64 FLRA No. 188

UNITED STATES
DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
(Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Union)

0-AR-4277

_____

DECISION

June 30, 2010

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Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members[1]

I. Statement of the Case

This matter is before the Authority on exceptions to an award of Arbitrator M. David Vaughn filed by the Union and the Agency under § 7122(a) of the Federal Service Labor-Management Relations Statute (the Statute) and part 2425 of the Authority's Regulations. The Agency and the Union filed oppositions to each other's exceptions.

The Arbitrator found that the Agency did not unlawfully fail to bargain with, or bypass, the Union. He also found that the Agency unlawfully failed to respond to the Union's request for, and to provide the Union with, information. For the reasons that follow, we: set aside the Arbitrator's finding that the Agency unlawfully failed to provide the Union with information; modify the award to provide a cease-and-desist order and the posting of a notice; and deny the remaining exceptions.

1. The separate opinion of Member DuBester, dissenting in part, is set forth at the end of this decision.

II. Background and Arbitrator's Award

As relevant here, for several years, the Agency and the Union annually reached an agreement regarding the content and administration of voluntary surveys that asked employees about their job satisfaction and solicited their suggestions to improve Agency operations. Award at 22. After the survey results were tabulated, the Agency would have a single, mandatory meeting where it shared those results with employees. *Id.* Workgroups would then be established to review the survey results, prioritize the most important issues that had been identified ("elevated" issues), and attempt to resolve those issues. *Id.*

When the parties were unable to reach agreement with respect to the content and administration of the 2005 survey, the Agency developed and administered the survey without Union involvement or support. *Id.* at 24. After the Agency administered the 2005 survey, but before it discussed the results with employees, it decided to make certain changes regarding the survey process, including: (1) a shift from discussing and measuring "employee satisfaction" to discussing and measuring "employee engagement[;]" and (2) eliminating the single, mandatory meeting and instead having routinely scheduled group meetings (survey meetings) where managers would discuss with employees what was expected of them at work, the importance of that work, and how that work related to the Agency's mission and goals. *Id.* at 24-25.

The Agency directed managers to give the Union notice of and an opportunity to attend, and actively participate in, the survey meetings, and also informed managers that:

> You **can** make notes about discussion topics and barriers that may impede your group from achieving the FY06 goals and objectives outlined by your business unit. You **can** discuss with the group the pros and cons of certain actions or suggestions to determine the preferred approach or method, and you **can** support a suggestion.
>
> As a manager, you **can** evaluate the information after the meeting to determine if you want to make any changes in your work processes, recognizing that any bargaining obligations will need to be addressed prior to implementation. **You cannot commit to implement a suggestion until you have completed any bargaining obligations.**

> You must consult with your Servicing LR Specialist to determine if there are bargaining obligations before making changes to work processes.

Id. at 26.

With respect to the Agency's shift in emphasis from "employee satisfaction" to "employee engagement," the Agency notified employees that "employee engagement" refers to "the degree of employees' motivation, commitment and involvement in the mission of the organization." *Id.* at 28. The Agency also stated that "[e]mployee satisfaction is a key component of employee engagement[,]" and that "[b]y placing an emphasis on employee engagement, we do not mean to imply that employee satisfaction is no longer important to the [Agency]. We recognize that employee satisfaction has a tremendous impact on our ability to accomplish our mission." *Id.*

The Agency contacted the Union and expressed the hope that the 2006 survey would be jointly administered. *Id.* at 29. In response, the Union stated that it was prepared to negotiate and would "consider it a violation of several laws and regulations" if the Agency moved forward with the survey process "without negotiating and reaching agreement with" the Union. *Id.* The Agency replied that, "in light of the Union's unwillingness to participate," the Agency would administer the 2006 survey "in compliance with the requirements of the Agreement by providing a copy of the survey to the Union 30 days in advance of distributing it to employees."[2] *Id.*

Subsequently, the Union requested that the Agency "immediately cease implementation" of the survey so that the parties could "bargain over matters such as the [survey] meeting process, the changes in the survey process, and all other negotiable matters.'" *Id.* at 30. The Union also stated:

> [P]ursuant to law and contract we request the following data to help us prepare for these negotiations and related enforcement actions:
>
> - any material which identifies the classification of work groups based on prior year data, e.g., 'model' group, 'developing' group, etc;[3]
> - all IRS, OD/FD and functional strategic plans;
> - all elevated issues from 2005 by functional area;
> - the [Engagement Strategy Tracker (ESTracker)] database for 2005;[4]
> - all Manager 360 degree results
> - all Manager employee engagement commitments
> - any list of workgroups that did not have enough employees take the 2005 survey to produce a group report.

