for promotions, reassignment, transfer or awards based on discipline issued within the preceding two years.”

(Attachment 2 of Agency’s Motion to Dismiss).

The Union contends that, after being provided with this clarification of policy by the Agency, it believed that its concerns had been resolved. According to the Union, it mistakenly believed that there was no need for a national grievance to be filed at that particular time. In fact, it was not until the Union saw an Agency brief (in a local arbitration case) on September 5, 2012 that the Union learned that Agency management had repudiated its position outlined in the LMR meeting.

According to the Union, the Agency's improper use of promotion criteria (such as considering whether an employee has had allegations made against him/her) are clearly a national level grievance that need to be addressed on a national perspective.

The Union dismisses the Agency's contention that the grievance was filed at the wrong level. Article 31(f), Paragraph 4, of the Master Agreement provides: "In cases of violation at the national level only the President of the CPL or designee may file such a grievance. This grievance must be filed with the Chief Labor Management Relations and Security Branch, Central office..." According to the Union, it has fully complied with the above contractual provision.

The Union dismisses the contention that the grievance provides insufficient notice of the alleged violations of the contract and/or law to the Agency. It maintains that the Agency is fully aware of the nature of the Union's grievance and has been provided with ample notice of the issues raised. Dismissal of the grievance on technical grounds should be rejected, particularly where there been no demonstration of prejudice to the Agency. Here, the Agency was provided with the requisite information necessary for it to respond to the grievance. For the reasons outlined above, the Union maintains that the national grievance was properly filed and requests that the Agency's motion to dismiss should be denied.

DECISION AND AWARD:

The central issue for consideration in the instant grievance is whether or not the grievance filed by the Union in October 2012 was timely or not.

According to the Agency, the Union failed to file its national grievance within the forty (40) day period that is permitted under Article 31(d) the parties' Master Agreement.

Article 31(d) of the Master Agreement provides:

“Grievances must be filed within forty (40) days of the date of the alleged grievable occurrence. If a party becomes aware of a grievable event more than forty (40) calendar days after its occurrence, the grievance must be filed within forty (40) calendar days from the date the party filing the grievance can be reasonably expected to have become aware of the occurrence.”

In its submissions, Agency management strenuously argued that the Union had known much earlier, in fact as early as 2010, of the alleged contractual violation when an Agency Warden testified in a local level arbitration hearing that open investigations against an employee could be considered by management in deciding whether or not to grant that employee should be granted promotion.

According to the Agency, the Union could have and should have filed a grievance within forty (40) days of September 2010 (when an Agency Warden first testified that one of the selection criteria he uses in deciding whether or not to promote an employee is whether he/she has any open disciplinary cases pending) if it wished to grieve the matter, but, once again, the Union failed to do so. By the time the Union filed its grievance on October 12, 2012, some two years later, the grievance was untimely, the Agency maintains. For the Union to wait over two (2) years before it presents its allegations of misconduct is prohibited by the Master Agreement's forty (40) day filing requirement for grievances, the Agency insists.

The Union disputes this, insisting that the trigger date for its national grievance was the submission of the Agency's closing brief on September 5, 2012, in a separate, local level arbitration hearing.

While the Arbitrator recognizes that the underlying issue being challenged by the Union (the consideration of open charges of misconduct against an employee during the promotion process) first came to light in an earlier local, level arbitration hearing in September 2010, he nonetheless does not believe that this was the exact trigger date for the grievance in this case.

It should be noted that this was apparently the first date that the Union became aware that management might have used open allegations of employee misconduct in deciding whether employee should be promoted or not.

However, it is worth noting that this particular piece of information only came to light from the testimony of an Agency Warden in a local level arbitration hearing. Whether or not this was a nationwide Agency practice or whether this was a practice that was restricted to one Agency facility was unclear.

