UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

UNITED STATES DEPARTMENT OF THE AIR FORCE, RANDOLPH AIR FORCE BASE, SAN ANTONIO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1840, AFL-CIO Charging Party	Case No. DA-CA-02-0597

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 15, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: August 15, 2003
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: August 15, 2003

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: UNITED STATES DEPARTMENT OF THE AIR FORCE, RANDOLPH AIR FORCE BASE, SAN ANTONIO, TEXAS

Respondent

and Case No. DA-CA-02-0597

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1840, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

OALJ 03-42

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF THE AIR FORCE, RANDOLPH AIR FORCE BASE, SAN ANTONIO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1840, AFL-CIO Charging Party	Case No. DA-CA-02-0597

Anne E. McFearin, Esquire
William D. Kirsner, Esquire
For the General Counsel

Maj. Ferdinando P. Cavese, Esquire
David W. Chappell, Esquire
For the Respondent

Joseph Hendrix, Representative
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 1840 (the Union), against the U.S. Department of the Air Force, Randolph Air Force Base, San Antonio, Texas (the Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director of the Dallas Region, Federal Labor Relations Authority (FLRA). The complaint alleged that the Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), on or about May 7 and May 20, 2002, by failing to furnish information

requested by the Union, in violation of section 7114(b)(4).[1] Respondent filed an Answer denying that it committed the unfair labor practice alleged in the Complaint.

A hearing was held in San Antonio, Texas, on December 20, 2002.[2] The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed timely briefs.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.

Statement of the Facts

The United States Air Force is an agency within the meaning of section 7103(a)(3) of the Statute and Randolph Air Force Base is an activity of the United States Air Force. The 12th Services Division is located at Randolph Air Force Base and has approximately 400 bargaining unit employees and 40 to 50 supervisors and management officials. There are numerous types of employees throughout the division, such as cooks, maintenance staff, custodial workers and clerical staff. There are 23 different facilities or work centers within the division. Each manager, along with his or her subordinates, is responsible for and has control over the evaluation process of the employees in that work center. (Tr. 19, 48, 49, 69, 71-72; G.C. Ex. 1(b) and 1(f))

The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. (G.C. Ex. 1(b) and 1(f)) Joseph A. Hendrix is the Vice President of the Union and is the primary representative for the nonappropriated fund employees of the 12th Services Division, Randolph Air Force Base. (Tr. 19, 20)

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[1] The complaint was amended to clarify that the Union was requesting similar data for two distinct periods of time, evaluation periods for 2000 and 2001.

[2] Respondent filed a motion for summary judgment which was denied on December 11, 2002. Respondent also filed a motion to dismiss which was denied prior to the hearing. At the hearing Respondent renewed its motion to dismiss. Based on the decision in this matter, I am denying Respondent's motion.

On March 23, 2001, the Respondent and the Union resolved an unfair labor practice charge (Case No. DA-CA-01-0264) in which certain information was to be furnished to the Union. As a result of this settlement agreement, the Union received sanitized information limited to employees in the Lodging Service. (G.C. Ex. 6) On April 12, 2001 the Union received the information from the Respondent's Human Resources Officer Cheryl Johnson. (Tr. 41, 86-88)

One year after receipt of this lodging information[3], the Union, through Hendrix, on April 26, 2002, submitted two similar requests for information to the Respondent, one for the October 1, 1999 through September 30, 2000 period (G.C. Ex. 2) and the other for the October 1, 2000 through September 30, 2001 period. (G.C. Ex. 2(a)) These will be referred to as the 2000 and 2001 evaluation periods.

The Union requested that the following information be furnished in a sanitized format, pursuant to section 7114(b)(4) of the Statute:

1. Copies of all Services Division bargaining unit and non-bargaining unit employees' AF Forms 3527, "NAF Employee Performance Evaluation".

2. Copies of all Services Division bargaining unit and non-bargaining unit employees' AF Forms 1001, "Award Recommendation Transmittal".

