Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

DEFENSE LOGISTICS AGENCY
DEFENSE DISTRIBUTION REGION EAST DEFENSE DEPOT
SUSQUEHANNA

NEW CUMBERLAND, PENNSYLVANIA
Respondent

and

Case No. BN-CA-70149

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 2004, AFL-CIO
Charging Party

Gail M. Sorokoff, EsquireGary L. Lieberman, Esquire For the General Counsel
Michael J. Schrier, EsquireMartin R. Cohen, EsquireMark D. Roth, Esquire, On the Brief For the Charging Party
John D. Fritz, Esquire For the Respondent
Before: JESSE ETELSON Administrative Law Judge

DECISION

Statement of the Case

This case presents an issue of first impression under the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7101, *et seq.* That issue is whether an agency's duty to bargain in good faith may, in certain circumstances, include the obligation to provide access to its property to a non-employee designee of its employees' exclusive representative for the purpose of testing a work area for the presence of asbestos. If such a duty may ever exist, it must be determined whether, in the circumstances presented in this case, Respondent violated section 7116(a)(1), (5) and (8) of the Statute by denying requests from the Charging Party (the Union) for such access.

The complaint alleges that Respondent denied the Union necessary "data" within the meaning of section 7114(b)(4), and thereby violated section 7116(a)(1), (5) and (8), by refusing to grant the Union's requests for permission to have its retained experts conduct tests for asbestos exposure in Respondent's Building T-21 at the Union's expense. The complaint separately alleges that such conduct also violated section 7116(a)(1) and (5) and independently violated section 7116(a)(1) of the Statute. Respondent's answer admits that the Union was refused permission to have its experts conduct certain specific tests for asbestos, but denies that such refusal violated the Statute.

A hearing was held in Harrisburg, Pennsylvania on July 9, 1997. Counsel for the Respondent, the General Counsel and the Charging Party all filed timely and helpful briefs.(1) Based on the entire record, the briefs, my observation of the witnesses, and my evaluation of the evidence, I find, conclude, and recommend as follows.

Findings of Fact

A. The Parties' Relationship

The Union is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. The parties' current collective bargaining agreement was effective January 19, 1995. Article 15, Section 1 of their agreement requires Respondent to "provide and maintain safe and healthful working conditions for all employees . . . determined in accordance with the definitions and standards contained in Section 19 of the Occupational Safety and Health Act (OSHA), in Executive Order 12196, and in implementing regulations and directives." Article 12, Section 6 of the agreement provides that "environmental differential pay shall be paid to any employee who is exposed to a hazard, physical hardship or working conditions as authorized by FPM Supplement 532-1, Subchapter S8 and Appendix J."(2)

B. Background Concerning Asbestos in the Workplace

The specific worksite involved in this proceeding is Building T-21, a 55,000 square foot, two-story structure in the controlled security area at Respondent's complex in New Cumberland, Pennsylvania. The outside of the building is encased in asbestos. A cement-type material called "transit" or "transite" board affixed to the inside walls and insulation around the interior pipes also contain asbestos. In recent years, Building T-21 had been used as a warehouse. Larger supply items were stored on the first floor and smaller items in racks and bins on the second floor. Forklifts were used on the first floor to transport heavy and bulky items as required. Over the past several years, approximately 60 bargaining unit employees have worked in Building T-21.

In 1990, asbestos was found in the walls and around the pipes in Building T-21. The Union filed a grievance and invoked arbitration. On August 8, 1990, an arbitrator issued an award directing Respondent to pay EDP to certain employees. A dispute arose over compliance with the award and the Union filed an unfair labor practice charge over Respondent's alleged failure to comply. In 1992, the parties signed a settlement agreement which required the Respondent to pay a lump sum to wage-grade employees who worked at the New Cumberland site between April 7, 1988 and November 7, 1992.(3)

In accordance with the 1992 settlement agreement, the Respondent undertook an abatement process, including the wet scrubbing of work areas such as Building T-21, to remove the asbestos. The agreement further provided that, upon completion of the abatement process, "there will be no liability for environmental differential pay based upon the instant arbitrator's award subsequent to 7 November 1992." The abatement process was completed on October 1, 1992.

C. The 1996 Discovery of Asbestos in Building T-21

1. The Rewarehousing of Building T-21's Supplies

Almost four years after the settlement and completion of the abatement process, Building T-21 was deteriorating: chunks of crumbling building material were found inside, the roof leaked, and the lighting was inadequate. Respondent decided to "re-warehouse" the supplies from Building T-21 to a different location. The rewarehousing began in March 1996 and was to be completed by the end of 1997, at which time Building

T-21 was scheduled for demolition.[4] Between four and six bargaining unit employees were working in the building during that period. Their work consisted of removing all the supplies and bins and dismantling and removing the storage racks. This operation created more than the usual amount of dust and debris inside the building. Two large fans were in continuous operation, but it is unclear from the record what, if any, effect the fans had on airborne dust.

In June or July 1996, Joel Pechard, one of the employees who worked in Building T-21, attended a training session conducted by Respondent which included training in asbestos awareness. Pechard raised a concern that asbestos was once again a problem and that he and the other employees in Building T-21 had been exposed to a hazard. Pechard contacted Respondent's Safety Office on three occasions but was dissatisfied with the responses he received. He then contacted Rick Winland, the Union's Fifth Vice President, and discussed his concerns regarding the presence of asbestos in Building T-21. Winland walked through the building and discussed the matter with Union President John McLaughlin, who requested that Winland contact the Respondent's Safety Office. On July 11, 1996, representatives from the Union and Respondent's Safety Office conducted a visual inspection.

2. Respondent Conducts Asbestos Tests

On July 12, 1996, Clarence Smith, an environmental inspector specialist for Respondent, collected five bulk samples--large chunks of debris from various places within Building T-21--to be tested for the presence of asbestos. Winland was present during the collection of these samples. Respondent sent the samples to Analytical Laboratories, a private contractor.

Analytical Laboratories reported that two of the five samples it tested contained asbestos. The material in which the asbestos was found was non-friable, that is, not susceptible to being pulverized by the pressure of, for example, a finger.[5]

Based on the presence of asbestos in some of the tested samples, Respondent, after informing the Union, conducted a personal breathing zone (PBZ) test in Building T-21 on July 17, 1996. A PBZ test uses a measuring device placed on an employee's collar or lapel to detect the presence of fibers in the air over an extended period of time--usually 8 hours-- while the employee is working.

