UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: July 11, 2002

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE, U.S. BORDER PATROL,
TUCSON SECTOR

Respondent

and Case No. DE-CA-01-0461

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, LOCAL 2544, 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

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL, TUCSON SECTOR Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 2544, AFL-CIO Charging Party	Case No. DE-CA-01-0461

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 his 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 12, 2002**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: July 11, 2002
Washington, DC

OALJ 02-49

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL, TUCSON SECTOR Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 2544, AFL-CIO Charging Party	Case No. DE-CA-01-0461

Hazel E. Hanley, Esquire
For the General Counsel

Gerald McMahon, Labor Relations Officer
Wanda Edwards, Labor Relations Specialist
For the Respondent

Edward Tuffly, Vice President
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

On March 9, 2001, the American Federation of Government Employees, National Border Patrol Council, Local 2544 (the Charging Party or the Union) filed an unfair labor practice charge against the U.S. Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol, Tucson Sector (the Respondent or the Agency). On May 23, 2001, the General Counsel of the Federal Labor Relations Authority, by the Regional Director of its Denver Region, issued an unfair labor practice complaint, alleging that

the Respondent violated section 7116(a)(1), (5) and (8) of

the Federal Service Labor-Management Relations Statute (the Statute) by refusing to furnish necessary information to the Union. The Respondent filed its Answer on May 31, 2001, admitting that it refused to furnish the information requested by the Union but denying that such refusal violated the Statute. A hearing in this case was held in Tucson, Arizona, on August 23, 2001, at which all parties were present and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

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.

FINDINGS OF FACT

The U.S. Department of Justice, Immigration and Naturalization Service (INS) is an agency as defined by 5 U.S.C. § 7103(a)(3) and the U.S. Border Patrol (Border Patrol) is a component thereof. The American Federation of Government Employees, National Border Patrol Council (the Council) is a labor organization as defined by 5 U.S.C. § 7103(a)(4), and it is the exclusive representative of a nationwide unit of employees of the Border Patrol. Local 2544 is an agent of the Council for purposes of representing unit employees in the Border Patrol's Tucson Sector.

Ralph Hunt is a Senior Border Patrol Agent assigned to the Agency's Tucson Station, and from April 2000 to April 2001 he was the Union's Chief Steward for that location. On August 24, 2000, Agent Hunt stopped a vehicle in which he believed the driver was illegally transporting two aliens across the Mexican border. After detaining the driver and passengers and learning that the vehicle had been rented from a car rental agency, Agent Hunt had the vehicle towed and put into storage, allegedly on the authorization of his supervisor. Subsequently, the driver of the vehicle filed a complaint concerning this incident with the Agency's Office of Inspector General (OIG).

The next day, a supervisor asked Agent Hunt to write a

memorandum of the events of August 24, and Hunt did so. Prior to providing his memorandum, Hunt was advised, pursuant to Article 31(B)(3) of the Collective Bargaining Agreement, that he had the right to Union representation, and Agent Hunt chose to serve as his own Union representative. Hunt did not hear anything further about the complaint, officially, until he was notified that an agency official would be coming to the office on January 25, 2001, to conduct a management inquiry.[1] On that date, Hunt met with Supervisory Agent Todd Jewell, who interviewed and took a sworn statement from him about the August 24 incident. Hunt was again advised of his right to Union representation and chose to serve as his own Union representative.

Based on his limited knowledge of management's investigation of the August 24 incident, Hunt became concerned that he was being singled out unfairly and that the investigation itself was "bogus." (Tr. at 47). He believed that he had acted on proper supervisory authorization and within Agency policy; he wanted to make sure that he would be exonerated by the investigation; and he also "wanted to investigate the management inquiry." (*Id.*) Therefore, on February 9, 2001, he sent a letter (on Union letterhead) to the Tucson Station's Chief Patrol Agent, David Aguilar, requesting several types of documents and other information from the Agency (General Counsel Exhibit 3). The letter stated that Hunt was seeking the information as Chief Union Steward and as his own representative, pursuant to 5 U.S.C. § 7114(b). Specifically, Hunt requested all memoranda from certain supervisors; records of a phone conversation between his supervisor and the rental car agency; the tape of his radio conversation concerning the stopping and towing of the rental vehicle, as well as radio dispatch records

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[1] At the hearing, there was considerable debate as to what Hunt was told in the fall of 2000 about the status of the OIG complaint, and whether the IG and the Agency's Office of Internal Audit had "cleared" him. However, for purposes of this decision, it is immaterial what those offices had done on the complaint or what Hunt was told about the status of the matter. In any case, the Agency was still investigating the matter in January of 2001, and it was possible that disciplinary action could have been proposed against Hunt as a result of that investigation.

concerning the towing of other rental vehicles; policy

memoranda concerning the disposal and return of rental vehicles; asset forfeiture records concerning seizures of vehicles; and proposal and decision notices in disciplinary and adverse action cases involving similar alleged offenses. The letter explained that he needed the information (in sanitized form) "[i]n order to fully prepare for any outcome of a management inquiry against me . . ."; "to compare policy and actions regarding employees involved with similar allegations and management administration, disparate or otherwise, vis-a-vis said policy and/or actions . . ."; and "to substantiate that I had acted in a prudent manner based on past Border Patrol policy and actions . . ." (General Counsel Exhibit 3, pp. 1-2).

