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

OALJ 25-6

U.S. ARMY TRAINING AND DOCTRINE COMMAND
FORT EUSTIS, VIRGINIA
Respondent

And

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES,
LOCAL R4-12
Charging Party

WA-CA-23-0078

Melissa K. Coward
For the General Counsel

LTC Jeremy A. Haugh
For the Respondent

Robert Novak
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

The Union and the Agency in this case seem to have been going through the motions of filing and responding to a request for information under Section 7114(b)(4) of the Statute: walking through the steps of an all-too-familiar procedure, checking off the required boxes, and reaching the inevitable standoff, while expending the minimum amount of effort possible. Neither side seems to have been very interested in actually talking to each other, in finding common ground, or in identifying what information could be furnished that would accommodate both sides' legitimate interests; rather, their actions appear calibrated to pass the buck to an outside decisionmaker. In that modest goal, they have succeeded.

The Union was investigating an employee's complaint that a vacancy announcement may have been filled improperly, and that the Agency had thereby committed a prohibited personnel practice. In order to evaluate the merits of this complaint, the Union requested the

underlying documentation that was utilized by the hiring panel and selecting officials; the Agency denied the request. The Union submitted a second request that was nearly identical to the first, and the Agency denied it again. Neither the requests nor the denials provided a great deal of explanation for their reasoning, and soon after the second denial was received, the Union filed an unfair labor practice charge. The Union received none of the information it requested.

The main issue to be resolved is whether the Union adequately stated a "particularized need" for the information, as that term is defined in FLRA case law. The Respondent now asserts other grounds for refusing to furnish some of the information, but it waived those defenses by failing to raise them with the Union at the time of the request. I conclude that the Union's information request, albeit brief, did set forth its need for some, but not all, of the information, and I will order the Agency to furnish the necessary documents to the Union.

As is true in most cases of this nature, however, the Union's receipt of this information, two-and-a-half years after the disputed vacancy was filled, is unlikely to help any aggrieved employees. If, instead, the Union had sought to engage more directly and personally with management officials right after the vacancy was filled, and if the parties had jointly engaged in discussions with a sincere resolve to identify and furnish information that would accommodate everyone's interests, a more satisfying outcome might have been achieved.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or the Authority), 5 C.F.R. part 2423.

On November 8, 2022, the National Association of Government Employees R4-12 ((the Union or Charging Party) filed a ULP charge (JX 8(a)) in this case against the U.S. Army Training and Doctrine Command, Fort Eustis, Virginia (the Agency or Respondent, commonly referred to as TRADOC), and on February 14, 2023, the Union filed an amended charge. JX 8(b). After investigating the charge, the Acting Regional Director of the Atlanta Region of the FLRA issued a Complaint and Notice of Hearing, on behalf of the FLRA's General Counsel (GC), against the Respondent on June 7, 2023, alleging that the Respondent violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by refusing to furnish information requested by the Union. JX 8(c). On July 3, 2023, Respondent filed its Answer to the Complaint, admitting some of the factual allegations but denying that it had violated the Statute. JX 8(e).

On February 13, 2024, the parties filed a Joint Motion to Enter Into Stipulation of Facts, along with a Stipulation of Joint Exhibits 1 through 8. In the Joint Motion, the parties agreed that the facts set forth therein constitute the entire record in the case and that a hearing is not necessary to resolve any disputes of material facts. The parties further acknowledged that they were waiving their right to a hearing. After reviewing the Joint Motion and exhibits, I agreed that these documents adequately set forth a record on which to render a decision, and that a hearing was not necessary. Accordingly, I issued an Order Cancelling Hearing on February 15, 2024, and set a date for the parties to file briefs supporting their positions regarding the allegations in the Complaint. The GC and the Respondent filed briefs on March 15, 2024, and

the record was closed on that date.

I will not repeat the stipulation of facts verbatim, but I will summarize those facts that I consider most important, and I will then make conclusions of law and recommendations.

FINDINGS OF FACT

TRADOC, the Respondent, is an agency within the meaning of § 7103(a)(3) of the Statute. The Union, the National Association of Government Employees R4-12, is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of employees at Fort Eustis, Virginia. The Union and Respondent are parties to a collective bargaining agreement (CBA) dated August 8, 2022. JX 1.[1]

Article 9, Section 4 of the CBA states: "Consistent with the Negotiated Grievance Procedure, Article 47, the Union has the right to represent an employee or group of employees in presenting a grievance or other appeal or when raising matters of concern or dissatisfaction with management concerning conditions of employment." *Id.* at 12.

Article 14 of the CBA states that promotions will be made on the basis of merit. *Id.* at 16. Section 7 of Article 14 provides:

> It is understood that non-selection [for a promotion] from a properly constituted, ranked, and certified referral list is not grievable. However, an employee may grieve if he feels that a referral list was not properly constituted, ranked, and certified. The employee may have Union representation. When the Union is representing the employee, the Employer will make available for review all materials necessary to reconstitute the referral list consistent with 5 U.S. Code §7114(b)(4) and the Privacy Act. Any grievance filed will be consistent with the Negotiated Grievance Procedure, Article 47.

Id. Relatedly, Article 47, Section 2.k. of the CBA excludes from the grievance procedure the "non-selection for promotion from a group of properly ranked and certified candidates." *Id.* at 51.