Two employees were monitored for an entire workday while they dismantled racks and bins. The Union was not involved in conducting the PBZ tests, but Union Vice President Winland was present for a total of approximately 10-15 minutes during the tests. Winland, lacking expertise, conceded that he would not know whether the tests were set up properly.

Guardian Laboratories, a private contractor, analyzed the PBZ test data collected by Respondent. Guardian reported that the total fiber content in the air was within permissible limits under the OSHA standard, and thus no separate test was conducted to determine how much asbestos (as distinct from any other kinds of fiber) the sample contained.[6] Respondent gave the Union reports on the results of both the bulk sample and the PBZ tests.

3. The Union Conducts Its Own Sample Test

Around the same time that Respondent was conducting its bulk sample and PBZ tests, Winland asked Pechard to gather some samples in Building T-21. Although not certified in collecting hazardous material, Pechard took three bulk and two "wet wipe" samples. The Union brought these samples to Johnston Laboratories of New Cumberland, Pennsylvania, a firm Winland had selected through the Yellow Pages, for analysis. Johnston Laboratories reported that three of the five samples tested positive for asbestos. The Union did not inform management about these samples or test results. However, Union President McLaughlin concluded that further tests, by independent experts, were necessary.

4. The Union Requests Permission to Have Its Experts Conduct Tests For Asbestos at the Union's Expense

On August 5, 1996, McLaughlin wrote to John Stamatellos, Respondent's Safety and Occupational Health Manager, requesting clearance to conduct asbestos testing, at the Union's expense, by a laboratory of the Union's choice. McLaughlin acknowledged that he had received Respondent's test results but noted that Guardian Laboratories offered no warranties on its findings and, according to its report, "assume[d] no liability for results based upon inaccurate data supplied by the client." McLaughlin stated in his request, "it is the unions (sic) intention to take every precaution to insure that a safe workplace is a reality."

5. Respondent Gives a Qualified Approval but Then Rejects the Union's Request For a Specific Test

The Union's request to conduct the test was forwarded to Col. Joseph Donnelly, the management official responsible for the buildings on the installation, including Building T-21. Larry Neidlinger, who was at that time Respondent's Director of Engineering and Equipment Management, met with McLaughlin in mid-August. McLaughlin expressed his concerns about the possible presence of asbestos and told Neidlinger that, in order to fully represent the employees and assure them that they were not exposed to any kind of hazardous condition, it was imperative for the Union to obtain independent testing results. Neidlinger agreed that the Union could have an expert conduct independent tests.

This approval was confirmed in a letter from Col. Donnelly to McLaughlin dated August 13, 1996, conditioned upon the Union's first providing management with specific information, including the expert's certification to conduct the tests and a description of the tests, which were to be performed in conformance with applicable OSHA requirements. To that end, Winland requested from Johnston Laboratories a statement of the scope of work, i.e., the type of tests to be conducted, a copy of the expert's certification, and a cost estimate. Winland also inquired about the use of the "aggressive" air sampling method for asbestos testing.

By letter dated August 23, 1996, Johnston Laboratories' President Ed Kellogg provided McLaughlin with the requested information, including a proposed procedure for conducting "aggressive asbestos sampling."[(7)] The Union presented this information to Respondent. By letter dated September 6, 1996, from Col. Donnelly to McLaughlin, Respondent denied the Union's request to conduct aggressive asbestos sampling because "aggressive air sampling is not the applicable procedure to determine employee exposure to airborne asbestos . . . ." Instead, Col. Donnelly stated, the applicable OSHA monitoring procedure under 29 C.F.R. §

1910.1001(c) and (d) and Appendix A thereto, is a PBZ test conducted over an 8-hour period.(8) The parties presented conflicting testimony about the proper testing procedure.(9)

After Col. Donnelly denied the Union's request, McLaughlin contacted General Privratsky, the Region Commander at Defense Distribution Region East. In a meeting on September 10, 1996, McLaughlin asked Gen. Privratsky to intercede on the Union's behalf and allow the Union to get into the building to take their own tests. Gen. Privratsky stated that the request for access seemed reasonable and that he would ask Col. Donnelly to reconsider but would not override his decision. He referred the matter back to Col. Donnelly, who responded to the Union by letter dated October 4, 1996. In this letter, Col. Donnelly noted that it was management's responsibility to ensure a safe work environment and that "we cannot allow representatives from your local or hired by you, regardless if state certified, to gather and test potential or known asbestos samples." Instead, Donnelly advised the Union to bring all future concerns over asbestos to his attention for handling by Respondent's experts.(10)

6. Respondent Agrees that the Union May Conduct Its Own PBZ Tests but Later Rescinds Approval

On November 7, 1996, Col. Donnelly met with McLaughlin on matters unrelated to asbestos testing. At the conclusion of that meeting, they briefly discussed the testing of Building T-21. McLaughlin indicated that the Union wanted to do its own testing because the unit employees did not trust management's earlier asbestos test results. Col. Donnelly agreed to allow the Union to conduct its own tests, provided that the Union followed "the protocols of 13 August." Both parties understood this to mean that the Union would conduct PBZ tests which simulated actual working conditions, rather than the "aggressive" testing that the Union had previously sought. McLaughlin agreed to these terms. As McLaughlin testified, he agreed because he was becoming increasingly frustrated by the previous denials, approvals, and denials of the requests to conduct tests and wanted to get an agreement.

Nevertheless, by memorandum dated November 13, 1996, Col. Donnelly advised McLaughlin that he had reversed his decision to allow the Union to conduct PBZ tests. Col. Donnelly stated that no additional tests were needed because PBZ tests already had been conducted by management in July 1996, with results in the permissible range, and that conditions of the building had not changed since that time. He stated further that Building T-21 would no longer be used after the following week, that very little stock was still in the building, and that only one employee was still working there.(11) Accordingly, Col. Donnelly concluded, "if the purpose of the test was to preclude any possible future health conditions of employees, it is not necessary as the building is no longer going to be used for warehousing operations."

McLaughlin testified without contradiction that he had told Respondent consistently "throughout this whole ordeal" that the Union was concerned about the employees' past exposure to airborne asbestos, an issue which Col. Donnelly's memo did not address.(12)

7. The Union Files a Grievance the Next Day

On November 14, 1996, the Union filed a grievance alleging that Respondent violated Articles 12 and 15 of the parties' collective bargaining agreement by failing to provide a healthy and safe work environment for unit employees working in Building T-21 for the past six years, due to their exposure to unsafe levels of asbestos. In support of the grievance, the Union noted that management's refusal to allow the Union to take tests of its

own created a presumption that the building was unsafe. The remedies sought by the Union were "a full and proper clean-up program of asbestos" in Building T-21 and prospective and retroactive EDP for all bargaining unit employees assigned to Building T-21 for the past six years.(13)

Discussion and Conclusions

A. Section 7116(d) Does Not Bar This Complaint

As a threshold matter, Respondent contends that the instant complaint should be dismissed under section 7116(d) of the Statute because the Union first filed a grievance on the same issue later raised in its unfair labor practice charge. Section 7116(d) provides in pertinent part that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not both." The underlying purpose of section 7116(d) is to prevent relitigation of the same issue in a different forum. *U.S. Department of Defense, Marine Corps Logistics Base, Albany, Georgia and American Federation of Government Employees, Local 2317*, 37 FLRA 1268, 1274 (1990).