In a letter dated February 28, 2001, Deputy Chief Patrol Agent Edwin B. Pyeatt responded to Agent Hunt. After restating the substance of Hunt's request, Pyeatt indicated that he had "adjudicated your request, and have determined that nothing in the statute you cited entitles you to this information, and thus the information cannot be released." There were no subsequent discussions or communications between the parties concerning Hunt's information request, and the Union filed its unfair labor practice charge a few days after receiving Pyeatt's denial.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel alleges that the Respondent failed to comply with section 7114(b)(4) of the Statute by refusing to furnish the Union with the information it requested, thereby violating section 7116(a)(1), (5) and (8). The GC argues that the information met all of the requirements set forth in section 7114(b)(4): specifically, that the information was normally maintained by the Agency, that it was reasonably available and necessary for full and proper discussion of subjects within the scope of collective bargaining, and that it did not constitute guidance or advice for management relating to collective bargaining. It further argues that the information request of February 9, 2001, satisfied the Authority's requirement that the Union "establish a particularized need for the information by articulating, with specificity, why it

needs the requested information, including the uses to which

the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute." *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 669 (1995)("*IRS Kansas City*").

In particular, the GC points to Agent Hunt's letter of February 9, in which he stated that the Union needed the information "to substantiate that I acted in a prudent manner" and "to compare policy and actions regarding employees involved with similar allegations". In this manner, the Union allegedly established that it needed the information to defend Hunt against any potential discipline and to establish any inequities or disparate treatment in the Agency's investigation. The GC argues that the Union's role in a management inquiry is the same as its role in representing an employee after discipline has been proposed: although the Agency had not formally charged Hunt with any misconduct or proposed discipline, the Union begins its efforts to help employees at the earliest stage of the investigative process, and its entitlement to information at the investigative stage is comparable to its entitlement at the disciplinary stage. The Union simply wants information that the Agency itself would utilize in considering whether to charge Hunt with misconduct, and indeed Agent Hunt and the Union want to ensure that potentially exculpatory information is not lost in the investigation.

In the GC's view, by denying the information request with a conclusory assertion that "nothing in the statute you cited entitles you to this information," the Agency failed in its duty to identify any "countervailing anti-disclosure interests" (*IRS Kansas City*, 50 FLRA at 670) and thus cannot raise such interests now. Specifically, the Agency's argument that management inquiries are outside the scope of collective bargaining and therefore irrelevant to any representational role of the Union should not be considered, as it was not articulated when the Agency responded to the Union's request. Finally, the GC argues that the Agency's late and summary response violated the terms of Judge Oliver's order in a 1997 decision involving the same parties, an order which became final after no exceptions were filed. *U.S. Immigration and Naturalization Service, Border Patrol, Tucson, Arizona*, Case Nos. DE-CA-60715 and DE-CA-60791 (1997), ALJ Decision Reports, No. 129 (September 17, 1997).

The Respondent argues, however, that the Union's information request did not satisfy the basic requirement of *IRS Kansas City* of articulating how the Union's proposed use

of the information was connected to its statutory representational responsibilities. All of the reasons cited by Agent Hunt in his information request related to defending himself in the ongoing management inquiry and against possible future disciplinary action. The Respondent notes that the information request was quite clear in these regards, and it therefore did not need to request any clarifying information from the Union in order to respond to it. In the Respondent's view, all of the proposed uses were improper, or at least they were not within the scope of collective bargaining or the Union's representation of an employee. The Agency concedes that all or part of the requested information would be appropriate if and when Agent Hunt is actually charged with misconduct, but the Union has no role in representing an employee during a management inquiry. The Agency further distinguishes between the Union's role at an investigatory interview (at which the employee has the right to request Union representation) and at a management inquiry (at which the Union has no role). Moreover, the information request was made by the Union on February 9, after the January 25 interview with Agent Jewell had taken place; therefore, the Respondent argues that the information had no conceivable relation to the interview or to any representational function of the Union.

Analysis

Although both the General Counsel and the Agency have made a variety of arguments and cited many relevant decisions concerning the standard for evaluating union requests for information, neither party has identified the crucial issue in this case or cited the one decision that most closely affects the outcome here. The issue I refer to is the relationship between a union's right to information under section 7114(b)(4) and its right to represent an employee at an investigatory examination under section 7114 (a)(2)(B). The decision is *Federal Aviation Administration, New England Region, Burlington, Massachusetts*, 35 FLRA 645 (1990)("*FAA New England*").

