BEFORE
SEYMOUR STRONGIN
ARBITRATOR

June 30, 2013

In the Matter of the Arbitration between-

FEDERAL BUREAU OF PRISONS

-and- **Re: FMCS Case No. 12-02458**

COUNCIL OF PRISON LOCALS
American Federation of Government Employees

APPEARANCES:

For the Council:
Philip W. Glover
National Regional Vice-President
220 Parkview Drive
Johnstown, PA 15905

For the Agency:
Michael A. Markiewicz
Federal Bureau of Prisons
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This undated grievance, and in other respects incomplete, filed by the Council of Prison Locals C-33 on behalf of the nation-wide bargaining unit, alleges violations at the national level of the rating and ranking of job applicants as required by the Office of Personnel Management's Delegated Examining Unit (DEU) procedures, the Agency's internal Merit Promotion Policy, and the collective bargaining agreement (Agreement), together with a number of federal rules, laws or regulations.

The instant case concerns alleged violations that resulted in wrongful rating and ranking in the Agency's hiring process, exclusively with respect to employee Ray Price, a Senior Corrections Officer detailed for training in Federal Prison Industries (not described in the record), who sought on two occasions the position of Pipefitter Supervisor at FCI Fort Dix, New Jersey. The Union asserts that the Agency's wrongful application of rating and ranking procedures generally has had an adverse impact on numerous bargaining unit employees throughout the Agency when applying for upward mobility vacancy announcements. The Union asks the Arbitrator specifically to establish Price in the position of Pipefitter Supervisor at FCI Fort Dix, and to direct the Agency to abide by all applicable rating and ranking regulations and directives.

No facts were entered into the instant record by the Union with regard to any employee, anywhere, experiencing or protesting any alleged harm regarding his/her rating or ranking in connection with any application for any position with the Agency, whether under DEU or Merit System procedures. As for Price, not named as a grievant but treated by the parties as such in this proceeding, the Arbitrator will meet the parties where he finds them and decide the issue with regard to Price. The operative facts concerning Price are undisputed and may be summarized briefly.

In July 2011, Price applied for a Pipefitter Supervisor vacancy pursuant to DEU Job Announcement Number FTD-2011-0032. As a DEU announcement, veteran status is relevant and the vacancy is open to all U.S. citizens in the general public. Evidence shows that the position is essentially that of a craft journeyman Pipefitter, a job that normally requires three to five years of relevant training. The job in question also entails the supervision of from three to six inmates with Pipefitter job skills ranging from novice to the journeyman level. Following the regular application process, Price was selected as one of three applicants deemed best-qualified for the position. Price was one of two best-qualified applicants selected who were veterans, with Price, coded as CPS, given the higher preference eligibility as a 30% disabled veteran. The other applicant who was a veteran, was coded TP, a so-called "five-point" veteran. The third applicant selected as best-qualified was a non-veteran with no preference over the other two. For reasons not entirely clear in the record, the Agency determined not to fill the position from this Job Announcement—an action that cannot be grieved--and not any of these best-qualified applicants was awarded the position.

In November 2011, a second vacancy announcement was published for the same position. This announcement appeared not as a DEU announcement open to the public, but as a Merit Promotion announcement, limited to Agency employees and, under which process veteran status is irrelevant. Price supplied the "same paperwork" he prepared and provided to the Agency in connection with his earlier DEU-governed application, relying largely upon various general contracting work he had performed that gave him experience with some of the bundle of tasks regularly performed by Pipefitters. Also, as a regular part of the application process, Price presented himself for a job-specific interview where his Pipefitter knowledge was

personally tested. During this interview, 20 questions concerning Pipefitting work, not any of which were objected to by the Union, were asked of Price, who could provide an answer to only 10 of them. According to the undisputed testimony of the Agency interviewer, whose qualifications as such were not questioned, Price was unable to answer correctly questions involving the most basic requirements of Pipefitter work. He could not, for example, read blueprints and did not know the proper color-code of piping to use for specific purposes. As a consequence of his poor demonstration of Pipefitter knowledge, Price was found not qualified for the Pipefitter Supervisor position. Price's demonstrated lack of substantive knowledge and ability to perform craft Pipefitter work as conclusively demonstrated by Price at his interview, is unrelated to hiring procedures protected by the Agency's Merit Promotion plan pursuant to Article 33 of the Agreement, which incorporates the Merit Promotion plan into the Agreement by reference.

