

In the Matter of the Arbitration)

between)

Department of Veterans Affairs)
(hereinafter also called "the Agency"))

-and-)

American Federation of Government)
Employees [AFGE], Local 2401,)
(hereinafter also called "the Union"))

Re: Grievance 08-11)
FMCS Case No. 0754973)

OPINION

&

AWARD

ARBITRATOR: Edna E. J. Francis

APPEARANCES: Rona S. Lige, Attorney, U. S. Department of Veterans Affairs, Office of Regional Counsel, Region 19, representing the Agency, and Mary Garrison, President, AFGE Local 2401, representing the Union

The hearing was held on September 18, 2008, at Northern Arizona VA Health Care Systems, 500 N. Highway 99, Prescott, AZ 86313

RECEIVED
REGIONAL COUNSEL
PHOENIX, AZ
2008 NOV 19 AM 11:45
Rbssa

PROCEDURAL BACKGROUND

This arbitration proceeding was convened by the parties pursuant to the current "*Master Agreement between the Department of Veterans Affairs and the American Federation of Government Employees.*" (Joint Exhibit 1). The proceeding stems from an unresolved grievance filed on March 12, 2008, alleging that the Agency's retention of written counselings for longer than six months violated Article 16, Section 11.C.2 of the Master Agreement and the Health Care System Memorandum [HCSM] 00-16 4a 2c.¹

Article 16, Section 11 ("Counseling") of the Master Agreement provides, as follows:

A. Counseling shall be reasonable, fair, and used constructively to encourage an employee's improvement in areas of conduct and performance. It should not be viewed as disciplinary action. At any counseling session where an employee has the right to Union representation, the employee shall be advised of that right at the beginning of the session.

B. Oral Counseling

When it is determined that oral counseling is necessary, the counseling will be accomplished during a private interview with the concerned employee and Union representative if requested and appropriate. If after such a meeting, the employee is dissatisfied and wishes to pursue a grievance, the employee may proceed to either Step 1 or Step 2 of the grievance procedure. If there is to be more than one Management official involved in a counseling session with an employee, the employee will be so notified in advance and the employee may have a Union representative at the session.

C. Written Counseling

1. Written counseling will be accomplished in the same manner as specified above, except that two copies of a written statement will be given to the employee.

¹ In its post-hearing brief, the Union representative stated that "[t]he Union is dropping the charge of violating HCSM 00-16." Therefore, this opinion and award will resolve only that aspect of the grievance involving Article 16, Section 11.2.C.

2. A written counseling for misconduct may only be kept or used to support other personnel actions for up to six months unless additional related misconduct occurs, and then it may be retained up to one year.

3. A written counseling for performance may only be retained and used beyond the appeal period of the annual performance rating to support a timely personnel action related to that rating or any timely action taken during that period.

4. In the case of probationary employees, written counselings may be kept up to the time a decision is made whether or not the employee will be continued beyond the probationary period.

(Joint Exhibit 1, pp. 46-47)

The evidentiary record from the arbitration hearing comprises two Joint Exhibits; six Union Exhibits, and testimony from one witness. The Union made an opening statement and then rested its case based on the documentary evidence presented in Union Exhibits 1 through 6. The Agency elicited testimony from one witness, Jennifer Geiss, Human Resources Manager. In accordance with their agreement at the hearing, both parties submitted closing argument via a post-hearing written statement.

STIPULATED ISSUES

“Did the Agency violate Article 16, Section 11.C.2 by retaining counselings beyond six months without any additional related misconduct?”

