IN ARBITRATION

OPINION AND AWARD

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1304,	)	
	)	**FMCS No.: 12-01703-5**
And	)	
FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION Greenville, Illinois.	)	**Katherine A. Paterno, Arbitrator**

APPEARANCES:

For the Union: **Sally E. Barker, Esq. of Schuchat, Cook & Werner**
For the Agency: **Michael A. Markiewicz, Federal Bureau of Prisons**

Dated: December 17, 2012

BACKGROUND

The Federal Bureau of Prisons ("BOP") was established to provide more progressive and humane care for Federal inmates, to professionalize the prison service, and to ensure consistent and centralized administration of the 118 Federal institutions, 6 regional offices, a Central Office, 2 staff training centers, and 22 residential reentry management offices. The Central Office and regional offices provide administrative oversight and support to BOP facilities. The Federal Correctional Institution in Greenville, Illinois, ("Agency"), a medium security facility is part of the BOP and located approximately 63 miles from Springfield, Illinois.

The employees are represented by the American Federation of Government Employees, Local 1304 ("Union") under the Master Agreement ("Agreement") as defined in 5 U.S.C 71, excepting supervisory and managerial employees. Article 17 of the Agreement provides that the Agency must disclose information to the employee in any official personnel file that could adversely affect the employee's career or character. In or around August 2011, newly appointed supervisor Alex Aguirre informed employees of secret files, but refused to release the files until he received approval from his superior. In or around November 2011, Aguirre released the secret files to the employees, and after reviewing the content, the grievance in the instant case was filed alleging violations of the Agreement and statutes and regulations as incorporated into the Agreement.

Unable to resolve the grievance in the lower steps, the Union demanded arbitration. At hearing, no issues of arbitrability were raised and both parties agreed to submit to the authority of Arbitrator Katherine A. Paterno to determine the issue(s) and a final and binding decision. Hearing on this matter was held on September 19, 2012, at the FCI Greenville, Greenville, Illinois, wherein Gregory Warren, Brian Mueller, Jeff Hartwick, Jeff Foster and Willie Gibson testified on behalf of the Union. The Employer presented evidence through witnesses Robin

Bohle, Kathleen Keohane, Chris LaFrance and Alex Aguirre. The parties elected to file briefs in lieu of closing arguments, which were timely received by agreement on November 16, 2012. The Agency raised for the first time in its brief a procedural issue of whether the grievance was time-barred. The Union was granted leave and filed a reply brief addressing that issue, which was received November 19, 2012.

ISSUE

Whether the Union's grievance is time-barred under the Agreement.

If not time-barred, did the Agency violate the Section 17 of the Agreement?
If not time-barred, did the Agency violate 5 U.S.C. § 2302 Prohibited Personnel Practices, as incorporated into the Agreement?
If not time-barred, did the Agency violate 5 U.S.C. § 552a, the Privacy Act, as incorporated into the Agreement?

RELEVANT PROVISIONS

Joint Ex. 1, Master Agreement

Article 3 – Governing Regulations

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.

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.

Article 7 – Rights of the Union

Section b. In all matters relating to personnel policies, practices, and other conditions of employment, the Employer will adhere to the obligations imposed on it by the statute and this agreement. This includes, in accordance with applicable laws and this Agreement, the obligations imposed on it by the statute and this agreement. This includes, in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute.

Article 17 – Employee Personnel Files

Section a. No derogatory material of any nature which might reflect adversely upon the employee's character or career will be placed in any official personnel file, written or electronically maintained, without the employee's knowledge. This excludes investigative files and those mattes for which disclosure is prohibited by applicable laws and regulations. Disciplinary and adverse action files are not considered investigative files.

Section b. Personnel records will be available to the employee upon request or to the employee's representative if authorized by the employee in writing, except for those matters prohibited by applicable laws and regulations. The Official Personnel File cannot be removed from the Human Resource Management Office by the employee or the representative and must be reviewed with a member of the Human Resource Management Office present.

Section 31- Grievance Procedure

Section a. The purpose of this article is to provide employees with a fair and expeditions procedure covering all grievances properly grievable under 5 U.S.C. 7121.

Section d. Grievances must be filed within 40 calendar days of the date of the alleged grievable occurrence. . . 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. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

Section 32 – Arbitration

Section a. In order to invoke arbitration, the party seeking to have an issue submitted to arbitration must notify the other party in writing of this intent prior to expiration of any applicable time limit. The notification must include a statement of the issues involved, the alleged violations, and the requested remedy. If the parties fail to agree on joint submission of the issue for arbitration, each party shall submit a separate submission and the arbitrator shall determine the issue or issues to be heard. However, the issues, the alleged violations and the remedy requested in the written grievance may be modified only by mutual agreement.

