

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS U.S. PENITENTIARY ATLANTA ATLANTA, GEORGIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1145, COUNCIL OF PRISON LOCALS, LOCAL 33 Charging Party	Case No. AT-CA-01-0140

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 28, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

ELI NASH, Chief
Administrative Law Judge

Dated: September 25, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM
2002

DATE: September 25,

TO: The Federal Labor Relations Authority

FROM: ELI NASH, Chief
Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY ATLANTA
ATLANTA, GEORGIA

Respondent

and

Case No. AT-CA-01-0140

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1145, COUNCIL OF PRISON LOCALS, LOCAL 33

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 02-61
WASHINGTON, D.C.

<p>DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS U.S. PENITENTIARY ATLANTA ATLANTA, GEORGIA</p> <p style="text-align: right;">Respondent</p> <p>and</p> <p>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1145, COUNCIL OF PRISON LOCALS, LOCAL 33</p> <p style="text-align: right;">Charging Party</p>	<p>Case No. AT-CA-01-0140</p>

Kelly L. McDonald, Esquire
Tamara E. Chrisley, Esquire
For the Respondent

Julie K. Anderson, Esquire
For the General Counsel

Before: ELI NASH, Chief
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an Unfair Labor Practice charge filed by the American Federation of Government Employees, Local 1145, Council of Prison Locals, Local 33 (the Union), a Complaint and Notice of Hearing was issued on March 28, 2001, by the Acting Regional Director of the Atlanta Regional Office. The complaint alleges that the Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary Atlanta, Atlanta, Georgia (the Respondent), violated section 7116(a)(1) and (5) by failing

to timely respond to the Union's information request. The complaint further alleges that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to provide a regional disciplinary log requested pursuant to section 7114(b)(4).

A hearing was held in Atlanta, Georgia, on July 16, 2001. All parties were represented and afforded an opportunity to be heard, introduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The General Counsel and the Respondent filed timely briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law and recommendations.

Findings of Fact

On July 3, 2000, the Union submitted to Respondent, by letter from Benjamin Jetter, Union President, to Warden Willie Scott,¹ a written request for information pursuant to 5 U.S.C. § 7114(b)(4). The request, as relevant to this case, sought a copy of the "regional disciplinary log from 7/98 to the present." (Jt. Ex. 2). The Union's request stated that the information was necessary "to compare discipline for bargaining unit employees with other bargaining and non-bargaining unit employees" and to "determine if discipline is being administered in a fair and even manner throughout the South East region of the Federal Bureau of Prisons." *Id.* The Union asked that the Respondent reply to the request by July 17, 2000.

Not having received any response from Respondent, on August 7, 2000, Mr. Jetter submitted a second written request for information again in a letter to Warden Scott with a carbon copy to Mr. May. Among the items requested was a copy of "the regional disciplinary log from 7/98 to the present." (Jt. Ex. 3). The Union's statement of necessity in the request was identical to the statement in its July 3, 2000 request. The Union asked Respondent to reply by August 14, 2000.

Respondent did not reply to the August request, and on September 12, 2000, Mr. Jetter sent a third request to Warden Scott (with a carbon copy to Mr. May) for the regional disciplinary log for the same time period. In this request, the Union stated that the information was necessary "for the union to properly mitigate allegations made in the

¹

The letter indicates that a carbon copy was provided to Barry May, Human Resources Manager for Respondent. Mr. May and Warden Scott are the only individuals authorized to receive information requests for the Respondent (Tr. 108).

agency's proposal of discipline letter to Mr. William J. Williams dated June 20, 2000." (Jt. Ex. 4). The Union also stated that the log would show "similar cases of inattention to duty in the South East region and could show disparities in treatment concerning the charge leveled against Mr. Williams." *Id.* The Union noted that Respondent had failed to respond with "any countervailing interests" and therefore should provide the information. *Id.* Without specifying any date, the Union explained that failure to respond to this request for information would result in the filing of an unfair labor practice.

According to the testimony of both Mr. Jetter (Tr. 38, 76) and Mr. May (Tr. 94, 101), between the Union's July 2000 request and Respondent's first written response in November 2000, Mr. May and Mr. Jetter discussed the information requests. In the course of these discussions, Mr. May informed Mr. Jetter that Respondent did not have the information the Union was seeking (Tr. 38, 94).

On September 21, 2000, Mr. Jetter wrote a letter to Mr. May asking Mr. May to bring to the scheduled September 22, 2000 labor relations meeting, among other things, "[a] copy of the regional disciplinary log" or to provide the status of this and other information requests. (Jt. Ex. 6) Mr. May testified that he did not consider this letter to be an information request pursuant to 5 U.S.C. § 7114(b)(4). In any event, Respondent did not respond to this request.

