IN THE MATTER OF ARBITRATION BETWEEN:

NATIONAL COUNCIL OF HUD LOCALS 222, AFGE, AFL-CIO,	)	
Union,	)	Issue: FLSA Overtime FLSA Exemptions
v.	)	
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,	)	
Agency.	)	

UNION'S OBJECTION AND RESPONSE TO
AGENCY'S MOTION FOR DISCOVERY

Introduction

The Agency filed a Motion asking for carte blanche access to Union Counsel's clients, documents, work product and hearing exhibits. Without having any reliable authority, the Agency's Motion must be denied.

The Agency's Motion

The Agency requests that the Arbitrator order

1. That the Agency's hired contract attorney law firm may interview the Grievants (clients of the Law Offices of Snider & Associates, LLC) or that they be allowed to take their depositions;
2. that the Union be required to return "any HUD data or information that it has improperly obtained form the Government, and all copies thereof, regardless of the format in which such data or information was obtained;"

3. that the Union be forced to produce copies of its Grievant-Union communications; and

4. that the Union produce "copies of any document they [sic] intend to introduce at hearing in this case."

The Union's Opposition and Response

The Union requests that the Arbitrator deny the Agency's Motion. In sum, our arguments are:

1. The Union objects to the Agency's hired contract attorney law firm interviewing any Grievant (clients of the Law Offices of Snider & Associates, LLC), or depositions of those employees. No precedent has been provided allowing for this extraordinary measure. The same information is available from co-workers, mentors, supervisors and/or managers. No effort has been made to obtain the information from these alternative methods. None of the case law or other citations provided by the Agency are anywhere near on point. The proposed methodology would not only create an unfair and wasteful system, but would unduly prejudice the Union. The Agency did not propose that the Union could likewise interview or depose any Agency manager or supervisor.

2. The Agency's allegation that the Union possesses "any HUD data or information that it has improperly obtained from the Government," is slanderous and preposterous. Screen shots are not "HUD data … improperly obtained" and all information provided by the Union's Grievants and clients

are run of the mill data and information normally produced in the course of Grievances and Arbitrations to the Union and Arbitrator.

3. The Agency has no right to any documents whatsoever from the Union, let alone any copies of its Grievant-Union communications, which are confidential and/or privileged.

4. The Agency, again, has no right to pre-hearing discovery that is not mutually agreed upon, including a unilateral and unbalanced request that the Union produce "copies of any document they [sic] intend to introduce at hearing in this case." The Union has proposed a Hearing Resolution Methodology which provides for some pre-hearing production of exhibits but the Agency has not agreed to that procedure to date. Further, the Agency's demand is lopsided, unfair and prejudicial to the Union.

The Agency's Motion must be denied in its entirety.

The Agency begins its Motion with one of many misrepresentations to the Arbitrator:

> time they spend performing such tasks. In this regard, last Thursday, the Union took the indefensible position that the Government cannot even talk to its own employees. On Sunday, the Union relented and asked only that Mr. Snider be present at any interviews. However, this has proven to be an ephemeral position, as it was then asserted that Mr. Snider will be unavailable for weeks at a time as the hearing looms, thereby practically preventing the interviews and improperly forcing HUD to proceed in a trial by ambush fashion.

The Union has not "relented" and clarified that it did not "relent" in an email sent to all parties at least two days before this Motion was submitted. (See **attached** 4-9-06 Snider Email Re Interviews with Grievants).

Mr. Panken initially made the same assertion that he does in the Agency's Motion in an email on April 9, 2006 at 3:11 p.m., in which he stated to Union Counsel (in relevant part):

From: Peter M. Panken [mailto:PPanken@ebglaw.com]
Sent: Sunday, April 09, 2006 3:11 PM
To: Michael Snider
Cc: rogerss@starpower.net.
Subject: RE: FEW: Agency Interviews with Grievants (AFGE 222 and HUD FLSA Case)

I am pleased that you recognize finally the employer's right to interview the grievant. As soon as I have ascertained which of the grievant I wish to interview I will give you the appropriate notice and arrange for appropriate times for attendance by union representatives. …

To which Union Counsel promptly responded:

From: Michael Snider
Sent: Sunday, April 09, 2006 3:30 PM
To: 'Peter M. Panken'
Cc: 'Sean J. Rogers'; 'carolyn_federoff@hud.gov'; flsa; 'Daniel Abrahams'
Subject: RE: FEW: Agency Interviews with Grievants (AFGE 222 and HUD FLSA Case)

Mr. Panken:

You are misreading my email.

I stated clearly, in bold underlined type, that **"The Union is not waiving by this email any rights it may have to protest the Agency's actions."**
I also stated clearly that "We believe that the Agency's interviewing of employees at this time, given the Arbitrator's ruling (below) would be premature."

