UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT SAN FRANCISCO, CALIFORNIA Respondent	
and	Case No. 8-CA-90223
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2403, AFL-CIO Charging Party	

Lawrence Marcus, Esquire
For the Respondent

Gerald M. Cole, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq.,[1/] and the Rules and

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7114(b)(4) will be referred to, simply, as "§ 14(b)(4)."

Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated §§ 16(a)(1), (5) and (8) of the Statute by failing and refusing to furnish the Union with a copy of a proposed removal which had been given to the employee.

This case was initiated by a charge filed on February 8, 1989 (G.C. Exh. 1(a)), which alleged violations of §§ 16(a)(1), (2), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued on May 17, 1989 (G.C. Exh. 1(b)); alleged violations of §§ 16(a)(1), (5) and (8) only; and the hearing was set for June 15, 1989. By Order dated June 6, 1989 (G.C. Exh. 1(c)), the hearing was rescheduled for July 12, 1989; and by Order dated July 6, 1989 (G.C. Exh. 1(e)) the hour of the hearing was changed, pursuant to which a hearing was duly held on July 12, 1989, in Los Angeles, California, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issue involved, and were afforded the opportunity to present oral argument which both parties waived. At the conclusion of the hearing, August 18, 1989, was fixed as the date for mailing post-hearing briefs, and Respondent and General Counsel each timely mailed an excellent brief, received on, or before, August 22, 1989, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. American Federation of Government Employees, Local 2403, AFL-CIO (hereinafter referred to as the "Union") is the exclusive representative of certain of Respondent's employees in various offices in Southern California, including Santa Ana, San Diego, and Los Angeles, and in Arizona, including Phoenix and Tucson (G.C. Exhs. 1 (b), Par. 4, 1 (d); Tr. 16). Most of the employees in the bargaining unit work in the Los Angeles Office (Tr. 16).

2. On January 25, 1989, Ms. Ernestine Napue, President of the Union (Tr. 16), received a notice (G.C. Exh. 2) that respondent had issued a proposed removal of bargaining unit employee Alexandros Makris (Tr. 16-17). This notice was sent to the Union pursuant to Section 21.03 of the nationwide collective bargaining agreement of the parties.

3. The provisions of the collective bargaining agreement applicable to this case are as follows:

"Section 21.03 - Union Notification.
When Management issues a notice of proposed action under this Article to an employee in the unit, Management shall so notify the Union. When Management issues a notice of decision on such an action to an employee in the unit, the Union will be given a copy upon request.

"Section 21.02 Procedures.

. . .

"(4) An employee whose reduction in grade or removal for unacceptable performance is proposed is entitled to:

> "(a) Advance written thirty - (30) day notice which identifies the specific instances of unsatisfactory performance within the last twelve (12) months and the critical element or elements of the employee's position involved in each instance. Upon the employee's request, Management will provide one (1) copy of the documentation relied upon to support the proposed action."
>
> "(b) A notification that the employee has the right to reply to the proposal orally and in writing within fifteen (15) days and to be represented by an attorney or other representative which includes the right to Union representation."

"Section 21.01 General.

. . .

(2) The grievance procedure for reducing in grade or removing an employee for unacceptable performance is set forth in this Article [21 - UNACCEPTABLE PERFORMANCE ACTIONS] and is in lieu of the procedures identified in Article 22 (Grievance Procedure).

. . ."

"Section 21.05 - Grievance Appeal Rights.

(1) The decision of Management regarding:
(a) Reduction-in-grade; and for
(b) A removal
Will be sent to the employee and, upon request, given to the Principal Office Representative. Within twenty (20) calendar ays [sic days] of the employee's receipt of the notice, the Union may invoke arbitration.

. . ."

4. Upon receipt of the notice, Ms. Napue on January 25, 1989, called Respondent's administrative officer in San Diego and was referred to Ms. Marcia Dontje in San Francisco (Tr. 17-18). Later on the same day, Ms. Napue called Ms. Dontje and after identifying herself began asking questions about the proposed removal. She also told Ms. Dontje that the Union was the exclusive representative of employees in the San Diego office and that they should have contacted her concerning any action against an employee (Tr. 18-19). Ms. Napue told Ms. Dontje that she needed all of the information regarding the proposed action, including the proposed removal itself and any warnings given to the employee. Ms. Dontje told Ms. Napue that the employee had not told her he was represented by anyone and therefore she considered Ms. Napue as no representative (Tr. 19). In response to Ms. Napue's request for information, Ms. Dontje stated that she was not going to give her that information unless and until the employee designated her as his representative (Tr. 20). Ms. Napue then told Ms. Dontje that she was going to send a letter requesting the information; that she was going to give her a stated time to supply it; and if the information was not supplied she was going to file an unfair labor practice charge (Tr. 20).