On June 22, 2022,[2] TRADOC posted a job opening on USAJOBS, seeking applicants for the position of Safety and Occupational Health Manager, GS-0018-14, a supervisory position. The job listing code was SCER 227000980750. Stipulation at ¶ 7. Union President Robert Novak was one of 47 applicants for the position; he was interviewed for the position but not selected. Another bargaining unit employee, Christina Bass, was selected sometime in August of 2022. The Hiring Official notified Novak by telephone on August 11 of his non-selection and offered him feedback regarding his resume, interview, and what he could do to improve his potential for future applications. *Id.* at ¶¶ 8-10. On August 22, Novak met with the Hiring Official about the hiring process. *Id.* at ¶ 11.

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[1] The Union is identified in the Preamble of the CBA as the National Association of Government Employees, SEIU 5000. TRADOC is listed there as one of several Army activities at Fort Eustis subject to the CBA. JX 1 at 4.

[2] Hereafter, all dates are 2022 unless specified otherwise.

On August 29, Union Vice-President Mark Maggio requested that the Agency furnish the Union with the following information:

1. Request a copy of job listing SCER 227000980750, a copy of the hiring panel worksheets and results.
2. A redacted copy of resumes for those applicants interviewed for the position, a list of questions asked, and board member results for each applicant's interview.
3. All email between [sic] from, to, or between interview panel members, selecting officials, the DCS G-1/4 XO or DCS G-1/4 which mention the selection.
4. A listing of each directorate within the G-1/4, indicating which have deputy (or like) positions and which do not. The month and date that the Safety Office deputy position was removed from the TDA.
5. A listing when Ms. Christina Bass was given duties as acting G-1/4 XO, record of solicitation of volunteers for those duties and rotation schedule for those who volunteered.
6. Date which Ms. Bass was granted XO duties for the safety office, record of solicitation of volunteers for those duties and rotation schedule for those who volunteered.

Id. at ¶ 12. The information request is also JX 2.

The Union explained its particularized need for the information in this manner: "This information is requested to provide proper employee representation guidance and actions necessary, by NAGE." Stipulation at ¶ 13; JX 2.

On September 8, Agency representative Nicolas Graham responded to the Union: "Your request for information under Section 7114(b)(4) dated 29 August does not state the particularized need; nor is it in accordance with the Collective Bargaining Agreement (CBA) and is therefore denied." Stipulation at ¶ 14; JX 3.

On September 23, the Union submitted a new request, slightly modifying the information it sought, as follows:

1. Request a copy of job listing SCER 227000980750, a copy of the hiring panel worksheets and results from each board member.
2. A redacted copy of resumes for those applicants interviewed for the position, a list of questions asked, and individual board member results (by name) for each applicant's interview.
3. All email between [sic] from, to, or between interview panel members, selecting officials, the DCS G-1/4 XO, or DCS G-1/4 which, in any way, mention the paneling or selection.
4. A listing of each directorate within the G-1/4, indicating which have deputy (or like) positions and which do not. The month and date that the Safety Office deputy position was removed from the TDA. The month and year that the reinstatement of the Safety Office Deputy Director position was first discussed by the Safety Office Director and the G-1/4 Deputy, XO, or DCS.
5. A listing when Ms. Christina Bass was given duties as acting G-1/4 XO, record of solicitation of volunteers for those duties and rotation schedule for those who volunteered.
6. Date which Ms. Bass was granted XO duties for the safety office, who initially directed her appointment to those duties, record of solicitation of volunteers for those duties and rotation schedule for those who volunteered.

Stipulation at ¶ 15; JX 4. The Union explained its particularized need for the information:

> This information is required to enable the Union to determine if any of the represented employee's rights were violated, specifically if the agency violated prohibited personnel practices during the hiring/promotion selection process. Such information directly relates to the employee's claims of possible legal violations during the process. Once provided, this information will allow the Local to provide proper employee representation, guidance, and take appropriate actions.

Stipulation at ¶ 16; JX 4. On September 30, Mr. Graham responded to Mr. Maggio, on behalf of the Agency:

> Your request for information under Section 7114(b)(4) dated 23 September 2022 does not sufficiently state the particularized need. Unions do not have exclusive representational rights to bargain on conditions of employment for applicants. Furthermore, the particular representation indicated in the request would be excluded from the Negotiated Grievance Procedure under the Collective Bargaining Agreement.

Stipulation at ¶ 17; JX 5.

Pursuant to Article 50 of the CBA, the Union notified the Agency on October 3, and again on October 19, of its intent to file a ULP charge regarding the denial of its information request. Stipulation at ¶¶ 18, 19; JX 6, 7. The ULP charge was filed with the FLRA on November 8.

POSITIONS OF THE PARTIES

Rather than setting forth the positions of the General Counsel and the Respondent separately, I will describe their respective arguments item by item, as the Respondent raises different objections to different portions of the Union's September 23 information request.[3] In doing so, I believe the disputed issues will be easier to identify and to address subsequently.

Section 7114(b)(4) of the Statute requires an agency, upon request and to the extent not prohibited by law, to provide a union with data that is: (1) normally maintained by the agency; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (4) not guidance or training to management relating to collective bargaining. *Health Care Fin. Admin.*, 56 FLRA 503, 506 (2000) (*HCFA 1*). An agency that fails to do so commits an unfair labor practice in violation of § 7116(a)(1), (5), and (8). The Respondent admits in its Answer that none of the requested information constitutes guidance to management. JX 8(e) at ¶ 10; Respondent's Brief at 9. Accordingly, this requirement is not disputed, and I will not address it further. The GC

[3] Throughout this decision, I will focus on the Union's second information request, submitted on September 23, not the earlier request dated August 29. The GC's Complaint focuses on the second request as well, although it erroneously referred to its date as September 22.

asserts that each of the six items of information requested by the Union meets the above criteria. The Respondent admits that some of the items meet some, but not all, of the criteria, and therefore it was not obligated to furnish any of the information.

