Federal Mediation and Conciliation Service

In the Matter of Arbitration Between

DEPARTMENT OF VETERANS AFFAIRS, WASHINGTON, DC
and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFGE) NATIONAL VETERANS AFFAIRS COUNCIL (NVAC)

FMCS Case No. 13-50679-A

ARBITRATOR
Stanley D. Henderson

APPEARANCES
For the Agency: Kimberly P. McLeod, Attorney
For the Union: Ibidun Roberts, Attorney

Opinion and Award

On August 14, 2012, the American Federation of Government Employees (AFGE), National Veterans Affairs Council (NVAC) (the Union), filed a national-level grievance complaining that the Department of Veterans Affairs (the Agency) was failing to comply with Article 27, Section 10 of the parties' 2011 Master Collective Bargaining Agreement (the Agreement) concerning the Union's participation in the development of employees' performance improvement plans. Following the Agency's denial of the grievance on October 19, 2012, the Union moved the matter to arbitration under the Agreement.

I. Issue

The Union states the issue as whether the Agency violated the Agreement by requiring an employee to actually designate a Union representative prior to any "consultation" with the Union in developing the employee's performance improvement plan (PIP), and if so, what remedy is appropriate. The Agency says the issue is whether, taking into account federal statutes, the provision in dispute grants the Union "a separate contractual right to participate in the development of an individual employee's PIP."

II. Relevant Contract and Statutory Provisions

Central to this dispute is Article 27 of the 2011 Master Agreement, which provides in relevant part:

ARTICLE 27 - PERFORMANCE APPRAISAL

Section 10 - Performance Improvement Plan (PIP)

A. If the supervisor determines that the employee is not meeting the standards of his/her critical elements(s), the supervisor shall identify the specific, performance-related problem(s). After this determination, the supervisor shall develop in consultation with the employee and local union representative, a written PIP. The PIP will identify the employee's specific performance deficiencies, the successful level of performance, the action(s) that must be taken by the employee to improve to the successful level of performance, the methods that will be employed to measure the improvement, and any provisions for counseling, training, or other appropriate assistance....

C. Ongoing communication between the supervisor and the employee during the PIP period is essential; accordingly, the supervisor shall meet with the employee on a bi-weekly basis to provide regular feedback on progress made during the PIP period.... If requested by the employee, local union representation shall be allowed at the weekly meeting.

It is important to note two developments in the historical evolution of this current Article 27, Section 10 language on performance improvement plans, or PIPs.

First, in the parties' preceding contract, the 1997 Master Agreement, what is now treated in Article 27, Section 10A, quoted above, was dealt with in Article 26 - Performance Appraisal System, Section 7A of which was titled Performance Improvement Plan (PIP) and opened with this sentence:

A. If the supervisor determines under Paragraph 6H that the employee is not successfully performing their job duties, the supervisor shall, in addition to providing the employee the written notice discussed above, develop in consultation with the employee and union representative, upon request, a written PIP.

Second, pursuant to the reopener provision in Article 26 of the 1997 Master Agreement, the parties renegotiated Article 26 in 2005, replacing it with a revised Article 26 - Performance Appraisal, effective February 1, 2006, which in Section 10 (Performance Improvement Plan) provided:

A. If the supervisor determines that the employee is not meeting the standards of his/her critical element(s), the supervisor shall identify the specific, performance-related problem(s). After this determination, the supervisor shall develop in consultation with the employee and union representative, a written PIP.

Thus, in 2006 the parties deleted from Section 10A the "upon request" language that had

been in the 1997 Master Agreement (immediately following "union representative"), and in negotiating the 2011 Master Agreement they added to Section 10A the word "local" to precede the carried-forward reference to "union representative."

In addition to Article 27 of the 2011 Master Agreement, this dispute requires consideration of the Agency's reliance on the following federal statute:

PRIVACY ACT OF 1974
5 U.S.C. § 552a(b)

> (b) Conditions of Disclosure. No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be [within one of a dozen enumerated exceptions].

III. Facts

The parties, at the hearing, stipulated that there is no dispute as to the factual basis for the national grievance filed by the Union on August 14, 2112. The grievance alleges that the VA, by virtue of instructions given its representatives at various Agency offices and locations, has and continues to require an employee to designate a local Union representative as a prerequisite to recognizing the Union's right to participate in the development of a PIP for the employee. In providing its representatives such guidance, the grievance asserts that the Agency has failed to comply with Article 27, Section 10A of the 2011 Agreement, which, says the Union, does not condition the Union's right to participate in the development of a PIP on an employee's designation. Various remedies, including an order to cease providing Agency representatives with such objectionable guidance, are requested.

