In the Matter of Arbitration:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	FMCS Case No. 09-57344-A
and	Grievance No. OHR-GR-09-005 Union Grievance FY2009-WFO-001
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL COUNCIL OF EEOC LOCALS NO. 216, LOCAL 3614	WFO Administrative Judges and Investigators Office Assignment September 12, 2008 MOU

Before: Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Union:

Joseph F. Henderson, Esq.
(Associate General Counsel, AFGE)
Regina M. Andrew, Esq., President, AFGE Local 3614
Brenda Hester, First Vice-President, AFGE Local 3614
Kurt C. Hodges, Esq., EEOC Administrative Judge

For the Agency:

Ariya McGrew, Esq.
(Agency Representative, Office of the General Counsel, EEOC)
Steven H. Schuster, Esq., Senior Attorney
Dana R. Hutter, Esq., Program Manager, Systemic Investigations, Office of Field Programs
Mindy E. Weinstein, Esq., Acting Director, WFO
Gwendolyn Reams, Esq., Associate General Counsel, Litigation Management Services, OGC, EEOC
Corbett L. Anderson, Esq., Appellate Attorney, OGC, EEOC

OPINION

The issue in this case is whether the Agency violated a Memorandum of Understanding negotiated with the Union and signed on September 12, 2008, entitled "MOU Concerning Allocation of Office Space for the EEOC Washington Field Office,

131 M Street, NE, 4th Floor" ("MOU") and, if so, to determine the appropriate remedy. An arbitration hearing was held on March 2, 2010. A transcript was prepared that was agreed to constitute the official record of that hearing. Post-hearing briefs were filed electronically that were received by the Impartial Arbitrator on April 5, 2010.

Article 42, Arbitration, Section 42.04, Procedures for Arbitration, of the Parties' Agreement provides in pertinent part that: "(g) The Arbitrator shall issue an award with a written opinion stating the reasons for the award as soon as possible after the conclusion of the arbitration (including receipt of briefs), but in no event later than 20 calendar days from the close of the arbitration." At the arbitration hearing, the Impartial Arbitrator agreed that he could meet this expedited decisional time frame if the Parties were in agreement that they would receive only a relatively brief Opinion accompanying the Award in this matter. All Parties agreed and indicated that they preferred a briefer Opinion within the time frame set forth in Section 42.04(g) of the Agreement.

The MOU provides in pertinent part that:

> The parties agree that the following provisions shall apply to the impact and implementation of the allocation/reallocation of office space affecting bargaining unit employees in the Washington Field Office:
>
> Office and work station assignments, and other matters connected with the Washington Field Office relocation, shall be governed by the following:
>
> 1. Employees will be assigned to offices and work stations based on their seniority at the Washington Field Office, excluding periods of detail outside of the Washington Field Office.
>
> . . .
>
> 4. After offices/work space has been designated by the director for non-bargaining unit positions, of the remaining window offices, one shall be assigned to the ADR Unit, and the balance of the remaining window offices shall be divided evenly among the Federal Sector Administrative Judges and the Enforcement Unit Investigators.
>
> 5. Notwithstanding the priority order set forth in paragraphs 1 through 4 above, Administrative Judges, Investigators, Mediators, and any other bargaining unit persons covered by this agreement, who are frequent telecommuters (more than three days per

week) will be assigned a window office in lower priority than all other full time employees.

. . .

This agreement shall not be altered or amended without the mutual agreement of the Parties.

This agreement becomes effective on the date signed by both Parties.

Any disputes concerning the application or interpretation of this agreement shall be resolved through the negotiated grievance procedure or an appropriate third party procedure.

Signed this 12th day of September 2008.

For the Equal Employment Opportunity Commission	For the Union
/s/	/s/
Dana R. Hutter Director, Washington Field Office	Regina M. Andrew President, Local 3614, AFGE

The action complained of by the Union in this matter – its decision to allocate and reserve a window office (Room #4NE17B) at the new Washington Field Office ("WFO") location for a Trial Attorney violated the plain terms of the MOU. The Agency acknowledged as much, but challenged the legal enforceability of the MOU on the basis of its argument that the MOU was "voidable" based upon the Agency's belief that there was an underlying mutual mistake of material fact regarding the staffing of the Trial Attorney position in the Legal Unit. The Union denied that there was any mutual mistake of material fact, asserting that the decision to exclude the Trial Attorney position from receiving priority to obtain a window office was intentional.

