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

MEMORANDUM DATE:
September 11, 2007

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. RAILROAD RETIREMENT BOARD
CHICAGO, ILLINOIS

Respondent

AND Case No. CH-CA-07-0340

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 375, AFL-CIO

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

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

U.S. RAILROAD RETIREMENT BOARD
CHICAGO, ILLINOIS

Respondent

AND Case No. CH-CA-07-0340

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 375, AFL-CIO

Charging Party

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 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 15, 2007**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424-0001

PAUL B. LANG

Administrative Law Judge

Dated: September 11, 2007
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. RAILROAD RETIREMENT BOARD
CHICAGO, ILLINOIS

Respondent

AND Case No. CH-CA-07-0340

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 375, AFL-CIO

Charging Party

Gary Stokes, Esquire
For the General Counsel

Eric T. Wooden, Esquire
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On December 28, 2006, the American Federation of Government Employees, Local 375, AFL-CIO (Union) filed an unfair labor practice charge (GC Ex. 1(a)) against the U.S. Railroad Retirement Board, Chicago, Illinois (Respondent). On May 7, 2007, the Regional Director of the Chicago Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing (GC Ex. 1(b)) in which it was alleged that the Respondent committed unfair labor practices in violation of §7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by failing and refusing to provide the Union with sanitized copies of application material submitted by external

candidates for certain positions as Claims Examiners.[1/] It was

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[1/] During the pre-hearing conference and at the hearing counsel for the General Counsel confirmed that the information requested was limited to the application material submitted by the successful candidates.

also alleged that the Respondent had violated §7114(b)(4) of the Statute. The Respondent filed a timely Answer (GC Ex. 1 (c)) in which it admitted all of the factual allegations in the Complaint, but denied that it had committed any unfair labor practices.

A hearing was held in Chicago, Illinois on July 3, 2007. Both parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all of the evidence as well as of the post-hearing briefs submitted by the parties.

Positions of the Parties

General Counsel

The General Counsel maintains that, in making its request to the Respondent, the Union included a valid statement of particularized need, *i.e.*, its desire to determine whether the successful candidates for the Claims Examiner positions, none of whom were selected from current employees of the Respondent, were more qualified than the unsuccessful internal candidates.[2/] In fact, the Union had already initiated grievances on behalf of a number of the unsuccessful internal candidates. The General Counsel further maintains that the disclosure of the requested information in redacted form is not prohibited by the Privacy Act, 5 USC §552a (Act), as alleged by the Respondent and that the Respondent has not presented any evidence to show that the disclosure of the requested information would violate the Act.

The General Counsel also argues that an adverse inference should be drawn from the Respondent's failure to call either its Chief Privacy Officer or its Chief Information Officer as a witness.

Respondent

[2/] It is undisputed that the position of Claims Examiner is within the bargaining unit represented by the Union.

The Respondent maintains that the disclosure of educational information provided by the successful external applicants is prohibited by the Act. Therefore, the Respondent is under no duty to provide that information. According to the Respondent, the small number of successful candidates, eight in all, is such that even redacted information would allow the Union to identify all or some of the individual candidates. This is so because the educational material, when combined with other information already provided to the Union, such as veteran's preference, would allow the Union to easily determine the identities of the candidates. Accordingly, the circumstances of this case distinguish it from decisions by the Authority which have been cited by the General Counsel in support of the proposition that the disclosure of redacted information from employment applications is not prohibited by the Act.

The Respondent also maintains that it has already provided the Union with sufficient information so as to enable it to determine whether the internal candidates received fair consideration as compared to the external candidates.

Findings of Fact

The Respondent is an agency within the meaning of §7103 (a)(3) of the Statute. The Union is a labor organization as defined in §7103(a)(4) of the Statute and is the representative of a unit of the Respondent's employees which is appropriate for collective bargaining (GC Ex. 1(c), ¶¶2 and 3).

Some time in October of 2006[3/] or before the Respondent solicited applications, both within and outside of the agency, for a Medicare Claims Examiner training class. On or before October 27, Kenneth Jones, the President of the Union, and James Glover, the Executive Vice President of the Union, were called into a meeting and informed that the Respondent intended to fill all eight of the openings with external candidates (Tr. 13). The Respondent subsequently posted a notice on its website with the names of the successful

[3/] All subsequently cited dates are in 2006 unless otherwise indicated.

applicants (GC Ex. 2).

