64 FLRA No. 45

SOCIAL SECURITY ADMINISTRATION
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL 215, AFL-CIO
(Charging Party/Union)

WA-CA-04-0604

DECISION AND ORDER

November 30, 2009

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

I. Statement of the Case

This case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (the Judge) filed by the General Counsel (GC). The Respondent filed an opposition to the GC's exceptions.

The complaint alleges that the Respondent violated § 116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to provide necessary information to the Charging Party. The Judge found that the GC failed to demonstrate that the requested information was necessary, within the meaning of the Statute and, therefore, he recommended that the complaint be dismissed.

For the following reasons, we reverse the Judge and find that the Respondent violated the Statute as alleged in the complaint.

II. Background and Judge's Decision

The facts are fully set forth in the Judge's decision and are only briefly summarized here. During the relevant time period, the Respondent and the Charging Party were negotiating a new collective bargaining agreement. The Charging Party proposed to retain Section 3B of the parties' prior agreement, which gave employees in the Office of Hearings and Appeals (OHA) flexibility in terms of when they could take lunch and other breaks (the break flexibilities) and required the Respondent to give the Charging Party notice and an opportunity to bargain over certain changes to the break flexibilities. [1] The Respondent proposed to replace that provision with one that would allow it to set lunch and break schedules based on "operational needs." Decision at 4.

Subsequently, the Charging Party sent the Respondent a letter requesting, as relevant here, "[a]ny documents that list, define or reference the normal time when each employee within each hearing office takes his/her breaks and lunch for each workday. Identify by name and position the normal times for each individual by hearing office location." *Id*. (quoting GC Exh. 2 at 2). The letter explained that the Respondent could provide sanitized documents omitting employee names and other private information. *See id.* This information was sought "[f]or the period March , 2004 to present[.]" [2] *Id*. In addition, the letter stated:

> The Union's particularized need for this data/information is to have a full and complete understanding of the Agency's initial contract proposals relating to the Office of Hearings and Appeals. Additionally, the Union believes such information is critical to preparing counter contract proposals based on factual information, in an attempt to meet the Union's and Agency's concerns. In presenting its proposals to the Union[,] the Agency indicated it did not have sufficient knowledge of the OHA hearing office process to discuss the matter thoroughly with the Union.

Id. at 3-4. Subsequently, the Charging Party sent another letter that elaborated on the previous letter and stated, in pertinent part:

> As you are aware, most hearing offices have three different unions representing employees and such changes in working conditions have not been proposed to their bargaining unit employees. Additionally, since my bargaining unit employees only represent approximately 60% of the office staff, it

1. Article 10, § 3B provided:

> Management will continue the existing flexible lunch and break arrangements. If Management determines that an adjustment to lunch and/or breaks is necessary to solve any significant public service or operational problems caused by the flexible 5/4/9 work arrangement, the Union will be given the opportunity to bargain on such changes in working conditions, consistent with 5 USC 71 and the National Agreement.

Decision at 3.

2. The Judge presumed, and the parties do not dispute, that "to present" refers to the date of the Charging Party's information request, which is June 14, 2004. *Id*. All dates are 2004 unless otherwise noted.

> appears the reasons for such proposals are without merit since office coverage, if proven needed, could be adjusted in many other ways. As such, the requested information is necessary to determine whether the Agency's proposals are based on legitimate operational needs or are simply hard ball negotiation tactics.

GC Exh. 3.

The Respondent replied to the Charging Party's request in writing, asserting that the Charging Party "ha[d] failed to establish a particularized need for each item requested" and had failed to "justify a particularized need for the information requested for each of the 139 OHA hearing offices." Decision at 4-5. The letter also stated that the Respondent had a "countervailing interest against disclosure" because the documents requested were "inextricably intertwined with management collective bargaining strategy[,] pursuant to section 7114(b)(4)(C) of the Statute." [3] *Id*. at 5. The parties never discussed the information request or the Respondent's reply.

The GC filed a complaint alleging that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by failing to provide necessary information to the Charging Party. In its answer, the Respondent admitted that it had refused to provide the information but denied that it was obligated to provide the information. Nevertheless, the Agency provided the Charging Party all of the requested information before the hearing.