The Agency, responding by letter on October 19, 2012, denied the grievance on two grounds: (1) since the Art. 27, Sec. 10A right to a representative is given the employee, not the Union, the Agency does not have to involve the Union in the PIP process in the absence of the employee's actual designation of a representative; and (2) because notification that an employee's performance is unacceptable, requiring a PIP, is personal information, acceptance of the Union's interpretation of Art. 27, Sec. 10A results in a violation of the Privacy Act's § 552a(b), which prohibits the disclosure of a federal employee's personal information without the employee's consent. Hence, pursuant to the Agreement's Article 24 (Official Records), an employee must designate a Union representative in writing in order for the Union to gain access to PIP records.

This dispute over the Union's contractual role in the PIP process is not of recent origin. The record reveals that the Union grieved the issue in late 2008, with the parties settling the grievance without resolving the issue of the meaning of the contract language in dispute (then

Sec. 10 of revised Art. 26). Two years later, in December 2010, the Union (AFGE Local 17) again grieved the issue, the Agency denied the grievance in January 2011, and the Union gave notice to invoke arbitration but did not pursue that step. Ag. Exh. 3, 4, 5. The 2011 Master Agreement became effective shortly thereafter, on March 15, 2011.

IV. Positions of the Parties

The Union. The Union makes two principal arguments. One is that it has met its burden of proof that the Agency violated Art. 27, Sec. 10A by requiring employee consent prior to a supervisor's consulting with the local Union representative in developing an employee PIP. It relies on the express language of Sec. 10A, insisting that the "plain meaning" rule of interpretation applies since that provision is clear and unambiguous, and that its interpretation of the phrase "local union representative" to require PIP-development consultation without any request by an employee is consistent with the parties' usage of that phrase throughout the Agreement. The Union further contends that bargaining history, elaborated by the testimony of the Union's Wetmore and the Agency's Kerber, unequivocally supports its reading of Sec. 10A. It stresses that the 2006 reopener negotiations resulted in the parties dropping the words "upon request" after the reference to "union representative," and that in the lengthy negotiations leading to the current 2011 Agreement this deletion was not restored. Rather, the essence of the 2006 PIP revision was carried forward in the new Sec. 10A.

The Union further argues that the materials prepared by the parties for the joint training of Agency management and employees, and Union officials, respecting the provisions of the 2011 Agreement, notably U. Exh. 2, confirm its interpretation of Sec. 10A. And by virtue of the Agency's failure to produce a requested management witness at the hearing, the Union says it is entitled to an adverse presumption that Agency managers, by their actions, have agreed with the Union's interpretation of its contractual rights under Sec. 10A.

The Union's second major contention is that the Agency has failed to prove that the Privacy Act would be violated by Union participation in developing an employee PIP. This is so because the Agency failed to show that a PIP-development meeting involves any "record" within the meaning of the Privacy Act, nor did it produce evidence of a system of records in which information is retrieved (that is, Union presence at a PIP development meeting is not providing information that is contained in a system of records). Even if the Privacy Act is found to apply, the Union argues that information regarding development of a PIP can be disclosed under either of two exceptions to the Act's prohibition against disclosure. One exception is for records or information required to be disclosed under the Freedom of Information Act (FOIA), which involves a balancing of the public's interest in disclosure against an employee's privacy interest. The other is the "routine use" exception, which, says the Union, is satisfied in this case because any personal information disclosed in a PIP meeting relates solely to the employee in question and is relevant to the express purpose of the meeting and the Union's needs in performing its function as employee representative.

For these reasons, the Union asks that the grievance be sustained.

The Agency. The Agency interprets Art. 27, Sec. 10A to mean that it has a duty to develop a PIP only "with the employee and *their* designated local union representative," that absent an employee's designation the Union has no contractual right to be involved. Its principal argument offered to support this interpretation is that in the 2006 negotiations that included deletion of "upon request" from the 1997 PIP provision the Agency's negotiators "did not intend" that change in language to give the Union any independent standing in PIP development. In essence, the Agency, relying on the testimony of witness Kerber, its chief negotiator at the time, asserts that "the parties simply did not agree" that dropping "upon request" was intended to change the meaning of the 1997 PIP provision.

The Agency further argues that the 2006 language carried into Sec. 10 of the 2011 Agreement does not confer the participatory right the Union claims, because the term "union representative" (distinguished from the term "union"), as used throughout the Agreement, is intended to attach the right of representation to an employee. Moreover, since Sec. 10C states that Union presence during the required weekly communications between a supervisor and employee subject to a PIP is expressly at the "request" of the employee, and Sec. 10E states that a supervisor may terminate a PIP at any time by notice to the employee alone, the Agency argues it would be wholly inconsistent to interpret Sec. 10A to include an independent Union right.

The Agency's second major argument is that the federal Privacy Act governs the application of Art. 27, Sec. 10A in PIP matters. Since Art. 2 of the Agreement incorporates applicable federal statutes, including the Privacy Act, and Art. 27, Sec. 3 provides that performance-appraisal information must be "collected, used, and maintained in accordance with the Privacy Act," the Agency insists that Sec. 10A must be read to permit Union participation in PIP development only when an employee invites that participation. This is so because the Privacy Act broadly prohibits the disclosure of federal employees' personal information without their consent. Citing FLRA case authority, the Agency says that disclosing to the Union the performance-appraisal information of an employee about to be placed on a PIP (unacceptable performance of a position's "critical elements") would result in a substantial invasion of the employee's privacy that is not outweighed by interests served by disclosure to a Union representative. The Agency contends that none of the Act's exceptions to the disclosure prohibition is applicable where an employee's performance appraisal is involved.

