In The Matter of Arbitration

Between

Employer

And

Union

Arbitrator: Dr. Benjamin Wolkinson **Case: Wolkinson #1**

Employer Representative
V. H., Labor Relations Specialist

Union Representative
D. V, Labor Relations Coordinator

Grievant: R.R.

Issue: Disclosure Requirement

Date of Award: June 10, 2005

Background

On April 22, 2004 R.R., the Chief Steward at the Correctional facility, submitted a request of information from the Personnel Office. He requested punch-in and punch-out times for Sergeant D. for the last 120 days. Ms. K., the Facility's Human Resources Officer, denied this request on the grounds of its confidential nature. On April 28, 2004 R.R. expanded his request for punch-in and punch-out data to include Sergeants H, E, and A. On April 29, 2004, R.R. initiated the following grievance:

> Bargaining unit employees are being disciplined for time and attendance whereas supervisors and non-custody staff are not being disciplined in the same manner i.e. supervisors and non-custody staff will be late and no action is taken. Bargaining unit members are late and they are disciplined.

On April 29, 2004 Mr. R.R. reiterated his request for the punch-in and out times and the exception reports for Sergeants D., H, E, and A. These requests continued to be

ignored at the local facility level. On May 11, 2004, Mr. R.R. initiated a grievance that the Department was violating Article 9 G of the parties' agreement in refusing to give him the requested information. Subsequently, on September 8, 2004, Mr. R.R. requested time and attendance information for Ms. BP and Ms. JA.

During pre-arbitration discussions on the grievance, Ms. J.B., the Department's labor relations manager, provided the following response:

> The department must strike a balance between the Union's need to administer its contract and our obligation to protect the confidentiality of other groups of employees for whom THE UNION is not the exclusive representative. In order to do so, the department maintains that the request for personnel information of other non- UNION employees will only be provided to the Union at the advanced step of the grievance procedure (step 3 and above). This is a fair balance between the Union's need for appropriate relevant information and the department's obligation to protect the confidentiality of other employees' records.

The issued remained unresolved and was advanced to arbitration on March 22, 2005.

Issue

At the hearing the parties stipulated that the issue is whether the Department violated the Union's rights under Article 9 G by denying Chief Steward R.R. the time and attendance records that he had requested.

Relevant Contractual Provisions

Article 9, Section G. Documents and Witnesses

Upon written request, the Union shall have access to and/or receive specific documents or records available from the Employer not prohibited by law, and pertinent to the grievance under consideration. Discretion permitted under the Freedom of Information Act shall not be impaired by this section. Documents requested under this Section shall be provided in a timely manner.

Upon request, prior to a scheduled Arbitration Hearing, all documents or other materials not previously provided or exchanged which either party intends to use as evidence will be forwarded to the other party. However, such response shall not limit either party iii the presentation of necessary evidence.

Arbitration hearings will be held at the location which best minimizes time lost from work. At least ten (10) weekdays before a scheduled arbitration hearing, the Union shall provide the Employer a written list of the witnesses it plans to call and who it requested to be relieved from duty. Nothing shall preclude the calling of previously unidentified

witnesses. Upon request the Employer shall also provide a list of those it intends to call as witnesses.

Union Position

The Union maintains that the parties' contract and a prior arbitration award do not permit the Employer to decide at which level of the grievance procedure requested information will be provided to the Union. Nor do they permit that information be provided only at the higher steps of the grievance procedure. Rather under Article 9 G the Union is authorized to have access to specific documents or records pertinent to a grievance under consideration.

Employer Position

The Employer maintains that FOIA provisions are not an issue in this matter. Rather the issue before the arbitrator should be determined exclusively on the basis of contractual considerations. The Employer further contends that it is not required to provide the requested documents to local union representatives, because its contractual disclosure obligation is satisfied by its willingness to share the information with Union representatives at step 3 of the grievance machinery. Additionally, labor relations manager Ms. J.B. presented the requested documents to the Union's representative during pre-arbitration discussions and thereby satisfied the Employer's disclosure obligation. Furthermore, the incorporation of the disclosure obligation in the arbitration section of the contract demonstrates that disclosure is required only prior to arbitration.