SUMMARY OF THE CASE

The grievance arose from the following undisputed circumstances. While the Agency and the Union were processing an EEO complaint in March 2008, the Agency's legal counsel submitted, as part of the record, counseling memoranda issued by one its managers (Ms. Dunn) that were more than six months old. One of the memoranda was

issued in September 2004, and contains a handwritten annotation, "Removed from file 3/05"; the other was issued in June 2007, and contains a handwritten annotation, "Removed from file 1-7-08" (Union Exhibits 5 and 6) Upon further inquiry regarding the subject of retaining written counselings, the Union discovered that Ms. Dunn also had retained a written counseling (for Mr. "M")² that was issued in August 2005. (Union Exhibit 4)

Citing the provisions of Article 16, Section 11.C.2 of the Master Agreement, the Union protested that the counseling memoranda were still in existence and filed the instant grievance. Therein, the Union stated "it appears that Ms. Dunn [the supervisor] is keeping records on employees far beyond the acceptable time period," "AFGE has been told that Ms. Dunn keeps employees files at her home," and "VA employees are not allowed to take confidential information off VA premises."³ (Union Exhibit 1). The Union requested the following remedies: "1. Instruct Ms. Dunn to immediately destroy (shred, erase, delete) any records that she has in compliance with HCSM and the AFGE Master Agreement. 2. Instruct Ms. Dunn to immediately retrieval any and all records she has at her home either paper or media. 3. Censure Ms. Dunn for violation of AFGE Master Agreement and HCSM 00-16."⁴ (Union Exhibit 1)

Responding to the grievance at the third step of the grievance procedure, the Agency stated:

- a. Records maintained by Ms. Dunn are normally removed from employee's file to a generic file following the six month period. In the instance of one counseling, the record was an oversight. Ms. Dunn has been advised to review files frequently to ensure that these records are removed

² Initial only of the employee's last name is used to protect the employee's identity.

³ Although the HCSM aspect of the grievance has been dropped, the requested restitution is stated here in full to insure that no relevant portion of the grievance is inadvertently excised.

⁴ Ms. Dunn is no longer employed by the Agency.

from the employee files she maintains, in a timely manner. Two of the written counselings provided as exhibits were retained at the advice of the EEO Program Manager because there was an active ADR and EEO case at the time.

b. There is no evidence that Ms. Dunn maintains records at her home. Ms. Dunn has been instructed that she must not records at her home.

c. There is no evidence that Ms. Dunn should be censured for violation of the VA/AFGE Master Agreement and/or HCSM 00-16. Restitution not granted.

(Union Exhibit 3)

In summary, Jennifer Geiss, Human Resources testified that Article 16, Section 11, Section 2 C of the Master Agreement precludes the Agency from using an employee's counseling memoranda that are more than six months old for any purpose detrimental to the employee and that she so advises supervisors; that the Agency does have the right to retain such memoranda beyond that period where there is a pending EEO action for which the information may be relevant; that the Article does not prohibit the Agency from keeping and using such counseling memoranda (the employees' names are obliterated) for other appropriate reasons, e.g., to ensure consistency in disciplining employees, to use as samples, or to use as a reminder of past events; and that the Agency retains counseling memoranda that are more than six months' old in a generic file for such purposes, with the names of the employees obliterated.

SUMMARY OF ARGUMENT

By the Union

The Master Agreement states: "A written counseling for misconduct may only be **kept or** used to support other personnel actions for up to six months unless additional related misconduct occurs and then may be retained up to one year." (Emphasis added)

The Union submitted into evidence three counselings, all of which were **kept** beyond the six-month period. One of the counselings is dated September 1, 2004 and was introduced into evidence in an EEO case in March 2008. The subject of the counseling was not the complainant in the EEO case. The Agency has consistently stated that it does have the right to keep counselings indefinitely as long as they are moved to a generic file and not used for a personnel action. However, the contract clearly states "may only be KEPT OR used to support other...." Webster's Dictionary defines "keeping/kept" as "retain in one's possession." Therefore, regardless of where the Agency kept the counselings, it is clear that it did keep them in its possession.