The first item requested by the Union is the job listing for Safety and Occupational Health Manager, the hiring panel worksheets and the results for each board member. The Respondent admits that it normally maintains these records, that they are reasonably available, and that their disclosure is not prohibited by law. Answer at ¶¶ 7, 8, 11; Resp. Br. at 5, 8, 9-10. The Respondent's only objection to Item 1 is that the Union failed to demonstrate a particularized need for it. Resp. Br. at 11. I will return to this objection later, as the Respondent raises it regarding all six of the items.

Item 2 asks for redacted resumes of all applicants who were interviewed and documents relating to their interviews. Respondent admits that these documents are normally maintained and reasonably available. Answer at ¶¶ 7, 8; Resp. Br. at 9-10. It objects, however, to furnishing the documents on two grounds: the Union failed to demonstrate a particularized need for them, and the documents, even in redacted form, "could contain personal information that would allow the Charging Party's representative to identify the individual," thereby violating the employees' Privacy Act rights. Resp. Br. at 7.

Item 3 asks for emails exchanged by members of the interview panel and other officials relating to the paneling or selection for the disputed vacancy. Respondent admits that it maintains these documents, to the extent that the users have not deleted them, but it insists they are not reasonably available, "because it would require the Agency to expend large amounts of time and resources to conduct a search and compile" all such documents. Answer at ¶¶ 7, 8; Resp. Br. at 10. It further notes that the Union's information request did not explicitly state that it would accept redacted documents, and unredacted emails might contain personally identifiable information in violation of the Privacy Act. Resp. Br. at 7. Respondent also asserts that the Union failed to establish a particularized need for the information. *Id.* at 11.

Respondent admits that the information requested in the first sentence of Item 4 (the directorates within the G-1/4) is normally maintained and reasonably available, but not the information requested in the second and third sentences (relating to the Safety Office Deputy Director). Answer at ¶¶ 7, 8; Resp. Br. at 9-10. Respondent does not claim that disclosure of this information would violate the Privacy Act, but it does insist that the Union failed to demonstrate its need for the information. Resp. Br. at 11.

Item 5 asks for details relating to the assignment of duties to Ms. Bass as Acting G-1/4 XO. Respondent denies that it normally maintains this information, because this was an ad hoc duty, but it admits the information is reasonably available. Resp. Br. at 9-10. It also asserts that the Union failed to establish a particularized need for it and that disclosing information relating to Ms. Bass would violate the Privacy Act. *Id.* at 7-8, 11.

Item 6 asks for information relating to the assignment of duties as Safety Office XO. Respondent denies that these records exist, as there has never been an XO in the Safety Office. *Id.* at 9-10. To the extent that any information existed relating to Ms. Bass, its disclosure would be prohibited by the Privacy Act. *Id.* at 8.

The GC disputes the Respondent's allegation that some of the information is not normally maintained or reasonably available, describing that assertion as "troublesome and appears unlikely." GC Br. at 6. Article 13 of the CBA requires the Agency to document and maintain data relating to details and promotions, and the GC argues that the information requested in Items 5 and 6 falls within this requirement. Therefore, if the Agency was not maintaining this information, it was violating the CBA; and if this was true, it violated its obligation to tell the Union that the information did not exist. *See, e.g. Soc. Sec. Admin., Balt., Md.*, 60 FLRA 674, 679 (2005). GC Br. at 6-7. The GC makes several rebuttals to the contention that the information in Items 3, 5 and 6 is not reasonably available. The Authority requires that an agency raise its objections to information requests at or near the time of the request, but in this case the Respondent waited until its Answer to the Complaint to make this claim. *Id.* at 8 (citing *Pension Benefit Guaranty Corp., Wash., D.C.*, 69 FLRA 323, 330 (2016)). The GC says the Authority has set a high bar for proving that information is unreasonably difficult to obtain, while the emails sought by the Union in Item 3 can be easily compiled through a simple computer search. GC Br. at 7 (citing, e.g., *Dep't of HHS, Soc. Sec. Admin.*, 36 FLRA 943, 952 (1990) (*HHS)*). Additionally, the GC notes that the Respondent failed to offer any substantive evidence to demonstrate how difficult it would be to compile the requested information. GC Br. at 7.

With regard to Respondent's assertion of the Privacy Act as prohibiting the disclosure of some of the requested information, the GC argues that the Respondent failed to meet its burden of proving that claim. *Id.* at 14-15. Citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Detention Ctr., Houston, Tex.*, 60 FLRA 91, 94 (2004) (*BOP Houston*), the GC argues that the Respondent must show that the information is contained in a system of records and that disclosure of that information would implicate employee privacy interests; it must also explain the nature and significance of those privacy interests. For its part, the Respondent cites the Authority's decision in *U.S. Dep't of Transp., FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 345 (1995) (*TRACON*), which first laid out the analytical framework for such cases, and argues that the applicants for the disputed position have privacy interests in the contents of their resumes and in emails that refer to them, while Ms. Bass has a privacy interest in records relating to her assignment to XO or acting positions. Resp. Br. at 7, 8. According to Respondent, the Union has not identified any public interest in obtaining this information, other than in pursuing its complaint on behalf of Mr. Novak. *Id.* at 6-7. The GC, however, contends that the Respondent never actually identified any privacy interests at stake in the disclosure of the redacted information sought by the Union, nor did it explain the nature and significance of how those interests would be compromised by disclosure. GC Br. at 15.