On October 27 Jones sent an e-mail message to Dorothy Isherwood, a management representative of the Respondent, (GC Ex. 3, p. 3) in which he cited a portion of the collective bargaining agreement (CBA) between the parties and requested that some of the positions be filled with internal candidates. There then followed a series of messages between Jones and Glover and various management representatives regarding the selection process (GC Ex. 3, pp. 1-3). Finally, on November 7, Henry Valiulis, Respondent's Director of Administration, sent Glover and Jones a message (GC Ex. 3, p. 1) to which he attached a statement by Robert Duda, the selecting officer for the Medicare Claims Examiner training class. According to Valiulis, Duda's statement justified the selection of the eight external candidates. In his statement (GC Ex. 3, p. 4), Duda indicated that:

> The external candidates identified for the Medicare claims examiner training class all have substantially higher scores than the internal candidates on the OPM claims examiner test. The lowest scores for the external candidates are 90 and 89 for the ten 10-point veterans. The other external candidates identified for selection have scores of 100(3); 97(2); 95(1). The highest score for an internal candidate was 83. While not perfect, the test provides a gauge as to the ability of the applicant to master this type of work.
>
> The external candidates all have higher levels of education. One 10-point veteran has 25 semester hours of college; the other has an Associates degree. The other 6 external applicants all have college degrees. One internal candidate has an Associates degree; the others have a few hours to no college experience. The education level is another indicator of the applicant's ability to master a course of study, such as the Medicare training class.

By memorandum of December 4 from Glover to Respondent's Director of Operations (GC Ex. 4) the Union stated its intent to request an administrative review on behalf of Jonita

Raines, who was one of the unsuccessful internal candidates. Glover testified without challenge that an administrative review is the first step in a grievance for non-selection. It is a request to management to provide the reasons why the grievant was not selected (Tr. 18). The memorandum states, in pertinent part:

> Before we file a document for that request, we need to review documentation on her behalf so we can see if procedural errors were committed in these selections. Since management ended the Union's review of documentation for outside candidates as part of the panel process some time ago, we request all information submitted by outside candidates in their applications for the Medicare training class including their education levels and test scores. We have a particularized need for this information to determine if the outside candidates were superior candidates to the highly qualified candidates from within. We request all documents allowed under the Privacy Act with some documents sanitized as needed to protect the applicants privacy rights as determined by the Supreme Court.

According to Glover, the Union wanted the requested information only with regard to the eight candidates who had been selected (Tr. 20).

On December 6, Glover sent an e-mail message to Keith Earley, the Director of Human Resources, (Tr. 20, 21; GC Ex. 5, pp. 2 and 3) in which he stated that:

> . . . we want to review all unsanitized (and sanitized where necessary) panel material regarding the outside candidates selected before we give the formal written requests so we can point out possible procedural violations if they exi[s]t. . . .

There is no evidence that the Respondent subsequently questioned the Union as to whether it was seeking information about all of the external candidates or only the successful ones.

On December 7 Susan Chin, an Agency Staffing Specialist in the Bureau of Human Resources, sent an e-mail message to Glover, with copies to other representatives of the Union and the Respondent, in which she informed Glover that the Bureau of Law had advised management that they were allowed to provide the Union with only a "sanitized certificate of eligibles showing test scores, veterans' status and selection codes." Chin further stated that she would prepare that information for the Union and would inform Glover when it was ready. Later the same day Glover sent a message to Duda with the Union's formal request for administrative reviews for three of the unsuccessful internal candidates (GC Ex. 5, p. 1).

On December 8 the Respondent provided the Union with a sanitized certificate of eligibles and an explanation of the codes used to indicate agency action and veteran status (GC Ex. 6). The names and identification numbers of the candidates are redacted and there is no indication of whether a candidate is internal or external.