Section h. The arbitrator shall have not power to add to, subtract from, disregard, alter, or modify any terms of:

1. this Agreement; or
2. published Federal bureau of Prisons policies and regulations.

Human Resources Management Manual, Union Ex. 4, Chap. 2, pg. 7-8

293.1 Personnel Records and Files

1. Purpose and Scope. To communicate regulations and instructions for establishment, maintenance and disposition of the Official Personnel Folder (OPF) and the Employee Performance File (EPF) Supplement on record keeping. In addition to the OPF and EPF, HRM offices will establish and maintain and individual Payroll File for each employee for whom it

maintains an OPF. Other personnel records and files include the security file (se section 731.1) and disciplinary and adverse action files (see section 750.1) ...

3. Location. Each HRM office will maintain the OPF, EPF and Payroll file for each employee it services, including Chief Executive Officers.

294.1 Availability of Official Personnel Information

7. Sensitive Personnel Information. Any document which has an individual's name and social security number in combination is regarded as "DOJ Sensitive" and must be physically safeguarded against unauthorized use and disclosure.

Human Resources Management Manual, Union Ex. 4, Chap. 4, pg. 12

430.1 Performance Evaluation Program for Bargaining Unit Employees

14. Filing and Disposition of Performance Logs and Ratings Forms

b. The original signed copy of a completed rating form including continuation sheets, will be filed in the HRM office, either in the employee's individual Employee Performance File or on the left side of the employee's Official Personnel Folder. A copy of the employee's performance standards may be filed with the rating form or may be maintained in a separate master file of performance standards.

c. Completed performance ratings will be retained for four years . . . .

d. Rating officials will retain the performance log for one year after the performance rating based on the log approved.

Federal Statutes and Regulations

5 U.S.C. §2302 *et. seq.*
5 U.S.C. §552a
5 C.F.R. § 293.502
5 C.F.R. § 293.503,
28 CFR § 513.31(a)(D)
29 C.F.R § 1630
29 C.F.R. § 1630.14

EVIDENCE

FCI Greenville is divided into areas that are "inside the fence" ("compound") and "outside the fence". The administration and training center buildings are located outside the barbed-wire fence. The administration building houses several departments including, human resources, which stores the personnel files, the Special Investigative Section ("SIS") office, and the armory. Policy also dictates that human resource managers are the custodians of personnel

records and are responsible for the safeguarding and maintaining employee files. (U.Ex.4). The "Official Personnel File" ("OPF") has been maintained electronically in Grand Prairie, Texas, since 2005. The Human Resources Management Manual, provides that performance evaluations are to be removed from the personnel file after four years and performance logs will be removed after one year. (U. Ex. 4, Ch.2, 9; p. Ch.4, p12).

Between the inside and outside fenced areas is the control center and a secured area referred to as the "sally-port", which has mechanized gates to regulate and control entrance into and out of, the secured area. Once cleared of the metal detectors and x-rays at the front door of the administration building, employees are identified in the control center and then allowed to enter the secured compound. Inmates are confined to their cells during nighttime hours only and are out doing various activities in and around the compound the remainder of the day. The Trust Fund department, inside the fence, administers the inmates' monetary accounts. The secret files were maintained in the Trust Fund supervisor's office, where inmates regularly have access to the department to inquire about their respective account. Under the supervisor of the Trust Fund department is the warehouse supervisor, who oversees six bargaining unit employees, who hold the position of warehouse worker.

On July 31, 2011, Alex Aguirre was appointed to the position of supervisor of the Trust Fund department. Within two to three weeks of his arrival, Aguirre informed a bargaining unit member that there were secret files kept in his office of the Trust Fund Department. Employees were unaware that any secret files were being maintained inside the fence in the supervisor's office of the Trust Fund Department. (Tr. 32, 64, 98). Aguirre would not tender the files to the employees before obtaining his superior's authorization. (Tr. 42-43, 62, 64, 96-97, 110). Thereafter the Agency commenced a SIS investigation regarding the secret files. The Agency denied the Union's request for information concerning the secret files and the investigation on