Id. The Agency did not respond to the Union's information request. *Id.*

The Union filed a national grievance alleging that: the survey-meeting process constituted an unlawful bypass of the Union; the Union had the right to notice as to what the survey meetings would entail and to bargain over all negotiable matters before the Agency implemented changes; and the change from evaluating employee "satisfaction" to employee "engagement" was "not only an unannounced change, but also" violated the parties' agreement and certain regulations. *Id.* at 31-32. The Union also stated that the Agency "has denied us information . . . to enable us to understand what is happening in connection with the [s]urvey process, to prepare this grievance and to help us prepare for negotiations." *Id.* at 32.

When the national grievance was unresolved, it was submitted to arbitration.[5] *Id.* at 32. At

2. As discussed further below, Article 8, Section 8 of the parties' agreement provides, in pertinent part: "At [a] national level, surveys[] . . . will be provided to the NTEU National Office at least thirty (30) days in advance of distribution to bargaining unit employees." Award at 5.

3. The Union asserted that the Agency had instructed managers to "evaluate employees on the concept of 'employee engagement'" and had "created a classification of workgroups as 'highly engaged,' 'groups needing additional assistance,' and others." Award at 31. The Union also asserted that, in some documents, the Agency referred to these workgroups as "'Model groups' and 'Developing groups.'" *Id.*

4. The ESTracker is the automated system that the Agency uses to facilitate recording and tracking issues raised during workgroup meetings. Award at 38 n.9.

5. The national grievance was combined with another grievance involving "the denial of time to train stewards for participation in the 2005 survey process," and a separate award issued with regard to that other grievance. Award at 32 & n.3. That award is not at issue here.

arbitration, the parties agreed to the following issues: "Did the Agency violate law, regulation, past practice and/or the National Agreement by its actions related to the administration of the Agency's 2006 Employee Survey as set forth in the grievance? If so, what are the appropriate remedies?" *Id.* at 2.

The Arbitrator rejected a Union claim that the parties had a binding past practice that required the Agency to jointly develop and administer the annual surveys. In this connection, the Arbitrator found that the parties' annual negotiations over the content and administration of the surveys "are the antithesis of [such] an ongoing, binding past practice." *Id.* at 63. The Arbitrator determined that, to the extent there was a binding past practice, the practice was only that the parties "should make an annual effort to reach agreement" on the development and administration of the survey -- not that the Agency could implement a survey only after actually reaching such an agreement. *Id.*

In addition, the Arbitrator found that the parties' agreement did not require the Agency to bargain over the surveys. In this connection, the Arbitrator noted that Article 8, Section 8 of the agreement requires the Agency to provide national surveys to the Union at least thirty days before distribution to unit employees.[6] *Id.* at 62. The Arbitrator stated that "if the survey were to be negotiated . . ., there would be no need to provide a copy of the survey separately." *Id.*

Further, the Arbitrator found that the only changes in the 2006 survey were "*de minimis.*" *Id.* at 60. In this regard, the Arbitrator found that two questions "were eliminated [from the previous survey] . . . because 'survey result meetings' were eliminated in favor of integrating the [s]urvey results into regular monthly staff meetings." *Id.* In addition, the Arbitrator determined that, although the 2006 survey measured "employee engagement[,]" that "[d]id [n]ot [n]egate the [m]easurement of [e]mployee [s]atisfaction." *Id.* at 67. In this connection, the Arbitrator found that the survey contained questions that measured employee satisfaction, even though additional questions were intended to measure "the larger issue of employee engagement[.]" *Id.* The Arbitrator determined that there was no evidence that employees were adversely affected by the shift in focus from "employee satisfaction" to "employee engagement[,]" as that shift "only applies a preference in the context of [e]mployee [s]urveys[,]" and that there was no evidence that the Agency changed the way in which it evaluates employees or changed any critical job element that contained the term "employee satisfaction." *Id.* at 65. The Arbitrator concluded that there was "no obligation on the part of the Agency to negotiate the proper application of existing contract language and, perforce, no violation of the Statute when it did not do so." *Id.* at 68.