5. On January 26, 1989, Ms. Napue did prepare a letter to Ms. Dontje which she fax'd to her and also mailed her the original (Tr. 20). The letter stated as follows:

"As the exclusive representative of all bargaining unit employees in the San Diego HUD office, the Union requests that Management provide the following information regarding the issuance of a proposed removal notice to Unit Employee Mr. Alexandros Makris on January 17, 1989.

1. Any/all information regarding this notice of proposed removal. (Not his OPF file)

"Please provide this information to the Union not later than COB Tuesday January 31, 1989. Your cooperation regarding this matter appreciated." (G.C. Exh. 4).

6. Ms. Dontje replied to Ms. Napue's letter of January 26, 1989, by memorandum dated January 30, 1989, which provided in relevant part as follows:

. . .

"Section 21.02(4)(a) provides that the employee upon the Employee's request will be provided a copy of the documentation relied upon to support the proposed action.

"Section 21.02(4)(b) provides that an employee has the right to be represented by an attorney or other representative which includes the right to Union Representation.

"Management is unaware of any election by the employee as to who will represent him. Upon receipt of his representative designation, we will furnish a copy of the information requested

. . . . (G.C. Exh. 5),

7. On February 6, 1989, Mr. Charles J. Wilson, Manager, San Diego HUD, received a call from Mr. Warren P. Beck, an attorney representing Mr. Makris, and Mr. Makris by letter dated February 7, 1989, formally notified Mr. Wilson that Mr. Beck, ". . . is the attorney representing me in the matter regarding my proposed removal." (Res. Exh. 1).

8. Ms. Dontje stated that when Ms. Napue called on January 25, 1989, she [Dontje] asked why she [Napue] wanted the information; that she [Napue] said because she was the Union president; that she [Dontje] referred her to Article 21 of the contract which provides that the Union is only supposed to get a notice; and Dontje asked if she was representing Mr. Makris in the response to the proposed removal and she said "No". (Tr. 47). Ms. Dontje further stated that Ms. Napue said that she had called Mr. Makris and that he had told her he did not want her to represent him (Tr. 47, 54).

Ms. Napue denied that she told Ms. Dontje that she had spoken to Mr. Makris and that he didn't want her [Napue] to represent him (Tr. 55-56). Indeed, she stated that she did not speak to Mr. Makris until a day or so after her conversation will be Mr. Dontje (Tr. 22, 23, 56). Ms. Napue represented her conversation with Mr. Makris as follows:

> ". . . No, he didn't ask me to represent him. I explained to him who I was and if he wanted Union representation I was there to help him, if he wanted. Of course, he wasn't a member. I also explained to him that I did not really represent non-Union members, but since he didn't know that there was a union on the premises, I told him that I would do the best I could for him. And I quoted some prices, you know." (Tr. 22).

Although Ms. Napue stated that Ms. Dontje did not ask if she were representing Mr. Makris (Tr. 23), I find, as Ms. Dontje testified, that she told Ms. Dontje that she was not representing Mr. Makris (Tr. 47). Subsequently, Ms. Napue stated that she told Ms. Dontje, ". . . Even if I didn't represent the employee . . . we are entitled to that information. . . ." (Tr. 28). Consequently, I find that Ms. Dontje's testimony is in this regard more convincing, is consistent with all other testimony, and is credited.

Conclusions

§ 21 of the Statute provides, in relevant part, as follows:

> "(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances . . . Except as provided in subsection (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
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> "(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

"(b) Any negotiated grievance procedure . . . shall --

. . .

"(3) include procedures that --

"(A) assure the 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.

"(B) 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

"(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration . . . ." (5 U.S.C. § 7121 (a)(1), (2), (b)(3)(A), (B) and (C)).

§ 14(a)(5) of the Statute provides, in relevant part, as follows:

"(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from--

"(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

"(B) exercising grievance or appellate rights established by law, rule, or regulation.

except in the case of grievance or appeal procedures negotiated under this chapter." (5 U.S.C. § 7114(a)(51) (Emphasis supplied).