Finally, and perhaps most crucially, the parties dispute whether the Union satisfied its burden of proving that it needs this information. In arguing that the Union failed, Respondent initially notes that the Union never specified that it needed the information to process a grievance on behalf of Mr. Novak or to determine whether to file a grievance. Resp. Br. at 11. Respondent asserts that "Authority caselaw in this context is focused on construing requests for information for grievance purposes." *Id.* at 13; *see also id.* at 11-12. An agency should not be required to provide information to a union regarding a hiring or promotion selection that goes beyond what it is required to provide under the parties' negotiated grievance procedure. *Id.* at 12-13. Further, the Union's assertion that it needs the information to determine whether the Agency committed a prohibited personnel practice (PPP) is not related to the Union's representational responsibilities. According to Respondent, a union is not entitled to file a PPP

complaint on behalf of an employee with the Office of Special Counsel; the employee files the complaint directly with the OSC, and the union's involvement is unnecessary. *Id.* at 13-14. Additionally, Respondent submits that Items 4-6 of the information request relate to events that occurred before the promotion decision that is in dispute. The information request itself identifies the Union's concern as possible "prohibited personnel practices during the hiring/ promotion selection process." JX 4 at 1. The Agency's actions relating to the assignment of duties to Ms. Bass as XO are unrelated to her selection subsequently as Safety and Occupational Health Manager; accordingly, the Respondent insists that the Union had no particularized need to this information. Resp. Br. at 15.

The General Counsel insists that the Union demonstrated why it needs the information. The Union specified that it was concerned about the selection process for the Safety and Occupational Health Manager; it identified the personnel action in dispute, SCER 227000980750; and it stated that it needed the data "to determine if . . . the Agency violated prohibited personnel practices during the hiring/promotion selection process." GC Br. at 12 (quoting JX 4 at 1). Contrary to the Respondent's argument, the GC says the Union's representational responsibilities to Mr. Novak and to other bargaining unit employees extend beyond the narrow confines of a grievance within the negotiated grievance procedure. The CBA itself authorizes the Union to represent employees "in presenting a grievance or other appeal or when raising matters of concern or dissatisfaction with management concerning conditions of employment." GC Br. at 9 (quoting Article 9, Section 4 of the CBA). Thus, regardless of whether the Union ultimately chose to file a grievance under the grievance procedure or some other appeal in some other forum, the information request was directly related to the Agency's selection of the Safety and Occupational Health Manager, and the Union was entitled to represent Mr. Novak in that endeavor. *Id.* at 10. The GC cites *Luke Air Force Base, Ariz.*, 54 FLRA 716, 730-31 (1998), which involved a union's right to participate in the mediation of an employee's EEO complaint, and *U.S. Dep't of the Army, Army Corps of Engineers, Portland Dist., Portland, Or.*, 60 FLRA 413, 415 (2004) (*Army Corps*), which involved a union's complaint of prohibited personnel practices relating to several personnel actions, to support the right of a union to obtain information to represent employees in actions beyond the negotiated grievance procedure.

The GC likens the current case to the information request that was upheld in *HCFA 1*. The union in that case sought a wide range of documents relating to the selection process for a job vacancy, including all applications, resumes, ranking factors, and work sheets, because it was concerned that the agency had violated merit system principles, and it needed to determine whether to file a grievance. 56 FLRA at 503. In support of its finding of particularized need, the Authority noted that the request cited a specific vacancy announcement, its concern that merit system principles had been violated in the filling of that vacancy, and that the information was needed to help determine whether or not to file a grievance. *Id.* at 507.

The GC also addresses the Agency's objection to the information request because an employee's non-selection for a vacancy is not grievable under the negotiated grievance procedure.[4] The GC says the Authority has repeatedly held that the alleged nongrievability of a

[4] The Agency raised this objection in its September 30 denial of the Union's information request. JX 5 at 1-2. Respondent did not explicitly argue this point in its brief.

complaint is not a valid basis for denying an information request. GC Br. at 13 (citing *Health Care Fin. Admin.*, 56 FLRA 156, 161 (2000) (HCFA 2), and *U.S. Dep't of Transp., FAA, Nat'l Aviation Support Facility, Atl. City Airport, N.J.*, 43 FLRA 191, 196-97 (1991)).

ANALYSIS AND CONCLUSIONS

Respondent waived several of its objections by failing to raise them at or near the time of its response to the information request.

To summarize, the Respondent argues in its brief that the Union failed to show a particularized need for any of the requested items; additionally, it argues that the information in part of Item 4 and all of Items 5 and 6 is not normally maintained, that Items 3 and 6 are not reasonably available, and that disclosure of information in Items 2, 3, 5, and 6 is prohibited by law.

These arguments stand in stark contrast, however, to what it told the Union when it responded to the Union's information request. In its September 30 response, the Respondent stated:

> Your request for information . . . does not sufficiently state the particularized need. Unions do not have exclusive representational rights to bargain on conditions of employment for applicants. Furthermore, the potential representation indicated in the request would be excluded from the Negotiated Grievance Procedure under the Collective Bargaining Agreement.