Whether an unfair labor practice (ULP) charge is barred by an earlier-filed grievance depends on whether "the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar (*sic*)." *Olam Southwest Air Defense Sector* (T*AC*)*, Point Arena Air Force Station, Point Arena, California*, 51 FLRA 797, 801-02 (1996) (*Olam*) (quoting *U.S. Department of the Army, Army Finance and Accounting Center, Indianapolis, Indiana and American Federation of Government Employees, Local 1411*, 38 FLRA 1345, 1351 (1991), *petition for review denied sub nom. American Federation of Government Employees, AFL-CIO, Local 1411 v. FLRA,* 960 F.2d 176, 177-78 (D.C. Cir. 1992). Only if both of these requirements are satisfied is a subsequent action barred by a former one. *Olam*, 51 FLRA at 802.

I find it unnecessary to decide whether Respondent's section 7116(d) contention can survive the first part of the Authority's test, that the ULP charge must have arisen from the "same set of factual circumstances" as the grievance.(14) Instead, I reject the section 7116(d) contention based on an absence of the required similarity between the theories advanced in support of the ULP charge and the grievance.

The November 14, 1996, grievance alleged that Respondent violated Articles 12 and 15 of the parties' agreement by failing to provide a healthy and safe work environment for bargaining unit employees in Building T-21, since employees working at that location had been exposed to "illegal and/or unsafe levels of asbestos" for many years. The issue alleged in the ULP charge (as amended) is whether Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to permit the Union to conduct its own tests in Building T-21.

The ULP charge did not assert a contractual right to conduct such tests, but relied on the Union's right under the Statute to be furnished with necessary information. To be sure, one of the uses to which the test results might have been put was the pursuit of the grievance. However, ULP charges alleging failure to furnish information required by the Statute are often filed for the purpose of facilitating the union's processing of grievances. This relationship between the charge and the grievance does not mean that the charge and the

grievance raise the same issue.

Although, in its written grievance, the Union referred to Respondent's refusal to permit it to conduct the tests, that refusal was cited only as the basis for the contention that the building should be *presumed* to be unsafe. The grievance does not contend, as the ULP charge and the complaint do, that the refusal violated the Statute. The charge and the resulting ULP complaint do not seek to relitigate any issue that was presented by the grievance. *Cf. EEOC Locals*, 49 FLRA at 916 n.5 (charge involved only the agency's failure to furnish information as required by section 7114(b)(4) of the Statute and therefore did not advance the same legal theory as the relevant portion of the grievance). *See generally Id*. at 914-16. Accordingly, section 7116(d) does not bar the charge.

B. Respondent Unlawfully Refused to Furnish Necessary Data to the Union

The primary allegation in the complaint is that Respondent failed to comply with section 7114(b)(4) of the Statute and thereby violated section 7116(a)(1), (5) and (8) of the Statute by refusing to let the Union's designated expert test for asbestos in Building T-21. Under section 7114(b)(4), an agency's duty to bargain in good faith includes the obligation to furnish an exclusive representative of its employees, upon request, and to the extent not prohibited by law, data meeting the following criteria: normally maintained by the agency in the regular course of business; reasonably available; necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and not constituting guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining.

It is clear that testing for asbestos fibers has nothing to do with guidance, advice, counsel or training for managers concerning collective bargaining. Moreover, Respondent has not cited any provision of law which prohibits it from granting the Union's request.(15)

1. The Union's Request to Test For Asbestos Was a Request For "Data"

Under Section 7114(b)(4)

The first substantive question is whether the Union's request to have its own expert conduct asbestos tests in Building T-21 constituted a request for "data" within the meaning of section 7114(b)(4). I conclude that it did.

The Authority has long used the terms, "data" and "information", interchangeably. *See, for example, United States Department of Defense, Departments of the Army and the Air Force, Headquarters, Army and Air Force Exchange Service, Dallas, Texas*, 19 FLRA 652, 667 (1985). "Datum," the singular form of "data," is defined, among other ways, as "material serving as a basis for discussion, inference, or determination of policy" and "detailed information of any kind"; "information" is understood to include "knowledge communicated by others or obtained from investigation, study, or instruction." *Webster's Third New International Dictionary* (1971), pp. 577, 1160. Data, of course, come(s) in many forms. One recognized category is "raw data," *i.e.*, "unprocessed or unanalyzed information." *Webster's II New Riverside University Dictionary* (1984).

As its definitions suggest, "data," in ordinary usage, is a broadly encompassing term. While Congress required disclosure under section 7114(b)(4) only of data meeting certain criteria, there is nothing to suggest that it intended to limit the meaning of "data" itself. It is generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). *See also International Association of Machinists and Aerospace Workers, Franklin Lodge No. 2135 et al. and U.S. Department of the Treasury, Bureau of Engraving and Printing*, 50 FLRA 677, 683 (1995) *decision on remand*, *aff'd mem. sub nom. DOT, BEP v. FLRA*, 88 F.3d 1279 (D.C. Cir. 1996). In the absence of any indication to the contrary, I apply that principle here and conclude that the material and information that the Union sought to obtain by conducting asbestos tests falls within the meaning of "data" as that term is used in section 7114(b)(4).

To "furnish" information necessarily includes providing access to it. For example, the information that might be extracted from a book "exists" within the book's covers; its extraction requires access to the book, whether or not one must consider the physical book itself to be "information." Likewise, the information the Union sought to extract here existed within a cover constituted by a physical shell known as Building T-21. That information, the contents of the material within the building sought to be tested, constitutes "data" no less because one version of it could also be presented in a processed form, such as the printed results of the tests conducted by Respondent. If those contents are not considered to be "data," it might be equally arguable that the contents of a book written in a foreign language are not "data" in view of the availability of the book in translation. In other words, the source of information must be considered to be subject to the section 7114(b)(4) disclosure requirements, either because it constitutes "data" itself or because it contains "data."