3. Request that all the AF Forms 3527 and AF Forms 1001, both approved and disapproved, for the same Services Division bargaining unit and non-bargaining unit employees be attached to see what the evaluation and the award was for each particular employee.

4. Request that all bargaining unit and non-bargaining unit employees have some sort of written code on the requested forms to distinguish between the two groups (non-bargaining unit employees and bargaining unit employees).

5. Request that all bargaining unit employees that are/were Union members (dues withheld from their pay during the periods in question) have some sort of written code on

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[3] The testimony of both parties seemed to indicate that the limited information received as a result of the settlement agreement was close in time to the Union's information requests at issue in this case. However, the evidence shows that the limited information was actually received one year earlier, in 2001.

the requested forms to distinguish between the two different members (non-Union members and Union members). (G.C. Ex. 2 and 2(a))

Both letters then addressed the Union's need for the requested information as follows:

> Consistent with 50 FLRA No. 86, the Union has a "particularized need" for this information in order to properly evaluate fair and equitable treatment for Union members who have received awards in correlation to their evaluations and to determine if Union members are awarded the same as non-Union members.
>
> On 12 Apr 01, the Union received sanitized copies of evaluations and evaluation awards from Cheryl Johnson, HRO, in which the Union feels as though Union members may have been unfairly treated. This information was finally received by the Union after a settlement of a past ULP. The Union has a 'particularized need' in order to determine if Union members are being unfairly treated compared to non-Union members. The Union's 'particularized need' is also to determine if Union members received no evaluation award or less of an evaluation award in comparison to non-Union members. In order for the Union to properly evaluate fair and equitable treatment of Union members, the Union must have this information in order to properly perform our representational responsibilities and duties.
>
> This information is requested to properly evaluate fair and equitable treatment of Union members(s).

(G.C. Ex. 2 and 2(a), Tr. 22-25, 27)

The information for both evaluation periods was requested in a sanitized form and was requested to be coded together. This was necessary in order to match the employee performance evaluation with the recommendation for an award. (Tr. 26-27)

On May 7, 2002, the Respondent, by Cheryl Johnson, replied to Hendrix, in part, as follows:

> This office has carefully considered your request for information and your stated particularized need for this information concerning subject evaluations and awards for all Services Division bargaining and non-bargaining unit employees in

> CY2000 and CY2001. Your requests state that the information being requested is relevant and necessary in order to determine if union members are being unfairly treated compared to non-union members and to possibly represent bargaining unit employee(s) in a potential grievance(s) or ULP(s). **The union's request as stated needs clarification in order for management to assess the need.**

(G.C. Ex. 3; Tr. 32, 73)(Emphasis added)

The Union, by Hendrix, responded on May 14, 2002, stating that "the 'clarification' of the need is clear in the Union's opinion, as stated in our information request letter to you on 26 Apr 02. The Union will highlight the need for your ease in red so as to not be misunderstood on the 'clarification'". The Union then highlighted the last three paragraphs of its original letters in red. (G.C. Ex. 4 and 4(a); Tr. 35, 73-74)

The Union did not receive the requested information and on May 28, 2002 filed the unfair labor practice charge in this matter. (Tr. 38; G.C. Ex. 1(a))

There were no further communications between the parties, either in writing or by telephone, until a meeting in June 2002. The parties agree on some of the essentials of the meeting in June, but not on the participants and the extent of questions from Johnson. Hendrix asserts that the meeting was between Johnson and himself only. Johnson and Linda Cotner, Labor Relations Officer for Respondent, testified that they were both present for the meeting. However, I do not find the differences in testimony relevant to my decision.