September 14, 2011. (U. Ex. 3; Tr. at 23-4, 48-50, 64, 80, 98). Subsequently, in or around late November 2011, the secret files were turned over to the respective employee. (U. Exs. 5-8; Tr. 46, 97, 110-11). The files contained social security numbers of employees and their family members, medical documents, an inmate complaint regarding an employee ("cop-out"), past grievances, and outdated and altered performance evaluations and logs, desk audits, emails, outdated memoranda regarding an employee losing a radio, and disciplinary write-ups. (U. Exs. 5-8; Tr. 45-48, 50, 66-80, 100-107, 112-17). The acting supervisor of the Trust Fund Department told Aguirre to look at the files to know what kind of employees he was "dealing with." (Tr. 187). Several documents requiring removal were retained well beyond the 4-year limitation, the oldest being eighteen years old. (U. Exs. 5-8; Tr. 113-14). The Agency concedes that the retention of the old performance and quarterly logs and the year-end evaluation were in violation of Agency policy. (Tr. 143) Policy also provides that social security numbers in combination with an individual's name is "DOJ sensitive" and must be physically safeguarded against unauthorized use and disclosure. The Agency admits that the policy was not followed with respect to the secret files. (U. Ex. 4; Tr. 161-63). Medical information, concerning at least one employee, was conveyed by his supervisor, to a supervisor in another department. (Tr. 68-81).

POSITION OF THE UNION

The Arbitrator has jurisdiction over the grievance. The Agency's argument that the grievance is untimely was raised for the first time in its brief and therefore should be denied. The Agency's defense is based on the uncorroborated testimony of Supervisor Aguirre that he informed two bargaining unit members of their existence previously. Despite this testimony of its own witness, the Agency failed to raise objections to jurisdiction during hearing thereby waiving the same. The Agency interprets the Agreement as requiring a grievance to be filed as soon as the Union has the hint of a possible violation. This unreasonable interpretation is

disfavored in labor arbitration especially in light that the Agency failure to claim harm by any alleged delay.

Secret files concerning bargaining unit employees have been maintained by the Agency. These files contain sensitive personnel information, unsubstantiated complaints, medical information, and performance evaluation beyond the time limits allowed. Despite the fact the files were tendered to employees, the Agency denied the Union's grievance resulting in the demand for arbitration. The Union believes that the Agency violated Article 17 of the Master Agreement and Federal statutes and regulations by maintaining these secret files and because of the information contained therein.

The Federal Prison at Greenville is a highly regulated facility. Areas are distinguished between "inside the fence" and "outside the fence". The Human Resources Department is located in the Administration Building, located outside the fence where inmates are not generally allowed, except in instances of closely supervised work detail. The Trust Fund office, from where inmate money accounts are administered, is located inside the fence adjacent to the food services area. Inmates frequently go to the Trust Fund office to query about their money accounts. The secret files were kept in this same Trust Fund office inside the fence and thus were put at risk.

Sensitive information and various documents kept in the secret files were in violation of Agency policy and procedure and the Agreement. Documents listed the names of individual employees and their family members, including minors, and their social security numbers. Older performance evaluations, which should have been discarded after the requisite 4-year time period, where kept for years beyond. Some records where retained from the beginning of employment, some eighteen years prior. Among other information included: sensitive medical information, worker's compensations claims, a photograph of an employee's motorcycle in front

of his personnel residence, email correspondence, copies of outdated grievances, management memos detailing an employee's conduct, and an inmate complaint ("cop-out") containing racist allegations against and employee, where found in these files. At least in one instance, an employee's medical information was disclosed to unauthorized personnel.

The Union is also concerned about the vouchering system employed by the Agency in reviewing candidates for positions despite the EEOC's condemnation of it. The Agency prepares a list of qualified candidates for a vacant position. The prospective supervisor will then discuss the candidate with their current supervisor to determine whether that supervisor will "vouch" for the employee. During the time that the secret files were kept, employees applied for but did not receive promotions.

The maintaining of the secret files are unauthorized and in violation of U.S.C. 2302 (b)(1), Article 17 of the Agreement and the Privacy Act, 5 U.S.C. Section 552a. The Agency wrongly believes that there is nothing unusual or wrong in maintaining the secret files. The Agency's misidentifies the content of the secret files and erroneously advances that the employees were aware of the files and the content. The Agency testified that employees had the right to inspect the secret files under the Agreement and had both a contractual and due process right with respect to any negative information contained in the secret files. Regardless, the discovery of the secret files resulted in an official investigation, the results of which were never disclosed to the Union despite requests for the same. Therefore, a negative inference should apply that the investigation found wrongdoing regarding the formation and maintenance of the secret files. The Agency's actions also support the Union's position and this inference by the fact that upon discovering the secret files they were turned over to the respective employee in their entirety immediately.

The unambiguous intent of Article 17 of the Agreement prohibits the keeping of any secret files. Specifically, the Agency may not maintain any undisclosed secret files, which may reflect adversely upon an employee's character or career. If the Agency is allowed to keep secret files under the contract the provision providing employees the right to inspect the files would be rendered meaningless. The evidence is overwhelming that the files were kept without the employee's knowledge, listing information, which could reflect adversely on an employee's character and career. The Agency policy and procedures and a contractual time limit requiring older documents to be discarded further supports the inference that such information could reflect adversely impact an employee. The Agency's vouchering system further emphasizes the potential for harm. The secret files could have been read and disclosed to prospective future supervisors denying an employee an opportunity for advancement.