In a number of private sector cases in which unions have requested permission for health and safety inspections, including tests for harmful substances, the National Labor Relations Board (NLRB) has found that management's denial of access for such purposes violated its duty to bargain in good faith.(16) Initially, the NLRB's analysis was that such requests were ordinary requests for information. The NLRB modified its approach so as to take into account, as a countervailing factor, the employer's right to control its property. Notwithstanding this modification (which some reviewing courts have questioned (17) and about which the NLRB itself has signaled some doubt(18)) the NLRB has continued to regard such requests as requests for information in connection with the exclusive representative's performance of its representational duties.(19)

Although the private sector cases were decided in the absence of a statutory provision such as section 7114(b)(4), the NLRB's decisions treating requests for access to conduct tests as requests for information are worthy of the Authority's consideration in deciding whether such requests should be considered requests for "data" under the Statute.(20) I am persuaded that the NLRB's characterization of such requests reinforces my conclusion that the Union's requests here were for "data" or "information."

2. The Requested Data Was "Normally Maintained" and "Reasonably Available."

Building T-21, access to which was the subject of the request, was normally maintained by Respondent in the regular course of its business. Moreover, the information sought was reasonably available: the bulk samples were lying on the ground floor of Building T-21 and the air inside the warehouse was readily available to be tested. Both could be collected easily by a certified industrial hygienist and sent to a competent laboratory for analysis at no cost or effort by Respondent.

3. The Requested Data Was "Necessary."

In *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 665-71 (1995)(*IRS, Kansas City)*, the Authority adopted an analytical approach for deciding whether requested data is "necessary" within the meaning of section 7114(b)(4). The Authority held that a union requesting any type of information must establish a "particularized need" for the information by articulating and explaining why it needs such information, including the uses to which the information will be put and the connection between those uses and the union's representational responsibilities. Among other things, the union's explanation to the agency must be sufficient to permit the agency to make a reasoned judgment as to whether the requested information must be disclosed under the Statute. The Authority also considers whether the explanation was communicated to the agency in a timely manner. *See U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois*, 52 FLRA 1195, 1207 (1997).

Once the union has articulated such a particularized need, an agency seeking to justify its denial of the request must have asserted to the union, and have established, "any countervailing anti-disclosure interests." *IRS, Kansas City* 50 FLRA at 670; *Department of the Air Force, Scott Air Force Base, Illinois*, 51 FLRA 675, 681 (1995) *decision on remand* (*Scott AFB*). Assuming that the requested data meets the other criteria set forth in section 7114(b)(4), an unfair labor practice will be found if the union has established a particularized need for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of its particularized need. *IRS, Kansas City*, 50 FLRA at 671.

Based on the record evidence in this case, I conclude that the Union had a particularized need to conduct independent asbestos tests in Building T-21 and that it sufficiently, and in a timely manner, explained its particularized need to Respondent. The Union's August 5, 1996, request to conduct independent asbestos tests explained its concern that Guardian Laboratories had refused to provide a warranty of the test results performed for Respondent because the samples had been collected by Respondent and not by the laboratory itself. Moreover, on several occasions, the Union elaborated on its need for independent information.

Union President McLaughlin was aware that unit employees who had worked in Building T-21 were concerned about their exposure to asbestos after Respondent's tests of debris in July 1996 revealed its presence. Accordingly, he advised Respondent that independent tests were needed so that he could reassure the potentially affected employees that they were, and had been, in no danger from exposure to asbestos. I also have credited McLaughlin's testimony that he told Respondent of the Union's concern that employees had been exposed to asbestos in the past, particularly for the years since the prior abatement of asbestos in Building T-21 (for which the employees had received EDP through November 1992). Col. Donnelly admitted that he was concerned about Respondent's vulnerability to further EDP payments if the Union's testing were to reveal an ongoing asbestos hazard.

Additionally, I find that McLaughlin and Union Vice-President Winland both advised Respondent of other reasons why independent testing was necessary. Thus, Winland's credited testimony indicates that he met for about an hour in mid-August 1996 with Larry Neidlinger, Respondent's chief engineer, and explained the Union's needs. He told Neidlinger that the Union did not trust the accuracy of Respondent's test results

because of problems encountered in 1989 when similar tests had been conducted in Building T-21, prior to the 1990 EDP arbitration. McLaughlin testified credibly that, when Col. Donnelly asked him at their meeting on November 7 why the Union needed independent tests after being furnished with Respondent's test results, McLaughlin mentioned the problems encountered with Respondent's 1989 test results.(21)

Nor did Respondent satisfy its responsibility to assert its countervailing anti-disclosure interests when it denied the request for independent testing. For example, Respondent never suggested that such testing would disrupt the agency's operations or compromise its security in any way. Indeed, Respondent was prepared to grant the Union's request until the Union submitted the testing protocol from Johnston Laboratories in late August 1996, in which "aggressive" testing for airborne asbestos fibers was proposed. At that point, and thereafter, Respondent denied the Union's independent testing request on the ground that aggressive testing was inconsistent with OSHA standards called for by the parties' collective bargaining agreement, a contention addressed immediately below.(22)

3. Respondent Has Not Established A Contractual Defense

Respondent contends that its refusal to agree to aggressive air sampling is sanctioned by Article 15 of the parties' collective bargaining agreement, which incorporates the OSHA standard and procedures for asbestos testing. In *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091, 1103 (1993)(*IRS*), the Authority held:

> [W]hen a respondent claims as a defense to an alleged unfair labor practice that a specific Provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly.

Article 15, Section 1, of the parties' agreement requires Respondent to "provide and maintain safe and healthful working conditions for all employees . . . determined in accordance with the definitions and standards contained in Section 19 of the Occupational Safety and Health Act (OSHA), in Executive Order 12196, and in implementing regulations and directives." Thus, the parties agreed that OSHA standards would be applied in determining whether Respondent was meeting its obligation to "provide and maintain safe and healthful working conditions for all employees[.]"(23) Those standards, as set forth in 29 C.F.R. § 1910.1001(c)(1), require employers to ensure that "no employee is exposed to an airborne concentration of asbestos in excess of 0.1 fiber per cubic centimeter of air as an eight (8)-hour time-weighted average (TWA) as determined by the method prescribed in Appendix A to this section, or by an equivalent method."