I have already alluded to the basic legal standard for evaluating information requests, as set forth in *IRS Kansas City* and refined in several subsequent decisions. The case law thus envisions a process of two-way communication between a union and an agency: the union has the initial responsibility to articulate how the requested information is necessary to carry out a specific representational function; the agency then has the responsibility to express any interests weighing against disclosure; and the parties both have the responsibility to discuss each other's concerns and strive to reach a balance. When the parties

cannot reach an agreement, an unfair labor practice will be found if the union has established a particularized need for the information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need. *IRS Kansas City*, 50 FLRA at 671.

Very few published decisions, however, involve union requests for information during a management investigation of possible employee misconduct, and no Authority decision other than *FAA New England* involves facts close to those in the current case. In *FAA New England*, the Authority articulated principles that support some of the arguments made by both parties here, but ultimately that decision requires me to conclude that the Union was not entitled to the information it requested.

In *FAA New England*, the agency investigated several employees for possible falsification of travel vouchers, pursuant to which the agency interviewed the employees on two separate occasions. At each interview, the employees were represented by a union official. Prior to the second round of interviews, the union requested the agency to furnish it with a variety of reports and records which might be used by the investigators and which would help the union defend the employees. The agency refused to furnish the information, on the ground that it was premature to do so before management had proposed any action against the employees, and the Authority upheld the agency's refusal.

Noting the overlap of section 7114(a)(2)(B) and 7114(b)(4), the Authority reasserted the longstanding principle that the right to union representation at an investigatory interview includes the right to take an "active part" in the defense of the employee. 35 FLRA at 651, citing *Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri*, 6 FLRA 678, 678-79 n.2 (1981), and *U.S. Customs Service, Region VII, Los Angeles,*

California 5 FLRA 297 (1981). This is, it said, as much a part of the union's representative function as negotiating a contract. 35 FLRA at 650. Accordingly, it held that

> information requested in connection with a union's representation of an employee at such an investigation is relevant to the representational function of the union under the Statute. Consequently, . . . such information must be furnished by an agency when a union's request satisfies the requirements of section 7114(b)(4).

35 FLRA at 651-52. The Authority then went on to evaluate what information is "necessary" under 7114(b)(4) for a union to effectively represent an employee in an investigatory interview. Taking an approach similar to that of the National Labor Relations Board in *Pacific Telephone & Telegraph Co.*, 262 NLRB 1048 (1982), the Authority stated that the right of a union to obtain relevant information at an investigatory interview "must be balanced against the interests of an agency employer in investigating and disciplining misconduct." 35 FLRA at 653. It held, echoing the NLRB:

> The employer does not have to reveal its case, the information it has obtained, or even the specifics of the misconduct to be discussed. A <u>general</u> statement as to the <u>subject matter</u> of the interview, which identifies to the employee and his representative the misconduct for which discipline may be imposed, will suffice.

Id., citing 262 NLRB at 1049 (emphasis in original). Such an information requirement is far less than a "discovery" standard, and it does not entitle the union or employee to turn the investigation into an adversarial process.[2] *Id.* Finally, the Authority in *FAA New England* held that since the employees and union had previously learned the nature of the investigation at the first set of interviews, the information requested by the union was not necessary for the union to represent the employees at the interviews.

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2 It is important to recognize that both the Authority and the NLRB grounded their rulings on the reasoning of the Supreme Court in *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). In that decision, the Court recognized a union's representational rights in an investigation but also emphasized that those rights may not compromise the employer's legitimate interest in preserving the objectives and integrity of its investigation.

While there are important factual differences between the *FAA New England* case and the current case, they do not warrant a different outcome.

One of the Respondent's arguments must be rejected at the start. Contrary to the Agency's insistence, the "management inquiry" of which Agent Hunt was a subject is not legally distinguishable from an "investigatory examination," for purposes of an employee's right to representation under section 7114(a)(2)(B) and a union's right to information under section 7114(b)(4). When Agent Jewell interviewed Agent Hunt and took a statement from him on January 25, 2001, that constituted a 7114(a)(2)(B) examination, and the Union was entitled to represent Agent Hunt there.[3] Hunt could reasonably anticipate that the Jewell interview might result in disciplinary action against him, and his choice of the Union as his representative gave the Union a legitimate role in the examination. As noted in the *FAA New England* decision, the Union had the right to participate fully during the interview and to obtain from the Agency information necessary to become familiar with Hunt's circumstances and the subject matter of the misconduct being investigated.