It would be entirely improper to require the Union to file a national level grievance at a time before it had sufficient – or even any – information as to whether or not this practice was being conducted nationwide at BOP facilities. If the Union had filed a nationwide grievance at that time, then the Agency would most likely have dismissed such a grievance as being premature and without any factual basis.

Therefore, the Arbitrator finds that the Union was not, as the Agency claims, required to file its grievance at that time. Instead, the Union properly pursued the concerns it had through the proper channels – the National Labor Management forum.

The Arbitrator notes that the Union presented the issue to the National Labor Management Relations (LMR) forum in January 2011 in the hope that it would ascertain more information about whether or not the Agency did, in fact, consider allegations of employee misconduct during the promotion process. The minutes and notes of this quarterly meeting shows that the issue was discussed and “resolved” by the parties.

Minutes from the National LMR forum shows that the issue was resolved as follows:

“Item 6. Allegations: When you have allegations made against you, what effect does that have on your career, if any? Does the BOP have a reference check question for supervisors to fill out on bargaining unit staff – who rate the best qualified? Has the staff member been disciplined in the last two (2) years? Does this prevent an individual from being transferred? Does this prevent staff from receiving wards and/or promotions?

Resolution: *Policy does not allow selecting officials to exclude employees from considerations for promotion reassignment, transfer or awards on pending allegations of misconduct.* Policy does not allow selecting officials to exclude employees from consideration for promotions, reassignment, transfer or awards based on discipline issued within the preceding two years.”

(Emphasis added).

Based on the above, it appears to the Arbitrator that the Union had its concerns sufficiently assuaged that it did not believe that a national level was necessary at that time.

One could not expect the Union to file a nation wide grievance when it had been assured by the Agency that it had no policy of taking allegations of misconduct in to account when considering an employee's promotion. At that point in time, the Union accepted the Agency's stated position on this issue and reasonably concluded that there was no need to pursue the issue any further.

It was not until over a year later, on September 5, 2012, when the Agency restated its policy position that the Union decided that a national level grievance was necessary. The Arbitrator notes that the Agency in its closing brief on September 5, 2012, apparently restated its policy position as to whether or not allegations of misconduct against an employee could be considered as part of an employee's promotion bid. The relevant section of the Agency's closing brief states as follows:

"A warden considers numerous factors when trying to decide who should be promoted. These factors include factors such as a staff member's duty assignments, collateral duties, involvement in an employees' club, affirmative action, crisis management team, crisis support team, and command center team. He may also consider feedback from the immediate supervisor and Captain. Additionally, he may look at open

investigations and disciplinary records.”

(Emphasis added).

The Arbitrator believes that the above statement on behalf of the Agency stands in contrast to what the Agency had earlier led the Union to believe at the National LMR forum. Only after this closing brief had been submitted on September 5, 2012, did the Union become “aware” of the full nature of the Agency’s potential contractual violations.

It was at this point the Union was put on notice that the Agency’s stated policy on this disputed issue might not have been what the Union had earlier been led to believe. At that time, the Union was well within its contractual rights to file a national level grievance against the Agency. There is no reasonable basis for arguing that the Union should have filed a national level grievance at an earlier time, the Arbitrator finds.

While the Union may have suspected much of this information to be true at an earlier time, the Union had no solid factual basis upon which it could pursue a national level grievance. It was not until this closing brief detailing of the Agency’s position regarding the use of open allegations against an employee during the promotion process that the Union had a sufficient factual basis to support a national level grievance. The Arbitrator finds that, prior to this particular date and time, there was no adequate factual basis for the Union to be

able to pursue a national grievance.

Article 31 provides that the Union must file its grievance within 40 days of the “grievable event” or when it “can reasonably be expected to have become aware of the occurrence.” While the Union may have been “aware” of the issue in the sense that had concerns about what it thought could potentially be an illegal personnel practice, it had insufficient information to support a national level grievance.

