**602 469 0506 PO Box 20216 Fountain Hills AZ 85269** [**paulfar@cox.net**](mailto:paulfar@cox.net)

**Arbitrator • Elections • Card Checks**

**United States Department of Labor, Mine**

**Safety and Health Administration, Rocky**

**Mountain District**

**[Agency]**

**and**

**National Council of Field Labor Locals,**

**American Federation of Government Employees,**

**AFL-CIO**

**[Union]**

**Grievance of Larry Nelson**

**AWARD**

**Case History**

This case involves the grievance [Grievance] of Larry Nelson [Nelson] and concerns the Agency’s not having selected him for certain training. The Grievance arose under the parties’ collective bargaining agreement, 2006 version, then in effect [the CBA]. The Unit is essentially nationwide, covering DOL field employees. The Grievance was filed by the Union on Nelson’s behalf on August 9, 2010, pursuant to the parties’ then current agreement [the 2009 Agreement], which governed the procedural aspects of this arbitration. Pursuant to the 2009 Agreement, the parties obtained a list of arbitrators from the Federal Mediation and Conciliation Service [FMCS]. The parties selected the undersigned as arbitrator [Arbitrator] and FMCS appointed me to this position. A hearing [the Hearing] was held on Feb. 20 and 21, 2013. Briefs were duly filed by the parties by the March 25, 2013 deadline.

At the Hearing the parties stipulated that I had jurisdiction to resolve the Grievance. They also stipulated that the issue to be resolved was **:** “Did the Mine Safety and Health Administration deny training opportunities to Larry Nelson for reasons that violated law, rule or contract, and if so, what is the remedy?”

**Union’s Basic Contentions**

The Grievance, as amended, cites violations of CBA, Art. 5, Rights of Employees; Art. 20, Merit Staffing; and Art. 22, Training.

The Union’s basic case is that Nelson over the course of several years applied for certain training positions, 4 times for an Accident Investigation Special Assignment [AI] and 4 times for a Special Investigator Special Assignment [SI]. On each occasion he was not selected. The action that specifically triggered the Grievance was his July 16, 2010 non-selection for SI. The Union asserts the reason Nelson received none of the assignments was his protected activities as a grievance filer and as a Union steward. The Union also asserts Nelson’s situation is caused by the Agency’s failure to give Nelson a fair and equitable opportunity to receive training and development. In part, this situation is assertedly caused by the District Manager’s “procedural practice of preferential management”, in particular preselecting applicants for Special Assignments even before the openings were posted, an “ongoing practice” for SI and AI selections.

No party objected to the filing of the Grievance which arguably amounts to an allegation of a continuing pattern and practice that seemingly extends years beyond the CBA’s limit for timely filing of a grievance. The CBA has a 30-day time limit. The Union’s requested relief appears to be limited to appointing Nelson, now, to an AI *training* assignment on the grounds that the Agency conceded at the Hearing that he is qualified for such an assignment. Regarding an SI training assignment, District Manager Laufenberg testified that in his view, Nelson was likely not yet ready for such an assignment, because he needed more training on “documentation” before he could be selected for SI training. It is clear from the record that Nelson had never been informed that he needed more training in that aspect, notwithstanding several attempts to secure such information. Thus, the Union asks that I require that the Agency advise Nelson of his perceived shortcomings and give him the training necessary to become qualified.

**Agency’s Contentions**

Nelson performs well in his current position. He has not been selected for either an SI or AI, for valid, legitimate reasons, amply demonstrated in the Hearing by Laufenberg’s testimony. Nelson has not been denied any selection because of his Union activities. Either no selection was needed for *his* office, or a demonstrably more qualified individual had also applied. The selection to these positions does not fall under the Merit Staffing procedures. It is only a “job assignment”, not a promotion or change of position. There is no evidence of unlawful motivation.

**Nelson’s Work History**

Nelson was hired by the Agency in April, 2002, after a long career in private mining. He went through a substantial period of Agency training via the Agency’s training enterprise [the Academy], graduating in August of 2003. In 2003 he received his “AR”, an Agency rating or certification that allowed him to function independently as an agent of the Agency – his badge, so to speak.

David Brown was his supervisor from the time he started until 2009, at which time the office was split into two teams, and James Eubanks became his supervisor, a position he still held at the time of the Hearing.

The appraisal system consists of 5 elements. The employee is rated separately for each element, with a choice of one of 4 ratings: F [fail], NI [needs to improve], M [meets the standard] and E [exceeds standard]. The resulting element ratings score determines the overall performance rating.