JX 5. In other words: no mention that some of the information doesn't exist; no mention that some information is not normally maintained; no mention that some information is not reasonably available; and no mention that some information is protected by the Privacy Act. Respondent wants me to consider these objections now, but its failure to raise them in a timely manner precludes me from doing so.

The Authority's analytical framework for evaluating information requests under § 7114(b)(4) of the Statute has been firmly in place at least since its decision in *Internal Rev. Serv., Wash., D.C.*, 50 FLRA 661, 669-70 (1995) (*IRS*). In that decision, the Authority established a system of mutual responsibilities for both requesting unions and responding agencies. A union must articulate, in more than a conclusory manner, its need for the information, how it will use the information, and how the information relates to the union's representational responsibilities. Similarly, the agency must either furnish the information or explain why it cannot, in more than a conclusory manner. *Id.* The Authority explained that such a system:

> facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. In addition, it permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed.

Id. at 670-71. In subsequent decisions, the Authority made clear that an agency needs to assert its countervailing interests weighing against disclosure "at or near the time of the union's request." *Soc. Sec. Admin.*, 64 FLRA 293, 295-96 (2009) (*SSA*); *BOP Houston,* 60 FLRA at 93.

The Respondent's actions here are a perfect illustration of why this system of mutual responsibilities was established. If Respondent had advised the Union in September 2022 that it did not maintain some of the information requested, the parties could have discussed those factual issues in a timely manner, and perhaps the Union would have modified or withdrawn some of its requests. As noted in the GC's brief, the Union believes that some or all of this information is indeed maintained by the Agency. GC Br. at 6. A timely assertion by the Agency would have enabled the Union to explain where it believes the information is maintained, and allowed the Agency to demonstrate why it is not maintained. In short, it would have given both sides an opportunity to accommodate their respective interests and to reach an agreement on what information can be disclosed – as envisioned by the Authority in the passage quoted above. *IRS*, 50 FLRA at 670-71.

Similar points can be made regarding the Respondent's assertion that finding all the emails requested in Item 3 would be unreasonably difficult. If Respondent had said this in September 2022, it could have explained to the Union exactly what it needed to do in order to obtain the emails; the Union could perhaps have identified simpler ways for the emails to be compiled, or the parties could have discussed compromises that might have bridged the differences between them. Raising this objection after a ULP charge has been filed, and a ULP complaint issued, does nothing to narrow the parties' differences or to accommodate their respective interests.

The same holds true – even more strongly – with respect to the Respondent's Privacy Act objections. Looking at the Respondent's explanation of its position in its brief, it is evident that most of the privacy concerns it raises are speculative in nature. It states that even in redacted form, the applicants' resumes "could contain personal information that would allow the Charging Party's representative to identify the individual." Resp. Br. at 7. Then, assuming that Item 3 asks for unredacted emails, Respondent states that such emails "would contain personally identifiable information" that is objectionable. *Id.* If the Respondent had raised these concerns in September 2022, the parties could have engaged in a full discussion of exactly what information would be objectionable. From the Respondent's language in its brief, it appears that it never actually obtained any specific documents to determine whether they contained any Privacy Act information; identifying specific documents and specific protected information at that time would have enabled the parties to engage in meaningful dialogue. The Union could have clarified whether it indeed needed unredacted emails, even though it had already agreed to accept redacted information regarding Items 1 and 2.

It should be clear from this account that the requirement of asserting objections to information requests "at or near the time of the request" is not simply a procedural technicality. Waiting until litigation defeats the entire purpose of the system established by the Authority. Therefore, I cannot allow Respondent to raise these objections for the first time before me. I will not consider the Respondent's arguments that some of the information was not maintained,

that some of the information was not reasonably available, or that disclosure of some of the information was prohibited by the Privacy Act.[5]

The Union showed a particularized need for the information in Items 1, 2, and 3, but not for the other information.

The Union explained its need for its September 23 request as follows:

> This information is needed to enable the Local to determine if any of the represented employee's rights were violated, specifically if the agency violated prohibited personnel practices during the hiring/promotion selection process. Such information directly relates to the employee's claims of possible legal

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[5] I should note, however, that I would have rejected most of these objections, if I were to consider them on their merits. Respondent's justification for insisting that Item 3 is not reasonably available consists of one sentence: "it would require the Agency to expend large amounts of time and resources to conduct a search and compile all emails that mention the 'paneling or selection.'" Resp. Br. at 9-10. This is simply a conclusory statement, devoid of any facts or supporting evidence. Respondent could have engaged in a preliminary search for the requested information and quantified how much time and labor would be required to satisfy the request; such a quantitative analysis might well have supported its position that it is not reasonably available; but it chose not to offer any such evidence. The cases cited by the GC in its brief illustrate an agency's burden of proof in establishing such an objection, and Respondent made no effort to meet that burden. *See, e.g. HHS*, 36 FLRA at 952; GC Brief at 7-8.