The Union's position is further supported by arbitration decisions interpreting similar language, finding the inappropriateness and unfairness of maintaining undisclosed derogatory information about employees (i.e., "stale notations"). This unfairness is compounded by the fact that the files were kept inside the fence where inmates could conceivably gain access to the sensitive information and thus is inexcusable.

The Agreement incorporates external laws. Specifically, 5 U.S.C. Section 2302 (prohibited personnel practices by federal government) and Section 552a of the Privacy Act (requirements concerning what information/documents federal agencies may maintain and in what form or manner). The content and maintenance of secret files violates Section 552a of the Privacy Act by the inclusion of social security numbers on performance evaluations and other forms. The Agency is also required to maintain all occupational medical records in separate file, which in turn should be in a separate Employee Medical File System (*see* 28 C.F.R. 293.406, .504, 507), and is also required to be kept on separate forms and medical files pursuant to 5

U.S.C. Section 2302. *See* 29 C.F.R. 1630.14. The Agency violated both of these statutory requirements. The Agency objects for the first time at hearing regarding the Union's allegation of violations of the Act. The Agency was given notice of the alleged Privacy Act violation in the Union's written notice of arbitration and is not subject to unfair surprise at hearing. Therefore, consideration of Section 552a Privacy Act and 5 U.S.C. 2302 violations is proper.

Based on the overwhelming evidence, the Union's grievance should be sustained. The remedy should require the Agency to: (1) cease and desist the practice of maintaining secret files and that all supervisors be notified of the same; (2) adhere to all local policy/procedures and federal laws concerning personnel files and staff information; (3) return all such files to affected employees, including any copies; (4) disclose all documents relating to and resulting from the SIS investigation concerning the secret files; (5) post the finding (in three accessible areas) that the Agency's maintenance of secret files was improper and will be discontinued; (6) to provide training concerning acceptable and prohibited file maintenance practices; and (7) to refrain from any harassment, intimidation, reprisal, or any other coercion against the affected employees for exercising their rights in this process.

POSITION OF THE AGENCY

The November 30, 2011 grievance is untimely because the Union first became aware of the violation of in May 2011, when bargaining unit employee Jeff Hartwick reported the secret files to the Union. Section 31d of the Agreement clearly provides that grievances must be filed within 40 calendar days of the date of the grievable occurrence. Because the Union failed to timely file the grievance in accordance with the time requirements of the Agreement, the grievance should be denied.

In the event the grievance is timely, the Union has the burden of demonstrating a violation of the Agreement. Article 32 provides that the issues, alleged violations and remedy

requested in the written grievance may be modified only by mutual Agreement; The Agency has not agreed to the issues advanced by the Union as they were not listed in the grievance.

Article 17 only applies to the Official Personnel Files ("OPF") maintained in the Agency's consolidated Personnel Office in Grand Prairie, Texas. The secret files in the instant case are supervisory files not OPFs governed by Article 17 and therefore the Union's reliance is misplaced. The Agreement does not prevent supervisors from maintaining separate files on an employee.

The Union's argument that all employee files must be kept outside the fence must also fail as the Union concedes that time and attendance records are regularly maintained inside the fence. The Agency has the right to maintain various employee files, unless prohibited by the Agreement. The grievance does not allege files were lost, given to unauthorized individuals or files left in an unsecure area. The issue is whether these files are properly maintained. The secret files were stored in a fireproof cabinet, requiring a combination code, inside a supervisory office, and thus properly secured and maintained.

The information in these files was all work-related documents, including the motorcycle photograph taken at the time of an employee's worker's compensation leave. There were no disciplinary records in these files as defined by Article 30b of the Agreement nor could the Union show any adverse personnel action as a result of these files.

The Union also unsuccessfully alleges a violation of 5 U.S.C. 2102(b)(1) and the Privacy Act. No evidence was presented on the former and the Union failed to include the latter in the grievance as required by the Agreement. The Privacy Act prescriptions only pertain when a document becomes incorporated into a record keeping system under the Agency's control. The Privacy Act places the burden on the plaintiff to demonstrate disclosure has occurred, that the agency acted in an intentional or willful manner, and that actual damages exist. Courts have not

found disclosure even in instances where sensitive information was kept in an unlocked file cabinet. *Melfrum v. United States Postal Serv.*, 230 F.3d 1358 (6th Cir. 2000). Nor did the Union produce any evidence regarding actual damages or that the Agency acted intentional or willful. Therefore, the grievance should be denied in its entirety.