There Was No Proof of a Mutual Mistake of Material Fact

The clear weight of the record evidence supports the Union's assertion that there was no mutual mistake of material fact in this case.

The record revealed that:

1) there were two individuals who negotiated the MOU: Dana R. Hutter, then Director, WFO, EEOC, on behalf of the Agency, and Regina M. Andrew, President, AFGE Local 3614, on behalf of the Union;

2) Mr. Hutter and Ms. Andrew both testified at length regarding their negotiations;

3) Mr. Hutter served as Director of the WFO for just under five years prior to September 15, 2008, when Mindy E. Weinstein became Acting Director of the WFO;

4) the MOU was negotiated and signed on September 12, 2008, prior to Ms. Weinstein's appointment and was done without consulting her regarding the terms of the MOU;

5) after she became Acting Director of the WFO, Ms. Weinstein became aware of the terms of the MOU and was unhappy with the omission of the Trial Attorney position from priority relative to the assignment of window offices;

6) Mr. Hutter indicated that he was led to believe that obtaining agreement upon a final MOU was very important to the Agency given the time frame for the projected move of the WFO from 1801 L Street, N.W. ("L Street"), to 131 M Street, N.E. (a location in the "NoMa" neighborhood) and the need to complete those negotiations and reach agreement or impasse prior to making the move and making office assignments; Mr. Hutter noted that, by reaching agreement on the MOU and making office assignments prior to the move, telephone numbers and mailing addresses could be assigned in a timely fashion;

7) prior to the negotiations, there had been a dispute between the Parties regarding window office allocation at the WFO offices at L Street; specifically, a window office

had been assigned to the Trial Attorney and was kept vacant, reserved for him, during the course of a long detail; a number of bargaining unit members who did not have offices with windows were upset over the window office remaining vacant for an extended period; the Union had asked the Agency to fill that window office with another bargaining unit member, but the Agency had refused;

8) the NoMa space had even fewer window offices available for bargaining unit members than the L Street offices and a number of the offices at NoMa had columns in their interior; a number of employees were unable to obtain either window or interior offices and were assigned cubicles/work stations;

9) during the negotiations for the MOU, both Mr. Hutter and Ms. Andrew were aware that the sole incumbent of the Trial Attorney position, Corbett Anderson, Esq., remained on long-term detail to the Office of the Chairman, and that nobody was assigned or detailed to serve as Trial Attorney for the WFO; while on detail, Mr. Anderson was outside of the bargaining unit; if and when he returned to the WFO as a Trial Attorney, however, he would have been back in the bargaining unit;

10) Ms. Andrew testified that she was aware that Local 3614 represented the Trial Attorney position when she agreed to the MOU with the Agency and that she deliberately omitted the Trial Attorney position from priority to the available window offices; Ms. Andrew testified as follows:

> Q: And the fact that the bargaining unit members of the legal unit in the Washington Field Office were omitted from that MOU, you did that on purpose, correct?
>
> A: I certainly did.

(Tr. 35);

11) Ms. Andrew testified about the reference in paragraph 5 of the MOU to other bargaining unit jobs that were not granted any priority under paragraph 4 to receive window offices in the first instance; she stated that, upon reflection, that reference was probably a drafting mistake;

12) Ms. Andrew was asked whether she intentionally omitted the Trial Attorney position and certain other bargaining unit positions from receiving priority in the future (as distinct from original assignments of window offices); she testified as follows:

> Q: Okay. . . . Was it your intention to preclude the trial attorney from obtaining a window office, period, unless everybody else in the judges' unit, investigators and the mediator were occupying window offices?
>
> A: Well, based on the discussions I had, it's not going to be – there's not going to be a person in the trial attorney position.
>
> Q: But this [MOU] isn't limited to September of 2008. These relate to positions that might continue for years.
>
> A: Right.
>
> Q: So that the trial attorney might have more service in 2012 than a whole bunch of AJs or investigators that were hired after that individual went to the field office, right, and my question is was it your intention with respect to paragraph 4 to exclude the bargaining unit trial attorney, if there is one, from being included in the mix to go ahead and exercise length of service in the WFO to obtain a window office? That's the question I'm posing.
>
> A: That was the purpose and I also excluded some other functions from the window office selection. You know, nothing is etched in stone. I mean, had the Agency decided they were going to hire a whole complement of trial attorneys, obviously we would have sat down and renegotiated. There is a provision in here that says by mutual agreement of parties, we could do that, but at the time, at this point in time, the issues were we've got a position that's vacant and we've had that position vacant for well over a year and what are we going to do about it? There was a lot of give and take. I wanted more window units. One of the other things – I know it sounds like it's irrelevant at this point but just to show you that there was a lot of give and take here, I asked for part-time people to be excluded from the window unit classification. There are some people that are AJs and I believe investigators who are part-timers but they get a lot of field office seniority and so they get a window, which doesn't make sense to me either because why do we have part-timers occupying these windows when they're not here the full time? People who are here full time should have the natural light not vice versa, but I couldn't get that in my agreement. I wanted more windows, I couldn't get more windows and I couldn't get everything I wanted but this was the best that I could do.

(Tr. 66-68);

13) Mr. Hutter similarly testified that he understood that the Trial Attorney position was being omitted from priority for window offices under the MOU; Mr. Hutter testified as follows:

> Q: If you could turn your attention to paragraph 4 of Exhibit A, you testified that one of the units in the Washington Field Office is the legal unit. Why is the legal unit omitted from paragraph 4 of the MOU?
>
> A: Paragraph 4 deals with allocating window offices. There are two basic reasons that I recall for the legal unit not being referenced here. One is at the time that this agreement was executed we did not have a trial attorney working in the Washington Field Office at that time. The other is that the Union expressed, during our discussions, something concerning whether or not the legal unit should be a subject of this agreement. They had some objection to including the legal unit in here. I think it had something to do with – I don't remember exactly what the reason was for their objection. I don't think that I really understood it at the time. I don't know.

(Tr. 74-75); and

14) Mr. Hutter testified that he recalled that Mr. Anderson, the Trial Attorney assigned to the WFO, was on a detail at the time; Mr. Hutter advised that he understood from the Union or Mr. Anderson himself or perhaps other sources that Mr. Anderson would not likely be returning to the WFO; in agreeing to exclude the Trial Attorney position from priority in selecting one of the limited number of window offices, Mr. Hutter stated that:

> A: . . . As a general matter, particularly because the turnover in our office was probably higher than normal, meaning that people come and go with some regularity, it was my view that it would be better to allow the staff maximum use of the daylight coming into the offices via windows rather than hold an office for someone who may or may not be coming and who, when they did come, we would have a window office to discuss. Now take that philosophy and combine it with the Union did not adhere to include the trial attorney position in their negotiations and combine that with the fact that it had been impressed upon me the importance of concluding the negotiations before I hired on a position, taking into consideration all of those factors I felt comfortable signing the agreement in the form in which it was finally executed. It was a less than ideal situation at the time that we relocate and when we get trial attorneys, we'll deal with that, or my successor would deal with it as the situation was. That was my approach.

(Tr. 92-93).

Viewing the record in its entirety, it is clear that there was no mutual mistake of material fact. The Agency and the Union negotiators to the MOU both were aware of

Mr. Anderson's prior and current status, as well as the possibility that, at the completion of his detail, Mr. Anderson might return to the WFO or might not. They were also aware that if Mr. Anderson did not return, someone else might be hired to fill the Trial Attorney position or might not. Both Ms. Andrew and Mr. Hutter understood the situation and agreed, as part of the give and take surrounding the MOU, that the Trial Attorney position would not be afforded priority under paragraph 4 to select a window office from among those remaining after the Agency assigned window offices to non-bargaining unit supervisory and managerial employees. It is true that, at the time that the MOU was entered into, it was not known whether Mr. Anderson would be returning to the WFO or not or whether anyone would be hired to fill a Trial Attorney position if he did not. That uncertainty, however, was known by the negotiators and factored into their judgment as to how to handle the situation. Whatever happened thereafter cannot be found to be a mutual mistake of material fact sufficient to void or reform the bargain – which is reflected in the September 12, 2008 MOU.