Similarly, the Respondent has not met its burden of demonstrating that Items 2, 3, 5, and 6 contain information protected by the Privacy Act. While the Respondent correctly notes that since the *TRACON* decision, the Authority has required unions to show a public interest in the requested information that goes beyond its collective bargaining needs (50 FLRA at 343-44), that same decision placed the initial burden on agencies to show that the requested information is contained in a system of records, that disclosure of the information would implicate employee privacy interests, and to explain the nature and significance of those privacy interests. Only then does the burden shift to the union to show how disclosure of the information would serve a public interest. *Id.* at 345. The *BOP Houston* decision cited by the GC fleshes out these burdens more fully. 60 FLRA at 94-95. Respondent offered no substantive evidence to support its privacy objection; rather, it simply waved a flag saying "privacy," like a magic wand, and hoped that would suffice. It did not identify a system of records in which the various items of information are contained, and it did not offer even a rudimentary explanation of the privacy interests that would be compromised by disclosure. The Union explicitly requested only redacted information in Item 2, and while Item 3 did not specify whether it wanted redacted or unredacted documents, it is fair to infer from Item 2 that it would be satisfied with redacted documents in Item 3. The Respondent suggests that the identity of employees might be revealed even in redacted documents, but I don't think that is likely, especially in light of the large pool of applicants for this disputed position. As for Items 3, 5, and 6, the mere mention of an employee's name in an email or personnel record does not inherently invade the employee's privacy. I believe it would be more appropriate for the parties to address any privacy concerns to the General Counsel in the compliance process. Once responsive documents are made available, the parties can examine the documents individually to protect significant employee privacy interests affected by those documents. *See, e.g. Army Corps*, 60 FLRA at 416.

With regard to the Respondent's claims that it does not normally maintain some of the requested information, the record is not sufficient for me to evaluate them. While I share the GC's skepticism on this point, the stipulated facts simply don't enable me to resolve a direct factual dispute. However, in light of my decision that the Union does not need Items 4, 5, and 6, the point is now moot.

> violations during the process. Once provided, this information will allow the Local to provide proper employee representation, guidance, and take appropriate action.

JX 4 at 1. The Agency responded on September 30 in this manner:

> Your request for information under Section 7114(b)(4) dated 23 September 2022 does not sufficiently state the particularized need. Unions do not have exclusive representational rights to bargain on conditions of employment for applicants. Furthermore, the potential representation indicated in the request would be excluded from the Negotiated Grievance Procedure under the Collective Bargaining Agreement.

JX 5 at 1-2. Thus, we finally reach the central issue in our case: is the requested information "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining," as required by § 7114(b)(4)(B) of the Statute?

In order for a union to establish a particularized need for information, it must articulate, with specificity, why it needs the information, including how it will use it and how its intended use relates to its representational responsibilities under the Statute. The union's explanation must be more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the Statute requires it to furnish the information. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495-96 (2015) (*FCI Ray Brook*). But the union's explanation need not be so specific as to reveal its strategy. *Id.* at 496. A union frequently will not be aware of the contents of a requested document, and the degree of specificity required of the union must take that into account. *IRS*, 50 FLRA at 670 n.13. Moreover, whether the requested information would actually accomplish the union's purpose is not determinative of whether it is necessary under § 7114(b)(4). *SSA*, 64 FLRA at 296. And the fact that the agency believes the union's complaint is not grievable does not relieve the agency of the duty to furnish the information, because that is an issue for an arbitrator to resolve. *Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 39 FLRA 298, 309 (1991) (*SSA Balt.*).

Neither the Union's request nor the Agency's response is terribly detailed, but the Union's statement does provide some essential points of guidance for the Agency that should have enabled it to evaluate the request. It identified a specific promotion action that was the focus of its concern -- SCER 227000980750 -- and it specified that a bargaining unit employee felt his rights may have been violated during the process; more specifically, the concern was that the Agency may have committed a prohibited personnel practice. Agency management understood that SCER 227000980750 referred to the vacancy announcement for Safety and Occupational Health Manager, for which Mr. Novak had applied and Ms. Bass had been selected. The requested information, according to the Union, would enable it to advise the employee what, if any, action Novak and the Union could take. Thus the request is narrowly tailored to a specific promotion decision, about which the Union needs to evaluate whether a prohibited personnel practice may have been committed.

The Authority has long held, and the Respondent concedes, that a core representational function of a union is to assist employees in the investigation, evaluation, and processing of grievances. *HCFA 2*, 56 FLRA at 160; *see also NLRB v. FLRA*, 952 F.2d 523, 526 (DC Cir. 1992) and Resp. Br. at 10. The Respondent attributes great weight to the Union's failure to state explicitly that the information was needed to determine whether to file a grievance – instead referring vaguely to taking "appropriate actions." *Id.* at 11. Respondent asserts that "most of the FLRA precedent in this context is based on unions' information requests for the purpose of determining whether to file a grievance on behalf of a bargaining unit employee." *Id.* at 11-12. This represents a much narrower interpretation of the term "grievance," and of the scope of unions' representational duties, than the case law supports. The Authority has always interpreted "grievance" broadly, applying it to a wide variety of employee and union complaints beyond those within the parties' negotiated grievance procedure. The statutory language itself demands this: Section 7103(a)(9)(A) defines a grievance as "any complaint . . . by any employee concerning any matter relating to the employment of the employee." And as the Authority stated in *Dep't of the Air Force, 436th Airlift Wing, Dover AFB, Dover, Del.*, 57 FLRA 304, 308 (2001), *aff'd, Dover AFB v. FLRA*, 316 F.3d 280 (DC Cir. 2003) (emphasis in original): "By its plain terms, the Statute's broad definition of grievance encompasses *any* employment-related complaint, regardless of the forum in which the complaint may be pursued." Therefore, when the Union advised the Agency that it needed the information to determine if the Agency had committed a prohibited personnel practice in filling this position and violated Novak's rights, and to advise Novak what type of "appropriate action" he should take (JX 4 at 1), the request directly related to the Union's representational duty of investigating a grievance. It does not matter whether the Union would ultimately file a formal grievance under the parties' negotiated grievance procedure, or an EEO complaint, or a prohibited personnel practice complaint with the U.S. Office of Special Counsel.[6]