Suspicious and concerns do not trigger an obligation to file a grievance. Had the Union filed national grievance earlier, it likely would have been rejected by the Agency for lacking any factual predicate. The reason that the Union brought the matter to the National LMR forum in January 2011 was to obtain further information about the Agency’s policy. The fact that the Union raised this issue at the National LMR forum, however, does not mean it must be immediately grieved by the Union.

In fact, the effective functioning of a National LMR meeting would be undermined by such an obligation. If in an abundance of caution the Union was required to file a grievance on all issues of concern raised or discussed at a National LMR meeting, the intended purpose of the LMR meeting, informal discussion and resolution of issues of concern, would be lost. It makes no sense that an issue raised during a National LMR meeting for discussion should

automatically preclude that matter being grieved through the grievance resolution procedure.

National LMR meetings and the grievance-resolution process are two separate and distinct processes. Concerns that can be raised in the Quarterly LMR meetings may be broader and more general than the factual and contractual requirements for a “grievable event.”

Therefore, for the reasons outlined above, the Arbitrator finds that the Union’s national grievance was timely, as it was filed within forty (40) days of the Union becoming “aware” of the grievable event and concludes that the grievance is arbitrable.

The Arbitrator further finds that the subject of the Union’s grievance – the improper use of promotion criteria such as considering whether an employee has had allegations made against him/her - is clearly a national level grievance that needs to be addressed on a national perspective.

Whether or not the Agency takes such matters in to consideration in deciding whether will or will not promote an employee (or whether this was merely a policy misstatement rather than the actual policy of the Agency) and whether or not this occurs at a national level are pertinent issues that will need to be addressed at a substantive arbitration hearing, the Arbitrator finds. The

Arbitrator believes that the national level grievance was properly filed by the Union and at the appropriate level. He further finds that the Union has fully complied with Article 31(f) of the Master Agreement.

Finally, the Arbitrator rejects the Agency's assertion that the underlying grievance lacks sufficient details of the alleged contractual violations. The Arbitrator finds that the Union's grievance contains as much information and details as it possibly could have done.

It should be remembered that the Union in its grievance is seeking to challenge what it believes is the Agency's use of an improper criteria during employee promotion bids. What the Agency's exact policy is and how that policy has been used with regard to employee promotion bids is information that may not be available to the Union. It would be unreasonable to expect the Union to provide more specific information when, in fact, it was not in possession of the Union.

One cannot expect the Union to provide more detailed information to the Agency than it is actually able to do. The Union had provided sufficient detail in its grievance to put Agency management on notice of what it believes is an improper personnel practice. In any event, the Arbitrator finds that the information contained in the national grievance was nonetheless exact and precise enough to allow the Agency to understand exactly the nature and extent

of the alleged contractual violation.

In reaching this decision, the Arbitrator notes that much of the information that the Agency claims it was not provided with (such as the identity of any employee who may or may not have been affected by any improper promotion criteria) could easily be discerned by the Agency.

There is no question in the Arbitrator's mind that the Agency could access any and all of this information without any difficulty whatsoever. Certainly the Agency was not prejudiced in any way, nor was it prevented from being able to defend itself against the alleged contractual violation.

The Arbitrator is satisfied that the information contained in the national grievance filed by the Union was sufficiently specific in outlining the nature of the grievance and in providing the basis of the grievance. The grievance was neither over-broad in nature, nor was it lacking in specificity in a way that would prevent the Agency from being able to identify any and all employees the grievance was intended to include, the Arbitrator concludes.

For the reasons outlined above, the Arbitrator finds that there has been no unreasonable delay in the Union's filing of its national grievance, nor has the Agency been harmed or prejudiced in any way.

There is no valid or credible evidence that the Agency's ability to defend itself against the allegations made in the national grievance has been hampered. The Arbitrator finds that the national grievance was properly filed and rejects the Agency's motion to dismiss the grievance.

Joshua M. Javits _____ 7/13/13

Joshua M. Javits, Esq.

Date