The Agency has argued that EEO rules mandate that the Agency keep records when they believe an EEO complaint may be filed. The language in the Master Agreement clearly shows the intent was to prevent the Agency from holding counselings forever, to be used at any point in time even four years later. 29 CFR 1602.14 states that really important papers such as reasonable accommodation requests and application forms "shall be preserved by the employee for a period of one year." If that provision limits the amount of time to a year, it is reasonable to assume that a counseling which is not a disciplinary document should only be kept for six months. 29 CFR Section 1614.108 contains a set of instructions regarding the investigation of complaints and Section 1614.109 concerns hearings. The counselings had nothing to do with complaints or hearings.

None of the four litigation cases the Agency cited to support its position regarding retention of documents involved the AFGE Master Agreement. The Master Agreement is a legally binding document. The Agency focused on the counseling given to Mr. M (the employee involved in Union Exhibit 4) because he filed an EEO complaint in March

2006. The EEO complaint did not involve counseling. It involved twenty plus other actions taken by his supervisor.

Further, this case is not about Mr. M's EEO complaint. The Union filed this grievance because the Union's interpretation of the Master Agreement is different than the Agency's interpretation. The Agency position that they can violate the Agreement because it has a good reason to do so is ludicrous. If the Agreement is not working for the Agency, the proper action is to re-negotiate the section that is not working, not to violate it. Contrary to the Agency's position, as expressed in the opening statement of Agency counsel, the Master Agreement is not a guideline. It expresses the legal obligations of the parties.

As restitution for the Agency's violation of the Master Agreement, the Union requests that the Agency be directed to destroy all counselings in six months unless they are currently being used in a legal action or there is related misconduct. It further requests a declaration that the Master Agreement is not a guideline that the Agency can choose to follow only if desires to do so.

By the Agency

The plain language of Article 16, Section 11 C 2 of the Master Agreement is that written counseling letters may not be kept or used to support a personnel action after six months. The Agreement does not state that the records must be destroyed or that written counselings may not be kept or used for any purpose. It only states that written counselings may not be kept or used to support other personnel actions. Thus, when Ms. Dunn maintained the counseling records in anticipation of needing them as evidence in a future EEO case upon the advice of the EEO Program Manager, she did not violate Article 16, Section 11.C.2 of the Master Agreement.

Addressing the original grievance, the responding official stated:

Records maintained by Ms. Dunn are normally removed from employee's file to a generic file following the six month period. In the instance of one counseling, the record was an oversight. Ms. Dunn has been advised to review files frequently to ensure that these records are removed from the employee files she maintains, in a timely manner. Two of the written counselings provided as exhibits were retained at the advice of the EEO Program Manager because there was an active ADR and EEO case at the time.

The response is consistent with the notes that Ms. Dunn made on the counselings and with the advice given by Human Resources Officer Geiss. Ms. Dunn removed two of the counselings (Union Exhibits 5 and 6) from the "official file," the official to which she would have looked if she were considering taking disciplinary action against the employee. One of the counseling records (Union Exhibit 4) was not moved from the official file. Nevertheless, the failure to move it did not violate the Master Agreement. There is no violation unless the record is kept or used to support a personnel action. In this case, the record was kept to defend the Agency in EEO litigation, not to support a personnel action.

It would be contrary to law to require that counselings be destroyed after six months. (The Agency cites four cases—one a court decision and three EEOC decisions— a) confirming a party's obligation, pursuant to 29 CFR §1602.14, to preserve evidence that may be relevant in an EEO case or b) drawing an adverse inference against an Agency for its failure to preserve such evidence). Thus, the law requires that document retention policies, such as the Master Agreement provision, be suspended when litigation is anticipated. It would be contrary to law to require written counselings to be destroyed when a supervisor reasonably anticipates that the records may be relevant evidence in future litigation, as was the issue in this case.