In National Federation of Federal Employees, Local 1001, 15 FLRA 804 (1984), the Authority held:

> ". . . unit employees, under section 7114(a)(5), have the right to choose their own attorney or representative, other than the exclusive representative, in any grievance or appeal procedure except those grievance or appeal procedures which are negotiated under the Statute. Thus, unit employees may only be represented in negotiated grievance and appeal procedures by the exclusive representative. . . ." (15 FLRA at 806) (Emphasis in original).

Will regard to § 21, the Authority further stated:

> "Thus, while section 7121(b)(3)(B) expressly permits a unit employee to present a grievance on the employee's own behalf, the basic underlying policy of both sections [i.e., § 14(a)(5) and § 21] remains the same, i.e., only the exclusive representative, and no other, may represent unit employees under the negotiated procedure. The clear intent by Congress, therefore, was, with the one stated exception whereby an employee may present and process a grievance on that employee's own behalf, to preclude unit employees from being represented in the negotiated grievance procedure by any person or organization other than the exclusive representative. [footnote omitted]" (15 FLRA at 808) (Emphasis in original).

See, also, Department of Treasury, Internal Revenue Service Center, 17 FLRA 107, n. 1 (1985).

Here, Article 21 of the Agreement of the parties: (a) removed "Unacceptable Performance Actions" from the general grievance procedure (Article 22); (b) established in Article 21 the "grievance procedure" for reducing in grade or removing an employee for unacceptable performance; (c) removal or reduction-in-grade is initiated by a written 30 day notice (Section 21.02(4)) of which the Union must be notified (Section 21.03); (d) the response to the notice of proposed reduction in grade or removal is treated by the Agreement as a pre-grievance matter at which the employee has the right, ". . . to be represented by an attorney or other representative which includes the right to Union representation." (Section 21.02 (4)(b)). Had the parties

not treated the response to the notice as pre-grievance, i.e., not part of the grievance procedure,[2/] then only the Union, and no other, could have represented the employee at the response to the notice of proposed action; (e) the Agreement provides that, "Upon the employee's request, management will provide one (1) copy of the documentation relied upon to support the proposed action (Section 21.02(4)(a)); (f) the Agreement provided that, "When Management issues a notice of decision . . . the Union will be given a copy upon request." (Section 21.03) and "The decision of Management . . . will be sent to the employee and, upon request, given to the Principal Office Representative. . . ." (Section 21.05 (1)); and (g) The Agreement provides; ". . . Within twenty (20) calendar days of the employee's receipt of the notice, the Union may invoke arbitration." (Section 21.05(1)(b); [Suspension of 14 days or less] "If arbitration is not invoked by the Union, the matter is closed for purpose of the grievance/ arbitration procedure." (Section 21.05(2); [Suspension of more than 14 days, Reduction-In-Grade or Removal]" If the employee elects not to appeal the matter to the Merit Systems Protection Board, then the Union may invoke arbitration within twenty (20) calendar days of the employee's receipt of the notice. "(Section 21.05 (3)(b)); and [asserted prohibited discrimination] ". . . in lieu of paragraphs 2, 3(a) and (b) above, he/she may utilize the EEO complaint procedure by either filing a grievance at Step 1 of the Grievance Procedure (see Section 22.14) or by filing an EEO complaint. . . ." (Section 21.05 (4)).

Thus, the Agreement provides that a notice of proposed removal or reduction in grade must be given to the Union; addresses the supplying of documentation relied upon to support the proposed action; and specifically provides that

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2/ Respondent states, "Proposed actions can not be grieved under the Agreement, appealed to the Merit Systems Protections Board, 5 C.F.R. Sec. 1201.3, or be the subject of a discrimination complaint, 29 C.F.R. Sec. 1613.215 (a)(2). They represent only the view of the proposing official. They do not represent the policy or final judgment of an agency. They are proposals precisely because they are subject to further review." (Respondent's Brief, p. 4). Of course, the fact that an action, or proposed action, is subject to further review would not necessarily make such action non-grievable. Indeed, this is precisely the case of multi-step grievance procedures.

documentation will be supplied "Upon the employee's request. . . ." This is what Ms. Dontje told Ms. Napue and repeated in her memorandum of January 30, 1989, in response to the Union's request (G.C. Exh. 5). Moreover, Ms. Dontje in her memorandum stated,

> ". . . Upon receipt of his representative designation, we will furnish a copy of the information requested." (G.C. Exh. 5).

