UNITED STATES OF AMERICA FEDERAL LABOR RELATIONS AUTHORITY OFFICE OF ADMINISTRATIVE LAW JUDGES WASHINGTON, D.C. 20424

DEPARTMENT OF VETERANS AFFAIRS,

VETERANS AFFAIRS MEDICAL CENTER, GAINESVILLE, FLORIDA
Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2779
Charging Party

Godfrey E. Goff, Jr., Esq. For the General Counsel Case No. AT-CA-20176
Ann Barnett, Esq. For the Respondent
Before: ELI NASH, JR. Administrative Law Judge

DECISION

Statement of the Case

The American Federation of Government Employees, Local 2779 (herein called the Union) filed a charge in this matter on November 25, 1991, and a first amended charge on December 12, 1991 against the Department of Veterans Affairs, Veterans Affairs Medical Center, Gainesville, Florida (herein called the Respondent). Thereafter, on May 22, 1992, the Atlanta Regional Director, Federal Labor Relations Authority, issued a Complaint and Notice of Hearing alleging that the Respondent violated Section 7116(a)(1), (5) and (8) of the Federal Service Labor - Management Relations Statute, as amended, (the Statute) by its failure to respond to the Union's request and to furnish the Union a sanitized computer printout and alleged complaints regarding the performance of an employee who was being removed.

A hearing was held in Orlando, Florida at which all parties were represented. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Timely briefs were filed with the undersigned which have been duly considered.

Upon the entire record, from my observation of the witnesses and their demeanor, and from all the testimony and evidence adduced at the hearing, I make the following findings and conclusions.

Findings of Fact

The essential facts are brief and as follows:

On June 13, 1991 1 , Union 1st Vice - President Nancy Whitehead requested from Terry Hopkins, Chief Medical Administrative Services (MAS) a sanitized computer printout of the alleged complaints in the performance of employee Pedro Calderon. Whitehead stated in her request that she was the designated representative of Calderon in the matter of his proposed removal and for Respondent to contact her if the request needed clarification. The Union needed the information by June 19. Around June 17, Connie Bellville, Chief and Supervisor of Calderon's work section, phoned Whitehead asking for a clarification of the information request. Whitehead responded that she needed a more detailed listing of the errors that were contained in the proposed removal. The proposed removal was based on an alleged error rate in Calderon's performance. The Union received no further response from the Respondent and never received the requested information.

Conclusions

This is not a case requiring a profound analysis. Here the requested data was sought by the exclusive representative because it thought the information was used as a basis for the proposed removal of employee Calderon, and consequently it was needed to examine the accuracy of the errors, the basis of the proposed removal in order for it to respond to the removal proposal in its representative capacity. This necessity constitutes, under any view, a "particularized need" for the data requested. 2

The record in this matter confirms that under section 7114(b)(4) of the Statute the data should have been furnished to the exclusive representative. It shows that the data is: (1) normally maintained in the regular course of business; (2) reasonably available; (3) necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining and (4) does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining. Inasmuch as Respondent does not dispute that the essential elements are satisfied by the record, it is found that there was no bar to Respondent's furnishing the data, upon request, to the Union herein.

Respondent's justification for failing to supply the requested data is twofold. First arguing that it was unable, after taking reasonable steps, to notify the Union of actions taken on its request. It then persists that the data as initially requested was not available in the form requested.

Taking the latter proposition first. Case law places an obligation on an agency to respond to data requests notwithstanding the data may not exist. Thus, it has been consistently held that a reply is essential to allow the exclusive representative full and proper understanding of a disciplinary action against an employee and for the representative to effectively represent the grievant in the related grievance. 3 It seems, therefore, that the agency has an affirmative obligation to inform the exclusive representative of the nonexistence of requested data. Failed attempts to communicate this message to the exclusive representative are presumably at the agency's peril.

Here Respondent faults the Union for not making a clarification of its request as it contends the data the Union sought "was not even available, or had nothing to do with the case at all." If the requested data was not kept in the regular course of business or did not exist, the Union should have been informed. It is clear that the question whether the data was available in the form initially requested by the Union is not a real issue in this case. Besides, the record shows that Whitehead was called by Bellville, around June 17 and asked to clarify the Union's initial request. Whitehead responded that she "needed a more detailed listing of the errors that were contained in the proposed removal." Surely, this explanation to Bellville should have been sufficient to satisfy Respondent as to what data the Union was actually seeking. Finally, I do not view this conversation as a response to the Union's request.

Bellville then handed the request over to a personnel management specialist, Joan Turkovich. It appears therefore, that any specific concerns with the shortcomings of the request were resolved during that conversation between Whithead and Bellville. 4 Thus, all that remained to be done was for Respondent to gather the data and deliver it to the Union. In the circumstances of the case, it is found that the Union did clarify its request through Bellville and that Respondent was able, as the facts establish, to collect the data requested by the Union.

Respondent's primary reasoning for not responding to the request is again attributed to the Union. Respondent argues that it was unable, after taking reasonable steps, to notify the Union of actions taken on its request.

