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

MEMORANDUM DATE: September 28, 2006

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE

Respondent

and Case No. WA-CA-05-0331

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring t he 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 THE TREASURY INTERNAL REVENUE SERVICE Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-05-0331

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 **OCTOBER 30, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

_____

PAUL B. LANG
Administrative Law Judge

Dated: September 28, 2006
Washington, DC

OALJ 06-35

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

U.S. DEPARTMENT OF TREASURY INTERNAL REVENUE SERVICE Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. WA-CA-05-0331

Tresa A. Rice, Esquire
For the General Counsel

G. Roger Markley, Esquire
For the Respondent

William Igoe
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On April 27, 2005, the National Treasury Employees Union (Union or NTEU) filed an unfair labor practice charge against the U.S. Department of the Treasury, Internal Revenue Service (Respondent or IRS) (GC Ex. 1(a)). On April 19, 2006, the Regional Director of the Washington Regional Office of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(b)) in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(1)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (Statute)[1] by failing to provide the Union

[1] This is an obvious typographical error since there are no such sections in the Statute. The nature of the alleged violations and the General Counsel's post-hearing brief indicate that the citations should have been to §7116(a)(1), (5) and (8) of the Statute.

with certain information that it had requested pursuant to §7114(b)(4) of the Statute. The Respondent filed a timely Answer (GC Ex. 1(e)) in which it denied that it had committed the alleged unfair labor practice and further alleged that the information which the Union had requested was not subject to the control of the Respondent.

A hearing was held in Washington, DC on July 11, 2006. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon the evidence, including the demeanor of witnesses, as well as the post-hearing briefs submitted by the parties.

Findings of Fact

The Respondent is an agency as defined in §7103(a)(3) of the Statute. The Union is a labor organization within the meaning of §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining (GC Exs 1(a) and 1(e)).

The Union's Information Requests and the Respondent's Replies

By letter of September 3, 2004,[2] (GC Ex. 2) Jeffrey Basalla, Director, Field Compliance Area 6, informed Rebecca McCoy, a Revenue Officer and member of the bargaining unit, that the Respondent proposed to terminate her employment for the reasons set forth in the letter. By letter of September 14 (Resp. Ex. 1)[3] from Daniel O. Harbaugh, NTEU Chapter 64 President,[4] to Julie Tolle, Labor Relations Specialist, the Union requested that the Respondent provide it with certain specified information regarding McCoy's proposed removal. On November 15 Harbaugh, on behalf of the Union, submitted a third information request (GC Ex. 3) to

[2] All subsequently cited dates are in 2004 unless otherwise specified.

[3] The parties agree that this exhibit contains, among other things, all of the Union's requests for information regarding the proposed termination of McCoy as well as all of the Respondent's replies (Tr. 52).

[4] Although NTEU Chapter 64 was not identified in the Complaint, Harbaugh testified without challenge that it represents the Respondent's employees in West Virginia (Tr. 18). Therefore, all further references to the Union will include NTEU Chapter 64.

the Respondent through Tolle. Among the material requested was:

> All Treasury Inspector General for Tax Administration [TIGTA] investigatory and disciplinary policy documents to show how investigations should be conducted and how cases are referred to an agency's investigatory arm. [Citation omitted.] This is to include but is not limited to the Treasury Inspector General for Tax Administration Conduct Investigation Manual 400. This is to include but [not] limited to any manual sections, policy documents, or training materials dealing with UNAX [unauthorized access to tax information] investigations by TIGTA.

On December 8 Tolle responded to Harbaugh in a memorandum (GC Ex. 4) to which she attached some of the requested information. Which regard to the TIGTA material, Tolle stated:

> Our Agency does not have control over the release of information for the Treasury Inspector General for Tax Administration. As a result, no information will be provided for this particular item.