As relevant here, the Judge found that the Charging Party did not establish a particularized need for the requested information because it did not demonstrate that the information was necessary within the meaning of the Statute. [4] Specifically, the Judge found that the "temporal and geographic aspects of the request" were "very broad" and that the Charging Party "never explained how the specific information about break times and lunch times for every [bargaining unit] employee at OHA would enable [it] to determine whether there was a 'legitimate operational need' for a contract change." *Id*. at 12-13. On the other hand, the Judge found that the Respondent "explained in detail" its objections to the Charging Party's request and "left the door open" for the Charging Party to be more specific. *Id*. at 13-14. According to the Judge, the Charging Party therefore "needed to explain in more detail how the requested information . . . would assist negotiators in evaluating the operational need for a change in lunch and break scheduling procedures." *Id*. at 14.

Based on the foregoing, the Judge recommended that the Authority dismiss the complaint.

III. Positions of the Parties

A. GC's Exceptions

The GC asserts that the Charging Party established a particularized need for the requested information by showing that the information was needed to: (1) understand and bargain over the Respondent's proposal; (2) prepare counter proposals; and (3) determine whether the Respondent's proposal was based on an operational need. *See* Exceptions at 8. According to the GC, the Respondent did not establish a countervailing interest in non-disclosure that outweighed the Charging Party's particularized need and, therefore, it violated the Statute as alleged.

The GC argues that the Judge erred by considering the Charging Party's failure to clarify its information request. In this regard, the GC asserts that clarification is required only when a respondent requests it, which the Respondent did not do in this case. In any event, the GC asserts that, without the requested information, the Charging Party could not have been more specific about how the requested information would be used. *See id*. at 11. The GC acknowledges that the Charging Party "could have identified several possible factual scenarios the information might reveal and explained . . . how the information would be used in each scenario[,]" but it claims that this would have revealed the Charging Party's bargaining strategy, which it was not required to do under Authority precedent. *Id*. at 2 (citing *Health Care Fin. Admin.*, 56 FLRA 503, 507 (2000)).

In addition, the GC claims the Judge erred in two ways by finding that the requested information would not permit the Charging Party to determine whether there was an operational need for the Respondent's proposal. First, the GC claims that determining the Respondent's operational need was not the Charging

3. Section 7114(b)(4) of the Statute provides, in pertinent part, that agencies are not required to provide data that "constitute[s] guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]" 5 U.S.C. § 7114(b)(4)(C).

4. The Judge limited the issues in dispute to the Respondent's claims — raised at or near the time it denied the Charging Party's information request — that: (1) the Charging Party did not establish a particularized need for the information; and (2) the requested information constituted guidance or counsel to management officials regarding its bargaining strategy. *See* Decision at 5-6. As the Respondent does not except to this ruling, we do not address it further. As to the second issue, the Judge found that the requested information did not constitute guidance, advice, counsel, or training within the meaning of the Statute. As the Respondent also does not except to this finding, we do not address it.

Party's only stated purpose for requesting the information. *See* Exceptions at 10. In this connection, the GC claims that the Judge overlooked the Charging Party's other stated purposes, including the need to understand the Respondent's proposal and prepare counter proposals. Second, the GC asserts that whether the requested information would actually accomplish the Charging Party's stated purpose is not determinative of whether the information is necessary within the meaning of the Statute. *See id.*

Further, the GC disputes the Judge's finding that the Charging Party failed to justify the geographic and temporal scope of its request. According to the GC, the geographic scope of the Charging Party's request reflected the geographic scope of the Respondent's proposal, over which the parties were bargaining. The GC further claims that the temporal scope of the Charging Party's request covered "a relatively brief period" that extended from the date of the Respondent's proposal to the date of the Charging Party's request. *Id* at 14. As such, the GC claims that the Respondent was able to make a reasoned judgment about its obligation to provide the information and the Charging Party had no duty to explain the temporal scope of its request.

Finally, the GC requests, as a remedy, a cease-and-desist order and notice posting signed by the head of the Respondent, the Commissioner, to be posted in all OHA offices.