DISCUSSION

ARBITRABILITY

Procedural issues concerning contractual time limitations are question to be determined by the arbitrator. Public policy favors resolution of procedural issues by an arbitrator in an effort to avoid costly litigation and to foster the labor-management relationship. If an agreement does contain clear time limits for filing and prosecuting a grievance, failure to observe those limits will *generally* result in dismissal of the grievance. Arbitrators should not automatically order the relief demanded where granting such relief would alter or add to the agreement.

The purpose of the Grievance Procedure is to provide employees with a fair and expeditious procedure covering all grievance properly grievable under 5 U.S.C. 7121. (Jt. Ex. 1, p.65, Art. 31a). Section d provides that:

> Grievances must be filed within 40 calendar days of the date of the alleged grievable occurrence. . . 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. A grievance can be filed for violations within the life of this contract, however, where the statutes provide for a longer filing period, then the statutory period would control.

The Agency argues for the first time in its brief that the Arbitrator is without jurisdiction to decide the underlying substantive issues because the Union failed to heed the time limitations of Section 31d. Agency witness, Trust Fund supervisor Alex Aguirre, testified on direct examination that he began employment at the Greenville facility on July 31, 2011 and became aware of the secret files two to three weeks after arriving. (Tr.193-95). Employees were not

given the files until Aguirre received authorization from his superiors in November 2011, which was corroborated by Union witnesses. (Tr. 194-96; Tr.64-65)[1]. The cause of action arose when the employees were given access to the files in late November 2011. Shortly thereafter the Union filed the grievance on November 30, 2011. A filing of any grievance before hand without knowing if there had been a violation of the contract would have been premature and arguably frivolous. To hold otherwise would allow the Agency to withhold information on any potential grievable offense beyond the 40-day limit making it time-barred and nullify that section of the contract along with the fairness purpose stated in Section 31a and arbitrator authority in Section 32. Moreover, where the violation is ongoing, arbitrators have found no violation of the time limit exists because such grievance can be filed at anytime. The secret files also give rise to an ongoing violation during which the Union could have filed a grievance, including but not limited to individual violations in each respective employee's secret file.

Even if I found the grievance time-barred and a single occurrence, this Arbitrator holds that the Agency waived this procedural objection by failing to raise it prior to the submission of their brief. Despite having knowledge of the facts testified to by the Agency witness Aguirre and the contractual 40-day limit, the Agency failed to object any time during the grievance procedure, notice of arbitration or at hearing, depriving the Union of notice and the ability to cross-examine or present witnesses. The Agency's procedural argument that the grievance is time-barred is denied based on the above-stated reasons and because such a finding is in accordance with the stated fairness purpose of the Grievance Procedure in Section 31a.

SUBSTANTIVE ISSUES

Unlike Article 31 – "Grievance Procedure", requiring no specifics to be listed in a formal grievance, Article 32 – "Arbitration" provides that the notice to arbitrate must include: (1) a

[1] The Agency mischaracterized Union witness testimony regarding his knowledge about the secret files and notice

statement of the issues involved, (2) the alleged violations, and (3) the requested remedy. (Jt. Ex. 1, Art. 31 pp.65-67; Art. 32a, p. 68). The issues listed include: (1) the maintaining of secret files regarding several bargaining unit members; (2) the inappropriate and outdated content of said files; (3) the sharing of the secret files with an incoming supervisor; (4) content may have damaged the bargaining unit member opportunities for promotions and Incentive Awards through the years of their existence; (5) violation of the Agreement; and (5) violation under Title 5 of the U.S.C. The violations alleged by the Union are: (1) Agreement, Article 17a; (2) 5 U.S.C. §2302 -Prohibited Personnel Practice; and (3) 5 U.S.C. §552a – Privacy Act. Accordingly, the analysis will be limited to the issues alleged pursuant to the notice to arbitrate as required under Article 32 of the Agreement. To accept the Agency's interpretation would add to the Agreement.

Contract interpretation involves a process of determining, or giving meaning to, words in a collective bargaining agreement. The most common tenet of contract interpretation is one that states that unambiguous contract language prevails above all other standards. If the contract language is clear, the arbitrator should go no further to resolve the dispute. However, where the language of the contract is subject to more than one meaning, the interpretation of the parties, their bargaining history, and their practices will carry considerable weight.

I. VIOLATION OF ARTICLE 17 OF THE AGREEMENT

Article 17, provides, in part:

> Section a. **No derogatory material of any nature which might reflect adversely upon the employee's character or career will be placed in *any* official personnel file, written or electronically maintained, without the employee's knowledge.** This excludes investigative files and those mattes for which disclosure is prohibited by applicable laws and regulations. Disciplinary and adverse action files are not considered investigative files.
>
> Section b. Personnel records will be available to the employee upon request or to the employee's representative if authorized by the employee in writing, except for those matters prohibited by applicable laws and regulations. The **Official Personnel File**

> cannot be removed from the Human Resource Management Office by the employee or the representative and must be reviewed with a member of the Human Resource Management Office present. (emphasis added). (Jt. Ex. at 37).