The two *HCFA* decisions and *Army Corps* are particularly applicable to our case. In both *HCFA 1* and *2*, the union was requesting nearly the same types of documents as in our case, in relation to possible improprieties in the filling of a vacant position. 56 FLRA at 156; 56 FLRA at 503, 504. In *Army Corps*, the union was seeking a report investigating possible nepotism in hiring practices, on behalf of bargaining unit employees who believed they were unfairly excluded. 60 FLRA at 415. The Authority held in all three decisions that the union's representational duties include determining whether allegations like these adversely affected the rights of employees, and that the union had a particularized need to obtain the information. In our case, the Union's intended use of the information was stated broadly, because the Union did not know what type of legal action, if any, it would need to take: a grievance pursuant to the CBA, an EEO complaint, or a complaint to the OSC. A union does not need to explain its legal strategy to the agency. *FCI Ray Brook*, 68 FLRA at 495-96. Nonetheless, the Union here identified the specific nature of possible misconduct that it was investigating – a violation of merit system principles in the filling of the Safety and Occupational Health Manager vacancy – and that it was considering what recourse Mr. Novak should pursue if his rights were violated. Regardless of the type of action Novak and the Union ultimate chose to pursue, it related to the

[6] The General Counsel also points out, correctly, that Article 9, Section 4 of the CBA provides that "the Union has the right to represent an employee or group of employees in presenting a grievance or other appeal or when raising matters of concern or dissatisfaction with management concerning conditions of employment." JX 1 at 12.

Union's duty to represent him regarding the hiring selection. *See, e.g., HCFA 2*, 56 FLRA at 160-62. Thus the information request adequately specified why the Union needed the information in question.

The Agency also asserted in its response to the Union's request that "[u]nions do not have exclusive representational rights to bargain on conditions of employment for applicants." JX 5 at 1. I don't really understand what the Agency was trying to say here, and Respondent's brief does not explain it at all. Mr. Novak is a bargaining unit employee, represented by the Union, and the manner in which an agency goes about filling vacancies (even vacancies for supervisory positions) is a condition of employment, subject to the management rights restrictions of § 7106. As the Authority stated in *SSA Balt.*, 39 FLRA at 309, "an agency is required to furnish information concerning nonbargaining unit positions when the information is necessary for the union to effectively fulfill its representational responsibilities." This is true even for the filling of positions open to external applicants. *See HCFA 2* at 160-61.

The final objection cited by the Agency in its denial letter of September 30 was that "the potential representation indicated in the request would be excluded from the Negotiated Grievance Procedure under the Collective Bargaining Agreement." JX 5 at 1-2. Although the Agency seems to be arguing here that Mr. Novak's potential grievance relating to his nonselection would not be grievable under Article 47 of the CBA (an argument the Authority has long found to be an invalid objection to an information request), Respondent tries in its brief to clarify this comment: it was simply stating that if the Union should file a formal grievance on this matter, the grievance procedure entitles the grievant only to information about the proper certification and ranking of candidates. Resp. Br. at 11 n.13. But this conflates an employee's or a union's rights under a negotiated grievance procedure with a union's statutory rights to information under § 7114(b)(4): just as a union's duties in representing employees go beyond the filing of grievances under the negotiated grievance procedure, its right to information goes beyond that which is needed for a grievance.

Up to this point, I have addressed in general terms the Union's particularized need for information related to the filling of the Safety and Occupational Health Manager, but I have not addressed its need for the specific items sought in its September 23 request. I will do so now.

As I have stated, the information request stated that it needed to determine whether Mr. Novak's rights were violated, and whether the Agency had committed a prohibited personnel practice in the manner in which it filled the position of Safety and Occupational Health Manager. There is a distinct contrast between the information requested in Items 1, 2, and 3 of the request and the information sought in Items 4, 5, and 6. The former group of requests directly relate to the disputed position Novak applied for; the latter group, however, has no apparent connection to the process of filling that position. Item 1 asks for the job listing, the hiring panel worksheets, and the results from each member of the selection board. If the Union were to fully understand how the selection was handled, and whether there were any improper factors utilized in selecting one applicant or excluding another, these documents would be essential. Similarly, the information in Item 2 (redacted resumes, interview questions, and interview scores) would be needed to ensure that proper procedures were followed and that the certification and ranking of the applicants utilized only proper merit system considerations. The information in Item 3 (emails involving officials directly or indirectly involved in the hiring

process) is a bit more expansive than the first two items, but again the information all relates directly to the disputed personnel action. While the request is not explicit, I will interpret the Union's request in Item 3 to be confined to redacted documents. I conclude that the Union has a particularized need to obtain Items 1-3, and that the Agency was obligated to furnish them.

In regard to at least some of the information in Item 1, and perhaps Items 2 as well, the Respondent may even have conceded that the Union has a particularized need. In its brief, Respondent states, "the only grievable action related to the charging party representative's non-selection is the proper ranking and certification of candidates. Likewise, the only information required to be disclosed is information related to the ranking and certification of candidates." Resp. Br. at 11. I understand that Respondent nonetheless claimed that the information request failed to specify whether the Union intended to file a grievance, but Respondent's comment still seems to acknowledge that the Union was entitled to documents relating to the ranking and certification process. Since the Agency concedes that the Union would be entitled to certain documentation if it filed a grievance, I cannot understand why a reasonable agency official would not have furnished the Union with those basic documents relating to ranking and certification back in September of 2022.