The meeting occurred sometime in June 2002, after the unfair labor practice charge had been filed on a separate issue. According to the parties, at the end of the meeting, Hendrix questioned why the Union had not received the requested information. Hendrix asked what he needed to show in order to demonstrate particularized need. Johnson responded that her memorandum spoke for itself. According to Hendrix, Johnson did not ask for names of employees who were concerned about awards, and did not ask him why he needed two years of information. Hendrix told her that he had received complaints from Union members regarding the distribution of awards. He denied that Johnson asked for the names of employees who had raised concerns. (Tr. 38-40)

According to Johnson, the meeting in June was in her office and Cotner was also present. Hendrix brought up his requests for information and could not understand why she

had denied the requests. She told him that the particularized need for the information was not clear. She indicated that she had not received any complaints and was unaware of any problems. (Tr. 74-75) She asked who he was concerned with. He told her that several employees had come to him but would not give any information such as names or work center. He did not say what the complaints were. (Tr. 75)

The parties have had no further conversations regarding the request for information. The requested information has not been furnished to the Union.

At the hearing Hendrix asserted that the Union had established its particularized need for the requested information. He testified that he would have used the information to determine whether or not bargaining unit employees were being treated fairly and equitably compared to non-bargaining unit employees. He would also use the information to determine whether or not Union members were being fairly and equitably treated compared to non-Union members. (Tr. 23-25)

Hendrix further testified that the parties had recently negotiated AF DOI 34-27, which dealt with incentive awards. This DOI requires that, starting with the 2001 evaluation period, employees with ratings of 23, 24 or 25 would receive a minimum award. The data requested for the 2001 rating period would have made sure that the Respondent was abiding by the agreement. (Tr. 25-26) Hendrix admitted that he did not discuss this reason in any of his communications with Johnson. (Tr. 45)

Johnson testified at the hearing that she was confused by the Union's requests, since it referenced the limited information that had been furnished pursuant to a settlement agreement, but then asked for expanded information. Further she testified that she was confused as to how the two groups of information (bargaining unit employees and non-bargaining unit employees) were related and had therefore sought clarification from the Union. (Tr. 73)

Positions of the Parties

General Counsel

Counsel for the General Counsel asserts that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to furnish the Union with performance evaluations and award recommendations for evaluation periods 2000 and 2001. Counsel for the General

Counsel asserts that the Union's data request of April 21, 2002 meets all of the requirements of Section 7114(b)(4) of the Statute: that the data is normally maintained by the agency in the regular course of business, is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining and does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

Counsel for the General Counsel further asserts that the Union set forth a "particularized need" for the data requested, pursuant to the guidelines set forth in *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661 (1995) *(IRS Kansas City)*. The Union wanted to follow up on information provided on or about April 12, 2001, and compare groups of employees in terms of evaluations and awards so as to determine whether employees exercising their rights under the Statute were suffering disparate treatment. (Tr. 22-23, 24-25, 29-30, 39, 50, G.C. Ex. 2, 2(a), 4 and 4(a)). In addition the Union specified, to the extent required by law, the facilities or work centers involved, the employees involved, and how the information regarding supervisors would be used and how that use was connected to the Union's representation duties under the Statute. (Tr. 22-23, 24-25, 29-30, 39, 50, G.C. Ex. 2, 2(a), 4 and 4(a)). General Counsel argues that the Union therefore established a particularized need for the requested information by articulating, with specificity, why it needed the requested information, including the uses to which it would put that information and the connection between those uses and the Union's representational responsibilities under the Statute. The General Counsel further argues that the Respondent failed to assert any countervailing anti-disclosure interest. Furthermore, in its request for clarification (G.C. Ex. 3) and the final denial of the information requests (G.C. Ex. 5), the Respondent failed to communicate with the Union and failed to articulate and exchange specific interests with the Union as required by the Authority case law. *IRS, Kansas City*, 50 FLRA at 670-671.