I don't think that either of these statements could be reasonably be construed as meaning that I "finally recognize the employer's right to interview the Grievant."
A federal employer can interview a witness, but must give the Union the right to be present. A Grievant, as Mr. Rogers noted repeatedly in the
meeting Thursday, is a whole different story. You know that Union/Employee communications are privileged and confidential, so I expect
that you will give up on trying to obtain documents from us.

> The Authority has recognized communications between a unit employee and a union official occurring in the course of protected activity are confidential. *U.S. Department of Veterans Affairs,* 56 FLRA No. 117 (2000)(*Veterans Affairs*); *Long Beach Naval Shipyard, Long Beach, California,* 44 FLRA 1021 (1992)(*Long Beach Naval Shipyard*). *See also Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado,* 53 FLRA 1500, 1509 (1998)(*FCI, Littleton*). The Statute "clearly assures the right and duty of a union to represent employees in []proceedings, and the correlative right of each employee to be represented. Therefore, it follows, as found by the Judge that such rights and duties demand that the employee be free to make full and frank disclosure to his or her representative in order that the employee have adequate advice and a proper defense."*U.S. Department of the Treasury, Customs Service, Washington, DC,* 38 FLRA 1300, 1308 (1991)(*Customs Service*). Accordingly, union representatives have the statutory right to maintain the confidentiality of their conversations with employees they are representing and any interference with that right violates section 7116(a)(1) of the Statute, unless the right has been waived or an extraordinary need for the information has been established. *Customs Service,* 38 FLRA at 1300.
>
> Our conversations and communications with Grievants constitute protected activity and are entitled to confidentiality. *Long Beach Naval Shipyard,* 44 FLRA at 1038; *Customs Service,* 38 FLRA at 1308-09. *See also U.S. Department of Labor, Employment and Training Administration, San Francisco, California,* 43 FLRA 1036, 1039-40 (1992)(engagement of a contractual right is protected activity under section 7102 of the Statute).
>
> Your stated that "However, it seems to me that given your limited availability and the fact that other union representatives and professionals can appropriately attend, I do not **think** we should limit the representation to you, if we are going to be able to go forward with these hearings on May 8 and 9." (emphasis added).
>
> However, the language of the CBA is clear and cannot be modified or added to by you or the Arbitrator:
>
> **Section 3.05 - Union Delegations of Authority**. The Union may delegate its authority as exclusive representative **to whatever agent it deems appropriate**. Management **shall** recognize such agents and conduct appropriate labor relations business with them, upon receipt of written delegations.
>
> I am the designated representative. You have to deal with me. Further, my entire office is closed for Passover through 4/21. We can discuss this further on the phone with the Arbitrator.

Clearly, the Agency gets its Motion off on the wrong foot by this misrepresentation. The Agency's law firm has already established a history of playing fast and loose with the facts; the rest of this Motion is just as bad.

The Agency then proceeds to complain that since Congress established a statutory obligation on the Agency to produce data to the Union, it must somehow also

have a right to data from the Union:

> In addition, although the Union claims that the Government must provide it with every conceivable document in its possession, the Union refuses to share documents it intends to use in the proceeding. However, the complexity of this case and the intense factual investigation required to reach a fair conclusion mandate that the Arbitrator set fair ground rules for the exchange of documents and other information. Moreover, ascertaining and sharing the facts helps facilitate possible settlement opportunities. Conversely, leaving only one side without the pertinent information effectively forecloses any realistic settlement opportunity. Furthermore, the sharing of information would also help to expedite the hearing process.

Of course, these are mere conclusions and are not supported by any facts, affidavits or anything other than Agency counsel's desire to have not only the home-court advantage, but also the sun and wind at its back, a hundred extra players on the field and constant possession of the ball. Does the Agency really think anyone buys its argument that it has no "pertinent information?" Or that the Union would refuse to share information if the Agency would only sit down to meaningful settlement discussions (which it has refused to do for three years)? These unsupported allegations by the Agency are preposterous and are impossible to address due to their vagueness.

Next, the Agency engages in making an ugly inference that the process thus far has not been fair:

> Accordingly, we respectfully request the Arbitrator to promulgate fair procedures for additional disclosure in this proceeding including, but not limited to,

allowing the Government to conduct employee interviews and to obtain documents in the Union's possession. Further, we respectfully request the Arbitrator issue a written order with respect to the matters raised herein so that the record clearly reflects that the Government sought the due process and equitable relief indicated above and, in the unlikely event of an adverse ruling, can take all steps necessary to safeguard the Government's rights and to protect the public taxpayers' interest.

Of course, this is an unprecedented request without a single case citation on point. The Agency attorney's are now besmirching the Arbitrator and his handling of this case to this point, and also threaten to appeal any decision by the Arbitrator. The Agency's repeated (and incessant) references to the "public taxpayers' interest" are not only annoying and distracting to the facts, but are also clearly designed (however ineffective they may be) to bias the Arbitrator. This is unethical conduct that we suggest should stop.