Mr. Jetter sent another information request on November 6, 2000, addressing this letter to Mr. May. The letter stated that "[t]he local is still requesting a copy of the Regional disciplinary log." (Jt. Ex. 8) Mr. Jetter noted in the letter that "[e]very time I have asked you for this log your reply is that there is no one at the Regional Office to take care of this request. I have been asking for this information for several months with negative results from your office." (Jt. Ex. 8). The letter then restated the Union's belief that the information was necessary because it would "show similar cases of inattention to duty in the South East region and could show disparities in treatment concerning the charge leveled against Mr. Williams." *Id.*

In a memorandum dated November 28, 2000, Mr. May responded to Mr. Jetter's November 6 request. The memorandum explained that "the information cannot be provided because there is not an established point of relevancy for the basis of your request." (Jt. Ex. 10).

Shortly thereafter, on December 8, 2000, Mr. May sent another response to Mr. Jetter's November 6 request for information. In this memorandum Mr. May stated, for the first time, that the request "failed to state a particularized need for this information." (Jt. Ex. 11). The memorandum also suggested to Mr. Jetter that he could resubmit the request "with the inclusion of a particularized need" for further consideration by Mr. May. *Id.*

The Union submitted a final request for the regional disciplinary log through a February 13, 2001 letter from Mr. Jetter to the Southeast Regional Director. Mr. Jetter explained that the information was necessary to show disparities in treatment relating to the discipline of Mr. Williams and that the information would be used to mitigate the discipline imposed on Mr. Williams. The letter noted that the Union had been trying "for quite some time to obtain this information through Mr. May." (Jt. Ex. 14).

Kathy Guariglia, the Human Resources Administrator for the Southeast Regional Office, responded to the Union's February 13 request by letter dated February 23, 2001, to Mr. Jetter. She explained that the Union had failed to establish a particularized need and that the information request was vague and unduly burdensome for Respondent. Her letter indicated that the Union could narrow the request and resubmit it articulating a particularized need, and then Respondent would consider the request.

Analysis and Conclusions

A. Respondent's Failure to Timely Respond to the Union's Request for Information Violated the Statute

Section 7114(b)(4) of the Statute requires an agency to provide a union, upon request and, to the extent required by law, data: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. If the agency denies a request for information under section 7114(b)(4), it "must assert and establish any countervailing anti-disclosure interests." *Internal Revenue Serv., Wash., D.C. and Internal Revenue Serv., Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 670 (1995) (*IRS, Kansas City*). Failure to issue such a response in a timely manner, "even if the response is to tell an exclusive representative that the agency does not maintain the

information which the exclusive representative seeks," constitutes a violation of the Statute. *Dep't of Health and Human Serv., Social Security Admin., N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133, 1149-50 (1997) (*HHS*) (finding a violation of section 7116(a)(1), (5) and (8)); see also *Dep't of Justice, United States Immigration and Naturalization Serv., United States Border Patrol, El Paso, Tex.*, 43 FLRA 697, 710-11 (1991) (*Border Patrol*) (finding a violation of section 7116(a)(1) and (5)). Based upon the facts of this case, I find that Respondent failed to timely respond to the Union's information requests and therefore violated section 7116(a)(1) and (5) of the Statute.

In this case, the Union submitted its initial written request for information on July 3, 2000, and thereafter made four additional requests before receiving Respondent's first written denial of the request on November 28, 2000. Indeed, Respondent waited until December 8, 2000 to issue a written response fully articulating its reason for denying the request, that being the Union's failure to establish a particularized need for the information. The December 8th letter was also Respondent's first instance of offering the Union the opportunity to resubmit its request. This delay by Respondent is contrary to the requirements and intention of the Statute.

The Authority explained in *IRS, Kansas City* the reasons for requiring both the requesting unions and responding agencies "to articulate and exchange their respective interests in disclosing information." 50 FLRA at 670. First, "[i]t 'facilitates and encourages the amicable settlements of disputes . . .' and, thereby, effectuates the purposes and policies of the Statute." *Id.* (quoting 5 U.S.C. § 7101(a)(1)(C)). Second, "[i]t also facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced." *Id.* Finally, "it permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed." *Id.* at 670-71.

This case involved a request for a single piece of information--the regional disciplinary log from 7/98 to the time of the Union's request. Respondent has presented no evidence or argument justifying its delay of five months in properly responding to the Union's request.

Respondent contends that Mr. May verbally informed Mr. Jetter that Respondent was denying the request because it did not possess the information. The argument that such

verbal responses satisfied Respondent's duty to respond is unpersuasive for several reasons. First, the evidence presented regarding the verbal discussions is tenuous. Neither Mr. Jetter nor Mr. May could identify specific instances when they discussed the information requests. Second, the rationale for denying the information request given by Mr. May in these verbal discussions was that Respondent did not have the information. This is inconsistent with Mr. May's eventual written response, in which he stated that the Union failed to articulate a particularized need. Finally, there is no evidence that during the verbal discussions Mr. May suggested that the Union could resubmit its request in order to satisfy Respondent's reasons for denying the request. In contrast, Mr. May testified that his December 8th response was issued specifically in order to provide the Union with an opportunity to resubmit the request.