For these reasons, the Agency asks that the grievance be denied.

V. Analysis and Findings

Two questions are presented. (1) Does Art. 27, Sec. 10A of the Agreement confer on the local Union representative a contractual right to be consulted in the development of an employee's written PIP without regard to the employee's request for Union participation? (2) If

Sec. 10A confers such a right in the absence of employee consent, is the exercise of this right ultimately governed, perhaps nullified, by the federal Privacy Act (5 U.S.C. § 552a(b))?

A. The Contract Issue

The Union, the moving party, is assigned the burden of proof in this arbitration of a nondisciplinary grievance. It must demonstrate by a preponderance of evidence that its interpretation of the terms in dispute is more plausible than that offered by the Agency.

The first principle of contract construction is that, to the extent possible, an interpretation is to be based on the words of a written agreement, rather than on inferences drawn from outside sources or from conduct that is equivocal in nature and thus of uncertain relevance. The contractual basis for the grievance is Art. 27, Sec. 10A of the 2011 Agreement. The section's first sentence contemplates a situation where a supervisor, having determined that an employee's overall performance is unacceptable by virtue of poor performance of a position's critical elements, has identified the "specific, job-related problems." The section's second (and critical) sentence states what is to happen next:

> After this determination, the supervisor shall develop in consultation with the employee and local union representative, a written PIP.

There is no ambiguity or vagueness in this language. By its terms, the sentence obliges ("shall") a supervisor to develop a written PIP "in consultation with the employee and local union representative." To "consult" is to ask the advice or opinion of someone; a "consultation," says the standard dictionary, involves a meeting in which parties consult or confer, or deliberate together. Here, the parties to the required consultation are not left optional with a supervisor but explicitly identified—the employee "and" local union representative.

In short, the "plain meaning" of the provision in dispute supports the Union's claim that its Sec. 10A right to participate in the development of an employee PIP is not conditioned on an employee's designation of a local Union representative. That representative is expressly made a participant in the PIP process; no power to exclude is mentioned. Nonetheless, it is well understood that apparently plain meanings may not reveal what the parties actually meant in the language used. Interpretation is always contextual, and because sentences are not isolated units of meaning, a contract must be interpreted as a whole. Account must be taken also of evidence beyond the contract itself—e.g., bargaining history or past practice—that is offered to prove a meaning the terms in dispute will reasonably bear. All of this is by way of saying that the customary presumption that written contracts are to be enforced in accordance with the ordinary meaning of negotiated language is, though strong, nevertheless rebuttable.

In rebutting the presumption, the Agency, the party claiming that the written language means something other than what it seems to mean on its face, carries a heavy burden of demonstration. That burden is not met by showing it intended something other than what the

written language says. The governing objective theory of contract interpretation requires that the Agency produce believable proofs that both parties agreed that their words meant something other than the ordinary meaning objectively expressed.

What is there in this record bearing on the meaning of the terms in dispute?

First, the evidence of bargaining history is both relevant and telling, particularly the 2005-2006 renegotiation of the 1997 performance-appraisal article (the negotiations started and were concluded in 2005, with the revised article made effective in early 2006). The record establishes that the Agency initiated reopening of then Art. 26, pursuant to a reopener clause applying only to that article. It apparently wished to return to a five-tier appraisal system, as well as rework other provisions it deemed burdensome (e.g., the pre-PIP, or PAP, process and guidance for executing appraisal plans). The Union also wished to return to Art. 26, including the PIP provisions and its role in the process.

The 1997 Agreement, in Sec. 7 of Art. 26, provided that a supervisor who determined an employee was not successfully performing job duties "shall ... develop in consultation with the employee and union representative, upon request, a written PIP." In the 2006 reopener bargaining, the parties made numerous revisions of that article, increasing its length from five pages to twelve. One revision was the dropping of "upon request" from the 1997 provision. Hence the rewritten 2006 PIP provision, now Sec. 10A of Art. 26, read in relevant part: " ... the supervisor shall develop in consultation with the employee and union representative, a written PIP."

William Wetmore, a principal Union negotiator in the 2006 reopener talks, testified that dropping "upon request" from Sec. 10A was a "large issue" for the Union, because an individual's PIP affected the entire bargaining unit, and thus the Union deemed it important that its right to be involved be established. He stated that the Agency opposed the deletion on the grounds that some employees may not want the Union involved and some may not be forthcoming with a Union representative present. The Union's response was that employees intimidated by the PIP process might welcome the Union's presence. Wetmore stated that at the conclusion of several days of "hard negotiations," the Agency agreed to removal of the "upon request" phrase, perhaps because the Union agreed to delete the pre-PIP process, which, Wetmore stated, was deemed by the Agency to be too favorable to employees.

