BEFORE THE HONORABLE SIDNEY S. MORELAND

American Federation of Government Employees Local 922,	
and	**FMCS Case No.: 05-03987**
Bureau of Prisons, Forrest City, Arkansas	**DATE: May 26,2006**
Re:Data Request.	

UNION'S MOTION FOR AN ADVERSE INFERENCE
and
THE SETTING OF A HEARING

The arbitrator in the above styled case issued a subpoena duces tecum to the Agency to supply the union with copies of correspondence, maintenance, and projects related to the perimeter detection system for the past five years. The subpoena includes B & F Projects/Major Work Orders. The Agency requested that the arbitrator quash the subpoena. By letter of May 1, 2006, the arbitrator refused to quash the subpoena and directed the agency to provide the data or the hearing would be postponed.[1] The Agency did not provide the data and the hearing has been postponed.

[1]Arbitral authority supports the position that the arbitrator has the authority to order the production of data. *In re Federal Deposit Insurance Corporation [Dallas, Texas] and National Treasury Employees Union, Chapter 260*, 120 LA 1441 (Moreland, IV 2005) (Agency must produce data requested by union regarding process by which "corporate success awards" were made, since federal law requires that agency provide to recognized union upon request data (1) which is normally maintained by agency, (2) which is reasonably available and necessary for discussion, understanding, and negotiation of subjects within scope of collective bargaining, and (3) which does not constitute guidance, advice, counsel, or training for management and none of information requested by union falls outside these parameters.)

Assuming, arguendo, that the Union could file an Unfair Labor Practice charge with the Federal Labor Relations Authority[2] or could file for an enforcement of the subpoena in Federal District Court, the time necessary to reach a conclusion could be

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[2]The Union is actually probably prohibited from taking this issue before the Federal Labor Relations Authority. While the refusal to provide data is in violation of the Union's statutory rights under 5 USC §7114(b)(4):

> in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
> (A) which is normally maintained by the agency in the regular course of business;
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining;

and 5 U.S.C. §7116 provides as follows:

> (a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--
> (8) to otherwise fail or refuse to comply with any provision of this chapter.

Title 5 U.S.C. § 7116 also provides:

> (d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, **issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or an unfair labor practice under this section, but not both procedures**.

The issue before the arbitrator has been raised in the grievance procedure; therefore, the Union is prohibited from taking this issue before the Federal Labor Relations Authority.

several months. While the issue of a Federal Court enforcing a *subpoena in personam* has been addressed between the parties in the instant arbitration case – *American Federation of Government Employees, Local 922, Petitioner v. John Ashcroft, Attorney General, U.S. Department of Justice, Respondent*, 354 F. Supp. 2d 909 (2003) – the issue of whether a Federal Court can enforce a *subpoena duces tecum* has not. Rather than take this issue through what might prove to be a lengthy Federal Court procedure, or an even lengthier Federal Labor Relations Authority procedure, the Union hereby moves that the Arbitrator make an adverse inference on the data the Agency is refusing to produce, and proceed forthwith to the hearing.

The issue is before the arbitrator, and the arbitrator has the authority to rule on procedural questions. The making of an adverse inference is a tool at the arbitrator's disposal. As the Supreme Court noted in *John Wiley and Sons, Inc. v Livingston*, 376 U.S. 543, 557 (1964):

> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow of the dispute and bear on its final deposition should be left to the arbitrator.

The Federal Sector Labor Management Relations Act also recognizes the authority of the arbitrator to rule on procedural issues. The Civil Service Reform Act, 5 USC § 7121(a) provides:

> (1) Except a provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability.