Also unpersuasive is Respondent's reliance on *United States Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois*, 52 FLRA 1195 (1997) (*BOP, Marion*). Taken out of context, language in that decision suggests that the agency's failure to respond to a union request for information was "troubl[ing]" but not a violation of the Statute. *Id.* at 1208. It is true that the Authority states in *BOP, Marion* that "[t]he Authority has never found a violation of section 7114(b)(4) based on an agency's silence," 52 FLRA at 1208, but this statement is not valid as it pertains to the agency's failure to timely reply in this case because of the Authority's holdings in *HHS*, 52 FLRA at 1149-50, and *Border Patrol*, 43 FLRA at 710-11, as discussed above. Further, in *BOP, Marion*, the union's initial request was July 7, 1993 and its second request was July 23, 1993. The agency provided a written response to the information request on July 29, 2000. The circumstances of that case are far different from the five-month delay by the Respondent in this case.

In addition, Respondent's inaction in this case must be contrasted with the agency's actions in a very similar information case in which the agency prevailed before the Authority. See *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Correctional Inst., Forrest City, Ark.*, 57 FLRA 808 (2002) (*BOP, Forrest City*). As in this case, the union sought a list of disciplinary and adverse actions taken by the agency. When the union initially requested this information, the agency "timely responded to the Union's request, stating that the Union had failed to provide sufficient information to create a particularized need." *Id.* at 814. The union submitted a second request for the information, and the agency again "timely responded"

telling the union that it failed to establish a particularized need. After the union submitted a third request, the agency responded with a reply "sufficient to apprise the Union that additional specificity to support the request was needed." *Id.* The union did not respond. Therefore, the Authority, in agreement with the agency, concluded that the agency had not committed an unfair labor practice by not providing the information to the union because the union had not established a particularized need. In the instant case, however, regardless of whether or not the Union established a particularized need (discussed in section B., below), Respondent violated section 7116(a)(1) and (5) of the Statute by failing to timely respond in the manner that the agency did in *BOP, Forrest City*.

B. The Union Did Not Establish a Particularized Need for the Regional Disciplinary Log

As noted in the preceding paragraph, the facts of *BOP, Forrest City* are very similar to this case. In both cases, the unions made repeated requests for general disciplinary information about bargaining unit and non-bargaining unit employees (the regional disciplinary log in this case and the Forrest City institution's disciplinary records in *BOP, Forrest City*). According to the information requests in both cases, the unions intended to use the information in connection with representing one employee who had been disciplined for a specific offense. The unions also stated that they needed the general disciplinary information to compare the disciplinary actions to ensure that they were consistent and fair. In neither case, despite prompting by the agency's responses, did the union explain why it needed all disciplinary information and not just information regarding disciplinary actions comparable to the actions taken against the specific employees mentioned in the information requests.

In *BOP, Forrest City*, the Authority highlighted that in order for a union to establish a particularized need in a section 7114(b)(4) request for information, the request must provide "'sufficient specification of both the uses to which the information would be put and [the] connection between the uses and the union's representational responsibilities.'" 57 FLRA at 813 (quoting *United States Dep't of Justice, INS, Northern Region, Twin Cities, Minn.*, 52 FLRA 1323, 1331 (1997)). Given this requirement, the Authority further explained that "where the information sought is broader than the circumstances covered by the request, and the union has not been able to establish a connection between the broader scope of the information requested and the particular matter referenced in the

request, the Authority has found that the union has not established a particularized need for that information." *Id.*

Because the union's request in *BOP, Forrest City* concerned "general issues related to disparate treatment of unit employees" that were not solely related to the discipline of the employee referenced in the information requests, the Authority found that not all of the requested information was necessary. *Id.* at 814. Moreover, if the general disparate treatment information could have had a connection to the employee's discipline, the union did not articulate how it would do so. As a result, the Authority concluded that the union had not established a particularized need and was not entitled to the information. *Id.* at 815. The Union's requests in this case were similarly overbroad and not explained so as to establish a particularized need. Therefore, I find that the Union was not entitled to the regional disciplinary log information and Respondent did not violate the Statute by failing to provide this information to the Union.

Based on the foregoing, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary Atlanta, Atlanta, Georgia, shall:

1. Cease and desist from:

(a) Failing and refusing to reply to requests for data from the American Federation of Government Employees, Local 1145, Council of Prison Locals, Local 33, the employees' exclusive representative, which reply is necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its U.S. Penitentiary Atlanta, Atlanta, Georgia facilities where employees represented by the American Federation of Government Employees, Local 1145, Council of Prison Locals, Local 33, are located, 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 Warden, 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 section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Atlanta 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.

Issued, Washington, DC, September 25, 2002.

ELI NASH, Chief
Administrative Law Judge

If employees have any questions concerning this Notice or

compliance with its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: Marquis Two Tower, 285 Peachtree Center Avenue, Suite 701, Atlanta, GA 30303, and whose telephone number is: (404) 331-5380.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. AT-CA-01-0140, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: SEPTEMBER 25, 2002

WASHINGTON, DC