Bonnie Kerber, the Agency's chief negotiator in the 2006 bargaining, testified she could not recall why the phrase "upon request" was taken out of Art. 26. Nor could she recall any discussions whatsoever about removing this language. Her handwritten notes made at the time (Ag. Exh. 6) were silent on the "upon request" issue, indeed on Sec. 10 generally.

The Agency contends that Kerber's testimony proves that its negotiators "did not intend" the 2006 change in the Sec. 10A language to give the Union a direct right to participate in PIP development, and thus there was no mutual agreement that dropping "upon request" altered the

meaning of the 1997 provision. Kerber, like Wetmore an experienced labor negotiator, could recall no discussion of removing "upon request"; she stated unequivocally that she did not recall why that language was deleted, offering her silent notes to support her testimony. This leaves undisputed the testimony of the Union's Wetmore, which establishes that indeed there was an agreement on the deletion issue.

The point to be stressed, however, is that a finding of mutual agreement in 2006 to change the Union representative's status respecting PIP participation does not rest alone on the Wetmore testimony. That change is what the parties' words and actions in fact accomplished. If the ordinary meaning of contract language is to be given effect, the parties' removal of "upon request" from its placement in conjunction with "union representative"—thereby freeing the representative's PIP standing from any employee request—cannot fairly be read to support the Agency's position that employee consent nevertheless remained a precondition. Again, the operative meaning in contract interpretation is the outward expression—what is reasonably communicated by the parties' language in the circumstances. A party who intends words put into a contract to mean something other than the reasonable meaning the words convey, but who fails to disclose that different subjective intention, has no basis for objecting to an interpretation based on the words as written. It follows that the Agency's claim of "no intention" to grant what the contract pretty clearly says cannot be the basis for unraveling the parties' removal of "upon request" from the PIP provision.

Coming to the lengthy negotiations for the successor 2011 Agreement, a 300-page document, the record establishes that there was no discussion about changing the 2006 Sec. 10A provision on the PIP process. Rather, save for the addition of the word "local" to precede "union representative" in 10A's critical second sentence, the entire 10A language negotiated in 2006 was rolled into the 2011 Agreement unchanged. No Agency witness participating in the 2011 negotiations testified as to the circumstances explaining the addition of the word "local." Union negotiator Wetmore, on cross-examination, stated that this addition was intended to make clear that it was the Union local, not the national Union (the NVAC), that was involved in PIP development. He further indicated that this addition occurred during the "formatting stage," as part of the parties' final review, and clarification, of contract language. In any event, it cannot be found on this record that adding the word "local" altered in any significant way the 2006 negotiated language that, without substantive discussion, was carried intact into Sec. 10A of the current Agreement.

Nor can support be found for the Agency's reading of Sec. 10A in the training materials used by the parties following execution of the 2011 Agreement. In an effort to train both Agency managers and Union officials on the provisions of the Agreement (again, 300 pages in length), the parties, working through joint committees, employed an outside firm to prepare some 500 slides for group presentations, as well as an Instructor's Guide for trainers responsible for the presentations (U. Exh. 2). The Union's Wetmore testified that 30 Agency managers and 30 Union officials reviewed and discussed the slides and the Guide, agreeing on "what was to be said" during training sessions. The Guide addresses Sec. 10A at page 28, stating in relevant part:

DELIVERY
Section 10. Performance Improvement Plan (PIP)
10A. If a supervisor determines that an employee is not meeting standard critical elements of his/her job, the supervisor will identify the specific performance-related problems.

-The supervisor will then develop a written PIP **in consultation with the employee and local union representative....** [Bold type in original.]

NOTE
* 10A may lead to discussion. Participants may ask, "What if the employee doesn't want the union rep involved in the process?"
* The answer is that the Master Agreement applies to all employees in the AFGE bargaining unit, even if they don't like it. Do not spend a lot of time on this.

The Agency's response to this Guide provision is "we did not agree" to it. Denise Biaggi-Ayer, who directed the Agency's Labor Management Relations office but was not involved in either the 2006 or 2011 bargaining, testified that while she had reviewed the training slides and Guide, she "missed catching" the above-quoted language, that the Agency never agreed to what is said in the note, and that she believed a Union representative had added this commentary at one of the joint committee meetings. Biaggi-Ayer further testified that, largely because of Privacy Act concerns, her interpretation of 10A did not change by virtue of the deletion of "upon request" in 2006, and thus her office developed its own Manager's Guide to the 2011 Agreement, which, in commentary on Sec. 10A, states: "If the employee does not designate the union as his/her representative, there is no obligation to consult with the union." Ag. Exh. 8. This was an "in-house" guide, prepared for VA managers without Union participation.