It does not follow, however, that Article 15, Section 1, of the agreement permitted Respondent to reject the Union's request to conduct aggressive asbestos tests. Respondent's contention that this provision had that effect confuses whatever substantive rights and obligations the contractual provision confers on the parties with the rights and obligations conferred by section 7114(b)(4) of the Statute. Section 7114(b)(4) is designed,

at least in part, to facilitate the resolution of disputes about the application of the parties' substantive rights and obligations. While Article 15, Section 1, limits Respondent's substantive obligations in certain respects, neither expressly nor by implication does it affect whatever rights the Union might otherwise have to *data* concerning employee health.(24)

One of the uses to which the Union might appropriately put the results of the tests it sought to conduct was as a basis for a claim of EDP. Indeed, in its November 14, 1996, grievance, this was one of the remedies the Union sought. Notwithstanding the parties' agreement that the OSHA standard would be used to determine whether Respondent satisfied its *general* duty to "provide and maintain safe and healthful working conditions for all employees," there has been no showing that the parties agreed that the OSHA standard would be the exclusive basis for determining entitlement to EDP.

Employees' entitlement to EDP is covered in Article 12 of the agreement, an article entitled "Position Classification," which deals with matters concerning pay, among other things. Article 12, Section 6, provides that "[e]nvironmental differential pay shall be paid to any employee who is exposed to a hazard, physical hardship or working conditions as authorized by FPM Supplement 532-1, Subchapter S8 and Appendix J." Neither Article 12, Section 6, nor Article 15 ("Safety and Health"), cross-references the other.

As previously noted (supra, n.2), the FPM Supplement, Appendix J, provisions specified in Article 12, Section 6, of the parties' agreement concerning employees' eligibility for EDP are now codified at 5 C.F.R. § 532.511, Appendix A. Appendix A conditions the payment of EDP for exposure to asbestos on only two findings: (1) that employees are working in areas where airborne concentrations of asbestos fibers may expose them to *potential* illness or injury; and (2) that protective devices or safety measures have not practically eliminated the *potential* for such personal illness or injury.

A brief review of events preceding the negotiation of the present Article 12, Section 6, illustrates the relevance of that provision and of the fact that it refers not to Article 15 of the agreement but rather to the former Appendix J of FPM Supplement 532-1. Under Article 36, Section 1, of a previous agreement, EDP was payable "[w]hen[ever] action taken does not overcome the unusual nature of the hazard, physical hardship or working condition, and environmental pay is warranted, . . . and [environmental] pay will continue until such time as the hazard is practically eliminated."

In the 1990 arbitration award referred to above, the arbitrator interpreted that provision as not precluding EDP even when the concentrations of airborne asbestos did not exceed OSHA requirements. The Authority, upholding the award, held that, notwithstanding another provision that required the agency to "comply with applicable OSHA laws and regulations," the award was consistent with the agreement and with Appendix J, which "does not set forth any specified quantitative level of asbestos exposure required for the payment of EDP." *New Cumberland,* 40 FLRA at 187 n.*, 191-92.(25)

After the Authority's decision in *New Cumberland*, the parties negotiated their current agreement, which contains Article 12, Section 6, in place of the EDP provision that the arbitrator, as reviewed by the Authority, interpreted in 1990. Article 12, Section 6, specifically links EDP entitlement to the requirements of Appendix J (now Appendix A of 5 C.F.R. § 532.511). In agreeing to such a link, in the face of the Authority's decision that Appendix J did not restrict EDP to work situations in which any specified level of asbestos exposure had been exceeded,(26) the parties can hardly be said to have foreclosed an arbitrator's finding that a level not

exceeding the OSHA standard might warrant EDP.

Of course, the parties also agreed on the language, in the current Article 15, that is more specific than the language in the previous contract in equating "safe and healthful working conditions" with OSHA standards. Thus, it is conceivable that, notwithstanding the absence of any explicit cross-reference, the parties intended to make OSHA standards exclusive for determining entitlement to EDP. However, the arbitrator having rejected that very contention in the 1990 award (*New Cumberland*, 40 FLRA at 188), I am not persuaded that, had the parties shared a mutual intention to reach a different result, they would have manifested their intention in so oblique a fashion. While Respondent is free to contend before an arbitrator, in any EDP grievance arising under the current agreement, that the parties intended to incorporate OSHA standards for EDP purposes, its prospects for success are far from the sure bet that would be required to make plausible its contention here that the Union has bargained away its right to conduct "aggressive" tests.

Even if the Union had bargained away its right to conduct aggressive tests of airborne asbestos, its request encompassed testing both debris chunks and air samples. Respondent gave the Union no reason for denying the request to test the solid debris. Although the Union already had tested some debris (and discovered that 40% of the samples contained asbestos), that did not foreclose it from testing other samples from different locations within Building T-21 in order to confirm or negate a hazardous exposure of employees working (or having worked) there to asbestos particles, by virtue, for example, of asbestos fibers in the debris having been released by some disturbance or other. *Cf. U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service Chicago, Illinois District Office*, 40 FLRA 1070, 1083 (1991) *decision on remand* (union is entitled to information that enables it realistically to assess the strengths or weaknesses of a potential grievant's position and may have other representational needs even if it decides not to file a grievance after it obtains and evaluates the information).

Respondent also argues that Article 15, in addition to adopting OSHA standards in Section 1, provides in other sections a "comprehensive and joint approach in addressing the safety concerns of bargaining unit employees." The provisions referred to here relate to such things as notification to the Union of unsafe or unhealthy work area determinations and results of safety/health inspections/investigations (Section 1 Regional Supplement), joint determination of the necessity for protective equipment (Section 2 Regional Supplement), annual agency safety/health inspections and Union participation in annual and other safety/health inspections (Section 3 and its Regional Supplement), joint annual review of health services (Section 5 Regional Supplement), joint review of employee safety and health claims (Section 7B Regional Supplement).

This argument has the appearance of a contention that any right the Union may have to conduct its own tests is "contained in or covered by" the agreement. The Authority approved and explained such a defense in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004 (1993) (*SSA Baltimore*). However, the Authority viewed this as a defense only for agencies seeking to justify their refusal to bargain over specific proposals. *See Department of Health and Human Services, Social Security Administration*, 47 FLRA 1206, 1210 n.2 (1993). *See also Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 858, 864 n.7 (1996). For present purposes, the gist of such a defense, as I understand it, is that the parties have exhausted their efforts to negotiate about a particular matter and have incorporated the results of their efforts in an agreement. Each party's obligation to bargain over that matter would therefore have been satisfied for the duration of the agreement. Although I am not necessarily persuaded that such a defense is available in section 7114(b)(4) cases, I shall explore it on the merits because a refusal to comply with a request for data under section 7114(b)(4) is a form of refusal to bargain.