By memorandum of December 22 to Tolle (GC Ex. 5) Harbaugh reviewed the Respondent's replies to its first, second and third information requests. Harbaugh noted that the Union had not received a response to its request for the TIGTA policy and training documents. By letter of January 10, 2005, to Tolle (GC Ex. 6) Harbaugh submitted a fifth request for information.[5] In it he referred to the prior request for TIGTA documents and stated that the Respondent's refusal to comply would constitute an unfair labor practice. Tolle responded to Harbaugh by memorandum of January 11, 2005, (GC Ex. 7) in which she stated:

> As you were previously advised on December 8, 2004, our Agency does not have control over the release of information for the Treasury Inspector General for Tax Information (TIGTA). Therefore, the information requested cannot be provided. Please note, you may be able to secure a copy of the requested information through another avenue; however, in order to do so, you will need to

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[5] Presumably the Union considered the December 22 memorandum to have been its fourth request.

submit a FOIA [Freedom of Information Act] request through the TIGTA Office of Special Counsel.

Tolle testified without contradiction that, upon receipt of the Union's request for the TIGTA information, she contacted Donna Rabbitt-Murphy who was the TIGTA special agent who had interviewed McCoy as part of an investigation leading to her proposed separation. Rabbitt-Murphy informed Tolle that the requested information could not be released, even to Labor Relations or IRS management. Rabbitt-Murphy further stated to Tolle that, if the Union wanted the information, it could initiate a FOIA request to the TIGTA Office of Special Counsel. Tolle further testified that she passed that information along to Harbaugh (Tr. 48-49).[6]

The Relationship Between the IRS and TIGTA

Jeanne E. Morrison is a Senior Technical Advisor for the Respondent. Her responsibilities include the handling of national grievances and negotiations as well as disclosures in response to information requests. Morrison testified that IRS and TIGTA are separate bureaus within the Department of the Treasury. The Commissioner of the IRS has no authority over TIGTA, nor does TIGTA exercise any control over the IRS (Tr. 59, 60). TIGTA performs two primary functions for IRS: the first is to conduct investigations of employees; the second is to review IRS programs and to make recommendations for improvements. TIGTA will hand over reports of investigations and recommendations for program improvements, but it is very difficult to get information from TIGTA (Tr. 60, 61). According to Morrison's understanding, the IRS does not have the ability to obtain information from TIGTA regarding UNAX investigations. However, such material would be available if the investigation were conducted by the IRS itself (Tr. 62).

On cross-examination Morrison testified that TIGTA's relationship to the IRS is as an independent inspector general that functions as a third party. TIGTA may initiate an investigation in response to a referral from IRS management, because of information from an IRS employee or on its own initiative based upon information which TIGTA has

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It is unclear whether Tolle mentioned her conversation with Rabbitt-Murphy since she also testified that, to the best of her recollection, all of her communications with Harbaugh were in writing (Tr. 48); none of them made reference to efforts to obtain the documents. Harbaugh, on the other hand, testified as to a telephone conversation that he had with Tolle (Tr. 30) but did not indicate prior knowledge of Tolle's conversation with Rabbitt-Murphy.

received through its own efforts. The investigation in the McCoy matter was initiated by a management referral. In response to my question, Morrison stated that IRS management may choose to conduct an investigation on its own or there may be instances in which TIGTA does not accept a referral (Tr. 65, 66).

Morrison also testified that, while TIGTA makes recommendations after program investigations, its role is very different in investigations of employee misconduct. In such cases, TIGTA merely makes a report of the facts which it has collected through interviews. It is up to IRS management to determine what action to take as a result of TIGTA's report (Tr. 66, 67). The quality of the TIGTA investigation is not a factor in management's determination of whether there has been disparate treatment because the IRS has no knowledge as to how TIGTA conducts its investigations (Tr. 63, 64). Morrison further testified that the IRS has no control over how TIGTA conducts its investigations or over the nature of the training that is given to TIGTA personnel (Tr. 68, 69).