The Employer also maintains that its position is required by its need to strike an appropriate balance between the Union's need to know and the right of non- UNION employees to confidentiality. The Department does not believe that management should provide time and attendance records of supervisory staff to subordinate employees, simply because they request them. Additionally, the Department maintains that its denial of this information to local union representatives is consistent with a prior arbitration award of Don Sugarman in which he held that the Department need not provide the Union with time and attendance records of managerial employees, employees on flextime, and workers who do not punch time cards. Finally, the Employer maintains that management had no obligation to provide such information to the Union, as such data is irrelevant to any determination whether bargaining unit members were treated disparately.

Discussion

At the outset, the arbitrator notes that both parties in their briefs have recognized that the disposition of this grievance rests exclusively upon a determination of the parties' rights under Article 9 G. Furthermore, both parties have acknowledged that this determination should be made independently of the parties' rights and obligations under the Freedom of Information Act. Consequently, the arbitrator will not address whether the Union's request for information is governed by the Freedom of Information Act.

While this arbitrator's mandate is to interpret the parties' contractual rights, it is useful and instructive to briefly examine the obligation of an employer to provide requested information to a union under prevailing statutory policy. In *NLRB v. Acme Industrial Co.,* the Supreme Court held that the employer's duty to furnish information, like its duty to bargain, "extends beyond the period of contract negotiations and applies to labor management relations during the term of an agreement." (385 US 432, 436, 1967) Thus the Supreme Court required disclosure of information pertaining to a grievance filed by the union. Underlying this approach is the recognition that without information that allows it to understand the issues and complaints employees present, the union will be handicapped in its efforts to represent its members. Moreover, the free exchange of relevant data will nourish a positive labor relations environment that will facilitate the parties' capacity to resolve their differences short of arbitration.

It is apparent that the obligations inherent in Article 9 G correspond to this statutory framework. Article G provides that "Upon written request, the Union shall have access to and/or receive specific documents or records available from the Employer not prohibited by law and pertinent to the grievance under consideration." Pursuant to this provision, the Employer is required to provide documents once the following conditions have been satisfied: (1) The Union has initiated a grievance; (2) the request for information is pertinent, material, or relevant to the grievance under consideration; and (3) the Union's request is in writing.

These prerequisites for the Union's receipt of information in this case have been satisfied. It is undisputed that on April 29, 2004 Chief Steward R.R. initiated a grievance contending that bargaining unit employees were being disciplined unfairly and disparately for breach of time and attendance policies which when allegedly committed by non-custody staff did not result in their discipline. That same day he re-submitted a written request for the punch-in and out times of four custody sergeants. In September of 2004 this request was expanded to include two other non-unit employees. These records were pertinent to the grievance that had been filed, as they would reveal whether non-bargaining unit staff had been excessively tardy or absent. Through additional inquiries, Mr. R.R. could have determined if the Facility had similarly disciplined these non-unit employees for any attendance infractions. In short, the requested information would have enabled the Union to assess the merits of its April 29, 2004 grievance and decide what further steps, if any, it should pursue within the grievance-arbitration process.