If no provision of the agreement asserted as a defense expressly encompasses the matter in dispute, the Authority determines whether the subject is inseparably bound up with a subject expressly covered by the contract. In doing so, the Authority examines whether the subject matter is so commonly considered to be an aspect of the matter set forth in the provision that the negotiations are presumed to have foreclosed further bargaining over the matter. *SSA Baltimore*, 47 FLRA at 1018.

I see in Article 15 neither an express provision concerning the Union's right to receive additional information about health hazards in the workplace nor anything to suggest that the parties should be presumed to have substituted any of the Union's contractual rights to information for its statutory rights under section 7114(b)(4). Perceiving no other point to Respondent's argument about the effect of these sections of Article 15, I conclude that it lacks merit.

4. The Dismantling and Cessation of Operations In Building T-21 Provides No Defense

Respondent argues that it was justified in denying permission for the Union to conduct any tests in November 1996, when the previous working conditions could not be replicated without unreasonable expense. This argument is irrelevant to some extent, since, as examined more closely below, Respondent had, in effect, denied permission for some time previous to the dismantling and cessation of operations in Building T-21. However, to the extent that circumstances for which Respondent should not be held responsible delayed the testing until mid-November, the change in conditions in Building T-21 still affords no defense.

Respondent's argument really goes to the *weight* to be given to test results that are subject to the argument that they do not reflect prior working conditions. Respondent might even be able to persuade an arbitrator or other decision-maker in an appropriate proceeding not to consider such test results at all. In any event, arguments going to the prospective validity of the test results cannot affect a union's right to data under section 7114(b)(4) as long as the data meets all of the affirmative criteria for disclosure under that section. Respondent's argument about changed conditions does not implicate any of those criteria.

5. The 1992 Settlement Agreement Provides No Defense

Finally, Respondent contends that the Union was not entitled to test for asbestos in Building T-21 because the parties' 1992 settlement agreement following the 1990 arbitrator's award cut off all claims to EDP after November 1992. This contention is not persuasive.

Respondent's assertion that the Union could not arbitrate another EDP claim over exposure to asbestos in Building T-21 is essentially an assertion of non-arbitrability. Under section 7121(a)(1) of the Statute, questions of arbitrability are for the arbitrator to resolve. *Department of the Air Force, Langley Air Force Base, Hampton, Virginia*, 39 FLRA 966, 969 (1991). *See also U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois*, 52 FLRA 1195, 1224 (1997) (*dictum* in Judge's decision).[(27)]

To the extent that Respondent may be contending that the 1990 award and the settlement agreement which resulted from it have collaterally estopped the Union from pursuing a subsequent EDP claim, I find that the elements of collateral estoppel are not present. Specifically, the same issue would not have been involved in both cases. *See U.S. Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employess, Local R7-23*, 35 FLRA 978, 982 (1990). Thus, the case leading to the 1990 award involved employees' entitlement to EDP prior to November 1992; the second case would involve employees' entitlement to EDP thereafter, notwithstanding Respondent's abatement efforts in Building T-21 which satisfied the Union in November 1992.

6. Summary: Respondent Unlawfully Failed To furnish Necessary Information To The Union

It is beyond dispute that the Union was never permitted to have its experts conduct the asbestos tests as requested. Respondent's initial, conditional approval of the Union's request was withdrawn, even though the Union submitted proof of its industrial hygienist's certification, as requested**.** In early September 1996, when Respondent rejected the request for aggressive testing, there were 5 or 6 unit employees working in Building T-21, and it would have been possible to conduct the proposed tests while those employees were performing their regularly assigned duties.

I have previously concluded that Respondent could not lawfully reject the Union's request to conduct aggressive testing. I have also rejected Respondent's contention that only management was authorized by law and regulations to conduct safety and health testing in the workplace. Further, there was no justification for denying the Union's request to collect and test chunks of debris from locations within Building T-21. Finally, Respondent again denied the requested access to the Union in November 1996, when Col. Donnelly first agreed that the Union could take its own PBZ tests and then changed his mind and informed the Union that *no* additional tests would be permitted. Under all these circumstances, I conclude that Respondent failed to furnish the Union with necessary and reasonably available information within the meaning of section 7114(b)(4) and thereby violated section 7116(a)(1), (5) and (8) of the Statute.[(28)]

C. The Appropriate Remedy

The traditional remedy in cases where an exclusive representative's request for information has been unlawfully withheld is an order to cease and desist from such unlawful conduct in the future and, affirmatively, to furnish such information and to post appropriate notices to employees. In this case, it is unclear from the record whether Building T-21 has been demolished as scheduled, or whether the Union still wishes to undertake this expense inasmuch as the EDP grievance filed on November 14, 1996, has already proceeded to arbitration. Nevertheless, I shall recommend an order requiring Respondent to *permit* the Union's designated representative to conduct bulk sample and aggressive air tests in Building T-21 to determine the extent of asbestos and airborne asbestos fibers in that work location.

The General Counsel has requested an order requiring Respondent to maintain Building T-21 until testing is completed. However, such a remedy, if I understand its import correctly, would really be something in the

nature of an interim restraining order pending the final outcome of this litigation. The General Counsel has given no indication of the source of my authority to issue such an order, which is one traditionally within the province of the courts. The powers delegated to me under the Authority's Rules and Regulations, once the hearing is over and the record is complete (except for those powers involving settlements and the time for filing briefs) are limited to issuing a decision including a *recommended* final disposition or order.(29)

I have also considered the Union's requested remedies and have concluded that, to the extent that they exceed the remedies recommended below, they are inappropriate. Therefore, I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), Defense Logistics Agency, Defense Distribution Region East, Defense Depot Susquehanna, New Cumberland, Pennsylvania, shall:

1. Cease and desist from:

(a) Failing and refusing to negotiate in good faith with the American Federation of Government Employees, Local 2004, AFL-CIO (the Union), the exclusive representative of certain of its employees, and failing and refusing to comply with section 7114(b)(4) of the Statute, by denying the Union's designee access to Building T-21 for the purpose of conducting asbestos tests.

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

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

(a) Upon request, permit a qualified designee of the Union to enter Building T-21 for the purpose of conducting asbestos tests at the Union's expense.

(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 Commander, Defense Logistics Agency, Defense Distribution Region East, Defense Depot Susquehanna, New Cumberland, Pennsylvania, 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C. January 29, 1998.