I reject the Agency's argument that Article 17a only applies to the Official Personnel File ("OPF"). The clear language and capitalization of Article 17 distinguishes between files. Section 17a references "any official personnel file" and section 17b references "The Official Personnel File". In addition, Section 17a specifically excludes investigation files from "any official personnel file" and clearly distinguishes disciplinary and adverse action files from that exception. While the Agency's supervisors are not prohibited from maintaining files of employees, the clear language of Section 17a provides limitations on that right. To accept the Agency's interpretation of Article 17 would nullify Section 17a. Contract construction requires an interpretation that gives effect to all provisions.

The Agency cannot place *any* written or electronically maintained information of a derogatory nature in *any* official personnel file (lower case distinguished), "which might reflect adversely upon the employee's character or career *without the employee's knowledge*." (Jt. Ex. 1, at 37)(emphasis added). This includes disciplinary and adverse action files. To accept the Agency's interpretation would subtract from, disregard, alter, and modify the terms of the Agreement by eliminating the word "any", thereby allowing the Agency to create secret files at will without being required to disclose the adverse information contained in other files to the employee. The evidence demonstrates that employee secret files contain information that is derogatory in nature, which *might* adversely reflect upon an employee's character or career. Union Exhibit 5 contains documents, which should have been disclosed to the employee, that I find to be derogatory in nature and which might adversely affect the employee's career and question his character. (U.Ex. 5a-5m,5q,5r, 5s-v, 5w-5bb). I do not find credible that the motorcycle photograph taken in front of an employee's home while out on worker's

compensation leave, was retained because the supervisor was concerned for the employee's well-being, but rather because of possible worker's compensation fraud. Those documents coupled with the various supervisor memoranda, a cop-out alleging the employee to be a racist and past-filed grievances substantiate a finding that the content of the secret files might adversely affect that employee's character and career. By allowing the Agency to create personnel files, name that file something other than "personnel file" would result in circumvention of the Agreement and prevent a bargaining unit employee from being able to know the contents of any other file that might adversely affect his career or character. Moreover, the retention of documents beyond the four years in the secret files presented as evidence, might adversely affect the character and career of any of the employees. (U. Exs. 5-8). The Union is not required under Section 17a to show an employee's character or career was *actually* adversely affected to prove a violation. I therefore hold that the Agency violated the Article 17 of the Agreement by placing documents in these files without the employee's knowledge and that said material might adversely affect the employee.

II. VIOLATION OF 5 U.S.C. § 552a – THE PRIVACY ACT

The Union advances that the Agency violated Agreement when it failed follow the Privacy Act regulations by not: (1) redacting employee social security numbers; and (2) maintaining separate employee medical files relating to the documents contained in the secret files. Article 3, Section b – Governing Regulations of the Agreement provides:

> 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. (Emphasis added.) (Jt. Ex. 1, p.5).

Contrary to the Agency's position, the Union is not alleging independent claims under Federal law. Rather, the Union posits that the Agreement was violated when the Agency failed to follow its obligations under Federal law. The Agreement provides that the Agency will adhere to the

obligations imposed on it by statute and the Agreement. Specifically, Article 7 – Rights of the Union states:

> b. In all matters relating to personnel policies, practices, and other conditions of employment, **the Employer will adhere to the obligations imposed on it by the statute and this agreement.** This includes, in accordance with applicable laws and this Agreement, the obligations imposed on it by the statute and this agreement. This includes, in accordance with applicable laws and this Agreement, the obligation to notify the Union of any changes in conditions of employment, and provide the Union the opportunity to negotiate concerning the procedures which Management will observe in exercising its authority in accordance with the Federal Labor Management Statute. (Emphasis added). (Jt. Ex. 1, p.16).

The Agency advances that the Union is unable to state a cause of action under the Privacy Act because the documents only become subject to the Privacy Act when the record disclosed is contained in a "system of records". (*Citing Bechhoefer v. U.S. Dept. of Justice*, 312 F.3 562 (2d Dist. 2002)). (Ag. Brief, p.4). The Agency implies that because the documents were not in the OPF, the Privacy Act does not apply. I refuse to find that because the documents in the secret files where not part of the OPF, that neither the Agreement nor the Privacy Act by incorporation apply. Moreover, the Agency's position ignores the fact that the Union is proceeding under violations of the Agreement alleging the Agency ignored its duties and obligations under the Privacy Act, as incorporated into the Agreement.