President Napue testified that, ". . . under our contract . . ." (Tr. 26, 28) the Union has the right to such documentation even if it ". . . didn't represent the employee." (Tr. 28), and that under the contract the Union has the right to receive such documentation ". . . when an employee is being terminated or disciplined" (Tr. 26) notwithstanding that the employee has not then requested the documentation or that the Union is not then representing the employees.

These assertions involve differing and arguable interpretations of the Agreement of the parties and the Authority has made clear that,

> ". . . In cases such as this one, involving disputed interpretations of a negotiated agreement, the aggrieved party's remedy is through the grievance and arbitration procedure available to the parties rather than through unfair labor practice procedures." 22nd Combat Support Group (SAC), March Air Force Base, California, 30 FLRA 331, 334 (1987).

See, to like effect: United States Marine Corps, Washington, D.C., et al., 33 FLRA 105 (1988).

But for the provisions of Article 21 of the Agreement of the parties, I would wholly agree with General Counsel that Respondent violated § 14(b)(4) of the Statute by failing to provide the data in question. General Counsel asserts, in effect, that the right to information, pursuant to § 14(b)(4), is a statutory right which exists unless there has been a clear and unmistakable waiver of the right. Of course, General Counsel asserts that, ". . . Section 21.03 does not constitute a clear and unmistakable waiver of the Union's statutory right to receive the copy of the proposed removal and supporting documentation it requested on January 26, 1989." (General Counsel Brief, p. 8). I

disagree as to whether this case should be considered as a "waiver" case. More accurately, our disagreement goes more to whom should make the determination. In a "waiver" case the decision, necessarily, must be made by the administrative law judge and/or by the Authority, while in a "contract interpretation" case the decision is left to the parties' negotiated grievance and arbitration procedures. Aerospace Guidance and Metrology Center, Newark Air Force Station, Newark, Ohio, A/SLMR No. 677, 6 A/SLMR 361 (1976); Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region, 23 FLRA 422 (1986); United States Marine Corps, Washington, D.C., et al., 33 FLRA 105 (1988).

The dividing line between "waiver" and "contract interpretation" may not always be clear and I doubt not that there have been inconsistencies. Nevertheless it is not a matter determined by "whose ox is being gored", but, rather whether a case concerns "contract interpretation" is determined by application of the following factors: (a) is there a contract[3/]; (b) does it purport to treat the issue[4/]; (c) are there disputed plausible interpretations of the contract[5/]; and (c) does the absence or existence of an

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3/ Bureau of Indian Affairs, Phoenix Area Office, Phoenix, Arizona, 32 FLRA 903 (1988). (Not a provision of a collective bargaining agreement; but, rather, a settlement agreement of an unfair labor practice complaint. Necessary to determine whether, as asserted, there was a waiver.

4/ Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, Case No. 9-CA-60376, 79 Adm. Law Judges Dec. Rep., April 7, 1989 (No contention that agreement addressed copies of data to union; but, rather that bargaining history showed that union changed its position and thereby waived its right to receive data. Necessary to determine whether there was a waiver since there were no disputed interpretations of a collective bargaining agreement.

5/ Immigration and Naturalization Service and Immigration and Naturalization Service Newark District, 30 FLRA 486, 489 (1987).

unfair labor practice depend on the meaning of the contract.6/

Here there is a contract; the contract deals with the supplying of the data in question; Respondent's interpretation of the contract is supportable as is the Union's differing interpretation; and the existence of an unfair labor practice depends on the meaning of the contract. Under these circumstances, the Authority, notwithstanding that a § 14(b)(4) right is asserted, has made it clear that, ". . . the aggrieved party's remedy is through the grievance are arbitration procedures rather than through unfair labor practice procedures." 22nd Combat Support Group (SAC), March Air Force Base, California, 30 FLRA 331, 334 (1987).

Accordingly, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 8-CA-90223 be, and the same is hereby, dismissed.

William B. Devaney
WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 3, 1990
Washington, D.C.

6/ Oklahoma City Air Logistics Center, Tinker Air Force Base, Oklahoma, 3 FLRA 512, 521 (1980).