Additionally, while the Agency mentions the interests of the taxpayers repeatedly, it completely fails to mention how it trampled the rights of thousands of hard working employees for decades. The taxpayers owe money to many of these employees, but are paying more now for an outside firm instead of HUD using its own fully-staffed internal OGC or LMR staff – that is wasteful, not adherence to ordinary arbitration procedures. The Agency attorneys are the ones asking for something extraordinary, so they should be required to provide binding precedent directly on point.

AGENCY CITED CASELAW IS NOWHERE NEAR ON POINT. ALL CITED CASES ARE REGARDING MSPB-APPEALABLE CASES

The Agency claims, by quoting a small portion of a large case that it has the right to "pre-hearing discovery:"

> As the Federal Labor Relations Authority ("FLRA") has recognized, "parties have a substantial and legitimate interest in conducting prehearing discovery interviews with the witnesses of the opposing party. These interests are consistent with the purposes and policies of the [Federal Service Labor-Management Relations Act], in particular, the encouragement of amicable settlements of disputes and the promotion of effective and efficient Government." Patent Office Professional Assoc. (U.S. Dep't of Commerce Patent and Trademark Office), 41 FLRA 795 (1991) (citing 5 U.S.C. § 7101).

The Agency clearly misstates the holding in this case, misrepresenting a material point of law to this tribunal. POPA I was a negotiability ruling on the Union's right to engage in discovery in actions taken through the Grievance/Arbitration process that are otherwise appealable to the MSPB. Those matters are distinguishable greatly from the current matter, as will be much more fully set forth below.

THE AGENCY'S PROPOSED "INTERVIEWS" AND DEPOSITIONS ARE FORMAL DISCUSSIONS

Interviews and depositions are Formal Discussions under Section 7114(a)(2)(A). To find that a union has a right to representation under section 7114(a)(2)(A) of the Statute, it must be shown that the following elements exist: (1) there must be a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more unit employees or their representatives; (4) concerning any grievance

or any personnel policy or practice or other general condition of employment. VA Long Beach, 41 FLRA at 1379. The FLRA has held that depositions conducted by an Agency in preparation for MSPB proceedings were formal discussions under section 7114(a)(2)(A) of the Statute.

The Authority has repeatedly held that interviews by agency representatives with bargaining unit employees named as witnesses in preparation for third-party proceedings, including MSPB proceedings, are formal discussions. See, for example, VA Long Beach, 41 FLRA at 1379 and cases cited therein, finding that such interviews constitute a formal discussion concerning a grievance under section 7114(a)(2)(A). Therefore, under section 7114(a)(2)(A), the Union would be entitled to be given the opportunity to be represented at those discussions.

The purpose of providing a union with the right to be represented under section 7114(a)(2)(A) is to give the union an opportunity to safeguard its institutional interests and the interests of employees in the bargaining unit. See, for example, **National Labor Relations Board**, 46 FLRA 107, 111 (1992); **U.S. Department of Defense, Defense Logistics Agency, Defense Depot Tracy, Tracy, California**, 37 FLRA 952, 961 (1990); **Veterans Administration, Washington, D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts**, 37 FLRA 747, 754 (1990); and **Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California**, 29 FLRA 594, 598 (1987). The right to be represented at formal discussions generally means more than merely the right to be present. See **U.S. Department of the Army, New Cumberland Army Depot, New Cumberland,**

Pennsylvania, 38 FLRA 671, 677 (1990); and **U.S. Nuclear Regulatory Commission**, 21 FLRA 765, 768 (1986)(NRC) (the unions' right to be represented at meetings between management and unit employees on a planned reorganization and compressed work schedules included the right of the union representatives to "comment, speak, and make statements").

FLRA PRECEDENT, WITHOUT EXCEPTION, AWARDS RIGHTS TO INFORMATION SOLELY TO UNIONS, AND PROVIDES FOR THE 'RIGHT' TO INTERVIEW EMPLOYEES SOLELY TO NON-GRIEVANTS

Not a single case has been provided by the Agency in which the FLRA or an Arbitrator awarded "discovery" rights to an Agency; not interview rights to a Grievant (especially those represented by an attorney), not a right to documents and not a right to communications between Grievants and their counsel.

THE UNION HAS DONE NOTHING WRONG IN ITS PREPARATION FOR THE DAMAGES PHASE OF THIS CASE

Furthermore, the Agency, aside from casting aspersions about potentially "illegal" possession of some unproven "Agency information," has shown nothing in the Union's ordinary, run-of-the-mill collection of information in this case that would warrant any sanction, let alone forcing the Union to turn over innocuous information that it intends to utilize at hearing.