The Biaggi-Ayer testimony does little to further the Agency's reading of Sec. 10A. Whether or not the Agency agreed with the Training Guide's treatment of 10A, the Guide in fact was reviewed by joint committees composed of equal members, as well as Biaggi-Ayer, and used in some 29 training sessions (100 participants attending each session). No evidence was offered to show the 10A note was challenged during these proceedings. Again, at some point it becomes too late for a party to a written document, having signed off on it, to defeat the document on the ground it "missed catching" a term of the writing important to the other party. Moreover, even if the testimony were to be credited in some measure, it is wholly insufficient to offset the parties' earlier words and conduct in making the 2006 and 2011 written bargains, notably deleting "upon request" in 2006 and confirming the deletion in 2011.

There is, in addition, uncontradicted testimony that the Agency's final review of the 2011 Agreement by department heads yielded objections to some 15 or 16 provisions, but no complaint respecting Sec. 10A, or the PIP system generally, was raised by that group.

The Agency, pointing to various provisions of the Agreement, argues that the term "union representative" is commonly used by the parties to attach the right of representation to an

individual employee. In contrast, the single word "union" is used in the Agreement to denote a Union right that exists separate and apart from an employee. Hence, says the Agency, the use of "union representative" in Sec. 10A is itself a sufficient basis for requiring employee consent to Union presence during PIP development, because the phrase really means "the employee and *their* designated representative." The linguistic difficulties in finding "their" in this phrase are obvious. Nonetheless, for reasons already noted (agreed language and bargaining history), this argument must be rejected. Section 10A, by its terms, requires a supervisor to consult "with the employee and local union representative." There is not so much as a hint that the Union's participation depends on employee consent. The term "union representative," on this record, is far too inadequate a basis for returning to the section the "upon request" requirement the parties have twice agreed is no longer to be in Sec. 10A.

The Agency further argues that Sections 10C and 10E must be considered in interpreting 10A. Since 10C gives the employee subject to a PIP the option to request Union representation at required bi-weekly progress meetings with the supervisor, and 10E authorizes a supervisor to terminate a PIP at any time by notice to the employee alone, the Agency says it would be "wholly inconsistent" to interpret 10A to include a Union representational right in PIP development. In ascertaining the interpretive relevance of 10C, it is essential to note that there was no equivalent provision in the 1997 Agreement. The PIP provision, Art. 26, Sec. 7A, simply required a supervisor to develop a written PIP "in consultation with the employee and union representative, upon request." Then, in the 2006 revision of PIP procedures, the parties not only deleted the words "upon request" from this provision (Sec. 10A of Art. 26), but added a 10C provision on "ongoing communications" between supervisor and employee during the PIP period, concluding with this sentence: "If requested by the employee, Union representation shall be allowed at the weekly meeting."

As noted, the parties in concluding the 2011 Agreement carried forward the entire 10A language of the 2006 revision (adding only the word "local" to precede "union representative"). Equally important, they carried into 10C of the 2011 Agreement the exact language of the 2006 10C provision, which leaves to an employee the question of Union presence at PIP progress meetings. In short, in 2006 the parties dropped "upon request" in 10A PIP development, while adding in 10C an employee "request" option for Union presence at PIP-progress meetings with a supervisor, and in the 2011 Agreement they reaffirmed this differential treatment of the factor of employee request.

The conclusion is inescapable that the parties, in bargaining, twice demonstrated they knew how to both remove and insert a contract term respecting an employee's request for Union representation. The manifested intention is that 10C participation depends on an employee request, but 10A participation by a local Union representative does not. Nor can it be found that the parties' intention so clearly manifested in 10A and 10C is put in doubt by 10E's grant to a supervisor of the power to terminate a PIP by notice to an employee whose performance has improved to an acceptable level, without involving the Union representative. Rational labor bargainers, in such circumstances, presumably understood that the business of developing a PIP

is far different from that of ending one that is no longer needed.

Accordingly, this record compels a finding that Art. 27, Sec. 10A of the Agreement confers on the local Union representative a contract right to be consulted in the development of an employee's written PIP, a right that does not depend on a request by the employee.

B. The Privacy Act Issue

The remaining issue is whether the Privacy Act, raised by the Agency as an affirmative defense, nullifies the right to be consulted in PIP development conferred by Sec. 10A. The Agreement says in Art. 2 that its administration is "governed by applicable federal statutes," and Art. 27, Sec. 3 declares that, whatever the source of information used for "performance appraisal" (i.e., the entire Art. 27 process of reviewing and evaluating performance), such information must be "collected, used, and maintained" in accordance with the Privacy Act.