Even if the Arbitrator were to rule that the Agency violated the Master Agreement by keeping the counseling records for over six months, the Agency submits that the situation has already been remedied, in view of the restitution sought by the Union in the initial grievance. Ms. Dunn, the manager who retained the records, no longer works for the VA. When she left the Agency, she gave her official employment and personnel records to management and destroyed all personal records, which included the counseling letters that she had preserved as potential evidence. Thus, all of the counselings have been destroyed. It would not have been appropriate at the time to censure her, and now that she is no longer with the VA, it would not be possible to do so even if such a remedy were granted. Moreover, submission of the written counselings did not harm anyone.

DISCUSSION

The Union correctly asserts that the Master Agreement is not merely a guideline which either party is free to ignore or embrace at its will. In fact, the Master Agreement sets forth the legal obligations of the parties based on the bargain the parties reached during negotiations. Neither party is free to ignore it. Both parties are bound by its terms. Nevertheless, the fact that the parties may disagree about the meaning, application, or interpretation of the terms of the contract is not unusual. The parties' adoption of a grievance procedure and the use of the grievance procedure are attestations of that fact.

Additionally, the fact that the parties have differing interpretations of the bargain they struck or of the legal obligations conferred by the language they chose to express their bargain does not necessarily mean that either party is dismissively ignoring the other party's position. Each party may hold a good faith belief that its position is the

correct interpretation of the contract. That is the case here. In essence, the Union interprets Article 16, Section 11.C.2 to mean that the language prohibits the continued existence of an employee's written counseling beyond six months if the employee did not engage in additional misconduct within six months after issuance of the counseling. In essence, the Agency asserts that the Union's interpretation of the language is overbroad and not justified. In addition, it asserts that even if the language were given the Union's interpretation, that interpretation must yield if it conflicts with relevant law.

Without singling out and emphasizing any particular words of the language at issue and while trying to give meaning to all the substantive words Article 16, Section 11.C.2, I attempted to state the essence of the provision "in other words," based on my reading and understanding of it. From my perspective, and "in other words, the parties agreed, as follows—*The Agency may keep or use an employee's written counseling to support other personnel actions against the employee for up to six months from the date it was issued, unless additional related misconduct occurs; if additional related misconduct occurs, the Agency may retain the written counseling up to one year from the date it was issued, in order to support other personnel actions against the employee.*

In accordance with principles of contract interpretation, all of the words of the provision must be given due weight resolving the issue presented here. The provision does not confine itself to a statement that the Agency may only keep or use an employee's written counseling for up to six months. Rather, it contains important conditions and qualifiers. In this case, modifying words in the form of an infinitive phrase, i.e., "to support other personnel action," are indispensable in assigning meaning

to the provision. In fact, it appears that the crux of the parties' agreement, as written, is to restrict the Agency's right to keep or to use an employee's written counseling for the purpose of supporting other personnel actions against the employee. Thus, if, within six months after issuance of the written counseling, the employee has not engaged in additional misconduct of the nature addressed in the written counseling, the Agency cannot keep or use the counseling *in order to support other personnel actions against the employee*. Hence, a violation of the Master Agreement would arise from the Agency's retention and use of written counselings beyond six months for the purpose of supporting other personnel actions against the employee where no similar misconduct had occurred within six months after issuance of the counseling.

Here, the evidence reflects no such circumstances. Instead, the Union's grievance stems solely from the fact that the written counselings were still in existence although they were more than six months' old and the affected employees had not incurred similar misconduct during the six-month period. There is no evidence that the Agency used the memoranda for the illicit purpose the language proscribes. As written, the language does not require destruction of the written counselings upon expiration of the six-month period. Further, it does not prohibit the Agency from retaining or using the written counselings for other legitimate purposes that do not involve other personnel actions against the employee.

Based on the evidentiary record and in accordance with the foregoing discussion, there is no basis for finding that the Agency violated Article 16, Section 11.C.2 of the Master Agreement. Therefore, the grievance is denied.

AWARD

The Agency did not violate Article 16, Section 11.C.2 by retaining counselings beyond six months without any additional related misconduct.

Dated: *November 17, 2008*
Los Angeles, California

Edna E. J. Francis

Edna E. J. Francis