The Union has done nothing wrong in collecting "screen shots." The Agency has not provided a single Agency policy, or any law, rule, regulation or CBA provision which either prohibits the Union from collecting this type of information, or that requires the

Union to get the permission of the Agency in order to collect it.[1] In fact, this type of information (and more) is regularly collected/ provided by/to the Union for use in such hearings. See **Affidavit of Carolyn Federoff** (attached).

In fact, every case that discusses one Party's right to information from the other in terms of documents relates to the Union's right, not the Agency's; and that is not by accident. Agencies have superior resources, including complete and unfettered access to their computer system, managers, supervisors, scan records, overtime records, comp time records, computer log in/out records, video camera records, etc. Unions, of course, have a statutory right granted by Congress to such data under 5 USC 7114(b), but only if they can articulate a particularized need. Agencies have been known to frustrate even this clear statute by delay, destruction of documents and obfuscation in interpretation of requests for information, as well as repeated requests for clarification ad infinitum.

ALL CASES CITED BY THE AGENCY RELATING TO DISCOVERY RELATE TO MATTERS APPEALABLE TO THE MSPB, AND WHICH DO NOT APPLY HERE

Similarly, *every* FLRA and court case cited by the Agency in its Motion, and all of those that Union counsel could find, relate strictly to "discovery" or employee interviews, or even depositions or subpoenae, when the MSPB otherwise has jurisdiction (i.e., demotion, removal, denial of WIGI, long term suspension, etc) or there is an investigative interview regarding potential discipline or criminal charges. In addition, all of those cases (aside from the investigative interviews) apply only to Union witnesses,

1 In fact, the one document that the Agency could have used to potentially prevent the Union from accessing some relevant information (the OGC memo issued in February and again in March 2006) was

not to Grievants. Not one case cited by the Agency (aside from the investigative interviews) stands for the proposition that an Agency representative can interview a Grievant.

For instance, despite the Agency's blithe citation of the case for a proposition totally unlike its actual holding, the *POPA* case cited by the Agency (**attached**) clearly applied its own terms to the Union's interviewing of a witness named by the Agency. To demonstrate the total inapplicability of the case, we quote the entire relevant passage:

> "The record is not detailed as to the specific context in which this provision would apply. However, based on the language of the provision, the submissions of the parties, and the existing legal and regulatory provisions that govern adverse and disciplinary actions, we interpret this provision as requiring the Agency to make the employees, on whom it is relying as witnesses at a hearing to support an adverse or disciplinary action, available to the employee who is the subject of the action, or to the representative of that employee, for purposes of prehearing discovery.
>
> Under existing legal and regulatory provisions that govern adverse and disciplinary actions and appeals thereof in the Federal sector, there are three circumstances in which hearings may occur that are apparent to us. One is in conjunction with arbitration pursuant to section 7121 of the Statute. A second is in conjunction with an appeal to the Merit Systems Protection Board (MSPB) pursuant to 5 U.S.C. 7513(d). A third is in conjunction with regulations issued pursuant to 5 U.S.C. 7513(c).*8 For purposes of this decision, we interpret this provision as affording the employee against whom an adverse or disciplinary action is taken, or his/her representative, the opportunity for prehearing discovery of the Agency's witnesses in conjunction with hearings conducted in any of these three contexts.
>
> The Agency asserts only that this provision is inconsistent with section 7102 of the Statute. At the outset, we note that section 7102 would apply only to persons who meet the definition of "employee" under section 7103(a)(2) of the Statute.*9 Thus, the Agency's claim that this provision is nonnegotiable is relevant only insofar as the provision applies to Agency witnesses who are employees within the meaning of section 7103(a)(2) of the Statute.

---

disclaimed by the Agency as having "no nexus" to the instant matter.

The issue before us is whether a contractual requirement is inconsistent with section 7102 of the Statute if it requires an employee within the meaning of section 7103(a)(2) on whom the Agency is relying as a witness at a hearing to support an adverse or disciplinary action to submit to prehearing discovery conducted by or on behalf of the employee against whom the action is being taken. We begin our analysis by addressing this provision in the context of arbitration proceedings.