Positions of the Parties

The General Counsel maintains that the Union adequately articulated a particularized need for the TIGTA material which it requested. The General Counsel further maintains that the requested information was relevant to the Union's inquiry as to whether TIGTA had followed its own standards in conducting the investigation in the McCoy matter and whether there was evidence of disparate treatment in the conduct of the investigation. In the Respondent's replies to the Union's information requests it never stated that the Union had not established a particularized need. Accordingly, the Respondent was not entitled to raise the issue for the first time at the hearing.

The General Counsel further maintains that, since the disclosure of the requested information was not prohibited under §7114(b)(4) of the Statute, its disclosure was not barred by FOIA. FOIA does not prohibit the disclosure of information but rather establishes exemptions from otherwise mandatory disclosure under FOIA.

The General Counsel also argues that the requested information was normally maintained and reasonably available at TIGTA. Since TIGTA acted as the agent for the Respondent in conducting the McCoy investigation, and since the information obtained in the investigation was used by the IRS in making its decision as to the imposition of discipline, the IRS is obligated to provide the information

to the Union. Because the Respondent may conduct its own investigation rather than referring it to TIGTA, it should not be allowed to avoid its obligations under the Statute by means of an internal management decision.

The Respondent maintains that the General Counsel has failed to meet her burden of proof inasmuch as she has failed to present any evidence to show that the TIGTA material requested by the Union was maintained by the Respondent in the regular course of business and was reasonably available to the Respondent. The requested information was not under the Respondent's control. The Respondent was informed by a representative of TIGTA that it would not provide the information and the Respondent was not able to force TIGTA to do so.

The Respondent further maintains that the Union failed to demonstrate a particularized need for the information. The undisputed evidence shows that the Union's purpose in requesting the information was to determine whether TIGTA, rather than the Respondent, had conducted the McCoy investigation properly.

The Respondent emphasizes that it provided a great deal of information to the Union in the McCoy matter and that it attempted to obtain the requested material from TIGTA. Furthermore, it provided the Union with all of the material which it received from TIGTA.

Discussion and Analysis

The Legal Framework

The legal standards governing a union's right to obtain information are well established and are undisputed by the parties. Pursuant to §7114(b)(4) of the Statute, the duty of an agency to negotiate in good faith includes the duty to provide the union:

> . . . upon request and, to the extent not prohibited by law, data -
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper

> discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . . .

In order for a union to invoke its right to information it must establish a particularized need for the information by articulating, with specificity, the basis of its need, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute. The union's responsibility for articulation requires more than a conclusory statement; it must be specific enough to permit the agency to make a reasoned judgment as to its obligation to provide the information. The agency is, in turn, responsible for establishing its countervailing anti-disclosure interests, if any, and must do so in a nonconclusory manner, *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 669 (1995). Furthermore, the agency must articulate its nondisclosure interests in response to the information request and not for the first time at an unfair labor practice hearing, *Federal Aviation Administration*, 55 FLRA 254, 260 (1999).

In deciding whether information is reasonably available to an agency, the Authority will determine whether the information is accessible or obtainable by means that are neither extreme nor excessive. The physical location of the information is not a critical factor so long as it is subject to the agency's control or can be retrieved and provided to the agency at its request, *U.S. Department of Justice, Washington, DC, et al.*, 46 FLRA 1526, 1537 (1993). Even if the requested information is under the control of another agency, the agency to which the request was made might still not be absolved of the duty to make a reasonable effort to obtain the information. For example, in *U.S. Department of Transportation, Federal Aviation Administration, National Aviation Support Facility, Atlantic City Airport, New Jersey*, 43 FLRA 191, 197 (1991) the Authority held that information maintained by the Civil Rights Division of the Department of Transportation could be retrieved at the respondent agency's request and was therefore reasonably available.