JESSE ETELSON

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 Defense Logistics Agency, Defense Distribution Region East, Defense Depot Susquehanna, New Cumberland, Pennsylvania violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice:

We hereby notify our employees that:

WE WILL NOT fail and refuse to bargain in good faith with the American Federation of Government Employees, Local 2004, AFL-CIO (the Union), the exclusive representative of certain of our employees, or fail and refuse to comply with section 7114(b)(4) of the Federal Service Labor-Management Relations Statute, by denying the Union's designated representative access to Building T-21 for the purpose of conducting asbestos tests.

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

WE WILL upon request, permit a qualified designee of the Union to enter Building T-21 for the purpose of conducting asbestos tests at the Union's expense.

_____

(Agency or Activity)

Date: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 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 any of its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, Massachusetts 02110-1200, and whose telephone number is: (617) 424-5730.

1. Pursuant to the Union's motion, the time for filing briefs was extended from August 8 to September 17, 1997.

2. [2]Effective December 31, 2994, the FPM (Federal Personnel Manual) was abolished. The eligibility standards for environmental differential pay (EDP) were codified at 5 C.F.R. § 532.511, Appendix A. See *American Federation of Government Employees, Local 1482 and U.S. Department of the Navy, Marine Corps Logistics Base, Barstow, California*, 50 FLRA 572, 573 n.* (1995).

3. The settlement agreement provided for payments of $42.73 to each covered employee per pay period during the covered period. A covered employee who had worked at the facility for the entire period would be entitled to a payment of $5,085. Respondent paid employees between $5 million and $6 million under the agreement.

4. The re-warehousing was completed in November 1996, about a year ahead of schedule. At the time this case was heard in July 1997, Building T-21 had not yet been demolished. Nor do the parties' post-hearing

briefs, submitted near the end of September 1997, reflect that such demolition had occurred yet.

5. If something with more force, such as a forklift, were to run over non-friable matter, it could become friable and therefore much more likely to become an occupational hazard.

6. Under the OSHA standard, airborne asbestos cannot exceed 0.1 fiber per cubic centimeter of air. 29 C.F.R. § 1910.1001(c)(1). The analysis by Guardian Laboratories showed that the total fiber content was only 0.033 f/cc. Since the test samples had been collected by Respondent rather than Guardian, however, the laboratory would not warrant the accuracy of the results. Such disclaimer was a source of concern to the Union, because it had no independent knowledge as to whether the PBZ test had been conducted properly.

7. Aggressive air sampling refers to a technique for measuring fibers in the air by drawing air through a cassette using fans moving over the ceiling, walls and floor of a workplace to stimulate air flow. The parties apparently agree that such a test would not duplicate an employee's actual experience while on the job, but would create a "worst case scenario."

8. Col. Donnelly also testified at the hearing that he did not understand why the Union needed to test for asbestos in Building T-21, since Respondent had just conducted bulk sample and PBZ tests in that location and had given the Union copies of those test results. Additionally, Col. Donnelly testified that he was reluctant to establish a precedent for the Union to conduct tests at other worksites.

9. Mark Goldberg, an assistant professor at the Hunter College School of Health Sciences, an adjunct assistant professor at Mt. Sinai School of Medicine in New York, previously employed as a compliance officer for OSHA, and a certified industrial hygienist (CIH) with experience conducting air sampling since 1980, testified that, in his professional opinion, the PBZ test noted in the OSHA regulations is not the only available test, that PBZ test results are often misleading, and that aggressive air sampling would be the best way to test for asbestos in this situation. On the other hand, Environmental Inspector Specialist Clarence Smith (a non-CIH) testified on behalf of Respondent that, in his professional opinion, the OSHA regulation is the only appropriate source to consult. David Luscavage, a CIH with Respondent since 1993, also testified that he would not recommend aggressive air testing but would follow the PBZ test specified by OSHA. Luscavage admitted that, as a CIH, he sometimes had to "move off regulations

. . . and use professional opinion," and further conceded that it would not surprise him if other CIHs disagreed with him about the proper testing method.

10. Col. Donnelly and Clarence Smith testified that they met with employee Dave Wile (otherwise identified as Davey Wheyl), at Wile's request, at which time Wile, purporting to represent the Union, inquired into the possibility of conducting a test that might constitute a compromise between the PBZ test and the aggressive test proposed by the Union. Donnelly and Smith responded that they did not see any possibility of compromise between the two tests and the meeting ended inconclusively.

11. Col. Donnelly testified that when he agreed with McLaughlin on November 7 that the Union's expert could conduct PBZ tests, he did not know that Building T-21 would be vacated by mid-November; that when he informed his staff of the agreement with McLaughlin, they advised him about the imminent cessation of work in the building; and thus, "we probably couldn't do a normal working condition test in November."

12. I specifically credit McLaughlin's uncontradicted testimony that he advised management consistently about the Union's concerns that unit employees had been exposed to asbestos in Building T-21 over the past several years. Given the employees' prior exposure to asbestos at that location, as found by an arbitrator, which in turn led to a settlement in which employees received EDP due to such exposure, it is far more likely than not that McLaughlin would have expressed such concerns to management after asbestos was found in

chunks of material lying on the ground floor of that building.

13. At the time of the hearing, the Union had invoked arbitration, part of the hearing had been held, and the second day of hearings had been scheduled for August 1997.

14. If I interpret recent Authority decisions correctly, such a finding appears to require a rather close correspondence between the factual circumstances from which the two proceedings arise. *See, for example, Equal Employment Opportunity Commission and American Federation of Government Employees, National Council of EEOC Locals No. 216*, 53 FLRA 465, 472-73 (1997) *decision on remand*; *American Federation of Government Employees, National Council of EEOC Locals No. 216 and U.S. Equal Employment Opportunity Commission*, 49 FLRA 906, 916 n.5 (1994) (*EEOC Locals*).

15. Respondent suggests that union safety testing would conflict with the authority and responsibility of federal agencies to implement safety and health programs, citing 29 U.S.C. § 668 and 29 C.F.R. Part 1960. However, nothing in those provisions of law and regulation prohibits an exclusive representative from conducting tests at unit employees' worksites to verify that health and safety standards are being met or to obtain data for use in representing the employees' interests. In my view, there is no conflict between requiring federal agencies to provide safe and healthful workplaces and providing exclusive representatives the means to verify that agencies are meeting such requirements by conducting independent safety tests. Accordingly, I conclude that Col. Donnelly's statement, in his October 4, 1996, memo to the Union, that, as it was management's responsibility to ensure a safe work environment, "we *cannot* allow representatives from your local or hired by you . . . to gather and test . . . asbestos samples" (emphasis added), is incorrect to the extent that it is to be taken literally.