The Authority has held that "the right guaranteed to employees under section 7102 of the Statute to form, join, or assist any labor organization, or to refrain from such activity, is sufficiently broad to include within its scope the right of an employee to appear as a witness in an Authority proceeding to which the union is a party and to give testimony supporting or opposing the union's interest in that proceeding." National Treasury Employees Union and National Treasury Employees Union, Chapter 53 and Internal Revenue Service and Brooklyn District Office, 6 FLRA 218, 218 (1981) (IRS, Brooklyn). Clearly, the right guaranteed employees by section 7102 encompasses the right of employees to appear as a witness in arbitration proceedings and give testimony supporting or opposing the Union's interest in that proceeding.*10 See Internal Revenue Service and Brookhaven Service Center and National Treasury Employees Union and National Treasury Employees Union, Chapter 99, 9 FLRA 930 (1982) (Brookhaven) (the rights of employees under section 7102 extend to interviews by management for the purpose of ascertaining the facts in the preparation of its case for third-party proceedings). The Authority has held that generally an agency may not force bargaining unit employees to participate in interviews conducted in preparation of its case for presentation at proceedings before a third-party neutral. For example, U.S. Department of the Air Force, Griffiss Air Force Base, Rome, New York, 38 FLRA 1552 (1991); Brookhaven, 9 FLRA at 933. In so holding, the Authority has found that compelling employees to submit to such interviews conflicts with their rights protected under section 7102 to form, join, or assist a labor organization or to refrain from such activity freely and without fear of penalty or reprisal. Id.

The Authority's precedent in IRS, Brooklyn and Brookhaven raises the question of whether an agency can compel a unit employee to participate in prearbitration discovery interviews in any circumstances without interfering with the employee's section 7102 rights. We conclude that where such participation is required pursuant to a contractual provision, there is no violation of section 7102 rights. In so concluding, we find that employees' rights under section 7102 are not absolute. Rather, in assessing whether an employee's rights are protected under section 7102, we must take into consideration conflicting, legitimate interests and strike a balance between those interests and employees' rights to form, join or assist a labor organization or to refrain from such activity.

The Authority previously has applied such an approach in determining whether an employee has a right under section 7102 to wear a union lapel pin. In such cases

the Authority has applied a "special circumstances test" to balance employee and employer rights in determining whether employees have the right to wear union insignia at the workplace. For example, Border Patrol. In applying that balancing test, the Authority determines whether the employees' basic right to wear union insignia is outweighed by the potential for disruption of the agency's operations. 38 FLRA at 711-18.

In this case, we conclude that it is appropriate to balance the right of a unit employee to participate as a witness at an arbitration proceeding and give testimony supporting or opposing the Union's (or the Agency's) interest without fear of penalty or reprisal against the conflicting legitimate interests of the Union. Obviously, parties to an arbitration proceeding have a legitimate interest in adequately preparing their case. Also, settlement of grievances is generally favored. See, for example, Cook Paint and Varnish Company v. NLRB, 648 F.2d 712, 722 (D.C. Cir. 1981) (Cook Paint), denying enforcement and remanding Cook Paint and Varnish Company, 246 NLRB 646 (1979). Access to information through discovery can contribute to promoting settlement. See, id.; compare NLRB v. Acme Industrial Company, 385 U.S. 432 (1967) (employer required to furnish information to a union to enable the union to decide whether to process a grievance). Thus, we conclude that parties have a substantial and legitimate interest in conducting prehearing discovery interviews with the witnesses of the opposing party. These interests are consistent with the purposes and policies of the Statute, in particular, the encouragement of amicable settlements of disputes and the promotion of effective and efficient Government. See 5 U.S.C. 7101.

On the other hand, such interviews can be inherently coercive of employees' section 7102 rights. See, for example, Brookhaven, 9 FLRA 930; Cook Paint, 648 F.2d 712, 730-31 (Wright, dissenting); and NLRB v. Johnnie's Poultry Co., 334 F.2d 617 (8th Cir. 1965). However, in our view, there is a difference between the potential for inherent coercion in circumstances where a compulsory discovery interview is imposed unilaterally by an employer and those in which discovery is obtained through statutory and regulatory provisions that allow for discovery of opposing witnesses. In our view, in the latter situation the inherent coerciveness of compulsory participation in a discovery interview is diminished because in such circumstances an employee is not being compelled to participate purely on the basis of his/her employer's power and authority over the employee. Rather, the compulsion flows from a decision made outside the specific employment relationship based on a perceived need for orderly information procedures in which all parties are adequately informed. We believe that a contractual provision allowing for prearbitration discovery is similarly distinguishable from that which is unilaterally imposed by an employer. See Cook Paint, 648 F.2d at 734 n.48 (Wright, dissenting) ("[t]o respect a contractual agreement to supply information is one thing; to uphold the legitimacy of unilateral coercion . . . is quite another"). Under such a provision, the compulsion arises not from the employer's power and authority, but from a decision by the parties to the collective bargaining agreement

that the resolution of arbitral grievances in general will be enhanced by an exchange of certain information prior to an arbitration hearing. Thus, in our view, a mandatory process established by contract does not pose the same risk to employees' section 7102 rights that unilateral compulsion does.