The Arbitrator also addressed the Union's claim that the Agency unlawfully bypassed the Union in connection with the survey meetings. The Arbitrator stated that the Agency did not bypass the Union "simply by talking to employees about negotiable subjects or by soliciting employees' input and suggestions for work improvements." *Id.* at 70. The Arbitrator noted that the Union received notice of and an opportunity to attend the meetings, and stated that one purpose for allowing Union attendance was to "allow the Union to monitor communications between [m]anagers and bargaining unit members and to protest if [m]anagement crosses the line." *Id.* The Arbitrator then stated: "If there are specific situations in which that occurred in [the survey] meetings . . ., they are not part of the record." *Id.* Further, the Arbitrator found that although the Agency recorded in ESTracker certain matters raised by employees, there was "nothing in the record to indicate that, once [such matters were] identified, . . . the Agency dealt directly with employees in resolving the matter[s] without negotiating the change with the Union or represented that it would or could do so." *Id.* The Arbitrator stated that, "[i]n fact, the evidence is that Agency managers were specifically directed that they *not* commit to implementing any employee suggestions until after any required bargaining has been completed." *Id.* The Arbitrator concluded that the Agency did not unlawfully bypass the Union. *Id.* at 68.

Finally, the Arbitrator addressed whether the Agency's failure to respond to the Union's information request, and to provide the requested information, were unlawful. The Arbitrator noted the Agency's claim that, although it had acted unlawfully in failing to respond to the request, the Union nonetheless was not entitled to receive the information because: (1) the Union had failed to articulate a "particularized need" for it; and (2) disclosure of some of the requested information was barred by the Privacy Act. *Id.* at 72. The Arbitrator stated: "In other words, now, more than a year after [the information request], the Agency suggests that I reward its bad behavior by simply ordering it finally to *respond* to the Union's request

6. The Arbitrator found, and there is no dispute, that the Agency complied with this provision.

rather than . . . *provide* the requested information. I decline[.]" *Id.* The Arbitrator found that the Union's grievance was "long and detailed[]" and that the Agency "had little difficulty understanding the issues and presenting its own case fully and forcefully." *Id.* The Arbitrator also found that he was "persuaded [that the Agency] knew very well what the Union's 'particularized need' was . . . and it simply chose not to provide it[,]" and that "[t]he process is not served by allowing further delay or hyper-technical use of the 'particularized need' test to withhold relevant information to the Union's representative status." *Id.* Accordingly, the Arbitrator found that the Agency unlawfully failed to provide the requested information, and he directed the Agency to provide the Union with that information. *Id.* at 72-73.

III. Positions of the Parties

A. Union Exceptions

The Union argues that, for two reasons, the Arbitrator "[e]xceeded [h]is [a]uthority" by issuing an award that is contrary to law. Union Exceptions at 7.

First, the Union contends that the Arbitrator erred by finding that the Agency did not unlawfully fail to bargain. *Id.* at 14. Specifically, the Union asserts that: it is "[u]ndisputed" that the parties had an established past practice of jointly developing and administering employee surveys; the Agency unilaterally changed this practice; and the changes to the survey process -- specifically, the shift from "employee satisfaction" to "employee engagement" and "the termination of meetings solely devoted to 'employee satisfaction[]'" -- were greater than *de minimis*. *Id.* at 15.

Second, the Union argues that the Arbitrator erred by failing to find an unlawful bypass. *Id.* at 8. In this connection, the Union relies on the Agency instruction to managers that stated that managers could discuss with employees "the pros and cons of certain actions or suggestions to determine the preferred approach or method," and could "support a suggestion." *Id.* at 11. The Union asserts that this was "tantamount to collective bargaining[]" because it gave employees the impression that their suggestions would be given "considerable weight[.]" *Id.* Although the Union acknowledges that it was invited to the survey meetings, it states that it was improperly "put in a position in these meetings where employees were given the impression that an alternative advocate for their suggestions could be management and that management would represent them before the [U]nion[.]" *Id.* at 13. The Union asserts that an exhibit -- the 2006 survey -- lists examples of changes that were made as a result of the survey meetings. *Id.* In addition, the Union cites: *Dep't of the Treasury, IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 57 FLRA 126 (2001) (*IRS Kansas City*); *U.S. DOJ, Bureau of Prisons, Fed. Corr'l Inst., Bastrop, Tex.*, 51 FLRA 1339 (1996) (*FCI Bastrop*); *Air Force Accounting & Fin. Ctr., Denver, Colo.*, 42 FLRA 1226 (1991) (*Air Force*); *Dep't of HHS, SSA, Balt., Md. & SSA, Region X, Seattle, Wash.*, 39 FLRA 298 (1991) (*SSA Region X*); *Dep't of HHS, SSA, Balt., Md.*, 28 FLRA 409 (1987) (*HHS Balt.*); *U.S. Dep't of the Treasury, Bureau of ATF, Wash., D.C. & Its Cent. Region*, 16 FLRA 528 (1984) (*ATF*); *U.S. DOJ, U.S. INS*, 14 FLRA 578 (1984) (*DOJ*); and *Okla. City Air Logistics Ctr., Tinker AFB, Okla.*, 3 FLRA 512 (1980) (*Tinker AFB*).