B. Respondent's Opposition

The Respondent asserts that the Judge correctly found that the Respondent did not violate the Statute by failing to comply with the Charging Party's information request. In this regard, the Respondent claims the Charging Party's request was "conclusory" and, therefore, insufficient to establish a particularized need. Opposition at 5 (citing *Dep't of the Air Force, Wash., D.C.*, 52 FLRA 1000, 1009 (1997) (*Air Force*)). The Respondent also asserts that the Charging Party provided "no explanation . . . for why the information was necessary for the time period requested." *Id*. at 9-10.

According to the Respondent, even assuming that it violated the Statute as alleged in the complaint, the GC's requested remedies are precluded by law because the Respondent provided the Charging Party with the requested information and, therefore, the Charging Party suffered no harm. Alternatively, the Respondent agrees with the GC that the scope of the posting should be limited to OHA offices, but asserts that "it would be unreasonable to ask anyone other than those involved in the negotiations to sign any notice of positing." *Id*. at 11. Therefore, the Respondent asks that the notice be signed by either the Chief Spokesperson for negotiations or the Associate Commissioner for the Office of Labor-Management and Employee Relations.

IV. Analysis and Conclusions

A. The Charging Party established a particularized need for the requested information under § 7114(b)(4) of the Statute.

Under § 7114(b)(4) of the Statute, an agency must furnish information to a union, upon request and "to the extent not prohibited by law," if, as relevant here, the requested information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining[.]" [5] 5 U.S.C. § 7114(b)(4)(B). To demonstrate that requested information is "necessary" within the meaning of § 7114(b)(4), a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute." *IRS, Wash., D.C. and IRS, Kansas City Serv. Ctr., Kansas City, Mo.*, 50 FLRA 661, 669 (1995) (*IRS, Kansas City*).

"A union's burdens under *IRS, Kansas City* extend to articulating and establishing the necessity of the particular information it has requested, including the scope of a request." *U. S. Dep't of Justice, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472 (1996) (citing *U. S. Dep't of Labor, Wash., D.C.*, 51 FLRA 462, 476 (1995)). The scope of a request encompasses not only the type of the information requested, but also the "temporal and geographic" aspects of the request. *U. S. Dep't of Justice, INS, N. Region, Twin Cities, Minn.*, 52 FLRA 1323, 1330 (1997) (*Twin Cities*); *U. S. Border Patrol, Tucson Sector, Tucson, Ariz.*, 52 FLRA 1231, 1239 (1997). The union's responsibility for articulating its interests in the requested information requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether disclosure of the information is required under the Statute. *See IRS, Kansas City,* 50 FLRA at 670.

The agency is responsible for establishing any countervailing anti-disclosure interests and, like the

5. The requested information also must be: (1) normally maintained by the agency in the regular course of business; (2) reasonably available; and (3) not constitute guidance, advice, counsel, or training. 5 U.S.C. § 7114(b)(4). These three requirements are not at issue here, and we do not consider them further.

union, must do so in more than a conclusory way. *See id.; see also Health Care Fin. Admin.*, 56 FLRA 156, 159 (2000). Such interests must be raised at or near the time of the union's request. *See U. S. DOJ, Fed. Bureau of Prisons, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91, 93 (2004) (citation omitted).

The Respondent proposed to replace contract language that permitted the break flexibilities with language that would allow it to set break and lunch periods based on "operational needs." Decision at 3. The Charging Party requested documents showing, from March 1 to June 14, the normal times that each employee in each OHA takes breaks and lunch, explaining that it needed the information to: (1) have full and complete understanding of the Respondent's proposal; (2) prepare counter proposals; and (3) determine whether there was a legitimate operational need for the change.

As noted above, Authority precedent requires information requests to be specific and to set forth the necessity of the particular information requested, including the scope of the request, which encompasses the type of the information requested as well as the temporal and geographic aspects of the request. *See Twin Cities*, 52 FLRA at 1330. Here, the Charging Party's request for information from March 1 to June 14 and from particular offices corresponded with the scope of the Respondent's proposed change to the parties' agreement. In this regard, the Charging Party's request was limited to the time period covering the date of the Respondent's proposed change up to the date of the Charging Party's information request. In addition, the Charging Party's request concerned the 139 OHA offices that employed bargaining-unit employees whom the Respondent's proposed change would have affected. Consequently, the temporal and geographic scope of the Charging Party's request was limited appropriately.