On December 13 Glover sent an e-mail message to Chin and Marguerite Dadabo, Deputy General Counsel, (GC Ex. 7)[4/] stating:

> We received your information sheet and the explanation of codes. You advised that this is the only information that the Bureau of Law will allow the Union or the grievants to have. The sheet provided the list of candidates showing selected or not selected with no names or identifying code, a rating score, and veteran status. The rating score we believe is the score on a standard government entry test given by OPM. Is this correct?
>
> Were the outside candidates given the claims examiner test that was given to the internal candidates?

[4/] Glover's message to Chin and Chin's response are contained in this exhibit.

In addition, the applicants should have provided previous work experience, supervisor appraisals, educational background, test scores for the claims examiner test, interview scores due to the interviews conducted by Mr. Duda, and reference checks.

We are requesting all of the above information in a sanitized format if necessary. We have a particularized need for this because without this information it is impossible to compare the qualifications of the internal and external candidates to see that the external candidates were superior to all the internal candidates.

Please advise when this information will be provided.

Chin responded to Glover's message on December 14, stating:

To answer your first and second questions, the rating scores provided for the external candidates are their scores from taking the RRB claims examiner test. The external candidates took the same test as the internal candidates.

I spoke with Marguerite Dadabo regarding your request for sanitized materials showing work experience, performance appraisals, etc. I need to verify if you are requesting this information for the internal or external candidates.

If the requested material is for external candidates, then as previously stated, that information cannot be provided. We did provide a sanitized certificate of the eligible external candidates, showing their test scores from the claims examiner test. Also, there is no requirement in the *Negotiated Merit Promotion Procedures* for the selecting officer to keep interview notes or assign interview points.

In three memoranda dated December 18 (GC Ex. 8), Duda informed Glover that he had completed the administrative reviews and that he had concluded that the three employees represented by the Union had been properly considered for the position of Claims Examiner. Duda also informed Glover that, if the Union wished to file grievances on behalf of those employees, they should be filed within five working days of the date of each memorandum.

On December 21 Glover sent an e-mail message to Chin in which he stated, "Please advise when I can review all appropriate panel material for insiders and outsiders to see if procedural errors were made." Earley responded on the same day stating that the Respondent would provide the panel material for the internal candidates, but that there was no panel for the external candidates. He further stated that, "Ms. Chin provided you with all of the information we are allowed to provide for the external candidates." (GC Ex. 9). There is no evidence that the Privacy Act was mentioned in any of the Respondent's communications with the Union concerning the request for information or that the Respondent stated the specific basis for its contention that the disclosure of some of the requested information was prohibited by law.

Celeste O'Keefe is the Chief of Workforce and Organizational Management in the Respondent's Bureau of Human Resources. She testified that the only test that could have been given to the external candidates was one that was developed by the Respondent for Claims Examiner jobs and approved by the Office of Personnel Management (Tr. 48). O'Keefe's testimony concerning the weight given to educational achievement was somewhat confusing; on the one hand she stated that education played "absolutely" no role in the ranking of external candidates (Tr. 49), but, on cross-examination, she acknowledged that the selecting official (presumably Duda) stated that he "looked at" the educational level of the external candidates (Tr. 55). Neither Duda nor any other witness was called by the Respondent.

Upon consideration of the evidence, I find as a fact that the educational levels of all of the candidates, both internal and external, were considered by the Respondent, through Duda, in the selection of the successful candidates. It is unclear,

and of no consequence, whether educational levels were considered in the creation of the list of eligible candidates, in the final selection from the list of eligibles or, as appears likely, in both processes. The fact remains that Duda himself cited the allegedly superior educational levels of the successful external candidates in his response to a challenge by the Union (GC Ex. 3, p. 4). The Respondent may not now suggest that this factor was of little or no importance.

Discussion and Analysis

Adverse Inference

The General Counsel has cited portions of O'Keefe's testimony on cross-examination (Tr. 56-59), portions of the Respondent's website (GC Exs. 10 and 11) and a portion of the Respondent's regulations (GC Ex. 12) to show that the Respondent's Chief Privacy Officer works in its Chicago headquarters and that its Chief Information Officer is responsible for Privacy Act matters at the Chicago headquarters. According to the General Counsel, the Respondent's failure to call either of those officials as witnesses warrants an adverse inference to the effect that there is no merit to the Respondent's Privacy Act defense.