The overall performance rating has 5 potential levels: Unsatisfactory, fails standard in one or more elements; Minimally Satisfactory, needs improvement in one or more elements; Effective, meets standard in all elements, or better; Highly Effective, meets all standards and exceeds standard in 50% of elements; Exemplary, exceeds all standards.

In 06-07, Nelson was rated M in each element except Element 2, where he was rated E. His overall rating was Effective. Brown was the Rating Official, Laufenberg the Reviewing Official.

In 07-08, Nelson’s rating was M in each element, for an overall rating of Effective. Brown was the rater, Michael Dennehy the reviewer.

In 08-09, Nelson’s rating was M in each element except Element 2, where he was rated E. His overall rating was Effective. Brown was the rater, Dennehy the reviewer.

In 2010, Nelson’s rating was M in each element except Element 2, where he was rated E. His overall rating was Effective. Eubanks was the rater, Dennehy the reviewer.

Thus, in the 4 years leading up to the Grievance, Nelson was rated Effective overall every year. In 3 of those years he received the identical element scores: E in Element 2, M in all others. In one year he was rated M in all categories.

[I note that Element 2 covers mine inspections: Identifies and accurately documents unsafe, unhealthy mine conditions; issues citations and orders consistent with policy, fully explains enforcement action to operator; Consults with operators and sets reasonable abatement times, communicates why the conduct violates the standard and identifies abatement alternatives; utilizes proper level of enforcement appropriate for the conditions/practices observed. [My summation.]

[In comparing this element to the others, it is clear to me that Element 2 represents the “guts” of the job, the very reasons for the existence of the Agency. The rest are also important, but in a more supportive or ancillary manner.] [Yes, I recognize all are tallied equally, on paper.]

Nelson is very obviously dedicated to the mission of the Agency; he has a strong, personal desire and need to protect miners. A large portion of this zeal is due to an incident when he was a union representative at his previous employer’s mine. On three occasions Nelson, wearing that hat, had tried to get the Agency agent assigned to that mine to deal with what Nelson believed to be a particular, serious, safety hazard. For reasons unknown, the agent would not get involved. Then that very hazard killed one of Nelson’s fellow employees, one of that union’s members.

**Nelson’s Union Activity.**

Before Nelson was hired, he was a key agent of the mining union that represented the employees at the mine where he was employed.

In 2005, several years after his hire at the Agency, Nelson became a steward of the Union, and still is. During the time he was steward up until the instant Grievance, he was involved in the filing of approximately 10 grievances, some on his behalf, the rest on behalf of himself and/or fellow employees. It would be fair to say that the Union prevailed to some degree in most of these grievances, but not all. The grievances covered “First 40” issues that were very important to the unit members, failure to pay an employee on a training stint to the Academy when all others were paid, an allegedly unsafe hotel Unit members were required to utilize, evenly distributed overtime, and supervisory harassment of Nelson and others in the role of grievant, or his role as Union representative.

**Incidents of Union Animus by Agency Supervisors Towards Nelson’s Union Activities.**

After Nelson was hired, for a time he was assigned to work for training purposes with fellow employee Eubanks, [who eventually became Nelson’s supervisor]. Nelson did not yet have his AR. Eubanks, who had been interacting with Nelson in a totally appropriate manner, initiated some social chit-chat. He wondered what had prompted Nelson to seek employment with the Agency. Nelson related the above-described story of his futile attempts to obtain action on the job-site hazard, without naming the person. Eubanks suddenly got very angry at Nelson, stating that that person was Eubanks’ best friend, who had been discharged by the Agency as a result of Nelson’s complaints. Thus, he said, Nelson was responsible for that agent’s removal.

Eubanks gave Nelson the silent treatment for the duration of the assignment. For whatever reason, Nelson was not assigned to work with him again for 6 weeks. After that there was another assignment, in which Eubanks was civil.

However, there was a training incident with Eubanks in that time frame where Eubanks assigned Nelson to handle an inspection as if Nelson had his own AR. Nelson would be functioning under Eubanks’ AR, but the latter still retained full responsibility for the inspection. Nelson was agreeable to that arrangement. Nelson found multiple citations and wrote them up. Then he had to advise the mine operator. That individual blew up at Nelson for what he felt were invalid citations, or “too many”. He even threatened Nelson. Eubanks did nothing to support Nelson even though those citations were in reality Eubanks’. He just stood aside, totally silent, making Nelson look like a fool.

Perhaps this was just a tactic to teach “the youngster” [experience-wise] how to handle the stress of an unhappy customer. More than likely, it was a “payback” for the discharge of his best friend. Eubanks was not present at the Hearing to tell us.