The statute broadly defines a "record" as:

> "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or *employment* history that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552a(a)(4).

A record must reflect some quality or characteristic of the individual involved. *See* S. Rep. No. 1183, 93d Cong., 2d Sess.; *See also American Fed. of Govt Employees v. Nat'l Aeronautics and Space Admin.*, 482 F.Supp. 281, 283 (S.D.Tex. 1980). Accordingly, I find that the documents contained in the secret files are "record[s]" as defined under the Act.

A "system of records" is defined as:

> a group of records within the agency's control "from which information is retrieved by the name of the individual or by some identifying particular." 5 U.S.C. § 552a(a)(5).

A record must be maintained by the agency in a group of records cued to the requestor. *See Savarese v. Dept. of Health, Educ. and Welfare*, 479 F.Supp. 304, 307 (N.D.Ga. 1979), *aff'd.*, 620 F.2d 298 (5th Cir. 1980). The secret files were kept on individual employees listed by name, in individual file folders, with identifying particulars and thus I hold are a "system of records" as contemplated by the Act.

The Privacy Act and Prohibited Personnel Practices are implemented by the Code of Federal Regulations ("C.F.R."). Because the secret files are records being maintained in a system of records as defined under the Act, the C.F.R. outlines the requirements of any Agency record system. Section 513.31(a) prohibits the use of social security numbers in their entirety as a method of identification for any Bureau record system, except as authorized by statute. 28 CFR § 513.31(a). The evidence is clear that the Agency failed to redact or otherwise remove any and all social security numbers as identification in conjunction with an individual's name from the secret files.

Further, basic policies governing the creation, development, maintenance, processing, use, dissemination and safeguarding of personnel records, which the Office of Personnel Management requires agencies to maintain, are set forth in 5 C.F.R. 293. Section 293.502(d) defines Employee Medical File System ("EMFS") (system containing complete occupational medical records), Employee Medical Folder ("EMF") (separate folder with all occupational medical records) and Occupational Medical Record ("OMR") (occupational illness, accident and injury records).

Implementing instructions for EMFS, EMF and OMR are listed in §293.503, as follows:

> Agencies must issue written internal instructions describing how their EMFS is to be

implemented. These instructions must—

(a) Describe overall operation of the system within the agency including the designation of the agency official who will be responsible for overall system management. When the agency has a medical officer, that individual must be named the system manager. The system manager may then designate others within the agency to handle the day-to-day management of the records, e.g., the custodian of the records at the site where they are maintained;

(b) Be prepared with joint participation by agency medical, health, and safety, and personnel officers;

(c) Describe where and under whose custody employee occupational medical records will be physically maintained;

(d) Designate which agency office(s) will be responsible for deciding when and what occupational medical records are to be disclosed either to other agency officials or outside the agency;

(e) Ensure proper records retention and security, and preserve confidentiality of doctor/patient relationships;

(f) Provide that when the agency is requesting an EMF from the National Personnel Records Center (NPRC), the request form will show the name, title, and address of that agency's system manager or designee, who is the only official authorized to receive the EMF;

(g) Be consistent with Office regulations relating to personnel actions when medical evidence is a factor (5 C.F.R. parts 339, 432, 630, 752, and 831);

(h) Provide guidance on how an accounting of any record disclosure, as required by the Privacy Act (5 U.S.C. 552a(c)), will be done in a way that ensures that the accounting will be available for the life of the EMF;

(i) When long-term occupational medical records exist, provide for the creation of an EMF for an employee transferring to another agency or leaving Government service, and whether an EMF is to be established at the time an employee is being reassigned within the agency;

(j) Ensure a right of access (consistent with any special Privacy Act handling procedures invoked) to the records, in whatever format they are maintained, by the employee or a designated representative;

(k) Ensure that a knowledgeable official determines that all appropriate long-term occupational medical records are in an EMF prior to its transfer to another agency, to the NPRC, or to another office within the same employing agency;

(l) Ensure that all long-term occupational medical records an agency receives in an EMF are maintained, whether in that same EMF or by some other agency procedure, and forwarded to a subsequent employing agency or to NPRC;

(m) Ensure that, if occupational medical records are to be physically located in the same office as the Official Personnel Folder (OPF), the records are maintained physically apart from each other;

(n) Sets forth a policy that distinguishes, particularly for purposes of records disclosure, records in the nature of physician treatment records (which are generally not appropriate for disclosure to non-medical officials) from other medical reports properly available to officials making management decisions concerning the employee;

(o) Provide guidance that distinguishes records properly subject to this part from those subject to different rules, particularly in Privacy Act and Freedom of Information Act matters;

> (p) Ensure that guidance regarding the processing of Privacy Act matters is consistent with Office regulations implementing the Privacy Act at 5 CFR parts 293 and 297; and
> (q) Ensure that no security classification is assigned to an EMF by including therein any occupational medical record that has such a classification. In this regard, the agency creating the classified medical record is required to retain it separately from the EMF while placing a notice in the EMF of its existence and describing where requests for this record are to be submitted.