The Charging Party's first explanation for why its needed the information paraphrases the Statute's requirement for "full and proper . . . understanding . . . of subjects within the scope of collective bargaining[,]" and its second explanation — to prepare counter proposals — would apply in every bargaining situation. 5 U.S.C. § 7114(b)(4)(B). However, it is unnecessary to decide whether these explanations provide the requisite specificity to establish particularized need because the Charging Party's subsequent explanation — that it needed the information to determine whether there was a legitimate operational need for the Respondent's proposed change to the parties' agreement — provides such specificity. In this regard, there is no dispute that the Respondent was seeking to replace the break flexibilities with a policy that would permit it to "set different lunch/break schedules to accommodate operational needs." Respondent's Exh. 6 at 8. In response, the Charging Party requested information showing "the normal time when each employee within each hearing office takes his/her breaks and lunch for each workday." GC's Exh. 2 at 2. The Charging Party questioned the Respondent's need to set different lunch and break schedules based on office coverage and operational needs, explaining that unit members represent only about 60 percent of the office staff. According to the Charging Party, the information was necessary to assess whether the Respondent's proposed change was based on legitimate operational needs and to show that "office coverage, if proven needed, could be adjusted in many other ways." GC's Exh. 3 at 1.

The Judge found that the Charging Party's request lacked specificity because it did not explain how the requested information "would enable [the Charging Party] to determine whether there was a 'legitimate operational need' for a contract change." Decision at 12. However, the Charging Party's request clearly explained its intent to use the information to assess the need for office coverage and the various ways such coverage, if needed, could be achieved. The Charging Party also explained that the information was necessary to determine whether the Respondent's stated operational need for its bargaining proposal was legitimate or simply "hard ball negotiation tactics." *Id.* at 4. Thus, contrary to the Judge's finding, the Charging Party did explain the uses to which it would put the information and the connection between those uses and its representational responsibility to engage in collective bargaining.

The Judge also found that the Charging Party's request lacked specificity because it was "not at all clear . . . that the information would actually serve [the Charging Party's stated] purpose." *Id.* at 13. However, as the GC points out, "whether requested information would accomplish a union's purpose is not determinative of whether it is necessary within the meaning of the Statute." *U. S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 808, 813 (2002) (citation omitted) (then-Member Pope dissenting on other grounds).

Additionally, the Judge found that the Respondent did not expressly request clarification of the Charging Party's information request, but that it "left the door open [for] the Union to pursue the issue with more spec-

ificity." Decision at 14. Under Authority precedent, "when an agency reasonably requests clarification of a union's information request, the union's failure to respond to the request is taken into account in determining whether the union has established a particularized need for the information." *U. S. Dep't of the Air Force, Air Force Materiel Command, Kirtland, Air Force Base, Albuquerque, N.M.*, 60 FLRA 791, 794 (2005) (*Kirtland AFB*), *aff'd in part sub nom, AFGE, AFL-CIO, Local 2263 v. FLRA*, 454 F.3d 1101 (10th Cir. 2006). Also under Authority precedent, an agency is not required to expressly request clarification where its response to the information request "implicitly invite[s] further discussion . . . ." *Air Force*, 52 FLRA at 1008. In *Air Force*, the agency's response that was found to have invited further discussion was not an outright denial of the union's information request, but was tentative. In particular, the agency advised the union that its request should have been made to a higher authority, explaining that the request "does not appear" to establish a particularized need. *Id*. at 1003.

Unlike the agency in *Air Force*, the Respondent in this case definitively denied the Charging Party's information request, asserting that the Charging Party had "failed to establish a particularized need for each item requested." Decision at 4. Moreover, there is no question that the person responding to the Charging Party's information request had the authority to approve or deny the request. As the Respondent denied the Charging Party's information request without requesting clarification, there is no support for the Judge's finding that the Respondent "left the door open [for] the Union to pursue the issue with more specificity." Decision at 14. Given the Respondent's failure to request clarification, the Charging Party was not required to provide such clarification. In any event, the Respondent's reason for denying the Charging Party's information request was not only that there was no particularized need, but also that the information constituted guidance relating to collective bargaining under § 7114(b)(4)(C) of the Statute. Thus, even if the Respondent had requested clarification, providing such clarification would have eliminated only one of the two alternative bases on which the Respondent denied the request.