There was another incident of possible “payback”, in 2008. After Nelson had his AR, a fatal accident happened at the end of the Agency work day at a mine about 135 miles into the hinterlands of Arizona. There was nobody available to make the required immediate trip to the mine site to secure the site, pending arrival of an AI from New Mexico the next day. Nelson had no AI or training on how to handle such a situation. But, he was the only live body available to go. He was assigned to do so by Eubanks, who was not yet a supervisor, but was an Acting Supervisor that day to cover for the regular team supervisor, Brown. It is clear that Eubanks was a newbie to this kind of assignment, himself. Nelson reminded Eubanks that he had no IA rating or training on how to handle a “fatal”. He was the only option available for this totally unexpected assignment.

To make a long story shorter, Nelson encountered some difficulties due to varying stakeholders getting involved at the mine, the need to secure the site so it could not be tampered with pending the arrival of the AI, and transmission of the required evidentiary photos Nelson was gathering. [Clearly a fatality is of great importance to each stakeholder, and carries a potential of financial obligation or worse for the operator. The miners’ union of course is highly concerned about an employee death.] Eubanks, back in Mesa, was obviously stressed by his own inexperience [see below], but cut no slack for Nelson’s inexperience. Eubanks repeatedly changed directives, complained that it took Nelson too long to arrive at the site, too long to take and transmit his photos back. Nelson reminded him he was borderline diabetic and had to stop to get something to eat something on the way, and the travel time was consistent with the mine’s distance from the office, the road available and the fact of darkness. Nelson tried to explain that there was no decent cell phone access at or close to the site to transmit his images on the spot. He had to drive back late that night to the Mesa office to transmit the photos, about 1:00 am.

At one point in the evening, Nelson advised Eubanks that part of the delay was due to the involvement of multiple stakeholders, including the mine’s union officials. [Union representatives at a mine are entitled to full participation in safety matters, per Agency policy and statute.] Somehow Eubanks jumped to the conclusion that Nelson was granting the mine union’s representative some sort of special treatment, just because they were “union” like Nelson was. Eubanks, very angry, ranted “All you care about is your union brothers.” In fact, Nelson was acting totally consistent with Agency policy every step of the way.

Somehow, Brown, after listening the next business day to Eubanks’ version of the evening, *but not Nelson’s,* wrote up an adverse warning memo [Letter] to be retained in Nelson’s file for 2 years. It is quite possible that Eubanks, in relating his version of the events, was as much concerned about covering his own backside regarding the “delay”, as he was with his baseless notion of Nelson’s investigative work being slanted by his perceived union bias. He did not exactly exhibit leadership while under stress. At the time he was not yet a supervisor, *but* he was an Agency agent as acting supervisor at the moment.

Eubanks and Brown did not testify.

Nelson grieved the Letter. There appears to have been some sort of settlement eventually, but nobody at the Hearing could establish with certainty what it was, and neither party wanted to go down that trail.

In or about 2008 Nelson filed a grievance against his then-supervisor, Brown. A dispute had arisen about Brown’s distribution of overtime. Nelson had raised the issue with Brown on behalf of two other employees and himself. Nelson questioned Brown about how he was distributing overtime, contending that overtime was to be distributed evenly. Brown flatly asserted “I’m the boss …” Nelson responded that “I am the steward” and that he was just doing his job. Brown responded that “I will assign it to the best person available.” Nelson persisted, saying that he didn’t want to argue with Brown, but …”. Brown interrupted and abruptly pronounced “Mr. Nelson and Mr. Summers [one of the other employees Nelson was then representing] will be out of the office [continuously] for the next 2-3 months.” [Of course, travel in the course of Agency work was routine to all employees, but not to this extent.] In other words, Brown was “the boss” and was now also going to distribute travel however arbitrarily he wanted, including punishment for grievance filing. There had been no prior mention of such plans, and it appears that such would have likely have been a “detail” requiring formal posting under the CBA. Clearly, this was to be punishment for their audacity to question “The Boss”.

The next day Nelson raised the issue at a staff meeting. He asked why Brown was doing this “out-of-town detail thing” ? “Because I am the supervisor. Now get out!” After their ejection from the meeting and the conclusion of the meeting, Nelson approached Brown. He said Brown could not single them out just because of their Union activity – especially Nelson, who was only doing his job [as union representative]. Brown refused to talk and told Nelson to “do what you want.”

A grievance was filed. Brown handled Step 1. At the meeting Brown screamed and yelled at Nelson, “How come it’s just you [that does all this grievance filing]?” “Now you suck in someone else.” [i.e., his fellow grievants.] Brown told Summers to leave the office, “because you signed this” [the grievance]. Summers left and Brown asked Nelson, “Why don’t you just quit?” Nelson said he would file a charge with the FLRA, and did. Brown said that he hoped Nelson would become a supervisor someday, “You’ll see what it’s like.”