Respondent

Respondent asserts that it did not violate the Statute by refusing to furnish the requested data to the Union and asserts that the Union's request for data did not meet the standards as set forth in section 7114(b)(4). Specifically the Respondent argues that the Union failed to provide a particularized need for the requested information. The

Respondent asserts that two of the three primary justifications to support the Union's particularized need were never conveyed to the Respondent until the hearing and should therefore be disregarded. At the hearing Hendrix testified that one intended use was to determine whether or not bargaining unit employees were being treated fairly and equitably compared to non-bargaining unit employees. Respondent argues that it is undisputed that this intended use was not conveyed to the Respondent in the written information requests or in the subsequent June 2002 meeting. Hendrix also testified that he wanted the evaluations to ensure that the Respondent was complying with the Division Operating Instruction. However, the evidence is undisputed that this reason was not conveyed to the Respondent in the written information requests or in the subsequent June 2002 meeting. Respondent therefore argues that these two reasons can not now be used to support the information requests, since a union must articulate its disclosure interests in the requested information at or near the time of the request and not for the first time at the unfair labor practice hearing. *Health Care Financing Administration,* 56 FLRA 503 at 514 (2000) *(HCFA) (*citing *Department of the Air Force, Washington, D.C. and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio,* 52 FLRA 1000, 1006 (1997)*; U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and U.S. Department of the Treasury, Internal Revenue Service, Oklahoma City District, Oklahoma City, Oklahoma,* 51 FLRA at 1396-97 (1996) (*IRS, Oklahoma City); Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas,* 51 FLRA 545, 551 (1995) *(INS Dallas).*

Respondent further argues that the third justification, as set forth in the Union's information requests, was related only to a small fraction of the Division, specifically, the bargaining unit employees in the lodging section of the Services Division for a one year period of time. This is based on the reference to the information received one year earlier as a result of a settlement agreement. Furthermore the remaining information request only references Union members versus non-Union members. Respondent asserts that the justification by the Union only relates to bargaining unit employees and does not justify the request as it relates to non-bargaining unit employees. Further the Union's justification did not connect the request to a particular employee, group of employees, employees under a particular supervisor or in a particular work center, grade or occupation. *IRS, Oklahoma City, 51 FLRA at 1397.* Respondent argues that this limited justification fails to meet the standard of particularized need.

And finally, the Respondent asserts that the Union failed to act in good faith. In response to the request for clarification, the Union did not offer any additional information but merely highlighted its previous explanations in red for the Respondent. Respondent argues that the Union's actions demonstrated the Union's intent to not even attempt a good-faith clarification. Further, even after the unfair labor practice charge was filed, the Respondent attempted to elicit the Union's need for the requested information, but the Union refused to furnish any additional explanation. Respondent specifically noted that the Union did not even bother to ensure that its information requests contained all of its justification, since it introduced new justifications at the hearing.

Respondent therefore argues that the Union clearly failed to establish a particularized need for the information. Furthermore, it refused to make a good faith effort to clarify its request. Therefore, Respondent had no basis upon which to weigh the competing interests in a meaningful way and cannot be faulted for not providing the requested information.

Analysis and Conclusions

Section 7114(b)(4) of the Statute provides that an agency has the duty to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

1. Whether the Information was Normally Maintained by Respondent in the Regular Course of Business

The Authority has found that requested information is "normally maintained" by an agency, within the meaning of section 7114(b)(4) of the Statute, if the agency possesses and maintains the information. *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 37 FLRA 1277 (1990) (*SSA Baltimore).*

The Union requested copies of AF Forms 3527 "NAF Employee Performance Evaluation" and AF Forms 1001 "Award

Recommendation Transmittal" for all Services Division bargaining unit and non-bargaining unit employees for the 2000 and 2001 evaluation periods. Similar information was furnished to the Union for a more limited number of employees the previous year, pursuant to a settlement agreement. There was no evidence presented to indicate that such information is not normally maintained by the Respondent or that such information did not exist. Nor was the Union informed at any time that the information did not exist or was not maintained by the Respondent. (Tr. 77-78; G.C. Exs. 3 and 5)

Accordingly, it is found that the information requested by the Union on April 26, 2002 was normally maintained by the Respondent in the regular course of business.