The General Counsel has correctly cited *U.S. Dept. of Commerce, etc.*, 54 FLRA 987, 1017 (1998) in support of the proposition that an adverse inference may be drawn against a party because of its failure to call a witness reasonably assumed to be favorably disposed to that party. However, the unstated assumption of that and similar cases is that the testimony of the absent witness would be relevant and of some weight.

Presumably, the General Counsel would have me draw an inference that, if the Chief Privacy Officer or the Chief Information Officer were to testify, she would admit that the Respondent's reliance on the Privacy Act is without merit. That may be so, but it is also possible that those officials would testify that they were not consulted or that they were consulted and either authorized the Respondent's refusal to provide the information or (less likely) that they directed that the information be provided. Such testimony, even if

admissible, would be entitled to no weight. Regardless of who in the Respondent's organization decided that the Privacy Act prohibits the disclosure of the requested information, the Respondent is bound by that decision for the purpose of this case. It makes no difference whether the Respondent's decision was carefully considered or even whether it was made in good faith. Alternatively, the absent witness' defense of the Respondent's construction of the Privacy Act would amount to no more than opinion evidence on an ultimate legal issue that I must resolve. While the testimony of the absent witnesses might have been embarrassing to certain of the Respondent's representatives, it would have had no bearing on my decision. Accordingly, I will not draw the adverse inference requested by the General Counsel.

The Legal Framework

Section 7114(b)(4) of the Statute provides that the duty of an agency to negotiate in good faith includes the obligation:

> . . . to furnish to the [union], upon request and, *to the extent not prohibited by law*, data-
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . . .
>
> (Emphasis supplied.)

In order for a union to invoke its right to information under §7114(b)(4) of the Statute, it must establish a particularized need by articulating, with specificity, why it needs the information as well as a statement of the uses to

which it will put the information and the connection between those uses and its representational responsibilities under the Statute, *Internal Revenue Service, Washington, D.C, et al.*, 50 FLRA 661, 669 (1995). Once the union adequately states its particularized need, it falls to the agency either to provide the information or to tell the union why it will not do so.

The Respondent does not contend that the Union failed to adequately state a particularized need for the requested information. Rather, the Respondent relies solely on the proposition that the Privacy Act prohibits the disclosure of the information.

The Privacy Act, 5 U.S.C. §552a, states, in pertinent part:

(a) **Definitions**-For purposes of this section-

* * * *

> **(4)** the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education . . . and . . . employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;
>
> **(5)** the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

* * * *

(b) Conditions of disclosure-No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless

disclosure of the record would be- . . . .

There then follows an enumeration of exceptions to the prohibition against disclosure. The General Counsel has not invoked any of those exceptions.

The Respondent's Response to the Union's Request for Information

In *Federal Aviation Administration*, 55 FLRA 254, 260 (1999) (*FAA*) the Authority held that an agency must articulate its interest in non-disclosure at the time of its denial of the information request and not for the first time at a hearing. In its multiple responses to the Union's requests for information, the Respondent did not specifically invoke the Privacy Act but only stated that the disclosure of some of the information was prohibited by law. Ironically, the only mention of the Act was by the Union, which, in Glover's memorandum of December 4 (GC Ex. 4), requested:

> . . . all documents allowed under the Privacy Act with some documents sanitized as needed to protect the applicants privacy rights as determined by the Supreme Court.

Although, as stated above, the Respondent did not specifically mention the Privacy Act in its response to the Union's request for information, it unequivocally stated its contention that the disclosure of the information was prohibited by law. The Union could have harbored no reasonable doubts that the Respondent was referring to the Privacy Act.[5/] Even if that were not so, the language of the Statute is clearly to the effect that the non-disclosure interests set forth in §7114(b)(4)(A) through (C) need only be addressed if the disclosure of the information is not prohibited by law.

[5/] The General Counsel has not alleged that the Respondent should be barred from reliance on the Privacy Act because of a lack of timeliness in raising the defense.

I am aware that, in at least one instance[6/], an Administrative Law Judge has applied the holding in *FAA* so as to preclude an untimely reliance on the Privacy Act. Yet, he also found that the Privacy Act did not cover the circumstances of that case and the Authority affirmed the judge's decision on that basis without addressing the applicability of *FAA*.

