FEDERAL MEDIATION AND
CONCILIATION SERVICE

IN THE MATTER OF ARBITRATION

between

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3020
Union,
and

UNITED STATES DEPARTMENT OF
JUSTICE, FEDERAL BUREAU OF
PRISONS, FCI SCHUYLKILL
Agency,

FMCS Case No. 05-04730

ARBITRATOR: John D. Nagy, Esq.

APPEARANCES:

For the Agency: R. Suzanne Courtney, Esq.

For the Union: Heidi R. Burakiewicz, Esq.

DECISION ON AGENCY REQUEST FOR LIST OF INDIVIDUALS WHO HAVE EXPRESSED AN INTEREST IN RECEIVING DAMAGES

ISSUE

Whether the union should be required to provide the agency with a list of all individuals who have expressed an interest to date in receiving damages pursuant to the grievance.

BACKGROUND AND FACTS

Grievance documents dated May 25, 2005 and June 8, 2005 (Formal Grievance Form) were filed by the union. Both contain identical language in relevant part. They allege the grievant to be "A.F.G.E. Local 3020 on behalf of all affected bargaining unit employees." (Box 1 of each form.) Box 6 of each form requests information "In what way were each of the [specified

directives, orders, statutes or the Master Agreement between the parties] violated?" The allegations are that "From May 24, 2002, as well as before, and continuing and ongoing to the present the Agency is requiring bargaining unit employees currently classified as FLSA non-exempt, to begin work prior to the start of their shift." It is further alleged as follows: "There are approximately 123 correctional officer posts in which this occurs each time there is the start of a shift and the end of a shift. Specifically, all employees who work at these posts are not being paid for compensable pre-shift and post-shift duties." (emphasis supplied)

In Box 8, the remedy is requested. The documents state, in relevant part, "AFGE Local 3020 requests that each affected bargaining unit member who expresses an interest in receiving damages by signing the union's required forms be made whole in every way including but not limited to an award of backpay under the FLSA."

Position of the Agency

The Agency requests that it be provided with a list of all individuals who have expressed an interest in receiving damages so that it "may properly defend itself in this matter." Counsel contends that by setting up procedures by which employees who are adversely affected must sign up if they want damages, it is clear that some employees are affected and some are not. The Agency states that it should be aware which individuals did not sign up so that they may be questioned; and, it is argued that those individuals who do not believe they perform pre and post-shift activities are crucial to the Agency's case.

Counsel adds that the number of individuals who did or did not sign up could be significant since if only a small number signed up for damages, it could show that most employees do not believe there are pre and post-shift issues at FCI Schuylkill.

Finally, the Agency states that the union has several avenues available should it feel that any of its members are being retaliated against for participating in this case. Counsel argues that the possibility of potential reprisal is outweighed by the Agency's ability to defend itself.

Position of the Union

The Union responds that this is a union-wide grievance covering all affected bargaining unit employees, and therefore even if an employee has not signed up for the case, he or she is covered by the grievance. It is pointed out that if the Union loses the grievance, all employees at FCI Schuylkill could possibly be precluded from ever collecting FLSA overtime for performing the work. Counsel states that the Agency's attorney representative is ethically barred from speaking with any of these employees regardless of whether they have already completed a consent/retainer form. The Union concludes that because the Agency cannot question the employees, it has failed to articulate any legitimate purpose for obtaining the list; and, notes that the Union is similarly unable to question management officials. Counsel argues that "Essentially, the Agency hopes that by getting the list the Union will have done its work for it by narrowing down the pool of people who are not supportive of the Union's grievance . . ."

The Union further contends that the consent/retainer form is nothing more than a procedure by which the Union can fund the grievance since case law bars an arbitrator from ordering a federal agency to deduct a contingency fee from employees' damages checks. Counsel states that her firm's collection of consent/retainer forms is an ongoing process which is not complete, and is appropriately provided during the damages phase of the hearing.

Counsel contends that if the relief sought by the Agency is granted, it could expose employees who have already signed the forms to retaliation, and could discourage employees

who had not yet signed the forms from so doing as a result of the "questioning" of those employees.

Finally, the Union cites 5 U.S.C. § 7114(a)(1) for the proposition that a labor organization which been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for all employees in the unit. Elkouri & Elkouri, How Arbitration Works, 212 (6th ed. 2003) is quoted as follows: "It is widely accepted that a union has standing to file a group grievance that affects a significant portion of the bargaining unit." It is further cited for the concept that it is not necessary that a grievance filed by a Union be signed by an employee member of the bargaining unit. Counsel additionally cites language from Department of the Navy, Indian Head, MD and AFGE Local 1923, 57 FLRA 280 (2001) that the FLSA's opt-in provision does not apply to grievance and arbitration proceedings because to do so would create an unnecessary conflict between that requirement and the scope of the Union's rights as exclusive representative of the employees. It is concluded that Local 3020 has the authority to file grievances on behalf of the entire bargaining unit, and that Woodley & McGillivary's use and collection of consent/retainer forms is a purely internal matter between it, the union, and individual bargaining unit members.

DECISION

If the grievants in this matter consisted of correctional employees who had opted to claim that they were not paid for pre and post-shift work, fundamental principles of fair dealing would compel me to grant the relief requested since the Agency should, as of right, know who was bringing the grievance against it. But the filed grievance distinguishes between the grievant,

which in Box 6 of the grievance(s) is defined as "all employees who work at [correctional officer] posts, [all of whom] are not being paid for compensable pre-shift and post-shift duties" (emphasis supplied), and that portion of the correctional officer work force which elects to "sign the union's required forms" and may therefore receive damages. This is a classic example of what is described in Elkouri & Elkouri, How Arbitration Works, 6th edition, 211-212, as a "group grievance" or a "class action." 5 U.S.C. § 7114(a) accords the union, as exclusive representative, the right to act on behalf of all unit employees. Department of the Navy, Indian Head, MD and AFGE Local 1923, 57 FLRA 280, 286 (2001).

Since the grievant is Local 3020 on behalf of all employees who work correctional officer posts, it follows that the Agency's attorney representative is ethically barred from speaking with any of those employees, and therefore the Agency has not established a legitimate purpose for obtaining the list of employees who have completed the Union's consent/retainer form.

In its brief, the Union offered to permit me to examine, in camera, the number of employees who have already submitted consent/retainer forms "so as to assuage any concerns the Agency may have that only a 'small number' of employees have submitted the form. Because Local 3020 has, by statute and by general arbitration principles, the right to act on behalf of all unit employees, I decline its offer. The grievance alleges that there are approximately 123 correctional officer posts. Where would one draw the line as to how many consent/retainer forms would be necessary to justify the filing of the grievance? Congress has already spoken in 5 U.S.C. § 7114(a).

I have no doubt that most able counsel for the Agency will be able to fashion a fine defense utilizing management personnel who are fully familiar with the main issue. Management

personnel are quite likely to know which unit members are unsympathetic to the Union's claims and it will be possible for counsel to call such people to testify. I would add that the list of people who have signed the consent/retainer forms should properly be turned over during the damages phase of this arbitration, if any, since that list goes to the question of damages and not to the question of identifying the grievant. Finally, I wish to note that I have drawn no conclusions, nor based my decision on any allegation made by the Union that Agency personnel have coerced or may coerce bargaining unit members.

In view of the foregoing, the Agency's application for a list of individuals who have expressed an interest in receiving damages is denied.

John D. Nagy, Esq.
Arbitrator

February 29, 2008