It is important to note that this is not the typical case involving tensions between a collectively-bargained contract right and the Privacy Act. The Agency's brief relies on a line of typical cases—complaints that an agency committed a statutory unfair labor practice by refusing to provide the union with copies of performance appraisals or ratings, and supporting documents, for some or all unit employees. E.g., Dep't of Transportation, FAA and Nat'l Air Traffic Controllers Ass'n, 51 FLRA 324 (1995). Such complaints normally are based on a union's claim that the records it seeks are necessary for it to perform its representative function (e.g., investigate and process grievances). There are problems in attempting to find in these decisions guidance for resolution of this dispute, the first of which is that these cases are readily distinguishable factually (and thus in legal issues presented).

The center of the dispute in the typical cases is access to records known to be in an agency's record system. In the instant case, no identified record is sought. The center of this 10A dispute is not a record or record system, but merely a right to notice of, and to attend, a meeting preliminary to developing a written plan to correct an employee's job performance. As the Union concedes, Sec. 10A imposes no bargaining duty on an agency supervisor. Nor does it grant the Union representative a right to negotiate a PIP on behalf of an employee, or participate in the meeting as an equal. All we are talking about here is a right to be "consulted," that is, a right to notice of a meeting, to attend, observe, hear what is said about an employee's job problems, ask questions or comment when appropriate, but not "butt in." Not surprisingly, there is authority holding that a union's bargaining proposal requiring an agency to give the union notice of, and an opportunity to attend, meetings concerning placing employees under "last-chance" agreements violates neither the Privacy Act nor management's right to discipline employees. AFGE Council 214 and United States Dep't of the Air Force, 38 FLRA 309 (1990).

The crucial question is whether the Act applies—its requirements are satisfied—in this case. Not all disclosures of personal information by agency personnel are prohibited. Rather, the language of the Act reveals a purpose to preclude only a "system of records" from serving as the

source of personal information about an individual that is disclosed by an agency without the individual's consent. The Union urges that the Agency has failed to produce evidence sufficient to satisfy the Act's requirements. It insists that providing for Union presence at a PIP-development meeting involves no "record," no "system of records," and no information "retrieved" in the manner the Act prescribes.

The Act's prohibition is stated in 5 U.S.C. § 552a(b):

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, ... except pursuant a written request by, or with the prior consent of, the individual to whom the record pertains, unless disclosure of the record [comes within one of 12 stated exceptions].

A "record" means (§ 552a(4)):

> any item, collection, or grouping of information about any individual that is maintained by an agency, including, but not limited to, his ... employment history, and that contains his name, or the identifying number ... or other identifying particular assigned to the individual....

The term "system of records" means (§ 552a(5)) "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number ... or other identifying particular assigned to the individual...."

Accordingly, in order for a disclosure to come within the prohibition, there must be an item of information that qualifies as a record "contained in" a system of records and is "retrieved" by an individual's name or identifying particular from that information system.

Does the evidence in this record establish these requirements? The only witness offering testimony as to what normally occurs at a PIP-development meeting was the Union's Wetmore, who currently chairs its grievance-arbitration committee and, since 1979, has served in various attorney-advisor roles, including the Board of Veterans Appeals. He testified that it was well understood that a supervisor called and controlled such meetings, and that both the employee and the Union representative often asked questions, or commented, in response to a supervisor's presentation. When asked on cross-examination whether a supervisor must accept advice offered by the representative, Wetmore answered "no," that management decides whether to impose a PIP, and on what terms, and that the Union's limited role was to aid in devising a PIP that would correct an employee's shortcomings.

Wetmore stated that a supervisor may or may not have "written up something" at the time of the meeting; if so, it was likely a list of the employee's deficiencies and perhaps notes outlining actions to be taken. He confirmed that a supervisor normally prepared a written PIP

after the meeting, not before, adding that there were occasions when a concluded PIP was later modified following further conversations among the parties. As noted earlier, Sec. 10A itself contemplates that a PIP-development meeting is required only after a supervisor has identified "specific, performance-related problems" critical in nature. No pre-consultation writing is mentioned. It is the required consultation that calls for the written PIP.

There was no testimony about the number of PIP meetings, or actual PIP plans, during a given period. One document in the record includes a statement made in 2011 by an Agency official that "a PIP occurs very infrequently."

The record leaves no doubt that the information typically disclosed at a PIP-development meeting is that an individual's job performance has fallen below acceptable levels. That is indeed employment information protected by the Act, and oral disclosures come within that protection. Yet, the supervisor making the disclosure presumably acquired a good portion of such information by observation of, and discussions with, the employee over time, as well as from discussions with an employee's coworkers. There is no evidence indicating otherwise. And information acquired in this manner, if strong enough to indicate a PIP is called for, is likely to be fresh, not stale, from the distant past. The supervisor may have at one time seen an employee's annual performance appraisal, but there was no Agency testimony by a supervisor or other informed official showing that this was how a supervisor normally—or even occasionally—proceeded in pre-PIP meetings.

In short, what we know from this record about job-performance information likely disclosed at PIP-development meetings does not translate well to the Privacy Act's prohibitory language. All that 10A contemplates a supervisor will disclose at such a meeting is the "specific, performance-related problems" that underlie a determination that a written improvement plan should be the next step.