In 2009 Nelson [and two other employees] were chastised by Brown for being too aggressive in their mine inspections, issuing too many citations. This was after Nelson listened to a mine operator complain that Nelson had given the operator a “Full Nelson”[ a play on words of the wrestling term, using it to complain about perceived unfair, excessive charges]. Nelson insisted he was just doing his job.

While it is odd to see an Agency charged with mine safety berating employees for doing their job, it does not seem necessarily attributable to Nelson’s Union activity, since two others were similarly berated, with no evidence in the Hearing of any Union activity on their part.

Nelson states that the Agency has never settled any grievance in which he was involved, at an early step. Nothing happens until after Step 2. This is an indication of resistance, belligerence to Nelson’s activities, in the Union’s opinion.

**Employer Knowledge of Nelson’s Union Activities**

It is obvious that Brown and Eubanks were aware of Nelson’s Union activity. Laufenberg states that he was generally aware of Nelson’s various grievances, once they entered Step 1.

**The Selection Process and Statistics**

The Union has presented evidence that Nelson applied in response to postings for 4 SIs and 4 AIs between 2006 and 2010. There were 36 applications from 24 different applicants, for the SI positions, with 7 slots filled. There were 23 applications for AI from 17 different applicants, with 8 slots filled. Nelson was not selected for any. No other employee in the District came close to applying 8 times; in fact, only one had hit 4.

The postings were for the District, which has 7 offices – 8 if one considers two-team Mesa as comprising two offices. The postings do not mention which locations might be available.

Laufenberg testified about the selection process. His testimony was largely unrefuted, except as to legal conclusions.

The SI and AI are denominated “special assignments”. They are not distinct job *positions*, but rather viewed as involving ad hoc work assignments. They are not covered by requirements in the regulations or the CBA, as are promotions, open positions or lengthy details. One gets conditionally selected for a position *in one’s office*. This entitles one to go to the Academy for 2 weeks of training, in the relevant category. If one passes, one acquires the rating [my word]. As such, one is viewed as qualified for SI or AI cases on an as-needed basis. When not so assigned, they will perform their standard journeyperson work. [There are also 2 full-time SIs. Such positions would be filled by the standard merit posting procedures not involved herein.] The rating continues indefinitely, at least as long as one remains stationed in that office.

Only AIs handle fatal accidents, but only those arising outside of their home *office,* but in their District. They are supervised by their regular supervisor. Only SIs handle two types of critical, complex cases, under the direct supervision of the District’s SI Supervisor. They may handle cases in any of the District’s offices.

There is no extra pay or benefit for SIs or AIs. The Union suggested that obtaining such a position enhances one’s chances for supervisory promotion. Laufenberg said it would not “necessarily” help. Clearly it is not a *prerequisite* to such promotions; in the District, about 1/3 of the agents so promoted in recent years have not had either rating – but 2/3 have. I conclude that there can be little doubt that it surely doesn’t hinder promotion, and that holding an SI or AI is a kind of recognition, real or imagined; it gives one a chance at more difficult, important, challenging cases; a chance to show one’s abilities in handling heavy-duty cases. After all, without these ratings, one cannot handle this grad of cases. As such, the Agency cannot deny that status for anti-Union reasons.

The Academy periodically schedules training for new AI and SI selectees. WhenLaufenberg becomes aware of such scheduling, he makes an initial determination of whether he might want to fill some such positions in the District, and by email posts such potentiality to all. The notice does not name any potential sites; rather the process is simply open District-wide. To apply, one must hold a journeyperson grade. Applications are emailed to Laufenberg’s office, directly. The CBA states that the District Manager has authority to make all final decisions.

In due course, Laufenberg looks at where he might need such a position, and whether there are applicants from such offices. Generally, it is desirable to have at least one of each type of each position in each office. The Agency will not transfer anyone to another office to fill such a slot. The District covers a wide territory: Rapid City, Salt Lake City, Green River [Wyoming], Helena, Topeka, Denver, and Mesa. Ideally, one will have an AI and SI available in every office. Travel is expensive and time-consuming. Having a qualified person in each office for each type of work can reduce travel time and travel expenses.

If no agent in an office where Laufenberg would like to fill a slot applies, he might select an individual assigned to an adjacent office, which office itself does not need another qualified individual for its own office’s workload, to help cover the adjacent office’s cases.

If more than one agent in a particular office applies for a slot in that office, Laufenberg will pick the “best” person from that office. In doing so, he does not normally look at one’s annual appraisals or seek input from the agent’s supervisor. He does not look at individual statistics for individual applicants, statistics by which the Agency routinely tracks for each District and the District tracks for each team and team member. However, he does utilize certain statistics that reflect the percentage of the agent’s challenged citations that are upheld, and the percentage of citations that are critical [S&S] cases.