Unfortunately for the Union, the above-stated rights do not support its information request of February 9, 2001. First of all, as noted by the Respondent, the Union made its information request after the investigatory interview; second, and even more fundamentally, Agent Hunt was quite familiar with the circumstances and subject matter of the management inquiry. Hunt had had discussions with supervisors previously about the August 24 incident and understood that his seizure of the rental vehicle was being questioned. He had given a written statement to management immediately after the incident. When he met with Agent Jewell on January 25, 2001, he did not need to be familiarized about these matters, and indeed he did not make his information request until two weeks after the interview. His purpose in requesting the information was not for the very limited uses outlined in *FAA New England* and in *Weingarten*, but to prepare his defense against future disciplinary action (which he viewed as the all-but-

[3] The Agency did not dispute Hunt's entitlement to a representative at that time and indeed advised him of his right. In its post-hearing brief (at page 6), the Respondent appears to argue that this right derives only from the parties' collective bargaining agreement, rather than from the Statute, a theory that I do not accept. Nothing in Article 31 of that agreement constitutes a waiver of an employee's statutory rights.

inevitable outcome of the investigation) and to "investigate the investigation" itself. These are certainly legitimate aspects of a union's representation of an employee against whom discipline has been proposed, but they are not legitimate applications of section 7114(a)(2)(B) or (b)(4) while an agency is still pursuing its investigation.

It could be argued that the holding of *FAA New England* should be limited strictly to the facts of that case, that is, to information requested to assist a union at the investigatory interview. The General Counsel has not accused the Respondent of violating Hunt's or the Union's *Weingarten* rights under section 7114(a)(2)(B) in this case, but rather of violating section 7114(b)(4). Under this logic, a union continues to represent an employee throughout an investigation, even after the interview has been conducted, and it continues to be entitled to information when it establishes a particularized need for it. That much is certainly true, but an agency's interest in "preserving the integrity of the investigation" also continues after the interview and throughout the investigation. 35 FLRA at 652. One such management interest recognized in *FAA New England* and in *Weingarten* is to avoid transforming the investigation into an adversarial contest. 35 FLRA at 654. Yet that is precisely what the Union's information request would have done in this case. Even a cursory review of the material requested in the Union's letter of February 9 makes it clear that Agent Hunt was mounting a full-scale defense of his actions in advance of any formal charges being made against him. It is certainly understandable that he would want to defend himself pro-actively, but the law does not allow him to use section 7114(b)(4) as a tool for transforming the management inquiry into an adversarial or discovery process. Although *FAA New England* does not expressly cover information requested after an investigatory examination, the principles expressed by the Authority there are equally applicable to the facts of the current case. To hold otherwise would rob that decision (and *Weingarten*) of all protections for an investigating agency. If a union could

obtain information only for very limited purposes at or

before the interview, but could then obtain all information assembled by management while the investigation is still ongoing, the investigation would become a public forum, and the worst fears of the NLRB dissent in *Pacific Telephone* would be realized. 262 NLRB at 1051-52.

The General Counsel argues that a Union needs the right to demand information during an investigation in order to prevent exculpatory evidence from being overlooked or lost by management. That goal can be largely achieved, however, without requiring an agency to furnish the information to the Union. Agent Hunt and the Union were free to apprise the Agency, in writing, during the investigation of all possible sources of exculpatory evidence, and to request the Agency to consider that evidence in its investigation; if the Agency failed to preserve or consider such information and nonetheless proposed to discipline him, Hunt and the Union could then use the Agency's failure as a basis for challenging the discipline. But the Union did not have the right under section 7114(b)(4) to obtain that information from the Agency during the investigation, and the Agency was free to limit the scope of its investigation as it saw fit, albeit at its peril in a grievance proceeding.

For these reasons, I conclude that the Union did not establish a particularized need for any of the information requested in its February 9, 2001 letter. It did not demonstrate how the requested information was necessary for the Union to carry out its representation of Agent Hunt or other members of the bargaining unit during the pendency of the management inquiry into Agent Hunt's conduct. Although the Agency's response to the information request did not provide any detailed explanation for its denial of the request, the Union's failure to establish particularized need rendered a detailed explanation by management unnecessary. Since the Union was not entitled to the information during the pendency of the investigation, the defect in the information request could not have been cured by discussion or a meeting. Finally, because I find that the Union was not entitled to the information it requested, I do not consider it appropriate in this unfair labor practice proceeding to address the fact that the Agency's February 28, 2001 response to the Union's information request failed to conform to the requirements of Judge Oliver's order in his 1997 decision involving the same parties. ALJ Decision Reports, No. 129, *supra*.[4]

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[4] In a separate decision issued today, involving some of the same parties as this case, I have addressed this question more fully. DE-CA-01-0497 and DE-CA-01-0498, OALJ 02-50.

Based on the foregoing, I recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, July 11, 2002

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RICHARD PEARSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. DE-CA-01-0461, were sent to the following parties in the manner indicated:

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Dated: July 11, 2002
Washington, DC