B. Agency Opposition

The Agency asserts that the Arbitrator properly found no binding past practice, and that the Union's contrary claim does not demonstrate that the award is based on a nonfact. Agency Opp'n at 22-23. The Agency also asserts that the Arbitrator correctly found no unlawful failure to bargain because the Arbitrator determined that any changes to conditions of employment were *de minimis*. *Id.* at 21.

In addition, the Agency contends that the Arbitrator correctly found no bypass. *Id.* at 10. According to the Agency, even if the instructions to managers would have been a bypass had they been followed, the Union "offered no concrete, tangible evidence to show how any meeting was conducted or that any single meeting was conducted in a fashion that constituted a bypass[.]" *Id.* at 16. The Agency argues that the Union did not provide any evidence that, after the meetings, the Agency made any changes without negotiating with the Union. *Id.* at 16-17.

C. Agency Exceptions

The Agency argues that the award is contrary to law insofar as it requires the Agency to provide the Union with the requested information. Agency Exceptions at 1. According to the Agency, a finding that the Agency unlawfully failed to respond to the information request does not automatically result in an order directing the Agency to provide the information; rather, it is necessary to evaluate whether the Union's request met the requirements of § 7114(b)(4) of the Statute. *Id.* at 8. The Agency

claims that the Union failed to establish particularized need in this case. *Id.* at 10. In this regard, the Agency contends that, because the Agency had no obligation to bargain, the Union's statement that it needed the information to bargain does not demonstrate particularized need. *Id.* at 12. With regard to the Union's statement that it needed the information for "enforcement actions[,]" the Agency claims that, even if the enforcement actions involve the grievance concerning the 2006 survey, the statement does not establish why the Union needed data from 2005. *Id.* Finally, the Agency claims that disclosure of some of the requested information would violate the Privacy Act. *Id.* at 15-16.

D. Union Opposition

The Union contends that the Arbitrator correctly found that it established particularized need. According to the Union, it stated its need in both the information request and the grievance. Union Opp'n at 7-8. In addition, the Union contends that hearing testimony is properly considered in assessing the Union's need, and that one witness testified that the Union requested the information in order to "monitor the Agency's administration of the survey as well as its subsequent meetings with employees to insure that the Agency fulfilled its statutory and contractual obligations to bargain with the Union on appropriate matters." *Id.* at 12. Finally, the Union contends that the award is not contrary to the Privacy Act. *Id.* at 14-15.

IV. Analysis and Conclusions

A. The Arbitrator did not err by finding that the parties did not have a binding past practice that required negotiations over the 2006 survey.

In arbitration cases, the Authority addresses issues as to whether a past practice exists under the nonfact framework. *See U.S. Dep't of the Treasury, IRS, Nat'l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 591 (2010). By contrast, where the issue concerns whether the arbitrator improperly interpreted a past practice, the Authority considers the issue under the essence standard. *See id.* at 591 n.6. As the exceptions could be construed as challenging both the Arbitrator's finding that the past practice alleged by the Union did not exist, and his interpretation of what the parties' actual practice was, we address the Arbitrator's findings under both the nonfact and essence frameworks.

1. Nonfact

To establish that an award is based on a nonfact, the excepting party must establish that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result. *See U.S. Dep't of the Air Force, Lowry AFB, Denver, Colo.*, 48 FLRA 589, 593 (1993). The Authority will not find an award deficient on the basis of an arbitrator's determination of any factual matter that the parties disputed before the arbitrator. *Id.* at 594.

Before the Arbitrator, the parties disputed whether the parties had a past practice that required joint development and administration of employee surveys. As the parties disputed this matter before the Arbitrator, the Union provides no basis for finding the award based on a nonfact, and we deny the exception.