Laufenberg does not monitor individual performance in routine matters, such as how many citations are issued. Rather, he is personally familiar with each agent’s work because the case file of any case which is *challenged* by the operator comes across his desk. Laufenberg makes the final decision on any contested matter; he either approves or rejects any proposed resolution. In such situations, Laufenberg examines the file of each challenged matter personally to see if the record justifies going forward, or settling or dropping any particular matter. As such, he becomes familiar with most agents’ work over time. He can see quality, or lack thereof. He can see the percentage of challenged cases that are sustained.

Laufenberg pays little or no attention to seniority. [What seniority information was available in the Hearing pertained to *government* seniority, including military service, not necessarily to *Agency* seniority.] He is looking for the “best” person, whoever that may be.

The Agency has no guidelines or instructions on how a District Manager is to go about selecting SIs and AIs, beyond the CBA posting requirement and the journeyperson grade. [Of course, there do exist multiple CBA and/or statutory prohibitions of premising personnel actions upon a multitude of prohibited reasons, including union activity.]

**The Application Selections**

Nelson applied for each of the 8 postings to be discussed below.

The 5 SI selections and the 3 AI selections made in 2006-2007 were made by then-District Manager Hooker. Laufenberg said he had no knowledge of how Hooker made his selections, and no evidence was presented by either party. There is no indication that Hooker ever had any-run-in with Nelson, performance-wise or with regard to Nelson’s union activities. [Hooker is the District Manager in another District currently.]

Laufenberg was the Selecting Official in the 2008-2010 period.

In the 2009 SI posting, Laufenberg had no SI in Rapid City, so he wanted to station one *there*. There were 3 applicants from that office. Laufenberg was not totally familiar with Daniel Scherer, who apparently was a relatively new transfer to the District. Contact was made with a supervisor in the applicant’s former office, who was fully familiar with the SI program and with Scherer. She highly praised Scherer’s work. Relying on this, as well as his knowledge of the others, Scherer was selected. There were no other SI selections made that year.

In the 2010 SI posting, there were 4 applicants *from Mesa* [including Nelson], where Laufenberg had no SI. One applicant, Kyle Griffith, advised Laufenberg that while he was in his previous office in another District, he had been selected for SI training, and had completed about half of it, when he was for unrelated reasons transferred to Mesa. [There are two separate training elements for SIs.] Laufenberg had his own District SI Supervisor call Griffith’s former supervisor to get a handle on his work there and whatever was known about his work while in the SI training classes. Griffith received a very high reference from his former supervisor. Based on the applicant’s work and prior selection, Laufenberg decided to select him over the other 3 Mesa applicants.

In the 2008 AI posting, there were 6 applicants. Two were from Mesa. There were already 2 existing AIs in Mesa, so Laufenberg concluded that no more were needed there. He had 3 offices lacking any AI: Salt Lake City, Topeka and Green River. There were no applicants from either Salt Lake City or Green River, and two from Topeka. Laufenberg wanted 2 AIs in Topeka. He chose Lapin and Valentine, both from Topeka. [Valentine had been appointed an SI the previous year; now he held both positions. Valentine never became an AI after his AI selection as his training session was canceled. Later he was promoted to SI Supervisor in Denver.] The Helena applicant, Small, was selected because Helena is relatively close to Salt Lake City. There was no need for another AI in Denver.

In the 2010 AI posting, there were 8 applicants. Salt Lake City still had no AI, and one person from that office, Mike Tromble, applied and was selected. Steve Thoring, then an AI in Denver, had asked to be relieved from his AI position for a number of personal reasons. David Sinquefeld was the only applicant from Denver, so he was selected. It never got to the point that Nelson *and* Joseph Summers, both Mesa-based applicants, were compared, as Laufenberg did not feel he needed a second AI in Mesa. [I note that the next closest offices, Salt Lake City and Denver, were not offices in which Laufenberg wanted to have a new appointee, but had no volunteers. Compare this to the situation in the 2008 AI posting, where Laufenberg added an AI to Helena, which did not otherwise need another, in order to help cover nearby Salt Lake City, which had a vacancy but not applicant. Thus, there was no arguable basis to add another AI to Mesa, in the SW corner of the District.]

**Analysis, Discrimination**

In the instant case, the grievance does not seek some sort of back pay or grant of an SI or AI rating based on Nelson’s non-selections dating back to 2006. There is no way to go back, in 2010, and obtain remedies for possible wrongful failures to select, assuming for the sake of argument, that there had been any. The CBA contains a short time limit in which to file grievances.