As the seminal treatise on arbitration law and procedure, *Elkouri and Elkouri* point out, the refusal to provide data can have consequences. An arbitrator may "give such weight as he deems appropriate to the failure of a party to produce documents on

demand." Elkouri and Elkouri, How Arbitration Works, 6th Edition, BNA, 2003, p 381. Arbitrator Brisco in *Barnard Engineering Co., Inc. and Sprinkler Fitters' Local 709,* 86 LA 523, 528 (1985) opined that:

> calculated refusal to comply with the subpoena, regardless of its legal effectiveness, compels the conclusion that had he brought the subpoenaed documents they would have been **adverse** to his position in the case. His refusal places the Union in the unfortunate position of choosing either to delay the arbitration and attempt to enforce the subpoena in the California Superior Court, which would have incurred months of delay, or electing to proceed without the documents in the hope of reaching an early resolution of the dispute. It is appropriate to observe that the Company's maneuver was a courtroom tactic, disfavored in the arbitration of grievance disputes.... (EMPHASIS ADDED.)

In the context of the instant grievance, the arbitrator has the authority to rule and issue an appropriate award. Arbitrator Kubie, in *Social Security Administration and American Federation of Government Employees, Council 220*, 86 LA 1205,1211 (1986) made known to the parties that:

> I will feel free to assume, should it seem to me appropriate to do so, that the withheld, repressed or concealed information would undercut the position of the party in whose control it is. I let the parties know clearly that if I deem the information vital, I will be free to base an **adverse** determination, if necessary, upon the withholding, repression or concealment of that information. (EMPHASIS ADDED.)

See also, Piscataway Township Board of Education and Piscataway Township Education Association, 74 LA 1107, 1110 (Jacobson, 1980) ("There is a firmly established principle that when one party refuses to produce relevant evidence within its control, the opposing party is entitled to an irrebuttable presumption that the evidence would have been **adverse** to the recalcitrant party."); and *Vickers Petroleum Corporation and International Union*

of Operating Engineers, Local 670, 73 LA 623, 625 (1979) (The Company's refusal to make available to the Union those records needed by the Union to properly represent the grievant in this matter can only be construed as indicating that, if the Union had been given access to the records it requested, the results of its checking of those records would have been favorable to the Union's position.)

Federal Rule of Civil Procedure 37(b) lists some of the sanctions, "among others," which may be imposed against a party who refuses to obey an order to produce information:

> (2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a
>
> physical or mental examination;

While the sanction of contempt of court (37(b)(2)(D)) is available only to a judge of a court of record, the other sanctions are procedural and evidentiary rulings that are inherently in the power of any hearing officer and finder of fact. The Supreme Court case

of *Clifton v. U.S.*, 45 U.S. 242, 11 L. Ed. 957, 4 HOW 242 (1846), elucidates the concept aptly:

> One of the general rules of evidence, of universal application, is, that the best evidence of disputed facts must be produced of which the nature of the case will admit. * * * [T]he absence of the primary evidence raises a presumption, that, if produced, it would give a complexion to the case at least unfavorable, if not directly adverse, to the interest of the party.

In a court proceeding with a jury, the jury, as the finder of fact, has the power to make an adverse inference from a party's failure to provide evidence.[3] An arbitrator is in the same position as a lay jury as the finder of fact.

CONCLUSION

Therefore, the adverse fact the Union is requesting the arbitrator to adopt is that the documents not provided or lost will show that the "agency knowingly and willfully overlooked evidence of a safety and security hazard as it pertains to the fence detection system." The Union further request that the arbitrator set the case for a hearing as soon as possible.

Respectfully submitted,

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[3] Example of a civil jury instruction:
Arkansas Model Instruction 105A. Effect Of Intentional. . . Suppression Of Evidence:
If you find that a party intentionally [suppressed] _(description of item)_ with knowledge that [it] [its contents] may be material to a [pending] claim, you may draw the inference that [the (contents of the) (document) (writing) (description of item) would have been unfavorable to his [defense]. When I use the term "material" I mean evidence that could be a substantial factor in evaluating the merit of a claim or defense in this case.

North Little Rock, AR 72124

CERTIFICATE OF SERVICE

I hereby certify that the attached document was sent by U.S. Mail and/or Fax on the 26th day of May 2006, to the following:

Ruby Navarro
U.S. Department of Justice
Bureau of Prisons
Labor Management Relations West
522 N. Central Ave., Suite 243
Phoenix, Arizona 85004-2168

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