For the foregoing reasons, we find that the Charging Party's information request established a particularized need under the Statute and that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by not providing the Charging Party with the requested information.

B. The appropriate remedy is a cease-and-desist order and a notice-posting signed by the head of the Agency.

As an initial matter, the Respondent argues that no remedy is available to the Charging Party because, prior to the hearing, it provided the Charging Party with the requested information. However, the fact that the Respondent later provided the requested information does not alter the fact that it violated the Statute when it denied the request. Moreover, in virtually all cases where a violation is found, the Authority orders traditional remedies such as a cease-and-desist order accompanied by a notice posting. *See F.E. Warren Air Force Base, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996). Given that the Respondent has provided the Charging Party with the requested information, the GC has not requested an order to provide the requested information. The GC requests only the traditional remedies of a cease-and-desist order accompanied by a notice posting, and there is no reason why we should not order those remedies.

In addition, the parties dispute which Respondent official should sign the notice posting. The Authority typically directs the posting of a notice signed by the highest official of the activity responsible for the violation. *See U. S. Dep't of Veterans Affairs,* 56 FLRA 696, 699 (2000). In this regard, the Authority has explained that directing the highest official to sign the notice "signif[ies] that the Respondent acknowledges its obligations under the Statute and intends to comply with those obligations." *Id.* (citing *U. S. Dep't of Veterans Affairs, Wash., D.C.,* 48 FLRA 1400, 1402 (1994)).

Consistent with the foregoing precedent, the GC asks that the notice be signed by the Commissioner, who is the head of the Respondent, because the violation occurred through the actions of an Associate Commissioner at the Respondent's headquarters. The Respondent does not dispute that this Associate Commissioner denied the information request, but asks that the notice be signed by someone who was "involved in the negotiations[,]" such as the Chief Spokesperson for negotiations or the Associate Commissioner for the Office of Labor-Management and Employee Relations. Opposition at 11. As there is no dispute that the Commissioner is the highest official of the Respondent, the Commissioner ordinarily would be the appropriate official to

sign the notice posting, consistent with the foregoing precedent.[6] Accordingly, consistent with established Authority precedent, we will direct that the Commissioner sign the notice.

V. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Social Security Administration (Respondent) shall:

1. Cease and desist from:

(a) Failing or refusing to provide the American Federation of Government Employees, Council 215, AFL-CIO (the Union), the exclusive representative of bargaining-unit employees, with documents that list, define or reference, for each workday, the normal time when each employee within each hearing office of the Office of Hearings and Appeals takes his or her breaks and lunch for each workday.

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

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

(a) Post at its facilities within its Office of Hearings and Appeals copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Respondent's Commissioner, and shall be posted and maintained for 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.

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

6. We note that, in at least two cases, the Authority modified judges' recommended orders to require officials, other than the highest official, to sign notices. *See U. S. Dep't of Labor, Wash., D.C.,* 61 FLRA 603 (2006) (then-Member Pope joined in the decision solely to avoid an impasse); *U. S. Dep't of Labor, Wash., D.C.,* 61 FLRA 825 (2006) (same). However, as noted, then-Member Pope joined in those decisions solely to avoid an impasse. Moreover, in both decisions, the Authority acknowledged, without overruling, its precedent to require that notices be signed by the highest official of the activity responsible for the violation. To the extent those decisions are inconsistent with our decision here, we will no longer follow them.

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

The Federal Labor Relations Authority has found that the Social Security Administration violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the American Federation of Government Employees, Council 215, AFL-CIO (the Union), the exclusive representative of bargaining-unit employees, with documents that list, define or reference, for each workday, the normal time when each employee within each hearing office of the Office of Hearings and Appeals takes his or her breaks and lunch for each workday.

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

____
(Agency)

Dated: ________ By: ________________________

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of the 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, Washington Regional Office, whose address is: Federal Labor Relations Authority, 1400 K Street NW, 2nd Floor, Washington, DC 20424-0001, and whose telephone number is: 202-357-6029.