Arguably, I can go back and review those earlier selections and non-selections if no remedy is sought for them, if the actions allegedly would show a history of animosity towards Nelson, or even to show a history of wrongful rejections. This information would be reviewed not to right any past wrongs, but to show a past history that *could* aid review of the July 16, 2010 action on the SI application. I.e., the idea that the July, 2010 action followed a proven history of antagonism towards Nelson’s activities, or of blatant wrongful rejections. The July, 2010 allegation would have to be reviewed in the context or climate.

Analytically, there is a paradigm to be followed regarding proof and shifting burdens of proof in “wrongful motive” cases. The Agency cited a paradigm the Supreme Court announced in an EEO case. There are other decisional trees that accomplish the same result, particularly in NLRB cases involving discrimination for union activity. There may be another arrangement in FLRA union discrimination cases, and even another in straight arbitration cases involving just cause. But they all basically follow the same track.

First, the grievant must establish a prima facie case. That consists of protected union activity, employer knowledge of the same, and expressed employer animosity towards that activity.

Here, Nelson has a fairly long history of protected union activity – he filed about 10 grievances, and they were not trivial. Agency management was well aware of that activity, especially Brown and Eubanks, and Laufenberg was involved when matters got to the Step 1 or 2 stage in grievances. [Most got to at least the Step 2 Meeting stage.]

Brown bore great hostility towards Nelson because of his multiple grievances filed concerning Brown’s work actions, as well as his reactions to Nelson’s protected grievance-filing activity. He made a verbal threat to Nelson, and then told Nelson he and a fellow grievant would be sent out of the office for 2-3 months. It is clear this was to be a trip to Siberia, in retaliation for their grievance activities.

Eubanks also bore animosity towards Nelson for having had the audacity to complain about Eubanks’ best friend’s misfeasance – a factor in a fatality - which misfeasance cost the latter his job at the Agency. This animosity was exhibited while Eubanks was acting as a trainer for Nelson early in his career. Nelson’s activity in complaining to MSHA would have been protected under the NLRA, not to mention MSHA itself, and whistle-blower statutes. Resenting Nelson’s activity in connection with the complaints about inaction in the face of safety complaints, and acting on those feelings, thereby compromising Nelson’s status at MSHA, would surely be problematic.

Then later in the training process Nelson agreed to handle an investigation along with Eubanks, under the latter’s AR. Nelson simply sat and watched as the operator angrily objected to Nelson’s citations – which Eubanks had agreed with, given that Nelson was operating under Eubanks’ signature – and threatened Nelson. Eubanks sat idly by like the Cheshire Cat, and later pooh-poohed the threat – “that’s what they do”. I find all this to be a striking lack of leadership in supporting the new employee, and a deliberate payback.

Finally, Eubanks, Acting Supervisor for Brown that day, sent Nelson out on a fatality investigation that would normally have been handled by an AI. Neither Brown nor Eubanks held such a rating. Circumstances dictated that Nelson had to go out; apparently Eubanks had to remain in the office. Eubanks was totally unsympathetic to the various difficulties Nelson encountered in managing the preliminary investigation that night. Eubanks, apparently as green as Nelson on AI matters, made frequent changes of directives, and flip-flops.

At some point, when Nelson was explaining to Eubanks how he was handling the multiple stakeholders in the proceeding – including the operator, the local police, State officials, and the miners’ union – Eubanks loudly berated Nelson, based on Eubanks’ knee-jerk assumption that Nelson had given “your union buddies” some sort of special treatment at the site, which was simply unsupported and false.

To shorten the story, I find that Eubanks and Brown – the two individuals who most strongly resented Nelson’s union activities – connived for the latter to issue a one-sided, unjust disciplinary letter regarding Nelson’s supposed delays in the early stage of the above investigation. This shows Brown’s own antagonism towards Nelson’s Union position. It also shows Eubanks’ lingering resentment – albeit not in a pure supervisory role – of Nelson’s “causing” the discharge of Eubanks’ pal years before, and/or Eubanks’ resentment of Nelson’s Union activities.

I note that in the face of this evidence, neither Brown nor Eubanks testified, without explication. In such circumstances, an assumption is warranted that Nelson spoke the truth and the Agency did not want either to testify, for fear of the results. This is a normal assumption to be made under such circumstances in administrative and other legal matters.

I conclude that Nelson technically made out a prima facie case that the Agency was thwarting his attempts at furthering his career, because of his Union activity, by withholding an SI or AI. It is not at all uncommon that those in managerial positions in a union context resist/resent/revile Union activity, viewing it as an attack on their authority and power.