As the Union correctly argues, there is no proof in this record that information ordinarily disclosed at a pre-PIP meeting both (1) constitutes a "record" which is "contained in a system of records" and (2) was "retrieved" from such a system. In fact, the activity in dispute, a meeting attended by three people, is what leads to a written PIP and thus a record within the meaning of the Act.

Accordingly, this case is governed by an established line of authority holding that the Privacy Act is not violated where a disclosure arises not by virtue of retrieval from an agency record system, but from the personal observation or knowledge of agency personnel. See, e.g., Olberding v. United States Dep't of Defense, 709 F.2d 621 (8thCir.1983), *aff'g* 564 F. Supp. 907 (S.D.Iowa1982) (disclosures arising from personal knowledge of individual's medical records, even though information disclosed is identical to that contained in agency's record system, not within Privacy Act since disclosures not made as result of "retrieval" from records system); Jackson v. Veterans Administration, 503 F.Supp. 653 (N.D.Ill.1980) (where only independently-acquired information disclosed, absent evidence disclosures referred to or utilized

records retrieved from individual's file, there is no violation of letter or spirit of Act); King v. Califano, 471 F. Supp. 180 (D.D.C.1979) (a personal opinion stated from memory does not constitute a disclosure of a record within the Act's meaning).

In a word, there is a distinction between information retrieved from a system of records and information independently acquired. While the Act covers more than mere physical dissemination of records, the general rule is that it prohibits only nonconsensual disclosures of information that has been "retrieved"—"initially and directly," say the cases—from a record contained in a system of records. Bartel v. FAA, 725 F.2d 1043 (D.C.Cir.1984). If a party discloses information obtained independently of a protected record, the Act is not violated even if identical information is contained in the agency's records. Thomas v. United States Dep't of Energy, 719 F.2d 342 (10thCir.1983).

The reasoning underlying the general rule is set forth in the often-cited Savarese v. United States Dep't of Health, 479 F. Supp. 304, 308 (N.D.Ga.1979), aff'd sub nom., Savarese v. Harris, 620 F.2d 298 (5thCir.1980), where the District Court reviewed the Act's text and legislative history, concluding:

> ... Congress had as its purpose the control of the unbridled use of highly sophisticated and centralized information collecting technology. The capacity of computers and related systems to collect and distribute great masses of personal information clearly poses a threat that the Privacy Act seeks to remedy. That problem is not, however, present in this action. On the contrary, there was no utilization whatsoever of such an information system to retrieve the information at issue in this case. It may have been in such a system, but the uncontradicted evidence shows that no retrieval or disclosure from such a system was present.

The *Savarese* court, in embracing the proposition that the Privacy Act does not cover disclosed information merely because the information happens to be found in a records system, declared that any other result would be "implausible," because (479 F. Supp. at 308):

> [N]o government employee could utter a single word concerning any person without first reviewing all systems of records within the agency to determine whether or not the information was contained therein. In day-to-day operations of the federal government, officials are appropriately called on to make numerous statements concerning persons who may have information [about] them contained in a system of records somewhere within the agency.

Accord, *Jackson*, 503 F. Supp. at 656 (including within the Act "the kind of disclosure which occurred in this case [information acquired from personal observation or knowledge] would create an administrative nightmare, making it impossible for federal officials to know when communications of information ... might lead to criminal and/or civil liability"); *Olberding*, 564 F.Supp. at 913 (to interpret the Act to reach agency personnel who disclose information

possessed by means other than record-system retrieval—even if they know or have grounds to believe the information may also be in such a system—"would create an intolerable burden and would expand the Act beyond the limits of its purpose").

Nonetheless, courts applying the "retrieval rule" have been sensitive to the risk that a mechanical application may thwart the purpose of the Act. A few courts, faced with "peculiar" or "egregious" facts, have not restricted the Act's coverage to information directly retrieved from a protected record. Two leading cases illustrate what is required to justify a departure from the retrieval requirement.

In *Bartel*, cited above, documents collected pursuant to an investigation of employee misconduct were placed in a Report of Investigation (ROI), a protected record. An Agency official knew enough about the investigation and report to determine that the targeted employee should be officially reprimanded. Later this official wrote letters to third parties, identifying the employee by name and referring to and, in effect, disclosing a summary of, the ROI. The Second Circuit rejected the defense that the Act did not apply because the information disclosed in the letters came from independent knowledge of the investigation and its results. Rather, this was a situation "where an agency official uses the government's 'sophisticated ... information collecting' methods to acquire personal information for inclusion in a record and then discloses that information in an unauthorized fashion without actually physically retrieving it from the record system." Important to the court's analysis was the fact that the agency person disclosing the information "had a primary role in creating and using" the protected record, and that "it was because of that record-related role that he acquired the information in the first place." 725 F.2d at 1411.