2. Whether the Information was Reasonably Available

Availability under section 7114(b)(4) has been defined as that which is accessible or attainable. *Department of Health and Human Services, Social Security Administration*, 36 FLRA 943 (1990) (*HHS, SSA); U.S. Department of Justice, Washington, DC and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 46 FLRA 1526 (1993) (*INS Northern Region)*. Similarly, Respondent is not required to provide data which is available through extreme or excessive means; the determination of extreme or excessive means requires a case-by-case analysis. *HHS, SSA*, 36 FLRA at 950. It should be noted that the Fifth Circuit Court of Appeals questioned the extreme and excessive standard expressed by the Authority, and instead found that reasonably available should be near the middle of a spectrum between readily available and extreme and excessive means. *Federal Bureau of Prisons, Washington, D.C. and Federal Bureau of Prisons, South Central Region, Dallas, Texas and Federal Bureau of Prisons, Federal Transfer Center, Oklahoma City, Oklahoma*, 55 FLRA 1250, 1254-1255 (2000) (citing *Department of Justice v. Federal Labor Relations Authority*, 991 F.2d at 291). However, in cases such as this, where Respondent offers no evidence that the information is not reasonably available, the Authority has consistently determined that the information requested by the Union is reasonably available and the application of the Fifth Circuit's standard for reasonably available is not necessary. *Ibid.*, 55 FLRA at 1254-1255.

The information requested by the Union included performance appraisals and award recommendations for about 460 employees for two separate years. (Tr. 95-96; G.C. Exs. 2, 2(a), 4 and 4(a)) Respondent offered no evidence that compliance with the request would be onerous or require

extreme or excessive means. Respondent offered no evidence that compliance with the request would be costly in terms of employee work hours or budget and Respondent offered no evidence that Respondent's primary mission would be affected by compliance with the request. Finally, Johnson never asserted to the Union, at the time of the its response, that the information requested was not reasonably available due to these or any other concerns. (Tr. 77-78; G.C. Exs. 3 and 5)

Accordingly, it is found that the information requested was reasonably available. *Ibid., 55 FLRA 1250* (requested information encompassed five to six thousand documents at numerous locations not reasonably available).

3. Whether the Information Constituted Guidance, Advice, Counsel or Training Provided for Management Officials or Supervisors, Relating to Collective Bargaining

Section 7114(b)(4)(C) exempts from disclosure to the exclusive representative information which constitutes guidance, advice, counsel, or training for management officials relating specifically to the collective bargaining process, such as: (1) courses of action agency management should take in negotiations with the union; (2) how a provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or unfair labor practice charge should be handled; and (4) other labor-management interactions which have an impact on the union's status as the exclusive representative. *National Labor Relations Board*, 38 FLRA 506 (1990) *aff'd sub nom. NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992). In its testimony and in its Answer to the Complaint, the Respondent admitted that the information requested did not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining. (Tr. 78; G.C. Ex. 1(b) and 1(f))

4. Whether the Union Articulated a "Particularized Need" for the Information in its April 26, 2002 Requests

The Authority set forth guidelines in *IRS, Kansas City*, 50 FLRA 661 for determining whether information is necessary and how requested information will be disclosed under section 7114(b)(4) of the Statute. The Authority held that a union requesting information under that section must establish a particularized need for the information by articulating, with specificity, why it needs the information, including the uses to which it will put the

information and the connection between those uses and its representational responsibilities under the Statute. The requirement that a union establish such need can not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, it must be established that the information is required for the union to adequately represent unit employees. An agency denying a request for information under the Statute has a comparable responsibility as it must assert and establish any countervailing anti-disclosure interests. Its responsibility can not be satisfied through broad or general claims.

The Union gave the same explanation for its need for the requested information in both of its requests dated April 26, 2002. The Union referenced information that it had received the previous year, March 2001, as a result of a settlement agreement. This information concerned performance evaluations and recommendations for awards for a one year period of time for bargaining unit employees in the lodging center for the Division. The new information requests, both dated April 26, 2002, requested the same information, i.e. performance evaluations and recommendations for awards, but expanded the time frame to a two year period and expanded the number of requests to include all bargaining unit and non-bargaining unit employees in the Division. This would include approximately 400 employees and 40 to 50 supervisors.