At this point, the burden then shifts to the Agency to show that notwithstanding the evidence that resentment of Union activity was an arguable factor in the grieved conduct, there *was* a solid, lawful reason for its decision. I.e., the same thing would have occurred absent any unlawful motive anyway.

First, it must be conceded that Nelson still received fine appraisals from both Brown and Eubanks, notwithstanding their lingering resentment towards his union proclivities.. There is no indication that either ever spoke to Laufenberg [or vice versa], about Nelson’s qualifications for an AI or SI, or attempted to undermine his chances for an AI or SI. Likewise, there is not a hint of resentment on Laufenberg’s part concerning Nelson’s Union activities, other than perhaps his “I am the boss” resistance to answering Union questions of how he goes about selecting AIs and SIs and what Nelson could do to enhance his qualifications for such a slot.

Second, the Agency presented Laufenberg to justify his selections/non-selections, and especially the last action, the one cited in the Grievance. Finally, at the Hearing, he opened up and gave a transparent presentation of his decisional process, contrary to his earlier resistance, where his responses to the Unions questions were limited to generalities during the grievance process. Every single decision was amply justified. In particular, while Laufenberg had earlier expressed only some generalities about how he selected one individual over another [“needs of the agency” and similar fluff], or simply recited the elements set forth in the performance appraisal forms. He had *never* pointed out that his *first step* of decision-making in filling SI and AI slots is *not* to decide who is the best choice overall; rather, the first, key factor is geography and balanced stationing of SIs and AIs: In what office is there a shortage of AIs or SIs? Are there any applicants stationed in those offices?

I conclude that the Agency has shown a legitimate basis for its actions. As such, the burden shifts to the Union to show that the Agency’s expressed rationale was bogus, pretextual. The Union offered no such response, other than expressing exasperation [as did the arbitrator] that Laufenberg had never shown his cards earlier, during the grievance procedure. There is no basis for allegations that Laufenberg *ever* wrongfully denied selection of Nelson. This was specifically not what happened in the SI denial cited in the Grievance.

[There was no prima facie showing presented to suggest that Hooker had any anti-Union reason for his own selections. In other words, no prima facie case was presented regarding those 4 decisions.]

**Analysis, Other Issues**

The Union raised allegations based on alleged contractual violations, arising under Art. 20, Merit Staffing. I conclude that this section applies to performance plans, promotion plans, details and other enumerated items. It does *not* apply to AI and SI special assignments , among many other similar items. These latter items are clearly not covered, because they do not involve the kinds of formalized situations laid out in Art. 2. The non-applicability to AI or SI matters is shown by Art. 20, Section 2, C. [I assume the entire Article would apply to full-time appointments of SIs, of which there are some, not involved herein.] However, this case involves “special assignments. They are not full-time positions; they are training procedures to allow one to be assigned to handle ad hoc, special task assignments made if and when needed, as an additional assignment to an employee’s routine work tasks, on a case-by-case basis.

Art. 20, Section 2, C. states only that such opportunities will be posted and that “The Agency reserves the right to make the final selection.” This does not mean that the Agency may reserve the right to make *all* decisions, *even for unlawful reasons*. It means that while the Union may have little say generally in the selection decision, the Union *does* have role to make sure that no law, regulation or the CBA has been violated. The clause *does* *not* negate the Union’s right for information it might need to assure compliance with these restrictions, and to grieve any Agency misconduct.

Art. 20, Training was also cited by the Union. I view this article as covering the need to train employees, to prepare them for the next step in their career ladder, and to give them periodic refresher training. It is apparent that this *is* done, in the broadest sense. [The Agency has substantial training of new employees, and regular refreshers for veteran agents. The Union suggests that employees should be given training to become ready for posting for AI and SI positions. I do not accept this claim. Eligibility for consideration is based on meeting the minimum grade level. Once selected, the employee is *then* given training at the Academy before being granted the certification [my word]. The Union’s argument would pile on a required pre-training, in order to prepare agents to apply for SI or AI formal training.

It is clear that Nelson was not denied the SI position that prompted the Grievance because he was not an adequate applicant, or as good as others selected. He simply was not considered for a position in Mesa [nor was Summers] because Laufenberg felt another SI was not needed there.

There is not a scintilla of evidence to sustain the Art. 20, Section 2, B allegation of “preferential management practices” in training.

**Analysis, Lack of Disclosure**

In 2007 Nelson had asked Laufenberg directly what he could do to enhance his chances. [He had thus far been turned down 4 times by then Rocky Mountain District Manager Hooker, and Laufenberg was now District Manager.] Laufenberg basically told him to ‘keep up the good work and talk to your supervisor.”