2. Essence

The Authority will find that an arbitration award is deficient as failing to draw its essence from the collective bargaining agreement when the appealing party establishes that the award: (1) cannot in any rational way be derived from the agreement; (2) is so unfounded in reason and fact and so unconnected with the wording and purposes of the collective bargaining agreement as to manifest an infidelity to the obligation of the arbitrator; (3) does not represent a plausible interpretation of the agreement; or (4) evidences a manifest disregard of the agreement. *See U.S. Dep't of Labor (OSHA)*, 34 FLRA 573, 575 (1990).

The Arbitrator found that the parties' past practice was to meet every year to attempt to reach agreement on the content and administration of the survey, but that this past practice did not require that the parties reach agreement before the Agency could develop and implement the survey. The Arbitrator also found that Article 8, Section 8 of the parties' agreement -- which requires the Agency to provide surveys to the Union "for comment" -- implies that the Union was not entitled to bargain over their contents. The Union provides no basis for finding that the Arbitrator's interpretation of the parties' past practice is irrational, unfounded, implausible, or evidences a manifest disregard of the parties' agreement, and, thus, we deny the exception.

B. The award is contrary to law only insofar as the Arbitrator found an unlawful failure to provide information.[7]

The Union and the Agency allege that the award is contrary to law in various respects. When an exception challenges an award's consistency with law, the Authority reviews the question of law *de novo*. *See NFFE, Local 1437*, 53 FLRA 1703, 1709 (1998). In making that assessment, the Authority defers to the arbitrator's underlying factual findings. *See id.* at 1710.

When a grievance under § 7121 of the Statute involves an alleged unfair labor practice (ULP), the arbitrator must apply the same standards and burdens that would be applied by an administrative law judge in a ULP proceeding under § 7118. *See NTEU*, 64 FLRA 462, 464 (2010). In a grievance alleging a ULP by an agency, the Union bears the burden of proving the elements of the alleged ULP by a preponderance of the evidence. *See id.* As in other arbitration cases where violations of law are alleged, the Authority defers to an arbitrator's findings of fact. *See id.*

1. Failure to Bargain

Prior to changing unit employees' conditions of employment, an agency must provide the exclusive representative with notice of the change and an opportunity to bargain over those aspects of the change that are within the duty to bargain under the Statute. *See id.* As relevant here, an agency is not required to bargain over the impact and implementation of a change if the change has a *de minimis* effect. *See id.* In assessing whether the effect of a change is more than *de minimis*, the Authority looks to the nature and extent of either the effect, or the reasonably foreseeable effect, of the change on bargaining unit employees' conditions of employment. *See id.*

The Union argues that the shift from "employee satisfaction" to "employee engagement" and "the termination of meetings solely devoted to 'employee satisfaction[]'" were changes that were greater than *de minimis*. Union Exceptions at 15. The Arbitrator made detailed findings as to why the shift from "employee satisfaction" to "employee engagement" was only *de minimis* -- concluding that the shift did not adversely affect employees in any way -- and the Union provides no basis for setting aside these findings. In addition, the Arbitrator found that "employee engagement" encompassed the concept of "employee satisfaction," and the Union provides no basis for finding that the change in the meeting structure and focus on "employee engagement" changed employees' conditions of employment in a manner that was greater than *de minimis*. Accordingly, we deny the Union's exception concerning the alleged failure to bargain.

2. Bypass

The Authority has held that agencies unlawfully bypass an exclusive representative when they communicate directly with bargaining-unit employees concerning grievances, disciplinary actions, and other matters relating to the collective-bargaining relationship. *See U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst., Elkton, Ohio*, 63 FLRA 280, 282 (2009). Such conduct constitutes direct dealing with an employee, and violates § 7116(a)(1) and (5) of the Statute, because it interferes with the union's rights under § 7114(a)(1) of the Statute to act for and represent all employees in the bargaining unit. *See id.* Such conduct also constitutes an independent violation of § 7116(a)(1) of the Statute because it demeans the union and inherently interferes with the rights of employees to designate and rely on the union for representation. *See id.*