2) <u>The Agency Plainly Breached the September 12, 2008 MOU</u>

There was no dispute over the events that led to the filing of the grievance. Prior to the actual move during the office selection/assignment period, the Agency set aside window office #4NE17B at the NoMa offices of the WFO, over the objection of the Union, and held it for the Trial Attorney, depriving other bargaining unit employees from exercising priority under the MOU to be assigned that office. The fact that Mr. Anderson was on detail into a non-bargaining unit position did not permit the Agency to assign him an office as a non-bargaining unit employee of the WFO under the terms of the MOU. The only reason that Mr. Anderson was being assigned an office was the fact that his

detail was scheduled to end on or before December 22, 2008, and it was assumed that he would return to the WFO as a bargaining unit Trial Attorney. In an email that she sent to Ms. Andrew on September 22, 2008, Ms. Weinstein indicated that: "Because ADR, Investigations and Hearings all have at least one window office for staff, I plan to reserve one window office for the Legal Unit staff."

In fact, Mr. Anderson never returned to the WFO after the completion of his detail. In May 2009, a new Trial Attorney was hired for the WFO and that individual was assigned the reserved window office. Thus, the position of the Agency is not that a newly hired Trial Attorney be permitted to exercise WFO seniority to select from among the available window offices (a matter at odds with the language and intent of the MOU, but which might have been agreeable to the Union if a proposal had been made to modify the MOU in that regard), but rather that the Trial Attorney be accorded a guarantee of a window office (since there is only one Trial Attorney and the Legal Unit was being guaranteed one window office from among those available for bargaining unit employees).

The Agency in the lower steps and at the arbitration did not dispute that its actions violated the plain terms of the MOU. Its sole argument was that there was a mutual mistake of fact and/or that the interactions between Ms. Andrew and Ms. Weinstein in September and October 2008 supported the Agency's actions. The claim of mutual mistake of fact has been rejected for the reasons noted previously. It simply is at odds with the credible evidence as to the actions of both Ms. Andrew and Mr. Hutter in their negotiations. Both are attorneys of many years of experience, skilled in negotiations and in confirming their bargain in written form. Despite Mr. Hutter's imminent departure

from the Director position, there was no reservation of rights by the Agency requiring that Ms. Weinstein concur in the MOU's terms. In fact, Mr. Hutter testified to the contrary that he was tasked with concluding the impact and implementation bargaining process and reaching a final MOU quickly to allow the relocation and move to take place expeditiously.

For all of these reasons, the claim by the Agency, as noted in the Step 2 response, that "the Legal Unit was inadvertently omitted when WFO management and the Union negotiated the provisions . . . [of the MOU]" is rejected. What was shown was that Ms. Weinstein would have insisted upon inclusion of a reserved office for the Legal Unit if she had been negotiating on behalf of the Agency, not that Mr. Hutter and Ms. Andrew believed that they had done so when they signed the MOU. There was no mutual mistake of material fact. To the contrary, the record evidence made clear that not only was there no mutual mistake of material fact, but that the MOU provisions in paragraph 4 reflect the intent and understanding of both negotiators regarding the Legal Unit and priority to receive a window office in the WFO.

The assertion that the communications between Ms. Andrew and Ms. Weinstein in the weeks following September 12th provided some basis to permit the Agency to act as it did is examined next.

3) <u>The September and October 2008 Discussions Did Not Change the Terms of the 2008 MOU and Provide No Basis for Interpreting that MOU Contrary to Its Plan Meaning and Contrary to the Understanding of the Individuals who Negotiated the MOU</u>

Shortly after assuming the position of Acting Director, WFO, Ms. Weinstein became aware of the MOU and began the task of ensuring that office assignments at NoMa were made. On September 22, 2008, Ms. Weinstein sent an email to Ms. Andrew

attaching a proposed chart showing office assignments in WFO. The chart contained an office for the Trial Attorney. The email noted that:

> As indicated above [referring to the statement "Add trial attorney Corbett Anderson (returning to WFO in December 2008)"], the trial attorney is expected back in December. As you noted, he is not a member of your bargaining unit. Because ADR, Investigations and Hearings all have at least one window office for staff, I plan to reserve one window office for the Legal Unit staff.