16. *See Winona Industries, Inc.*, 257 NLRB 695 (1981)(test for formaldehyde fumes by taking air samples); *Holyoke Water Power Company*, 273 NLRB 1369 (1985), *enf'd,* 778 F.2d 49 (1st Cir. 1985) (noise level studies in fan room where unit employees worked); *ASARCO, Inc.*, 276 NLRB 1367 (1985), *enf'd in pertinent part,* 805 F.2d 194 (6th Cir. 1986)(access by union's industrial hygienist to accident scene where unit employee died); *American National Can Co.*, 293 NLRB 901 (1989), *enf'd,* 924 F.2d 518 (4th Cir. 1991)(access by an industrial hygienist to employer's glass container plant to measure heat and noise levels); *Hercules Inc.*, 281 NLRB 961 (1986)(access by union's experts to chemical plant to test for presence of toxic or hazardous fumes); *New Surfside Nursing Home*, 322 NLRB 531 (1996)(access by union representatives to nursing home to determine whether protocols concerning bloodborne pathogens, TB and hepatitis were being followed).

17. *See NLRB v. Holyoke Water Power Company*, 778 F.2d at 51-53; *ASARCO, Inc., Tennessee Mines Division v. NLRB*, 805 F.2d at 198.

18. *See New Surfside Nursing Home*, 322 NLRB at 531 n.2.

19. *See American National Can Co.*, 293 NLRB at 904.

20. Recent refinements in the application of section 7114(b)(4) have made NLRB precedent a less valuable guide in some respects. *See, for example, Department of Justice v. FLRA*, 991 F.2d 285, 290 (5th Cir. 1993). The NLRB holds private sector unions to be entitled to requested information if "relevant" to the union's representational duties, while the standard Congress legislated in the Statute requires a finding that the requested information is "necessary" for purposes of collective bargaining. *NLRB v. FLRA*, 952 F.2d 523, 531 (D.C. Cir. 1992)(*NLRB*). Further, the NLRB, in deciding whether an employer must permit nonemployee union experts access to the workplace to conduct safety and health investigations, takes into consideration whether the union has alternative means of obtaining the requested information, while the Authority has not usually relieved an agency of its statutory obligation to furnish information merely because the union may be

able to obtain it elsewhere. *See U.S. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 38 FLRA 3, 7 (1990) ("[N]othing in the language of section 7114(b) or its legislative history . . . indicates that Congress intended a union's right to information under the provision to be dependent on whether the information is reasonably available from an alternative source.") However, the Authority may have retreated from that position. *Compare Internal Revenue Service, Austin District Office, Austin, Texas*, 51 FLRA 1166, 1198 (1996) (Judge's decision) *with Id.* at 1178 (Authority's decision). In any event, these apparent differences preclude the wholesale adoption of NLRB precedent regarding entitlement to requested data. At the same time, even in *NLRB v. FLRA*, the court found certain principles governing information requests in the private sector to be applicable to section 7114(b)(4) cases. 952 F.2d at 531-32.

21. The Union's showing that conducting its own tests, even though Respondent had furnished it with the results of tests previously conducted by management, was necessary, does not depend solely on whether the Union should have "trusted" management. Thus, the test results might vary significantly depending upon the samples chosen and the testing methods used. The Union needed its own tests because, among other things, such information was necessary "to determine whether to proceed to arbitration in an attempt to ensure the workplace safety of unit employees." *Department of the Air Force, Scott Air Force Base, Illinois v. FLRA*, 104 F.3d 1396, 1401 (D.C. Cir. 1997), *enforcing* 51 FLRA 675 (1995).

22. As previously noted (see n.15), Respondent also claimed, but not until October 1996, that the Union's certified expert was not authorized to conduct independent asbestos tests because the agency alone had the responsibility to do so under applicable law and regulations.

23. I take official notice that an arbitrator so interpreted a similar provision in the parties' prior agreement in resolving the 1990 EDP grievance. The Authority upheld this interpretation on review of his award. *U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania and American Federation of Government Employees, Local 2004*, 40 FLRA 186, 188, 191-92 (1991)(*New Cumberland*).

24. Respondent contends that, rather than the *IRS* contract interpretation test, the Authority's previous "differing and arguable interpretations" standard should be employed here. Aside from the fact that I am bound by *IRS*, application of that alternative standard would not lead me to a different conclusion about the effect of Article 15, Section l, on Respondent's obligation under section 7114(b)(4).

25. The Authority has followed a practice of reviewing arbitrators' EDP awards for consistency with Appendix J. *See Allen Park Veterans Administration Medical Center, Allen Park, Michigan* and *American Federation of Government Employees, Local 933*, 28 FLRA 1166 (1987), *decision on remand*, 34 FLRA 1091 (1990).

26. *See also U.S. Department of the Army, Red River Army Depot, Texarkana, Texas* and *American Federation of Government Employees, Local 3961*, 53 FLRA 46, 51-53 (1997).

27. I find nothing in the parties' 1992 settlement agreement that would preclude the Union from pursuing an EDP claim against Respondent in November 1996, as it did. Paragraph 2 of the 1992 agreement refers to Respondent's wet scrubbing and asbestos abatement program to be completed by November 7, 1992, in all of the buildings covered by the arbitrator's award; provides that the Union agrees that such action satisfies Respondent's obligation to ensure a safe and healthful work environment; and concludes that "there will be no liability for environmental differential pay based upon the instant arbitrator's award subsequent to 7 November 1992." The parties thus agreed that, in exchange for Respondent's asbestos abatement efforts, to be completed by November 7, 1992, the Union would make no EDP claims against Respondent after that date *based on the 1990 arbitration award*. Nowhere does the Union forswear any claim for EDP based on subsequent exposure to asbestos. As previously stated, however, that question would be one for the arbitrator to decide.

28. In view of this finding, I find it unnecessary to determine whether Respondent violated sections 7116(a)(1) and (a)(5) of the Statute independently by such conduct, as alleged in the complaint. The duty to furnish information under section 7114(b)(4) is part of an agency's duty to negotiate in good faith, as my recommended order reflects. Even if Respondent committed the additional violations alleged, no remedy in addition to those recommended here would be appropriate.

29. On the other hand, the Authority has declared that the destruction of requested information while the refusal to provide it is being litigated constitutes an unfair labor practice. *Social Security Administration, Dallas Region, Dallas, Texas*, 51 FLRA 1219, 1225-26 (1996). Respondent may also be dissuaded from demolishing the building, if it has not done so already, by the prospect of thus arming the Union with a basis for requesting that an arbitrator draw an adverse inference, for example, an inference that the Union's testing had it been permitted, would support the employees' claims for EDP based on their exposure to asbestos in Building T-21.