However, the prohibition on management's negotiating or dealing directly with unit employees does not in every case prevent an agency from seeking information or opinions directly from its employees. *See IRS (Dist., Region, Nat'l Office Units)*, 19 FLRA 353, 354 (1985) (*IRS Dist.*), *aff'd*, 826 F.2d 114 (D.C. Cir. 1987). Thus, as part of its overall management responsibility to conduct operations in an effective and efficient manner, an agency may question employees directly, provided that it does not do so in a way that amounts to attempting to negotiate directly with them concerning matters that are properly bargainable with their exclusive representative. *See id.* In this connection, management must have the latitude to gather information, including opinions, from unit employees to ensure the efficiency and effectiveness of its operations. *See id.*

To determine whether polling of employees violates the Statute, the Authority considers the nature of the information sought, the manner in which the poll was conducted, how the information

7. We note that the Union argues that the Arbitrator exceeded his authority by rendering an award that is contrary to law. The Authority previously has addressed similar claims under a contrary-to-law analysis. *See NTEU*, 64 FLRA 504, 505-06 (2010). Accordingly, we do so here.

was used, and similar relevant factors. *See Dep't of the Treasury, IRS, Wash., D.C. & IRS Indianapolis, Ind. Dist. Office*, 31 FLRA 832, 838 (1988). The Authority has found no bypass where, for example, there was no evidence that a respondent: (1) attempted to deal or negotiate directly with unit employees concerning their conditions of employment, or in any manner created the appearance of doing so, when it solicited information, s*ee IRS Dist.*, 19 FLRA at 355; or (2) intended to or did use the information gained from employees in a way that would undermine the status of the exclusive representative, *see DOD, Office of Dependents Schs.*, 19 FLRA 762, 764 (1985), *aff'd*, 826 F.2d 114 (D.C. Cir. 1987).

To support its bypass argument, the Union cites the instructions that the Agency gave to managers, in which the Agency stated that, during the survey meetings, managers could "discuss with the group the pros and cons of certain actions or suggestions to determine the preferred method or approach, and you can support a suggestion[]" that an employee puts forth. However, even assuming that following the instructions could constitute a bypass, the Arbitrator did not find that any managers actually followed the instructions. Instead, he found that, if there were any meetings in which management "crosse[d] the line[]" with employees, then "they're not part of the record." Accordingly, the Arbitrator found that there was no evidence that management negotiated directly with unit employees during any of the meetings. The Union does not provide any basis for finding that the Arbitrator erred in this regard.[8]

The decisions cited by the Union are distinguishable. In some, the exceptions before the Authority did not involve bypass issues. *See HHS Balt.*, 28 FLRA at 409; *DOJ*, 14 FLRA at 579; *Tinker AFB*, 3 FLRA 512, 512. In others, agencies had dealt directly with employees regarding grievances. *See FCI Bastrop*, 51 FLRA at 1346-47; *SSA Region X*, 39 FLRA at 311-13. Finally, some decisions involved situations where, unlike here, there was evidence that management either negotiated directly with employees or made changes (or indicated that they would make changes) based on employee suggestions. *See IRS Kansas City*, 57 FLRA at 129-30 (agency negotiated directly with unit employees regarding seating arrangements); *Air Force*, 42 FLRA at 1239 (agency approved and implemented unit employees' proposal); *ATF*, 16 FLRA at 543 (agency representative asked employees how they wanted to handle a certain matter and stated, "It's whatever you decide.").

For the foregoing reasons, we deny the Union's exception concerning bypass.

3. Failure to Provide Information

The Authority has distinguished a failure to respond to an information request from a failure to provide information. In this connection, in *Department of Health and Human Services, Social Security Administration, New York Region, New York, New York*, 52 FLRA 1133 (1997) (*HHS NY*), the Authority found that an agency violated the Statute by failing to respond to an information request, but did not violate the Statute by failing to actually provide the requested information. *See id.* at 1134. In so doing, the Authority assessed whether the Union established an entitlement to the information under § 7114(b)(4)of the Statute. *See id.* at 1147-48.

A union requesting information under § 7114(b)(4) of the Statute must establish a particularized need for 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. *See IRS, Wash., D.C. & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 669 (1995) (*IRS*) (Member Talking concurring). The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be relevant or useful to a union. *See id.* Instead, a union must establish that requested information is required in order for the union adequately to represent its members. *See id.* at 669-70. The Union is responsible for articulating and explaining its interests in disclosure of the information. *See id.* at 670. Satisfying this burden requires more than a conclusory or bare assertion. *See id.* Among other things, a request for information must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. *See id.*

Determining whether requested information is "necessary" within the meaning of § 7114(b)(4)(B) of the Statute is a "question[] of law, not [a] question[] of fact." *Dep't of Energy, W. Area Power Admin., Golden, Colo.*, 27 FLRA 823, 829 (1987).