Returning briefly to Price's selection as one of three best-qualified applicants for this same, but unfilled position, only a few months earlier, the Agency's testimony is that Price's earlier selection as qualified, let alone best-qualified, was an obvious mistake by the person who made that judgment and placed his name on a selection list. Based upon the undisputed record concerning Price's lack of knowledge not only of the full scope of pipefitting work, but also some of what are described as the most elementary job requirements, the Arbitrator is compelled to accept the Agency's ultimate conclusion that Price erroneously was found to be among the best-qualified applicants during the DEU vacancy announcement in July 2011. Accordingly, it is of no moment whether Price is a proper grievant, and whether the Agency's disqualification of Price was grievable, need not be

considered, because the fact is that Price was not qualified for the position and therefore was not harmed by his non-selection.

Collateral to Price's protest of his non-selection for the Pipefitter Supervisor position, the Union's argument that Price was not provided appropriate consideration of his disabled-veteran status is not supported by the record and, in any event, is moot. The Union's argument, approaching a claimed guarantee of success in job application based alone upon disabled-veteran status, is misplaced. Job qualification trumps all other considerations. With particular reference to the Union's argument that if Price was found best-qualified in June 2011, it is, in effect, erroneous that he was found to be not qualified a few months later, suggesting that something must be wrong with the Agency's rating and ranking process to permit such a result. The clear, and short, answer to this argument is the fact that Price's selection as best-qualified in the July 2011 DUE announcement was a mistake. It was wrong. He was in fact not qualified as was clearly established by Price himself soon thereafter. The earlier error does not impact the credibility of the later finding.

The Union also argues that the Agency has impermissibly waived provisions of the Agency's P3000.03 Merit Promotion plan. The record shows that this plan has been in effect for the past five or six years, it has been consistently applied without any protest, and although the evidence on the point is far from clear, it seemingly applies principally to General Schedule (GS) positions as opposed to the Wage Scale (WS) position relevant here. In any event the Arbitrator finds no facts in the record concerning the application of the 15-page document, entitled "Merit Promotion Plan," to Price, to suggest any of its provisions have been violated

here, or wrongfully waived. This grievance, accordingly, is not advanced by the Union's waiver argument.

As affirmative defenses, the Agency maintains that the Arbitrator must deny jurisdiction to hear the merits of this case because the grievance, brought as a national grievance, was filed with the wrong Agency office, that it was untimely filed, and that it is barred by the Union having filed the same allegations regarding rating and ranking procedures as unfair labor practices with the Federal Labor Relations Authority (FLRA).

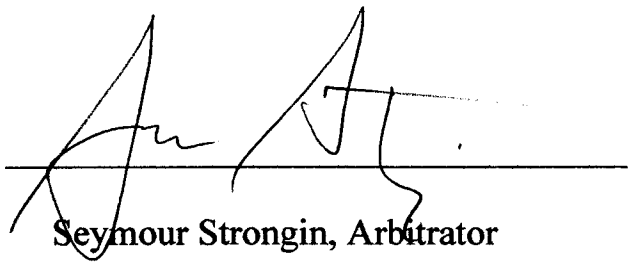
Given the above findings on the merits of Price's contentions and the Union's other claims on the merits, not any of the Agency's affirmative defenses need to be resolved. The Arbitrator notes, however, that the Union did indeed file the instant national grievance with the wrong office. On its face, the Agreement requires such grievances to be filed with the Chief, Labor Management Relations and Security Branch, Central Office (See Article 31, Section f. 4, of the Agreement). The grievance, in fact, was filed, in violation of this provision, with the Director of the Federal Bureau of Prisons, located in an office nearby that of the Chief, Labor Management Relations. The two offices are in frequent contact and this grievance, and with no harm, promptly reached the correct office. The Arbitrator finds no basis for disallowing this grievance by such wrongful filing under these circumstances.

The Arbitrator does note, however, that the Union, on August 26, 2010, prepared an unfair labor practice charge against the Agency with the FLRA, alleging substantially similar claims to those raised in this grievance. It is far from clear whether it ever was duly filed. Even if filed, however, while the issues were similar in part to those raised by this grievance, the unfair labor practice charge cannot be found by the Arbitrator to be

sufficiently identical so as to foreclose the instant grievance pursuant to 5 U.S.C. §7121(d), which provides that "issues which may be raised under a negotiated grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or as an unfair labor practice, but not under both procedures."

DECISION

The grievance is denied.



Seymour Strongin, Arbitrator

Washington, District of Columbia