In its information requests, the Union explained that it needed the information to properly evaluate whether Union members were treated in a fair and equitable manner. The letters also indicated that the information was being requested in order to represent bargaining unit employees in a potential grievance or unfair labor practice. (G.C. Ex. 2, 2(a), 4, and 4(a)). No other justification was presented to the Respondent, either in writing or at the meeting in June 2002. Although Respondent requested clarification of the Union's particularized need for the information, the Union did not offer any further justification. At the hearing, the Union, through Hendrix, first asserted that the information requests explained why the Union needed the information on both bargaining unit and non-bargaining unit employees, but later admitted that its explanation did not include bargaining unit and non-bargaining unit employees. The General Counsel argues that bargaining unit and non-bargaining unit employees were mentioned several times in the information section of the requests and that the Union testified at the hearing that their intent was for bargaining unit and non-bargaining unit employees to be encompassed in the terms Union member and non-Union member. (Tr. 55, 59-62, 64; G.C. Exs. 2, 2(a)).

This is clearly a misreading of the Union's requests and an attempt by the General Counsel to explain Hendrix' failure to adequately address the Union's need for information related to non-bargaining unit employees.

The General Counsel sets forth an interesting argument that, within the context of NAF employees, when the Union referred to Union members and non-Union members in the last paragraph of its request, it was referring to the largest possible group of employees and within that group existed bargaining unit members and non-bargaining unit members. This is clearly incorrect after reviewing the information requests. Paragraph 5 of both letters clearly requests that **all bargaining unit employees that are/were Union members** have some sort of written code to signify between the two different types of members. The Union is not interested in non-bargaining unit employees in paragraph 5 of the letters, but only bargaining unit employees and whether or not they are members of the Union.

Further Hendrix' testimony in this area is confused and unconvincing in his explanation of what he meant by non-bargaining unit employees and non-Union members. I also note that Hendrix' failure to adequately respond to Respondent's request for clarification further erodes the value of his testimony at the hearing. I particularly note that highlighting his original letter in red as a clarification was not helpful when his original letter did not address the information requests as related to non-bargaining unit employees. I therefore find that the Union made no explanation to the Respondent regarding its request for information related to non-bargaining unit employees.

Hendrix also testified that he requested the information in order to determine whether the Respondent was complying with AF DOI 34-27, which became effective in the rating period 2001. However, under cross-examination, he admitted that he did not reference DOI 34-27 in his requests for information and did not indicate to the Respondent this reason for requesting the information. The General Counsel argues that since DOI 34-27 was newly in effect and the parties had negotiated on the instruction, that the Respondent knew or should have known that the instruction was relevant to the information requests and is part of the Union's particularized need for the information. However, the Authority case law does not require that the Respondent decide what the Union's particularized need for requested information should be. Rather it is the Union's obligation to clearly set forth its reasons for why it needed the information. New reasons presented for trial purposes do not allow the Respondent to adequately review a request for

information and make an informed decision regarding whether the information should be furnished. Therefore I reject the Union's assertion that it needed the information in order to determine if there had been compliance with the DOI, since it was not timely presented to the Respondent during the processing of the information requests. *Equal Employment Opportunity Commission*, 51 FLRA 248, 258 (1995); *IRS Oklahoma City*, 51 FLRA 1391.

I therefore find that the Union set forth only one reason for why it needed the requested information: specifically in order to determine whether or not Union members were being treated fairly and equitably with regard to evaluations and awards. I find that the Union did not clearly articulate any reason for why it needed the information relating to non-bargaining unit employees.

With regard to the Union's request for information regarding bargaining unit employees, and identified as both Union members and non-Union members, I find that the Union has presented a particularized need for the information. The Union clearly expressed its concern that Union members were being treated differently from non-Union members and indicated its need for the information in order to represent bargaining unit employees in a possible grievance or unfair labor practice. The Respondent argues that the Union did not give it information related to specific employees or specific work centers, but the particularized need standard does not require that type of information, as long as the explanation gives enough information. *Department of Transportation, Federal Aviation Administration, New England Region, Bradley Air Traffic Control Tower, Windsor Locks, Connecticut,* 51 FLRA 1054 (1996). Respondent also argues that it was confused by the information requests since the Union had referenced the earlier information which concerned a more limited time frame and group of employees. While not the most articulate, the information requests are clear enough to show that as a result of the receipt of the information the year before, issues had been raised with regard to evaluations and awards, which the Union was seeking to address. Therefore I reject the Respondent's arguments that the Union's request did not meet the particularized need standard. *IRS, Kansas City*, 50 FLRA 661.