Therefore, weighing the interests of parties in prehearing discovery against the risk to employee rights, we conclude that the balance should be struck in favor of allowing parties to negotiate contractual provisions allowing for mandatory prehearing discovery of witnesses to be called in an arbitration proceeding and that such a provision, standing alone, does not interfere with employee's rights under section 7102. Of course, this conclusion should not be read as suggesting that a provision that would allow interviews to be conducted in a coercive manner would be sanctioned.*11

Now we turn to the other circumstances in which this provision could apply. As we noted earlier, Provision 9, as written, could apply also to hearings conducted under the auspices of the MSPB or pursuant to 5 U.S.C. 7513(c). It is not necessary to determine to what extent those proceedings would involve activity that is protected under section 7102. Based on the considerations expressed above, we find that even assuming that those proceedings involved protected activity the same balance would apply. Thus, a bilaterally established mandatory discovery procedure that is limited to employees who are to appear as witnesses would not interfere with any section 7102 rights of those employees. Moreover, the Agency cites nothing in the statutory or regulatory provisions governing those proceedings that precludes such a discovery procedure, nor is anything otherwise apparent to us. In fact, the regulations that govern MSPB proceedings permit voluntary discovery between parties. 5 C.F.R. 1201.71-1201.75.

Based on the foregoing, we reject the Agency's argument that Provision 9 is inconsistent with section 7102 of the Statute and conclude that it is negotiable. Our decision here should not be taken as an indication that we would find a proposal to allow for discovery interviews of witnesses appearing in proceedings before other third parties, such as the Authority, to be negotiable. Obviously, the policies of those third parties with respect to discovery would be a major consideration in ruling on any proposals relating to discovery during processes conducted under their auspices."

POPA and Department of Commerce, Patent and Trademark Office, 41 FLRA 795 (July 24, 1991)(POPA I). *POPA I*, notably, incorporated a discovery mechanism into a CBA, which is definitely lacking here. It also applied solely to MSPB appealable matters.

Additionally, the cases citing *POPA I* apply to matters appealable to the MSPB[2]. See ***Immigration and Naturalization Service, Border Patrol, El Paso, TX and AFGE, National Border Patrol Council,*** 47 FLRA 170 (March 25, 1993); ***Veterans Administration Medical Center, Long Beach, CA and AFGE, Local 1061,*** 41 FLRA 1370 (August 27, 1991), Affirmed at 91-70640 (9th Cir. 02/25/94).

Likewise, the case cited by the Agency in which the United States District Court upheld a subpoena issued by a federal sector Arbitrator was in a matter otherwise appealable to the MSPB (**Attached**). The decision, also, did not apply to discovery, an Agency's alleged right to documents, depositions, or any of the other things the Agency is requesting now. It only applied to subpoena power of a major witness to attend a hearing.

The other "unanimous authority" cited by the Agency are inapplicable here. The Federal Arbitration Act ("FAA") does not apply to federal sector arbitrations (Agency Motion at 6 and cases cited there). The LMRA does not apply to federal sector arbitrations (Agency Motion at 6-7 and cases cited there). The sole federal sector case cited by the Agency that does apply to a federal sector matter was not a discovery matter – as the Agency tries to misrepresent by its placement in a chain of discovery-

2 The FLRA noted the limited applicability of ***Brookhaven*** in ***General Services Administration and Bobbie J. Brunning and NFFE, Local 1800.*** 50 FLRA 401 (May 26, 1995)("Under Brookhaven and its progeny, the safeguards apply only where a nexus is established between an agency's interview of a bargaining unit employee in preparation for third-party proceedings and the employee's section 7102 rights."); since this case is not one under §7102, the applicability of the cited cases is therefore questionable.

related citations and conclusions – but rather to attendance at an Arbitration hearing in a matter otherwise appealable to the MSPB.

Other statutes similarly show that an Arbitrator, when deciding a matter otherwise appealable to the MSPB, has similar powers to the MSPB. For instance, see 5 USC 7121(b)(2)(A):

5 USC § 7121. Grievance procedures

(a) **(1)** Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) **(1)** Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(A) be fair and simple,

(B) provide for expeditious processing, and

(C) include procedures that—

(i) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(ii) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(iii) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

> **(2)** **(A)** The provisions of a negotiated grievance procedure providing for binding arbitration in accordance with paragraph (1)(C)(iii) shall, if or to the extent that an alleged prohibited personnel practice is involved, allow the **arbitrator** to order—
>
> (i) a stay of any personnel action in a manner similar to the manner described in section 1221 (c) with respect to the Merit Systems Protection Board;

(Emphasis added). In other words, Arbitrators are empowered, by **5 USC § 7121 (b)(2)(A)(ii),** to issue a stay of an Agency action that is an alleged Prohibited Personnel Action. This provision is 'read into' every Collective Bargaining Agreement, whether the words appear there or not, and is only true because a statute exists which so requires. That is not true in this case. No statute exists which even allows for the type of discovery the Agency requests, especially in a case not otherwise appealable to the MSPB. No CBA provision enables this type of discovery, nor is there any other case, law, rule or regulation that applies – or surely the Agency attorneys would have cited it.