The Arbitrator also finds unpersuasive the notion that the requested information was not material or pertinent to the disposition of the grievance, because employee punch times do not demonstrate conclusively whether or not the worker may have been absent or tardy with prior approval from his/her supervisor. Admittedly, an employee may have received prior approval to arrive late, depart early, or not report at all. Nonetheless, it cannot be seriously denied that a review of attendance records over a reasonable time period will identify whether an employee has abused rules on attendance. Moreover, the possibility of a subsequent review demonstrating that non-unit staff was not guilty of any

attendance infraction does not invalidate the original disclosure request and requirement. In any case where relevant information is sought in the context of labor management negotiations, a union has no guarantee that the solicited data will support its position. Yet even when it does not, the disclosure of relevant data promotes labor relations stability as it enables the Union to make a considered judgment about the strength of its claim and to eliminate unmeritorious claims at the early stages of the grievance procedure. Significantly, Ms. J.B.'s willingness to share the requested attendance data with higher level union officials in pre-arbitration discussions indicates the Employer's recognition of the relevance of the requested information to the disposition of the grievance under review.

While the Employer has essentially acknowledged the Union's right to disclosure, it seeks to limit its scope, by providing access to the requested documents to only higher level union representatives. The Employer has maintained that it is inappropriate to share information on supervisors with subordinate employees and that its obligation under Article 9 G is satisfied by its willingness to provide the requested documents to Union representatives at the step 3 level or in pre-arbitration discussions.

This argument is unpersuasive. Accepting the Employer's position would be to adopt a contractual interpretation that would be inconsistent with public policy and sound labor relations. As noted earlier, by providing the Union with information needed to process the grievance and thereby determine its merits, the parties at the very early stages of the grievance machinery would be better able to review and resolve grievances either through their withdrawal or settlement. Conversely, an interpretive approach that would permit management to deny local union representatives information necessary to process the grievance on its merits would artificially block such review until the later stages of the grievance machinery. It is doubtful that the parties negotiated a provision that would frustrate the settlement of grievances at the local level and thereby exacerbate labor management tension and conflict at the facility level.

The Employer has suggested that sharing with local union officials attendance data would compromise the capacity of supervisors to maintain effective working relationships with their subordinates. Yet the Employer has failed to provide any evidence in support of this assertion. Similarly, it has not demonstrated that the disclosure of the requested information would compromise the Employer's capacity to administer efficiently its operations. Furthermore, it is doubtful that supervisors such as sergeants have any reasonable expectation of privacy regarding the requested data, as employees have a general idea from their mere presence at work whether their immediate supervisors are satisfying their attendance obligations.

The Employer has contended that the placement of Article 9 G in the contract suggests that it is intended to require disclosure only at the upper levels of the grievance machinery. As noted earlier, the contract clearly imposes upon the Employer the obligation to provide records and documents to the Union that are pertinent to the grievance under consideration. The paragraph containing this provision does not limit that requirement to the third step or other upper levels of the grievance machinery, and

it is reasonable to conclude that had the parties intended to limit the Employer's disclosure requirement, they would have negotiated this restriction. For this arbitrator to establish limitations not contained in the contract would be tantamount to his legislating new terms and conditions of employment, an assumption of arbitral authority that is barred under Article 9 D of the parties' contract. Furthermore, since the release of documents at step 1 is necessary for the proper functioning of the grievance machinery, it is reasonable to conclude that the parties intended the disclosure requirement under Article 9 G to require the Employer to provide relevant documents to local union representatives.

Finally, the Union's request for time and attendance information does not conflict with Arbitrator Sugarman.'s prior award. He noted that the Department need not provide the Union with time and attendance records for managerial employees, those employees on flextime, and those who do not punch time cards. No evidence has been presented that the employees for whom the Union was requesting time and attendance information fell within these job groupings. Indeed the Union's request for the time and attendance records of only six employees appears fully consistent with Arbitrator Don Sugarman's award in which he found the Employer to have breached the contract for failing to disclose the "time cards and exception reports and other time records showing the times of all noncustody employees" not falling within the aforementioned excluded job groupings.

Award

The grievance is sustained. The Employer shall provide to Union representatives at the local level time and attendance records when such information is relevant to a consideration of a grievance under review. In accordance with Article 9 D of the parties' agreement, the cost of this proceeding shall be borne by the Employer.

Benjamin Wolkinson
Arbitrator

June 10, 2005