The Requested Information Was Not Normally Maintained by the Respondent in the Regular Course of Business and Was Not Reasonably Available

The undisputed evidence shows that, other than for the fact that the IRS and TIGTA are both bureaus within the Department of the Treasury, they are completely separate entities and are independent of each others' control. In view of those facts, the General Counsel's reliance on such cases as *U.S. Department of Justice, Washington, D.C., etc., et al.*, 46 FLRA 1526, 1537 (1993) (*DOJ*) is misplaced. In *DOJ* the Authority held that information which was controlled by an agency's inspector general was reasonably available to the agency and was therefore subject to disclosure. Although Morrison characterized TIGTA as an inspector general, she also described it as a third party. The overall weight of the evidence is that, while TIGTA conducted the McCoy investigation at the behest of the Respondent, its status was not that of an "in house" inspector general, but was analogous to that of an outside contractor. The limited character of the relationship between the Respondent and TIGTA is demonstrated by the fact that the Respondent is not required to refer investigations to TIGTA and that TIGTA is not required to accept every referral. Furthermore, the Respondent has no information as to the standards governing TIGTA investigations or the training given to TIGTA investigators.

The General Counsel has characterized TIGTA as the agent of the Respondent, but has produced no evidence to prove the existence of such a relationship other than the fact that TIGTA conducted the McCoy investigation on the Respondent's behalf. Assuming that the General Counsel is correct, there is nothing in the record to show the extent of TIGTA's authority or its obligation to the Respondent other than to conduct the investigation after the receipt of the referral. While the Respondent may be bound by the factual findings made by TIGTA as a result of its investigation, there is nothing inherent in its relationship with TIGTA which counteracts the thrust of the undisputed evidence that the Respondent lacked the authority to require TIGTA to disclose the information requested by the Union.

It is significant to note that the Respondent did not rely upon a conclusory assertion that it could not obtain the requested information. On the contrary, Tolle made an inquiry to the TIGTA representative who conducted the McCoy investigation and was told that TIGTA would not produce the material. Tolle also passed along to Harbaugh the

suggestion that the Union initiate a FOIA request. There is nothing in the record to indicate whether the Union did so.[7]

I am not persuaded by the General Counsel's argument that excusing the Respondent from disclosing the requested information would allow it to evade its obligation to provide information by referring investigations to TIGTA. The record shows that the Respondent produced information in response to numerous requests by the Union (Resp. Ex. 1),[8] including the Report of Investigation prepared by TIGTA. Furthermore, the undisputed evidence indicates that the material sought by the Union was not used by the Respondent in reaching a final decision regarding McCoy.

The General Counsel does not allege, and there is no evidence to suggest, the existence of a collusive relationship between the Respondent and TIGTA. Apparently the Union did not see fit to explore this issue by requesting copies of communications, if any, between the Respondent and TIGTA regarding the method by which the McCoy investigation was to be conducted or of any standing agreements or policies governing investigations conducted by TIGTA for the Respondent.

Having found that the material requested by the Union was not normally maintained by Respondent in the regular course of business, it is not necessary to address the issue of whether the Union expressed a particularized need for the information or whether the Respondent was entitled to raise the issue at the hearing.

This Decision should not be construed as a determination of the relevance of the TIGTA material to the merits of the Respondent's termination of McCoy's employment. The thrust of the Decision is limited to the Respondent's liability under the Statute for failing to provide the material to the Union.

For the foregoing reasons, I have concluded that the Respondent did not commit an unfair labor practice by failing to provide the Union with the TIGTA procedural and

[7] The General Counsel has not alleged that the Respondent should have attempted to persuade the Secretary of the Treasury to order TIGTA to produce the requested material.

[8] Although the Union cited the Respondent's alleged failure to produce a number of the items requested in the unfair labor practice charge (GC Ex. 1(a)), the General Counsel elected to proceed only with regard to the documents describing TIGTA procedure and training.

training documents which it requested on November 15, 2004. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, September 28, 2006.

Paul B. Lang
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. WA-CA-05-0331 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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