Ms. Andrew replied a few hours later, noting in regard to the updated proposed chart that:

> Local 3614 does represent the bargaining unit employees in legal too. I believe Brenda [Brenda Hester, First Vice-President, AFGE Local 3614] misspoke in this regard. I agree with you that there should be a window office, if desired, made available to the trial attorney. However, in the event that the trial attorney does not want a window office, it should not remain vacant (as it has for the better part of a year). If this becomes an issue, we need to discuss it again.

Ms. Andrew testified at the arbitration that her feeling that it would be nice if Mr. Anderson could have a window office if he returned (and her information was that Mr. Anderson was not returning to the WFO) did not constitute agreement to amend the MOU and that she advised Ms. Weinstein that there simply were not enough window offices being made available to bargaining unit members to allow a set aside for the Trial Attorney without further discussion and an agreement to change the MOU. Ms. Andrew explained that the set aside of the office for the Trial Attorney was implemented over her objection and, on October 23, 2008, Ms. Andrew filed the grievance in this case seeking compliance with the language of the MOU.

The two emails fell short of a mutual agreement to amend the clear language of the MOU. Nor can there be any claim of detrimental reliance by the Agency upon those communications. First, the limited comment of Ms. Andrew in her responsive email was not one that could reasonably be relied upon by the Agency, particularly when it was clear long before offices assignments were concluded and the move took place that the

Local was insisting upon compliance with the MOU as negotiated and no employee became vested with any expectations that he or she would have that improperly reserved window office. Second, there was no operational reason identified that would require that a Trial Attorney receive a window office.[1] Third, Ms. Andrew credibly explained that she was indicating nothing more than a willingness to discuss allocating a window office to the Trial Attorney under circumstances that never came to pass and likely would have required an appropriate quid pro quo for agreeing to such a modification of the MOU (and none was offered or agreed to).

In sum, I am unpersuaded that the September 22, 2008 emails or resulting conversations constituted a mutual agreement to amend the MOU or provided grounds for estopping the Union from insisting upon enforcement of the MOU as written.

4) The Appropriate Remedy

The final matter requiring discussion pertains to the appropriate remedy. The appropriate remedy in this case is clear – to require that the Agency comply with the MOU (i.e., a cease and desist order) and reassign the window office held by the Trial Attorney for selection in accordance with the agreed upon arrangements and priorities for selecting window offices contained in the MOU.

---

[1] Even if such an interest existed, it was waived by the intentional actions of Mr. Hutter on behalf of the Agency. Certainly, there was no showing of any changed circumstances that would support the abrogation of a negotiated MOU. Any changed circumstances (and none were shown) would need to have been addressed by a request to bargain a change to the MOU, not by unilateral action in violation of the negotiated MOU. The MOU was an enforceable Section 7106 appropriate arrangement and there was no contention otherwise. The Agency's position, as noted, was that the MOU was unenforceable solely because it was allegedly based upon a mutual mistake of material fact.

AWARD

The Agency violated the September 12, 2008 Memorandum of Understanding Concerning Allocation of Office Space for the EEOC Washington Field Office, 131 M Street, NE, 4th Floor, when it excluded a window office from the selection pool and reserved and later assigned it to a bargaining unit Trial Attorney. The Agency's claim that the September 12, 2008 MOU is unenforceable or void or voidable due to a mutual mistake of material fact is rejected.

The Agency is directed to cease and desist from future violations of the September 12, 2008 MOU and to offer the window office in question (#4NE17B) for selection in accordance with the provisions of the September 12, 2008 MOU.

For the reasons set forth in the foregoing Opinion and Award, the grievance is sustained.

April 23, 2010

Ira F. Jaffe, Esq.
Impartial Arbitrator