While it is indisputable that conditions do exist which can excuse a failure to respond to the type requests present in this case, the facts set out by Respondent concerning its attempts to reach a representative of the

exclusive representative located at its facility, do not persuade the undersigned that it met its obligation to provide the exclusive representative with the data requested. Notwithstanding that Respondent through Turkovich, left several telephone messages for Whitehead on the Union's answering machine which were unanswered, other means for reaching Whitehead existed which were just as effective, but were not utilized. The most convincing evidence in this case, which persuades the undersigned that Respondent did not meet its obligation to respond to and supply the information, is that Bellville had no difficulty in reaching Whitehead for a clarification of her request only a short time before Turkovich allegedly made her telephone calls. Since Bellville obviously knew how to reach Whitehead and appeared to be handling the matter for Respondent, surely one must surmise, that maybe the most reasonable way to get the information to the Union, in a timely fashion, would have been to reroute the data through Bellville to assure that Whitehead received it on time. In any event, several alternatives to merely leaving a message on the Union's answering machine clearly remained. Those alternatives included, contacting Whitehead at her work site or, by using the mailing system where the Union has a drop box. Turkovich's rejection of these alternatives indeed left a void for the Union. As the record shows, the Union was running out of time to answer the proposed removal and leaving messages on the answering machine and waiting for a response would not, in such circumstances be as reasonable as Respondent contends.

It is my view that without exhausting several of the methods which could have been used to reach Whitehead, who worked at the facility, Respondent can hardly argue that it took reasonable steps to inform the Union of actions taken on its request. While I agree that in some circumstances, Respondent's action may have been a reasonable step to notify Whitehead, it cannot be said that the efforts by Turkovich, were a reasonable effort to respond to and furnish the Union with the data requested in this case. Accordingly, where as here, the Union representative to be contacted is located on the facility and there are several ways to reach that representative, the undersigned rejects the argument that a respondent fulfills its obligation to respond to and furnish requested data merely by exhausting one of the ways to reach the representative. Therefore, the undersigned finds Respondent's argument that it was unable to contact Whitehead after taking reasonable steps to do so, lacks merit.

Based on the foregoing, it is found that Respondent violated section 7116(a)(1), (5) and (8) of the Statute by its failure to respond to the Union's request and to furnish the Union a sanitized computer printout and alleged complaints regarding the performance of the employee who was being removed.

In view of the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, the Department of Veterans Affairs, Veterans Affairs Medical Center, Gainseville, Florida, shall:

1. Cease and desist from:

(a) Failing and refusing to respond to requests to furnish the American Federation of Government Employees, Local 2779, the exclusive representative of its employees, with data requested pursuant to section 7114(b)(4) of the Statute which was relevant and necessary for its representational duties.

(b) Failing and refusing to furnish the American Federation of Government Employees, Local 2779, the exclusive representative of its employees, with data requested pursuant to section 7114(b)(4) of the Statute which was relevant and necessary for its representational duties.

(c) 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) Upon request, furnish the American Federation of Government Employees, Local 2779, the exclusive representative of its employees, information related to proposed removals which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

(b) Post at its facilities, 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 Director 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. º 2423.30, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, 1371 Peachtree Street, NE, Suite 122, Atlanta, Georgia 30367, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, August 25, 1993, Washington, DC

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ELI NASH, JR. Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to respond to requests to furnish the American Federation of Government Employees, Local 2779, the exclusive representative of our employees, with data requested pursuant to section 7114(b)(4) of the Statute which is relevant and necessary for its representational duties.

WE WILL NOT fail or refuse to provide to the American Federation of Government Employees, Local 2779, the exclusive representative of our employees, with data requested pursuant to section 7114(b)(4) of the Statute which is relevant and necessary for its representational duties.

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 Federal Service Labor - Management Relations Statute.

WE WILL upon request, furnish the American Federation of Government Employees, Local 2779, the exclusive representative of our employees, information related to proposed removals which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

_____ (Activity)

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, of the Federal Labor Relations Authority, Atlanta Region, whose address is: 1371 Peachtree Street, NE., Suite 122, Atlanta, Georgia 30367, and whose telephone number is: (404) 347-2324.

FOOTNOTES

Footnote 1 All dates are 1991 unless otherwise indicated.

Footnote 2 National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992); Scott Air Force Base v. FLRA, 956 F.2d 1223 (D.C. Cir. 1992); Department of Justice, Immigration and Naturalization Service, Border Patrol v. FLRA, 991 F.2d 285 (5th Cir. 1993); Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pa. v. FLRA, 988 F.2d 1267 (D.C. Cir. 1993) are examples of cases where the courts created a "particularized need" standard of necessity for data requests made by unions under section 7114(b)(4) of the Statute. Although I do not see this as a situation where such particularity should be a condition to furnishing the data, it is noted that at this writing, the Authority has not submitted to the courts approach. Accordingly, herein the Authority's method is applied.

Footnote 3 Social Security, Administration Baltimore, Maryland, 39 FLRA 650 (1991); U.S. Department of Justice, Office of Justice Programs, 45 FLRA 1022 (1991); U.S. Naval Supply Center, San Diego, California, 26 FLRA 324, 326-327 (1987).

Footnote 4 Army and Air Force Exchange Service, Dallas, Texas, 24 FLRA 292 (1986) cited by Respondent is inapposite. In the instant case the Union clearly gave a "reason" for needing the information, in Whitehead's response to Supervisor Connie Bellville's request for a clarification, on June 17, 1992. Her reply that she "needed a more detailed listing of the errors that were contained in the proposed removal" could not have been more clear.