During the grievance process, the Union asked Laufenberg in what areas Nelson could improve in order to get one of the desired positions. Laufenberg said to “just keep on doing what you’re doing and keep applying; talk to your supervisor – he knows best.” Laufenberg spoke of general needs for any applicant to perform well, or better – good notes, good documentation, etc., basically the 5 elements in the appraisal. Maybe there was room for improvement by Nelson, but Nelson should talk to his supervisor, Eubanks. Laufenberg might have mentioned improving writing and communication skills, but added at the Hearing that that was a comment that could be said to any applicant. Laufenberg may have mentioned that Nelson could improve his penmanship.

When pressed at the Hearing for what Nelson would need to do to enhance his qualifications,

Laufenberg said Nelson was qualified for AI training. With regard to SI, there was a vague mention that his “documentation” could be improved upon. He did not say that Nelson would never get an SI position unless he improved, but the new brand-new disclosure sounded like a lingering something that needs clarification.

The Union has a valid point. No shortcoming in Nelson’s writing was mentioned in his appraisals, ever. Laufenberg testified at the Hearing, when pressed, without elaboration, that Nelson could improve his “documentation”. Laufenberg, when reviewing contested files - his primary vehicle for obtaining information about his employees’ work - has access to information that could support such a concern .

Yet, Laufenberg [as described in detail above] did not ever mention this concern to Nelson when Nelson inquired of him what he might do to enhance his chances for such positions. Rather than provide direct information, he asked Nelson what *he* thought *his* own shortcomings were. [“When pressed, don’t answer a question; just ask one of your own instead.” A common tactic. Arbitrator.] He also said he should ask his supervisor Brown, or later his supervisor Eubanks [the guys that harassed him repeatedly for his Union activities]. Laufenberg never mentioned any concerns about Nelson’s work during the grievance procedure.

This is clearly not the way to “Aid employees in improving their performance in their current positions to provide an internal pool of qualified applicants for consideration for anticipated future vacancies….” [Art. 22, Section 1, A.] and “provide general career mobility opportunities….[Section 1, B.] Nor does it conform to the spirit of Art. 43, Section 4. How can an employee improve if his shortcomings are not revealed and thereby become a potential hidden anchor on his upward mobility? This is not the case of an employee who harbors an unstated desire to achieve a SI or AI, unknown to supervision. Nor is it a case of an employee who never did the obvious: ask. This is an employee who has applied repeatedly, stated his goal and questions directly to the District Director, asking “Why?” “What”. Similarly, Laufenberg was directly asked in the more formal setting of the grievance procedure.

In this case this unanswered, suggested secret defect has not yet impacted Nelson’s chances for an SI or AI. As I found above, in each case he was not in the right place at the right time, or lost out to a clearly better choice. I believe that neither Nelson nor the Union realized that *no one* could achieve such a position *outside of his assigned office; only inside.* Frankly, it is not at all clear to me that Laufenberg has passed down anything *specific* to Nelson’s supervisors, citing any reservations and requesting that such concerns be passed on to Nelson. If Laufenberg did, the supervisors did not follow through and clue in Nelson, for unknown reasons. With a regular “Exceed” in Element 2, how could Nelson possibly know there is a “documentation” issue?

**Conclusion**

I find that the letter and spirit of the CBA have not been followed with respect to Nelson, as discussed in the Lack of Disclosure section above. Accordingly, I shall order a remedy.

In all other respects, **I hereby deny the Grievance**.

**Remedy**

Upon written request [email OK] by Nelson, to be communicated directly to Laufenberg **within 30 days of this Award**, Laufenberg shall have a face-to-face meeting with Nelson and a Union representative of Nelson’s choice, not later than **30 days after said request**. In that meeting Laufenberg shall disclose the details of his concern about Nelson’s “documentation” revealed in the Hearing, to him, together with multiple specific, hard-copy examples, and answer any questions. This is not a disciplinary matter. It is not intended to be a bargaining session or a roaming review of past indignities. It is simply to give Nelson an honest notice and review of that which has not been disclosed to him. Under all of the circumstances set forth in this case, it will not suffice for this task to be handed off to someone else, such as Nelson’s supervisor. Any travel expenses with respect to this meeting shall be borne by the Agency.

I will retain jurisdiction of this remedial matter for 75 days, to assure compliance. Any claims of non-compliance must be transmitted to me in writing, copy to the Agency, **within 70 days** of the date below. Said writing must give the specifics of the non-compliance, including attempts to attain compliance and any Agency failures or refusals. If arguable information is timely presented, I will extend the jurisdiction as needed and entertain a response from the Agency.

**So Ordered.**

\_\_\_\_\_/s/ Paul Eggert\_\_\_\_\_\_\_\_\_

Paul Eggert, Arbitrator

April 29, 2013