IN THE MATTER OF THE ARBITRATION BETWEEN

Federal Bureau of Prisons,
Agency

and

Jurisdiction Ruling
FMCS Case No. 09-02744-3

AFGE Local 922 09-02444-3, Union

Arbitrator:	William E. Hartsfield
Date of Ruling:	November 17, 2011
Representing the Agency:	Michael A. Markiewicz Federal Bureau of Prisons U.S. Dept. of Justice 230 N. First Ave. Ste 201 Phoenix, AZ 85003
Representing the Union:	Trail, E. Nicole Harris Shelton Hanover Walsh, PLLC One Commerce Square, Suite 2700 Memphis, TN 38103
Decision	Jurisdiction Exists

JURISDICTION RULING

JURISDICTION

The parties requested and agreed that the Arbitrator rule on his jurisdiction prior to continuing the evidentiary hearing.

PROCEDURE

A hearing was convened on August 24, 2011. Both parties made opening statements. In its opening statement, the Agency urged that the Arbitrator did not have jurisdiction over the Grievance. A scheduling problem arose with witnesses, and as a result additional hearing days are to be scheduled. Mindful of the costs of the hearing, the parties agreed to bifurcate the jurisdiction issue from the evidentiary hearing. Further, the parties agreed to a briefing schedule on the jurisdiction issue.

ISSUE

"Does the Arbitrator have jurisdiction over the filed Grievance?

EXHIBITS

The parties submitted and the Arbitrator admitted Joint Exhibits 1 through 4.

KEY PROVISIONS OF CBA[1]

Master Agreement, Preamble, D

...[the Agency and the Union]
...
(D) recognize that the employees are the most valuable resource of the Agency, and are encouraged, and shall be recently unassisted, to develop their potential as Bureau of Prison employees to the fullest extent practicable.

Master Agreement, Article 3, Section a.,

Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.
...

Master Agreement, Article 3, Section b.,

In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.
...

Master Agreement, Article 6, Section b. 2.,

The parties agree that there will be no restraint, harassment, intimidation, reprisal or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:
...
2. To be treated fairly and equitably in all aspects of personnel management;

[1] For convenience, the Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locas, American Federation of Government Employees and the Local Supplemental Agreement between the Federal Correctional Institution, Forrest City, Arkansas and American Federal of Government Employees Local 0922 (Jt. Exh. 1) are collectively referenced as the CBA.

...

Master Agreement, Article 27,

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. The first, which affects the safety and well-being of employees, and involves the inherent hazards of a correctional environment; and

2. The second, which affects the safety and health of employees, and involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest possible level, without relinquishing its rights under 5USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, the hazards can never be completely eliminated.

With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.
...

Master Agreement, Article 32, Section h.,

...
...The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: 1. this agreement; or 2. published Federal Bureau of Prisons policies and regulations.
...

KEY PROVISIONS OF THE PRIVACY ACT OF 1974

5 U.S.C. § 552a (g)(1),
Whenever any agency (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a (g)(4),
In any suit brought under the provisions of subsection (g)(1)0 or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of - - (A) actual

damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court. Emphasis added.

ANALYSIS

Full and careful consideration was given to the CBA, the materials received and all arguments. Not every theory, argument, or provision is listed, but all were considered. References to the provisions of the CBA, cases or other materials are not exhaustive or exclusive. Rather, they are intended to indicate some basis for the particular matter.

Joint Exhibit 2 is the Grievance. It recites that the Agency's actions violated the following provisions of the CBA:

Master Agreement Article Preamble (D);
Master Agreement Article 6 - Section b (2);
Master Agreement Article 27;
Program Statement 3420.09 Attachment A 13, 9, 14 and 32.

It is axiomatic that jurisdiction exists to determine whether the actions of the Agency violated the CBA. *AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 650 (1986).

The Grievance takes the position that the Privacy Act of 1974, 5 USC §552a (Privacy Act) is part of the CBA and includes it as a basis for the Grievance. However, the Grievance references provisions of the CBA, and, thus, the Grievance is not based solely on the Privacy Act.

The Agency's brief acknowledges that the Privacy Act is part of the CBA and references Master Agreement, Article 3, Section b., which is quoted above. To interpret the CBA, including the provisions relied upon in the Grievance, it is necessary to interpret the entire CBA which includes the meaning of any reference to the Privacy Act. Again, jurisdiction exists to interpret the CBA provisions relied upon by the Union and to determine whether the reference to the Privacy Act in the CBA allows a remedy under the CBA in addition to a remedy available in a United States District Court. *See Alexander v. Gardner-Denver Co.* , 415 U. S. 36 (1974).

The Agency urges that a violation of the Privacy Act can only be decided by a United States District Court. However, that position proves too much. For example, the Grievance cites specific provisions of the CBA. To interpret those provisions it is appropriate to consider the CBA as a whole, which includes a reference to the Privacy Act.

As the Supreme Court has explained, a labor arbitrator is "not confined to the express provisions of the contract," but may also look to other sources – including the "industrial common law" – for help in construing the CBA. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). The Court has further stated that an arbitrator may "look for guidance from many sources," and the "arbitrator [may look] to 'the law' for help in determining the sense of the agreement." *United Steelworkers of Am. v. Enter. Wheel & Car*

Corp., 363 U.S. 593, 598 (1960). Thus, to properly interpret the CBA it is necessary to consider the cited provisions and the Privacy Act can be used an aid in interpreting the CBA. It may well be that the Privacy Act does not aid the interpretation, but that is a matter of interpreting the CBA. Elkouri & Elkouri, How Arbitration Works, pp. 503-04 and 509-11 (6th Ed. 2003).

Placing jurisdiction of the Privacy Act with the United States District Court does not oust an arbitrator from interpreting the CBA. *See Alexander v. Gardner-Denver Co.* , 415 U. S. 36 (1974).

The Agency maintains that the Privacy Act was not enacted for the purpose of affecting the working conditions of employees. The Agency writes that the "Privacy Act was enacted to protect individual citizen rights in furtherance of Constitutional Rights," and cites *U.S. Customs Service v. F.L.R.A.*, 43 F.3d 682 (D.C. Cir 1994) for the proposition that a grievance claiming a violation of a law may be brought under §7103 (a) (9) (C)(ii) only if the law was fashioned for the purpose of regulating the working conditions of employees.

The Agency overlooks the United States Supreme Court's announcement that those "Constitutional Rights" include an employee's right to privacy in personnel records in the hands of an employer in the context of a CBA which announcement referenced the Privacy Act as governing the recordkeeping activities of public employers. *Detroit Edison Co. v. N.L.R.B.,* 440 U.S. 301, 319 fn 16 (1979) ("A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the recordkeeping activities of public employers and agencies. See, e. g., Privacy Act of 1974, 5 U.S.C. § 552a (written consent required before information in individual records may be disclosed, unless the request falls within an explicit statutory exception)"). The Agency also overlooks the statement in Section 2 of the Privacy Act that "the opportunities for an individual to secure employment... are endangered by the misuse of certain information systems" which indicates that the Privacy Act was concerned with employment.

The Agency also asserts that the Privacy Act is not a "condition of employment" based on 5 USC 7103(a)(14) (C). While the Agency's position may be correct, it continues to overlooks the fact that the Grievance is based on provisions of the CBA not just the Privacy Act.

CONCLUSION

Jurisdiction exists to consider the Grievance in this proceeding and to proceed with the evidentiary hearing.

November 17, 2011
Date

William E. Hartsfield, Arbitrator