But as I have already explained, my review of the Union's information request is not confined to those documents the Union was entitled to under the parties' negotiated grievance procedure. The Union was investigating whether the Agency had committed a prohibited personnel practice in its hiring process, and it was considering a range of options for challenging the decision. The information encompassed in Items 1, 2, and 3 was directly relevant to that investigation, and it was within the scope of the Union's representational duties toward Mr. Novak.

The same cannot be said about Items 4-6, however. Those requests seek information relating to the organizational structure of the G-1/4 and the Safety Office, the creation and removal of a deputy director position in the Safety Office, and the assignment of duties to Ms. Bass as G-1/4 Acting XO and Safety Office XO. Nowhere in the Union's information request does it articulate how these actions could have affected the selection of Ms. Bass as director of the office, which was the personnel decision in dispute. If I unleash my imagination, I can probably conjure some scenarios in which the assignment of XO or deputy or acting duties to Ms. Bass may have affected her ultimate selection as director, but the Union did not identify any facts or connections between the disputed decision and the requested information. The Union was required to provide an explanation that would enable the Agency to make a reasoned judgment as to whether it should furnish this information; the Agency cannot be obligated to conjure every possible scenario that would connect the information to the disputed hiring decision. Accordingly, I conclude that the Union has not stated a particularized need for Items 4, 5, and 6 of its request.

To summarize, the Respondent violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by refusing to furnish the Union with Items 1, 2, and 3 of the Union's September 23, 2022 information request. It did not violate the Statute by refusing to furnish Items 4, 5, and 6 of the information request. In order to remedy the Respondent's unfair labor practice, it is appropriate to require it furnish the information in Items 1-3 of the request and to post a notice to employees regarding its unfair labor practice.

Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to § 2423.41(c)of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Army Training and Doctrine Command, Fort Eustis, Virginia (the Respondent), shall:

1. Cease and desist from:

(a) Failing or refusing to furnish the National Association of Government Employees, Local R4-12 (the Union) with the information in Items 1, 2, and 3 of the Union's September 23, 2022 information request.

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

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

(a) Provide the Union with the following information requested in Items 1, 2, and 3 of the Union's September 23, 2022 information request:

1. A copy of job listing SCER 227000980750; a copy of the hiring panel worksheets; and the results from each board member.
2. A redacted copy of resumes for those applicants interviewed for the position, a list of the questions asked, and individual board member results (by name) for each applicant's interview.
3. All email from, to, or between interview panel members, selecting officials, the DCS G-1/4 XO or DCS G-1/4 which in any way mention the paneling or selection.

(b) Post the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of TRACOM and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) In addition to the physical posting of paper notices, disseminate a copy of the Notice electronically, on the same day as the physical posting, through the Respondent's email, intranet, or other electronic media customarily used to communicate with bargaining unit employees. The message of the email transmitted with the Notice shall state, "We are distributing the attached Notice to you pursuant to an order of an Administrative Law Judge of the Federal Labor Relations Authority in Case Number WA-CA-23-0078."

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Atlanta Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., January 30, 2025

RICHARD A. PEARSON
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 U.S. Army Training and Doctrine Command, Fort Eustis, Virginia, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish the National Association of Government Employees, Local R4-12 (the Union) with the information in Items 1, 2, and 3 of the Union's September 23, 2022 information request.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured under the Statute.

WE WILL furnish the Union with the following information in Items 1, 2, and 3 of the Union's September 23, 2022 information request:

1. A copy of job listing SCER 227000980750; a copy of the hiring panel worksheets; and the results from each board member.
2. A redacted copy of resumes for those applicants interviewed for the position, a list of the questions asked, and individual board member results (by name) for each applicant's interview.
3. All email from, to, or between interview panel members, selecting officials, the DCS G-1/4 XO or DCS G-1/4 which in any way mention the paneling or selection.

_____

(Agency/Activity)

Date: _____ By: _____

(Signature) Commander, TRACOM

This Notice must remain posted for sixty (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, Atlanta Region, Federal Labor Relations Authority, whose address is: 229 Peachtree St. N.E., Suite 900, Atlanta, GA 30303, and whose telephone number is: (470) 681-7630.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this **DECISION**, issued by Richard A. Pearson, Administrative Law Judge, in Case No. WA-CA-23-0078, was sent to the following parties as indicated below:

CERTIFIED MAIL AND RETURN RECEIPT	**CERTIFIED NOS.**
Melissa K. Coward Counsel for the General Office of the General Counsel, ATL Region Federal Labor Relations Authority 229 Peachtree Street, N.E., Suite 900 Atlanta, GA 30303	7016-2140-0001-1288-4919
Jeremy A. Haugh, LTC, JA Deputy Staff Judge Advocate Office of the Staff Advocate U.S. Army Training & Doctrine Command 950 Jefferson Avenue, Suite 3002 Joint Base Langley-Eustis, VA 23604	7016-2140-0001-1288-4926
Robert Novak President, NAGE Local R4-12 P.O. Box 4014 Fort Eustis, VA 23604	7016-2140-0001-1288-4933

Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: January 30, 2025
Washington, DC