

PHONE: (314) 432-2662
FAX: (314) 432-6336

GERALD COHEN
ATTORNEY / ARBITRATOR
745 CRAIG RD. SUITE 105
CREVE COEUR (ST. LOUIS)
MISSOURI 63141

February 25 2015

Kristin Trainor, Staff Attorney
Department of Veterans Affairs
Office of Regional Counsel
1201 Walnut Street, Suite 800
Kansas City, Mo. 64106

Donny Boyte, National Representative
AFGE 9th District
4600 SE 29th Street, Suite 550
Del City OK, 73 115

Department of Veterans Affairs)
Health Resource Center)
Employer)

Arb. File No. 2155

AND)

Grievant Stephanie Glass)

AFGE Local 906)

Hearing Date Aug 12)
Oct. 8 2014)

Union)

FMCS No. 14-54855-7)

Bill

Hearing 2 days		\$ 2600.00
Travel 4 days Topeka, Ks		5200.00
Review, Consideration, writing 4 days		5200.00
Expenses		
Hearing Reporter	\$2149.15	
Air Fare	674.40	
Hotel	185.48	
Parking	74.00	
Car Rental	705.06	
Toll	11.00	
Food	67.25	3866.34

\$16866.34*

*Payable by Union \$ 8433.17

*Payable by Employer \$ 8433.17

IN ARBITRATION

Department of Veterans Affairs,)	FMCS Case No. 14-54855-7
Health Resource Center)	
)	
AND)	File No. 2155
)	
American Federation of)	Hearing Dates: August 12, 2014
Government Employees (AFGE),)	and October 8, 2014
Local 906)	
)	

ISSUE

While the issues in this case were not readily apparent, I believe the sole issue to be decided after reading various documents and hearing evidence is the following:

“Did the refusal of the Department of Veterans Affairs to provide to the Union action referral forms violate the Master Agreement between the parties? If so, what is the remedy?”

FACTS

As a preliminary matter, the Agency complained that the grievance filed by the Union violated Article 43, Section 7, Paragraph B of the Master Agreement in that it did not state “in detail, the basis for the grievance and the corrective action desired.” The Agency contended that there was no detail in the grievance and that the Union never requested any particular remedy.

The Agency at the hearing also urged that the grievance be dismissed for failure to request a remedy.

The Union presented a number of witnesses, all who testified that at various times Union Locals received the action referral form.

The Agency counter evidence was that if the action referral form was sent, it was never done regularly and only by inadvertence.

Two action referral forms were introduced in evidence. One was a blank form and the other was filled out for an employee.

The Union evidence was that the action referral forms were available to the Union under the Master Agreement because the form had the name, position, supervisor and other information identifying an employee.

Union witnesses testified to other action referral forms that had been received, pointing out that they contained statements of various degrees of disciplinary actions, ranging from performance improvement plans to disciplinary lay-offs. The form is important.

The Union, according to Union evidence, had received quite a few of these forms.

The evidence of the Agency was that the action referral form does not contain evidence and in and of itself is not evidence. It is a pre-decisional document that is only no better than notes.

A witness for the Agency testified as Director of the VA Health Resource Center where Grievant worked that there was no past practice providing action referral forms. There may have been one or two occasions when this occurred, but it was inadvertent and not done on a regular basis.

That testimony was corroborated by other witnesses on behalf of the Agency.

POSITION OF THE PARTIES

POSITION OF THE UNION

The Union maintains that it was entitled to a copy of action referral forms for any employee named in one. It had received these forms for quite a few years when the Agency stopped sending them.

The action referral forms name a specific employee who can be identified. An employee's name, position, supervisor and other information is in the form and under the Master Agreement any form that identifies an employee is available to the Union. The testimony of Union witnesses supports this position.

The Union requests that the Arbitrator order the Agency to give to the Union action referral forms when requested.

POSITION OF THE AGENCY

The Agency's first complaint is that the grievance is lacking in detail as required by the Master Agreement. The Master Agreement in Article 43 Step 3 states that the grieving party "must state in detail the basis for the grievance and the corrective actions desired."

The Grievance filed by the Union is deficient in both respects. The Arbitrator should dismiss it for failing to comply with the Master Agreement.