The Authority has never addressed the issue of the effect of an untimely assertion of a Privacy Act defense. In view of the fact that the Privacy Act contains an outright prohibition against disclosure of certain types of information, it is unlikely, to say the least, that the Authority would order the Respondent to violate the Act, assuming that it applied in the first place.

It is possible, however, that if an agency did not respond to an information request and later invoked the Privacy Act, the Authority would direct the agency to promptly respond to future requests for information so that the union would at least be aware of the agency's position and could consider an amendment of its request. In the instant case, the evidence does not indicate, and the General Counsel has not alleged, that the Respondent ignored the Union's request for information.

The Application of the Privacy Act

In *U.S. Dept. of Transportation, Federal Aviation Administration, New York TRACON, Westbury, New York*, 50 FLRA 338, 345 (1995) (*TRACON*) the Authority set forth an analytical framework for balancing an agency's Privacy Act defense against the right of a union to obtain information necessary to the performance of its representational duties. According to that framework, an agency seeking to withhold records must meet the same requirements as are applied to requests under the Freedom of Information Act, 5 U.S.C. §552 (FOIA). Specifically, when an agency contends that the requested information falls under FOIA Exemption 6 as set forth in 5 U.S.C.

[6/] Health Care Financing Administration, 56 FLRA 503, 514 (2000) (Health Care).

§552(b)(6)[7/], it has the burden of demonstrating (1) that the information requested is contained in a "system of records" under the Privacy Act; (2) that disclosure of the information would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If the agency meets its burden, the General Counsel must then

(1) identify a public interest that is cognizable under FOIA; and (2) demonstrate how disclosure of the requested information will serve that public interest.

Although the Respondent has not specifically addressed the *TRACON* factors, the General Counsel does not contest the self-evident proposition that the application packages of each of the successful external candidates are "records" as defined in §(a)(4) of the Privacy Act and that they are contained in a "system of records" within the meaning of §(a)(5) of the Act. Thus, the Respondent has met the first element of its burden of proof under *TRACON*.

As to the second element, information as to the educational background of the successful external candidates is specifically included in the definition of a "record" and is thus within the contemplation of the Act. However, the proposition that even sanitized records would not protect the candidates' privacy is far less clear. In fact, the Authority has held that FOIA Exemption 6, and therefore the Privacy Act, does not prohibit an agency from divulging otherwise protected information in a redacted or sanitized form, *Heath Care*, 56 FLRA at 506.

In contending that sanitized records would not protect the Privacy Act interests of the successful

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[7/] (b) This section [the Privacy Act] does not apply to matters that are-

* * * *

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; . . . .

candidates, the Respondent relies on the fact that they are only eight in number and that the release of the requested information would allow the Union to determine the identity of each of the candidates. In support of this proposition, the Respondent points to the fact that two of the successful candidates have veteran's preference and that, of those two veterans, one is male and the other female. Therefore, the Respondent contends, an examination of the military status of the candidates would allow the Union to match their educational information with their identities. Furthermore, according to the Respondent, "certain information" in the applications of the other six candidates would betray their identities even if their records were sanitized (Resp. Brief, pp. 10, 11).

An examination of the evidence indicates that six of the successful candidates have typically feminine first names (GC Ex. 2) and that two of them have veteran's preference (GC. Ex. 6). However, there is nothing in the record to tie the named candidates with their military records, if any. There is certainly no evidence regarding the mysterious other information cited by the Respondent. Finally, I am confident that the parties can agree on the details of the sanitizing of the records so as to eliminate any rational possibility of the inadvertent disclosure of the educational backgrounds of specific candidates. Accordingly, I have concluded that the Respondent has not met the second element of its burden of proof under *TRACON*.

While educational material can be highly sensitive, it is not necessarily so. According to Glover, the Union was not seeking a listing of academic courses or of grades, but merely verification that certain unnamed candidates had graduated from certain colleges with degrees in "business, or science, or whatever" (Tr. 41). To be sure, the Union did not express that limitation in its information requests, but the Respondent did not inquire into such details. It is possible that, if requested by the Respondent, the Union would have accepted the records with the names and locations of

the colleges sanitized so as to further ensure that the candidates could not be identified. In any event, the information requested by the Union was not so sensitive as to outweigh its right to obtain it. Thus, the Respondent has also failed to meet the third element of its burden of proof under *TRACON*.