Agencies have the responsibility to ensure that such documents are maintained in accordance with the Privacy Act regulations and with the implementing instructions listed above and in the C.F.R. 5 C.F.R. 293 *et. seq.* It is a violation of the Agreement for the Agency to fail to meet its statutory obligations.

The record clearly demonstrates that the Agency failed to maintain employee medical documents as required. The medical documents, including worker's compensation forms, were commingled in the secret files with a myriad of other documents, including but not limited outdated grievances, performance evaluations, write-ups, a photograph outside an employee's residence, cop-outs. (U. Exs. 5-8). The social security numbers of the employees and one employee's family were also contained in the files improperly. I, therefore find the Agency violated the Agreement by failing to adhere to the obligations imposed on it by the Privacy Act, as incorporated into the same.

III. VIOLATION OF 5 U.S.C. § 2302 – PROHIBITED PERSONNEL PRACTICES

The Union's brief alleges that the Agency violated the 5 U.S.C. § 2302(b)(1)(D) as incorporated into the Agreement, when employee medical information was comingled with other respective employee documents in the secret files. (U. Brief, p. 17). Section 2302(b)(1)(D) provides:

> Any employee who has authority to take, direct other 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 on the basis of handicapping conditions, as prohibited under section 501 of the Rehabilitation Act of 1973. 29 U.S.C. §791.

Although the American with Disabilities Act ("ADA") does not apply to the Federal government, the Rehabilitation Act was amended in 1992 making ADA's requirements applicable to Federal government. Thus, ADA regulations contained in 29 C.F.R 1630 apply to Federal employees. Specifically, the Union advances that regulation contained in 29 C.F.R 1630.14 ("Medical Examinations and Inquiries Specifically Permitted") requires that the medical condition or history of any employee be collected and maintained on separate forms and in separate medical files. The Union references language contained in sections governing employment entrance exams (§1630.14(b)(1)) and job-related examinations relating to the ability of the employee to perform job-related functions (§1630.14(c)(1)), which states, in relevant part, that:

> (b) [employment entrance exams] or (c) [job-related examinations] A covered entity may require a medical examination . . . .
>
> > (1) information obtained under [paragraph (b) or (c)] of this section regarding the medical condition or history of the applicant shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical records. . . 29 C.F.R 1630(b)(1).

As stated above, the Agency maintained files that commingled medical documents, including a worker's compensation claim with other employment documents in a file that was disclosed to individuals not designated privy to such information. (Tr. 67-75). I therefore find the evidence supports a finding that the Agency violated the Agreement when it failed to adhere to its statutory obligations under 5 U.S.C. § 2302.

AWARD

Based upon the testimony and evidence presented and contained in the post-hearing briefs and reply brief, and in accordance with the above analysis, findings and conclusions, I find that the Agency violated Article 17 of the Master Agreement, 5 U.S.C 552a – the Privacy Act, as

that the Agency violated Article 17 of the Master Agreement, 5 U.S.C 552a – the Privacy Act, as incorporated into the Master Agreement, and 5 U.S.C. 2302 – Prohibited Personnel Practices, as incorporated into the Master Agreement.

IT IS SO ORDERED:

1. The Agency shall CEASE AND DESIST from violating the Master Agreement by maintaining any file that contains personnel information or documents in violation of Article 17 of the Master Agreement.

2. The Agency shall maintain all medical records as required under 5 U.S.C. 552 – the Privacy Act and 5 U.S.C. 2302 – Prohibited Personnel Practices, as incorporated into the Agreement.

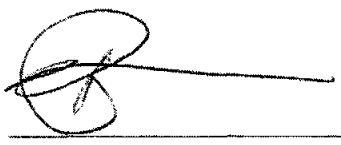
3. The Agency shall remove employee social security numbers from all files as required by 5 U.S.C. 552 – the Privacy Act and 5 U.S.C. 2302 – Prohibited Personnel Practice, as incorporated into the Agreement.

4. The Agency shall POST, in three (3) accessible areas to all bargaining unit employees that the Agency has removed all protected information from any employee files as provided under the Agreement and as incorporated into the Agreement under 5 U.S.C. 552 – the Privacy Act and 5 U.S.C. 2302 – Prohibited Personnel Procedures.

In the event any part of this Award is vacated, the remaining sections and corresponding remedy shall remain in full force and effect.

The Grievance is SUSTAINED.

Dated: December 17, 2012



Katherine A. Paterno, Arbitrator