In so far as the action referral form is concerned, it is neither a supervisor note nor a report of contact. It is not evidence in any way. It is a pre-decisional document used by the Agency to communicate information between the supervisor and Human Resources. It is

entirely internal in nature and is therefore not something that the Agency need furnish to the Union.

The next complaint of the Agency is that the Union did not ask for a remedy as required. On that ground alone, the grievance should be dismissed.

The Agency points out that its evidence indicated that while action referral forms had on occasion been sent the Union, this was not a consistent nor wide-spread practice and only occurred by error.

Therefore, the Agency maintains that no precedent for this practice was established.

In sum, the Agency believes that considering the nature of the action referral form and the Union's grievance, the grievance should be denied.

POSITION OF THE ARBITRATOR

I will first deal with the Agency's complaint that there was insufficient detail in the grievance to warrant its consideration.

I believe that the word "detail", as set forth in the Master Agreement, must be construed in the context of the Master Agreement. Article 43 Section 7 Procedure B states that employees are to informally discuss issues. I think that the general context of the Master Agreement is the rapid resolution of disagreements with as little formality as possible. Even the use of a grievance procedure intends this. Applying this to the word "detail" in the grievance would indicate to me that a grievance is sufficient if it advises the Agency of the complaint of the Union with sufficient definiteness to enable the Agency to respond.

I believe that the Union did so. There appears in the grievance the following statement:

“One of the documents in question is the “Action Referral” it clearly outlines employee identifying information, action requested (Counseling, Proposed Disciplinary Action, Performance Improvement Plan, Grievance Response, and Removal/Termination). The document describes a narrative or a brief description of the facts of the incident or issue. It indicates a list of any past history considered and gives the parties the action is being reviewed by. The document indicates the documentation/Evidence used to support the action. Finally the document shows that the Employee and Labor Relations Staff documents on the form and enters the data of the document in the ER/LR Tracking Log. “

I believe that that is sufficient to advise the Agency of the complaint that the Union had.

The Agency also complains that the grievance did not request a remedy. However, on the final page of the grievance form was a paragraph numbered III, entitled “Remedy Requested,” in which the Union seeks several remedies from the Arbitrator.

The question of remedy is also covered in the Master Agreement. Article 44 Section 2H states as follows, in part, “The Arbitrator has full authority to award appropriate remedies.” This means that in the final analysis it is up to the Arbitrator to fashion a remedy that he believes is appropriate in the circumstances. Given this authority, whatever the parties submit as a remedy is simply a suggestion which the Arbitrator may accept or reject as he sees fit.

The argument of lack of suggested remedy is, therefore, unavailing to the Agency.

Addressing now the merits of the grievance, I believe that it is possible to determine the issue simply on the basis of past practice. The Agency disputes this, but the evidence was clear that for a number of years, and frequently, whether by accident or design, the Union was given copies of the Action Referral Form. I therefore think that a precedent was established entitling the Union to the Action Referral Form as previously given.

The Agency argued that the Action Referral Form was a pre-decisional document and unavailable to the Union. The logical extension of that argument would be that the Union would be entitled to nothing because everything is pre-decisional until a decision is rendered.

In the Master Agreement Article 17 Section 6 appears the following "...employees have a right to be made aware of any information specifically maintained under their name and/or Social Security Number or any other personal identifiers. This includes any documentation that is not covered by official records referenced in Article 24."

Copies of the Action Referral Form both in blank and one filled out show that the form clearly has space for the identification of an employee. The Action Referral Form falls squarely in the language of Article 17 Section 6.


It is clear that as an initial matter Article 17 Section 6 would entitle the Union to the Action Referral Form. It is important in the Labor Relations of the parties. It sets out information that is important both to management and to the Union. It enables the Union to judge what course of action to take in a specific situation. This may be anything from acceptance of Agency action to grievance of what is proposed in the Action Referral Form.

It is my conclusion based on past practice and the Master Agreement that the Union is entitled to the Action Referral Form.

It is ordered that the Union be given Action Referral Forms when the Union requests such a form in writing designating the employee who is under consideration.

The grievance is sustained as above and the costs are assessed equally.

February 25, 2015


Gerald Cohen, Arbitrator