Although the Respondent has not directly challenged the Union's statement of particularized need, it argues that the information which it has already provided is sufficient. While the Respondent provided much of the information requested by the Union, it did not provide any information related to the educational records of the successful candidates. As shown above, the educational levels of the successful candidates were one of the factors cited by the Respondent in defense of the selection process. Therefore, information as to other factors in the selection cannot make up for that deficiency.

The Merits of the Underlying Grievances

The Respondent has devoted considerable effort to demonstrating that its selection process was legitimate. While that may be true, it is of no consequence in this case. It is, in the first instance, for the Union to decide whether it has a strong enough case to go forward and it is entitled to obtain all information necessary for it to make an informed decision. In *Health Care Financing Administration*, 56 FLRA 156, 159, 162 (2000) the Authority recognized that, in stating its particularized need, the Union is not required to describe the nature of the agency's alleged misapplication or violation of policy, procedure, law or regulation. The investigation of the possibility of such violations is part of a union's representational responsibilities and it need not take the agency's word as to pertinent facts. If a union decides to proceed with a grievance, and it cannot be settled, the agency may present its case to an arbitrator and may eventually prevail. However, the agency may not deprive the union of the facts necessary for it to make an independent decision as to whether and how to proceed.

The Respondent's Settlement Offer

Even if I were to accept the dubious proposition that the Respondent's "last chance" offer of settlement is admissible, there is absolutely no evidence that such an offer was made and I certainly cannot take official notice of such an offer. While the Authority encourages the amicable settlement of disputes, *American Federation of Government Employees, Local 2145 and U.S. Department of Veterans Affairs Medical Center, Richmond, Virginia*, 44 FLRA 1055, 1061 (1992), such settlements are, by their very nature, voluntary. A party rejects a settlement offer at the risk of a subsequent loss, but the fact of the rejection has no bearing on its entitlement to relief.

For the foregoing reasons, I have concluded that the Respondent committed unfair labor practices in violation of §7116(a)(1), (5) and (8) of the Statute by failing and refusing to provide the Union with the information which the Union requested on December 6, 2006, and thereafter concerning the candidates selected for the position of Claims Examiner. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Railroad Retirement Board, Chicago, Illinois (Respondent), shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 375, AFL-CIO (Union) with: (1) the redacted application materials submitted by the eight candidates who were selected by the Respondent as Claims Examiners in December of 2006; and (2) the redacted copies of any interview scores and reference checks conducted by the Respondent regarding the aforesaid eight candidates.

(b) 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:

(a) Provide the Union with (1) the redacted

application materials submitted by the eight candidates who were selected by the Respondent as Claims Examiners in December of 2006; and (2) the redacted copies of any interview scores and reference checks conducted by the Respondent regarding the aforesaid eight candidates.

(b) Post at all of its facilities where bargaining unit employees represented by the Union are located copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Chairman of the Respondent, 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 §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Chicago Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, September 11, 2007

_____
PAUL B. LANG
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 U.S. Railroad Retirement Board, Chicago, Illinois, 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 or refuse to furnish the American Federation of Government Employees, Local 375, AFL-CIO (Union) with: (1) the redacted application materials submitted by the eight candidates who were selected as Claims Examiners in December of 2006; and (2) the redacted copies of any interview scores and reference checks regarding the aforesaid eight candidates.

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 provide the Union with (1) the redacted application materials submitted by the eight candidates who were selected as Claims Examiners in December of 2006; and (2) the redacted copies of any interview scores and reference checks regarding the aforesaid eight candidates.

_____
(Agency)

Dated: _____ 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 its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: Federal Labor Relations Authority, 55 West Monroe Street, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: 312-886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. CH-CA-07-0340, were sent to the following parties:

_____

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Gary Stokes, Esquire **7005 2570 0001 8450 2484**
Federal Labor Relations Authority
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Eric T. Wooden, Esquire **7005 2570 0001 8450 2491**
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