8. In addition, we note that the instructions on which the Union relies expressly state that managers "cannot commit to implement a suggestion until you have completed any bargaining obligations." Award at 26.

Consequently, where an arbitrator finds that a union established particularized need for requested information, the Authority will assess whether, in making that finding, the arbitrator "erred, as a matter of law," and set aside the award if the arbitrator did so.[9] *NLRB*, 60 FLRA 576, 581 (2005) (Chairman Cabaniss concurring & then-Member Pope dissenting as to finding of no particularized need). Consistent with these principles, we assess whether the Arbitrator erred as a matter of law in finding that the Union established particularized need for the requested information.

In its information request, the Union stated, without elaboration, that it needed the requested information to assist in preparing for negotiations concerning the survey, as well as for "related enforcement actions[.]" Award at 30. Subsequently, in its grievance, the Union alleged, without elaboration, that the Agency "has denied us information . . . to enable us to understand what is happening in connection with the [s]urvey process, to prepare this grievance and to help us prepare for negotiations." *Id.* at 32. Thus, in essence, the Union asserted that it needed the information for three purposes: (1) to prepare for negotiations; (2) for "related enforcement actions[,]" including preparing the grievance; and (3) to enable the Union to understand the survey process. The Union also argues that, during the hearing, one of its witnesses articulated additional purposes for which the Union needed the information. These issues are addressed separately below.

i. Information for Negotiations

With regard to negotiations, the Authority has recognized that preparing proposals for collective bargaining is a central union representational responsibility under the Statute. *See Dep't of the Air Force, Wash., D.C.*, 52 FLRA 1000, 1009 (1997) (*Air Force D.C.*) (Member Wasserman concurring). However, the Authority has held that "an assertion that requested information is necessary to 'assist in developing proposals for . . . negotiations,'" is a conclusory or bare assertion that is insufficient to establish particularized need. *Id.* In addition, the Authority has held that where a union asserts that it needs information in order to draft bargaining proposals concerning a certain matter, and that matter is outside the duty to bargain, the union does not demonstrate that the information is necessary within the meaning of § 7114(b)(4) of the Statute. *See GSA*, 29 FLRA 197, 200 (1987).

The Union's statement that it needed the requested information "to help" it "prepare for . . . negotiations" over the survey is general and does not explain why the Union needed the particular information that it requested and the uses to which it would have put that information with respect to preparing for negotiations. In addition, as discussed previously, the Arbitrator found that the Union was not entitled to bargain over the survey, and the Union has not demonstrated that the Arbitrator erred in this regard. For these reasons, consistent with the foregoing precedent, we find that the Union did not establish a particularized need for the requested data in order to prepare for negotiations.

ii. Information For "Related Enforcement Actions"/Preparing the Grievance

The Authority has held that a statement that information was needed to "determine whether any employee or [u]nion rights have been violated and[,] if they have[]" been violated, to "take appropriate remedial action through [the] negotiated grievance procedures[]" was insufficient to establish particularized need for that information. *See Air Force D.C.*, 52 FLRA at 1008. Similarly, a statement that requested information was necessary to monitor compliance with the parties' national agreement, and necessary to pursue possible grievances and equal-employment-opportunity complaints, was insufficient where it did not explain why the union requested the particular information that it requested and the particular uses to which the union would put it if the information were disclosed. *See HHS, NY*, 52 FLRA at 1147-48 (Member Wasserman dissenting in part).

Here, the Union did not initially specify the "related enforcement actions" for which it allegedly needed the lengthy list of requested information. Award at 30. However, when the Union subsequently filed the national grievance, it alleged that it needed the information in order to "prepare" the grievance. *Id.* at 32. Nevertheless, neither the original information request nor the grievance explained why the Union needed the particular items that it was seeking or the particular uses to which the Union would put those items in processing the grievance. We note, in this connection, that the grievance involved the Agency's actions concerning the 2006 survey, and many of the requested items involved data from 2005; the Union did not explain how those items related to the grievance concerning

9. As such, the dissent errs by deferring to the Arbitrator's finding of particularized need as if it were a factual finding.