Likewise, none of the cases cited by the Agency as "arbitral precedent" are federal sector cases (Agency Motion at 7-8), nor do the AAA or UAA guidelines apply to this proceeding, as the Parties did not agree to select the Arbitrator in this case through the AAA or UAA, and did not agree to be bound by those guidelines. Incorporating them into the CBA would be "adding to or modifying" the CBA, which is prohibited.

NO CBA PROVISION EXISTS PROVIDING FOR THE DISCOVERY REQUESTED BY THE AGENCY AND THE CBA PROHIBITS ADDING TO OR MODIFYING THE CBA

All of this goes without mentioning that the CBA has no such discovery provisions as those urged by the Agency, and the CBA is quite clear on its own terms that:

> **Section 23.10 - Authority of the Arbitrator**.
>
> (2) The arbitrator shall not have authority to add to, subtract from, or modify any of the terms of this Agreement, or any supplement thereto.

Furthermore, as pointed out above, the provisions in POPA I applied to "discovery" that was provided for in a negotiated agreement – not foisted upon a Union by the Agency either unilaterally or otherwise.

In addition, additional 'discovery' to this case could and would establish a dangerous precedent between the parties. Ms. Federoff, in her Affidavit (attached), declares:

> To my knowledge, the agency has never interviewed a Grievant outside of the actual hearing process. Agency representatives often ask Grievants questions during Step 2 and Step 3 hearings, and may call them as witnesses (or cross-examine them) during arbitration hearings. There is and has been, however, no practice between the parties of interviewing Grievants outside of the hearing process. That is to say, the Agency has never, to my knowledge, interviewed a Grievant in preparation for an Arbitration hearing.
>
> Similarly, there is no provision in the HUD/AFGE Agreement (CBA) for "discovery" aside from the Union's statutory right to information under 5 USC 7114(b). There is no right in the CBA to depositions or other discovery, to pre-hearing disclosures aside from those listed in the CBA (e.g., witness list and proffer of testimony), and any request to add such a requirement would be an addition or alteration of the CBA. Of course, any mutually agreed to change can be acceptable, but a unilateral or arbitrator-ordered change in the CBA would violate its own terms.

THE AGENCY'S "WASTEFUL AND UNFAIR" ARGUMENT IS INVALID AND WOULD ACTUALLY LEAD TO ADDITIONAL WASTE AND UNFAIRNESS

The Agency claims:

> In the instant case, because the key to each grievant's exempt status depends upon the nature of the work actually done by each grievant, it would be unfair and wasteful to prohibit or impede the Government's ability to ask the grievants what they did as HUD employees in the HUD Office of General Counsel. Thus, in order to preserve "the necessary balance between the rights of management and the rights of employees and their exclusive representatives," Brookhaven, the Government must be allowed to obtain information from the grievants though non-coercive interviews.

What would be wasteful and unfair would be to allow dozens, hundreds and possibly thousands of interviews of unit employees by Government-paid contract attorneys at Epsten, Becker & Green. The CBA only requires that witnesses be named 7 days prior to a hearing if known, so there is no way under the CBA that the Union could even be forced to divulge the names of the individual employees it intends to call.

THE MOTION IS A SMOKESCREEN AND AN ATTEMPT AT SUBLIMINAL PERSUASION

Let us not forget the main point of this Motion, which is essentially both a smokescreen and simultaneously a crafty attempt at subliminal persuasion. The main question for the GS-904 Law Clerk position/employees will be the issue of independent judgment and discretion. The Agency is asserting (falsely, as we contend) that it can "only" get information concerning each employee's actual duties[3] if it has direct access

3 The Union is glad to see that the Agency now concedes that it wrongfully relied on grade and/or PD in its prior classifications and misclassifications of each and every bargaining unit employee.

to those employees. This assertion is based on a false premise and is aimed it giving a misimpression.

First, the assertion assumes that the employees' National Law Clerk Coordinator, supervisors, managers and mentors do not know what the Law Clerks are/were doing. This assertion / assumption has not been proven and has not been supported by any affidavit or other method of proving the alleged (disputed) fact. Next, the assertion attempts to suggest (wrongfully) that "since" the only alleged method of gaining information about each employee's actual job duties is interviewing each employee, the employee's supervisor/manager/coordinator/mentor do not know what the employees do, have little or no control over what they do and essentially allow and/or require them to use substantial independent judgment and discretion. Both of these allegations / assumptions are incorrect.