A second leading example of easing of the retrieval requirement arose in a PIP setting. In Wilborn v. Dep't of Health and Human Services, 49 F.3d 597 (9thCir.1995), a staff attorney's supervisor, an ALJ, informed the attorney he would be placed on a PIP for low production. The ALJ then analyzed the attorney's job performance and issued a PIP, using statistical data from the agency's records (the number of decisions written by other staff attorneys). The attorney grieved the PIP under the parties' collective agreement. Management granted the grievance, ordering that the PIP be expunged from the attorney's file and all records pertaining to it be destroyed. The attorney then left the agency for private practice. Later, one of his cases was heard by the ALJ, who, when the attorney objected to the way in which the case was being handled, included in his (the ALJ's) decision of the matter the statement that, "as [the attorney's former] supervisor, the undersigned was required to place him on a [PIP] because of his failure to meet even the minimal production requirements." Among the persons receiving copies of the decision was the attorney's client.

A District Court hearing the attorney's Privacy Act suit granted the agency summary judgment on the grounds the PIP reference was based on independent knowledge of events, not information retrieved from a records system, and there was no record in existence since the attorney's personnel file had been purged of all PIP references. The Ninth Circuit, affirming the

general applicability of the retrieval rule, nevertheless reversed, saying (49 F.3d at 601-602):

> [W]e hold that even though the ALJ may not have physically retrieved the disclosed information from [the attorney's] personnel file, he violated the Privacy Act by using the HHS's sophisticated collecting methods to acquire personal information for inclusion in the PIP, and then disclosing the existence of the PIP and its contents in an unauthorized fashion. To hold otherwise would mean that any agency official who uses government information collecting methods to generate a report containing private information could claim that a subsequent disclosure was based on "independent knowledge" ... Such "independent knowledge," gained by the creation of records, cannot be used to sidestep the Privacy Act....
>
> Thus, we agree with [the *Bartel* decision]... Our holding ... is not inconsistent with the long line of retrieval rule cases cited by the government [where the disclosure was based on independent knowledge].... In the instant case, unlike those [cases], the ALJ personally created the PIP, relying on reports and statistics that were a product of the agency's information gathering mechanism. Any "independent knowledge" the ALJ had of the PIP or its contents came from the act of creation itself.

This case is not a *Bartel/Wilborn* situation. There is nothing in this record suggesting that the PIP-development meeting in dispute here provides an occasion for departing from the general rule that the Act's coverage is limited to the disclosure of information retrieved directly from a record contained in a records system. There is no showing that a supervisor hosting a PIP consultation discloses any protected record at all, let alone one the supervisor has played a primary role in generating by virtue of involvement in any prior investigation. While a supervisor preparing for a PIP meeting may have looked at an employee's annual performance appraisal, there was no Agency testimony documenting such a practice. A possibility based on speculation is not proof of recurring practice. Nor can a possibility serve as a basis for disregarding the Act's coverage requirements.

Moreover, even if a supervisor knows of an employee's earlier annual appraisal, that is presumably one piece of information, which, merged with other independently-acquired information (observation and discussion), constitutes a supervisor's personal knowledge of the employee's job performance. Absent evidence that a disclosure of this information refers to or utilizes a record or information system, the case law establishing the retrieval requirement makes clear that a disclosure "arising from personal knowledge of an individual" does not violate the Privacy Act. E.g., *Olberding*, 709 F.2d at 622.

Whatever the role of personal knowledge or independently-acquired information in pre-PIP meetings, the relevant finding, compelled by this record, is that the Agency, the party insisting by way of an affirmative defense that the Act supersedes the Agreement, has failed to

prove that such meetings necessarily require a supervisor to disclose information in the record-retrieval manner the Act prohibits. Hence no violation of the Act has been shown. See *Thomas*, 719 F.2d at 345, 346 (party alleging unlawful disclosure under Act must come forward with evidence of source of disclosure in order to establish congressional purpose of preventing "misuse" of records-system information).

Given the evidence in this record, and the weight of the authorities supporting a finding that the Privacy Act has not been violated in these circumstances, there is no need to extend this discussion by pursuing the Union's alternative arguments that PIP-development information, pursuant to Sec. 10A of Art. 27 of the Agreement, may be disclosed under the "routine use" and Freedom of Information Act exceptions to the Privacy Act.

VI. Conclusions

Based on the foregoing, I conclude that Art. 27, Sec. 10A of the Agreement confers on a local Union representative a right to be consulted in the development of an employee's written PIP, a right that does not depend on the employee's request for, or consent to, representation. I further conclude that, in light of the full record in this case, it has not been shown that the Privacy Act alters, or supersedes, the contract right conferred by Art. 27, Sec. 10A.

VII. Award

The grievance is sustained. The Agency shall cease, and refrain from, requiring employee consent as a condition of the Article 27, Section 10A right of a local Union representative to be consulted regarding development of an employee's written Performance Improvement Plan (PIP).

Respectfully submitted,

Stanley D. Henderson

Stanley D. Henderson
FMCS Arbitrator

June 24, 2013

Date