The Respondent also argued that the Union's bad faith in not responding to its request for clarification excuses its failure to furnish the information. Since I have found that the Union's initial letters requesting information set forth adequate particularized need for the information, the failure to further clarify its particularized need did not

excuse the Respondent's failure to furnish the requested information as it related to bargaining unit employees.

5. Whether the Information was Prohibited from Disclosure by Law

The Privacy Act regulates the disclosure of any information contained in an agency "record" within a "system of records," as those terms are defined in the Privacy Act, that is retrieved by reference to an individual's name or some other personal identifier. 5 U.S.C. § 552a(4)(5). With certain enumerated exceptions, the Privacy Act prohibits the disclosure of personal information about Federal employees without their consent. *United States Department of Transportation, Federal Aviation Administration, New York Tracon, Westbury, New York, 50 FLRA 338, 339 n.3 (1995) (FAA Westbury).* *FAA Westbury* involved the disclosure of performance appraisals of bargaining unit employees, and the Authority set forth the analytical approach it follows in assessing an agency's claim that disclosure of information requested under section 7114(b)(4) of the Statute would violate the Privacy Act. Section (b)(2) of the Privacy Act provides that the prohibition against disclosure is not applicable if disclosure of the requested information would be required under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), Exemption 6 which provides, in turn, that information contained in "personnel and medical files and similar files" may be withheld if disclosure of the information would result in a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). If such an invasion would result, the disclosure is not required by the FOIA. In this case, the information requested pursuant to the April 26, 2002 requests might have resulted in the unwarranted invasion of personal privacy. However, see *Department of the Air Force v. Rose*, 425 U.S. 352, 374 (1976), in which the Court found that the request for sanitized information "respected the confidentiality interests embodied in Exemption 6." Id. at 380. *See also United States Department of State v. Ray*, 502 U.S. 169, 174 (1991) (in which the Court held that redaction procedure is "expressly authorized by FOIA"). Here, because the Union requested the information be sanitized and coded, the identifying information would be redacted, there would be no unwarranted invasion of privacy under Exemption 6. Respondent would be required to disclose the information under the FOIA, and the Privacy Act would not prohibit its release. (Tr. 26-28, 30-32; G.C. Ex. 2, 2(a), 4, 4(a)). In addition, Respondent, through Johnson, testified that she never communicated to the Union that Respondent had any Privacy Act concerns. (Tr. 78-79; G.C. Ex. 3 and 5). Accordingly, the information was not prohibited from

disclosure by law, and the Respondent violated the Statute when it failed to provide the Union with the information requested with regard to bargaining unit employees.

After careful consideration of the evidence and post hearing briefs, I have concluded that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing and refusing to furnish the Union sanitized and coded copies of all Services Division bargaining unit employees' AF 3527 Forms, "NAF Employee Performance Evaluations" and AF 1001 Forms, "Award Recommendation Transmittals" for the 2000 and 2001 evaluation periods. Respondent did not violate the Statute by failing and refusing to furnish the same information with regard to Service Division non-bargaining unit employees. Accordingly, I recommend that the Authority issue the following order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the United States Air Force, Randolph Air Force Base, San Antonio, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, AFL-CIO, Local 1840 copies of all Services Division bargaining unit employees' AF 3527 Forms, "NAF Employee Performance Evaluations" for the 2000 (October 1, 1999 to September 30, 2000) and 2001 (October 1, 2000 to September 30, 2001) evaluation periods; copies of all Services Division bargaining unit employees' AF 1001 Forms, "Award Recommendation Transmittals" for the 2000 (October 1, 1999 to September 30, 2000) and 2001 (October 1, 2000 to September 30, 2001) evaluation periods; with each employee's AF 3527 Form attached to that same employee's AF 1001 Form, sanitized, but coded to indicate whether each individual employee was a Union member or non-Union member.