the 2006 survey. In view of the general nature of the Union's statements and the scope of its request, we find that the Union did not demonstrate a particularized need for the requested data in connection with "related enforcement actions" or preparing the grievance.

iii. Understanding the Survey Process

As discussed above, the Union asserted, without elaboration, that it wanted the information in order to understand the survey process. The Union did not explain how it would use the information in this regard, or how any use of the information related to any representational activities. Also as discussed above, the Union did not demonstrate a particularized need for the information in connection with either negotiations or the processing of the grievance. Given the Union's unexplained statement and the lack of any demonstrated need for the information in connection with the Union's representational roles, we find that the Union did not establish particularized need for the information in order to understand the survey process.

iv. Reasons Proffered at the Hearing

The Authority has held that, to the extent reasons offered in a union's hearing testimony were not previously articulated, they "generally" may not be relied on to establish particularized need. *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195, 1205 n.10 (1997) (*Marion*) (Member Wasserman dissenting).[10] The Union does not assert that the hearing testimony on which it relies was previously articulated or provide any other basis for concluding that this "general" rule does not apply here. Accordingly, we do not consider the hearing testimony in assessing whether the Union established particularized need.

For the foregoing reasons, we find that the Union failed to establish particularized need for the information, and we set aside the portion of the award directing the Agency to provide it. Our decision to set aside this portion of the award does not affect the Arbitrator's unexcepted-to finding of an unlawful failure to respond to the information request. However, it does result in setting aside the sole remedy that the Arbitrator awarded for that violation, specifically, the direction to provide the information. In these circumstances, we find it appropriate to modify the award to provide for the typical remedy in failure-to-respond cases, which is a cease-and-desist order and a direction to post a notice. *See, e.g., HHS, NY*, 52 FLRA at 1150-51. *Cf. U.S. Dep't of Energy, Oak Ridge Office, Oak Ridge, Tenn.*, 64 FLRA 535, 538 (2010) (Authority modified award to bring it into compliance with applicable law). *Cf. also NTEU*, 64 FLRA 443 (2010) (Member Beck dissenting on the merits) (in decision reviewing exceptions to arbitration award, Authority directed notice posting).

V. Decision

The finding of an unlawful failure to provide information, and the direction to provide that information, are set aside. The award is modified to provide for an order directing the Agency to: (1) cease and desist from failing to respond to information requests from the Union; (2) respond to such requests; and (3) post an appropriate notice. The remaining exceptions are denied.

10. We note that, in one decision after *IRS*, the Authority considered reasons proffered in testimony for the scope of an information request. *See U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1475-76 (1996) (*INS*), *recons. den.*, 52 FLRA 1323 (1997), *pet. for review den.*, 144 F.3d 90 (D.C. Cir. 1998). In *INS*, after the union requested information, the parties met and the agency, while raising certain concerns regarding the request, did not raise a concern regarding the scope of the information requested. *See id.* at 1469-70. The Authority found it appropriate to consider hearing testimony regarding the scope of the request because to do otherwise "would give undue weight to whether the agency asked or the union answered questions about matters that, unlike other matters that were discussed . . . neither party appeared concerned about at the time of the request." *Id.* at 1476. However, the Authority subsequently indicated in *Marion* that the holding in *INS* was limited, noting that it was "the only Authority decision issued after [*IRS*] where" the Authority considered reasons proffered at a hearing, and emphasizing that although the parties had discussed many aspects of the information request in *INS*, they had not discussed scope. 52 FLRA at 1205 n.10. As there were no discussions in this case, and there is no claim that *INS* applies, it does not provide a basis for considering the hearing testimony.

Opinion of Member DuBester, dissenting in part:

I join my colleagues in all respects except for their determination that the Union failed to establish a particularized need for the information it sought, and their consequent decision to set aside the Arbitrator's finding that the Agency unlawfully failed to provide information, and the direction to provide the information. In my view, the Arbitrator made a factual finding that the Agency "knew very well what the Union's 'particularized need' was for the information it requested[.]" Award at 72. The Arbitrator found in this connection that the Union's grievance was "long and detailed[,]" and that "the Agency had little difficulty understanding the issues and presenting its own case fully and forcefully." *Id.* Because the Authority defers to arbitrators' factual findings, *e.g.*, *NFFE, Local 1437*, 53 FLRA 1703, 1710 (1998), I would deny the Agency's exceptions arguing that the award is contrary to law insofar as it orders the Agency to provide the Union with the information the Union requested.