FEDERAL AGENCIES ARE NOT ENTITLED TO INFORMATION FROM UNIONS

The Agency raises a number of arguments in favor of its request for documents from the Union, none of which are valid:

The Government is entitled to the questionnaires because the answers contained in the documents are discoverable facts not protected by any privilege. In addition, allowing the Government to inspect the questionnaires could potentially expedite the hearing by focusing the scope of the Government's discovery and by reducing the number and/or duration of employee interviews. Moreover, the Government is entitled to these documents as a matter of fairness because otherwise it will not be able to properly prepare for the hearing. Finally, the Government should receive the questionnaires because it has been cooperative with the Union's requests for documents.

but stated that they did not contain confidential information. Taking Government materials surreptitiously is not proper and may well be illegal. Moreover, the Union's bold and brazen assertions that the materials are not confidential is insufficient to justify taking non-public items away from the government.

These brazen allegations, made without support or any facts whatsoever, are contradicted by the sworn affidavit of Ms. Federoff (**attached**):

> To my knowledge, the agency has never denied an employee the right or opportunity to provide work-related documents in the course of a grievance or arbitration. For example, grievances that concern performance evaluations almost always include evidence of the Grievant's actual performance, including work logs, memoranda, and exchange of electronic mail between employees and their supervisors. Grievants routinely present work-related documents, through the Union, in support of their grievances without agency protest. There is a past practice of allowing Union officials and their designees access to such documents in the course of the Grievance/Arbitration process and the Agency has never raised any issue of privacy or confidentiality before.

UNION/GRIEVANT COMMUNICATIONS ARE CONFIDENTIAL AND/OR PRIVILEGED

The Agency claims that it is somehow entitled to Union surveys of the Grievants (all of them clients of the Law Offices of Snider & Associates, LLC) because, the Agency claims, there is no privilege. Even if there were no confidentiality or privilege, the Agency would not be entitled to any documents from the Union. However, the documents are confidential and also privileged.

The Authority has recognized communications between a unit employee and a union official occurring in the course of protected activity are confidential. *U.S. Department of Veterans Affairs,* 56 FLRA No. 117 (2000)(*Veterans Affairs*); *Long Beach Naval Shipyard, Long Beach, California,* 44 FLRA 1021 (1992)(*Long Beach Naval Shipyard*). *See also Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado,* 53 FLRA 1500, 1509 (1998)(*FCI, Littleton*). The Statute "clearly assures the right and duty of a union to represent employees in proceedings, and the correlative right of each employee to be represented. Therefore, it follows, as found by the Judge that such rights and duties demand that the employee be free to make full and frank disclosure to his or her representative in order that the employee have adequate advice and a proper defense." *U.S. Department of the Treasury, Customs Service, Washington, DC,* 38 FLRA 1300, 1308 (1991)(*Customs Service*).

Accordingly, union representatives have the statutory right to maintain the confidentiality of their conversations with employees they are representing and any interference with that right violates section 7116(a)(1) of the Statute, unless the right

has been waived or an extraordinary need for the information has been established. *Customs Service,* 38 FLRA at 1300.

Our conversations and communications with the Grievants constitute protected activity and are entitled to confidentiality. *Long Beach Naval Shipyard,* 44 FLRA at 1038; *Customs Service,* 38 FLRA at 1308-09. *See also U.S. Department of Labor, Employment and Training Administration, San Francisco, California,* 43 FLRA 1036, 1039-40 (1992)(engagement of a contractual right is protected activity under section 7102 of the Statute). Furthermore, since attorneys and paralegals are performing interviews and recording their legal impressions along with the facts given to them, the resulting "surveys" are attorney work product and are privileged on that basis as well.

Summary and Conclusion

1. The Agency has the right, provided it complies with the CBA, law and regulation, to interview "witnesses," including co-workers and mentors of the Grievants. The Agency has no right to interview Grievants.

2. The Agency's allegation that the Union possesses "any HUD data or information that it has improperly obtained from the Government," is slanderous and preposterous. All information provided by the Union's Grievants and clients are run of the mill data and information normally produced in the course of Grievances and Arbitrations to the Union and Arbitrator.

3. The Agency has no right to any documents whatsoever from the Union, let alone any copies of its Grievant-Union communications, which are confidential and/or privileged.

4. The Agency, again, has no right to pre-hearing discovery that is not mutually agreed upon, including a unilateral and unbalanced request that the Union produce "copies of any document they [sic] intend to introduce at hearing in this case."

The Agency had the burden of proof of showing that it was entitled to interviews and/or discovery. The Agency, however, failed to make that showing. The Union requests that the Motion be denied.

Respectfully Submitted,

April 24, 2006
Date

____/s/_____

Michael J. Snider, Esq.
Ari Taragin, Esq.
Jeffery Taylor, Esq.
Jason Weisbrot, Esq.
Jacob Schnur, Esq.
Andreas Akaras, Esq.
Snider & Associates, LLC
104 Church Lane, Suite 201
Baltimore, MD 21208
410-653-9060 phone
410-653-9061 fax

Carolyn Federoff
President, AFGE Council of HUD Locals 222