(b) In any like or related manner, interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Furnish the American Federation of Government Employees, AFL-CIO, Local 1840 copies of all Services Division bargaining unit employees' AF 3527 Forms, "NAF Employee Performance Evaluations" for the 2000 (October 1, 1999 to September 30, 2000) and 2001 (October 1, 2000 to September 30, 2001) evaluation periods; copies of all Services Division bargaining unit employees' AF 1001 Forms, "Award Recommendation Transmittals" for the 2000 (October 1, 1999 to September 30, 2000) and 2001 (October 1, 2000 to September 30, 2001) evaluation periods; with each employee's AF 3527 Form attached to that same employee's AF 1001 Form, sanitized, but coded to indicate whether each individual employee was a Union member or non-Union member.

(b) Post at its facilities in San Antonio, Texas, where non-appropriated fund (NAF) bargaining unit employees represented by the American Federation of Government Employees, Local 1840, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, 12 SPTG/CC, and shall be posted and maintained for 60 consecutive days thereafter. Reasonable steps shall be

taken to ensure that such Notices are not altered, defaced or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority' Rules and Regulations, notify the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Issued, Washington, DC, August 15, 2003.

_____

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Air Force, Randolph Air Force Base, San Antonio, Texas, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, AFL-CIO, Local 1840, the exclusive representative of certain of our employees, copies of all Services Division bargaining unit employees' AF 3527 Forms, "NAF Employee Performance Evaluations" for the 2000 (October 1, 1999 to September 30, 2000) and 2001 (October 1, 2000 to September 30, 2001) evaluation periods; copies of all Services Division bargaining unit employees' AF 1001 Forms, "Award Recommendation Transmittals" for the 2000 (October 1, 1999 to September 30, 2000) and 2001 (October 1, 2000 to September 30, 2001) evaluation periods; with each employee's AF 3527 Form attached to that same employee's AF 1001 Form, sanitized, but coded to indicate whether each individual employee was a Union member or non-Union member.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

WE WILL furnish the American Federation of Government Employees, AFL-CIO, Local 1840, the exclusive representative of certain of our employees, copies of all Services Division bargaining unit employees' AF 3527 Forms, "NAF Employee Performance Evaluations" for the 2000 (October 1, 1999 to September 30, 2000) and 2001 (October 1, 2000 to September 30, 2001) evaluation periods; copies of all Services Division bargaining unit employees' AF 1001 Forms, "Award Recommendation Transmittals" for the 2000 (October 1, 1999 to September 30, 2000) and 2001 (October 1, 2000 to September 30, 2001) evaluation periods; with each employee's AF 3527 Form attached to that same employee's

AF 1001 Form, sanitized, but coded to indicate whether each

individual employee was a Union member or non-Union member.

_____
Commander, 12 SPTG/CC

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, Dallas, TX 75202-1906, and whose telephone number is: 214-767-6266.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-02-0597, were sent to the following parties:

_____

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CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Anne E. McFearin, Esquire **7000 1670 0000 1175 2331**
William D. Kirsner, Esquire
Federal Labor Relations Authority
525 Griffin Street, Suite 926
Dallas, TX 75202-1906

Maj. Ferdinando P. Cavese, Esquire **7000 1670 0000 1175 2348**
David W. Chappell, Esquire
Central Labor Law Office
ATTN: AFLSA/CLLO
1501 Wilson Blvd., 7th Floor
Arlington, VA 22209

Joseph Hendrix **7000 1670 0000 1175 2355**
NAF Vice President
AFGE, Local 1840
P.O. Box 1084
Randolph AFB, TX 78148

REGULAR MAIL:

National President
AFGE, AFL-CIO
80 F Street, NW
Washington, DC 20001

DATED: August 15, 2003
Washington, DC