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

UNITED STATES DEPARTMENT OF AIR FORCE AIR FORCE MATERIEL COMMAND KIRTLAND AIR FORCE BASE ALBUQUERQUE, NEW MEXICO Respondent AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2263 Charging Party	Case Nos. DA-CA-01-0876 DA-CA-01-0877 DA-CA-01-0963 DA-CA-01-0964 DA-CA-01-0965 DA-CA-01-0968 DA-CA-01-0969 DA-CA-02-0320 DA-CA-02-0373 DA-CA-02-0603

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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 4, 2004**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

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RICHARD A. PEARSON
Administrative Law Judge

Dated: August 31, 2004
Washington, DC

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

MEMORANDUM DATE: August 31, 2004

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: UNITED STATES DEPARTMENT OF AIR FORCE
AIR FORCE MATERIEL COMMAND
KIRTLAND AIR FORCE BASE
ALBUQUERQUE, NEW MEXICO

Respondent

and Case Nos. DA-CA-01-0876
DA-CA-01-0877
DA-CA-01-0963
DA-CA-01-0964
DA-CA-01-0965
DA-CA-01-0968
DA-CA-01-0969
DA-CA-02-0320
DA-CA-02-0373
DA-CA-02-0603

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2263

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

OALJ 04-41

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
Washington, D.C.

UNITED STATES DEPARTMENT OF AIR FORCE AIR FORCE MATERIEL COMMAND KIRTLAND AIR FORCE BASE ALBUQUERQUE, NEW MEXICO Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2263 Charging Party	Case Nos. DA-CA-01-0876 DA-CA-01-0877 DA-CA-01-0963 DA-CA-01-0964 DA-CA-01-0965 DA-CA-01-0968 DA-CA-01-0969 DA-CA-02-0320 DA-CA-02-0373 DA-CA-02-0603

William D. Kirsner
James P. Hughes
For the General Counsel

Steven E. Sherwood
Major John B. Flood
For the Respondent

Michelle Sandoval
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

On July 24, 2002, the General Counsel of the Federal Labor Relations Authority, by the Regional Director of its Dallas Region, issued a consolidated unfair labor practice complaint in Case Nos. DA-CA-01-0876, -0877, -0963, -0964, -0965, -0968, -0969, and 02-0320, alleging that the Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to furnish necessary information to the Union. On September 26, 2002, the General Counsel issued a complaint in Case No. DA-CA-02-0373, alleging that the Respondent committed a similar violation of section 7116(a)(1), (5) and (8) and consolidating this case with those in the earlier complaint. On September 30, 2002, the General Counsel issued a third complaint, in Case No. DA-CA-02-0603,

alleging a similar violation of section 7116(a)(1), (5) and (8) and consolidating it with the other cases. On August 2, October 2, and October 9, 2002, the Respondent filed its answers to the respective complaints, denying that they had violated the Statute and asserting various affirmative defenses. A hearing was held in Albuquerque, New Mexico, at which all parties were present and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondents subsequently filed post-hearing briefs, which I have fully considered.

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

At all times material to this case, the American Federation of Government Employees, AFL-CIO (AFGE), has been the exclusive representative of a unit of employees of the Air Force Materiel Command (AFMC) at various facilities of the AFMC throughout the country, including Kirtland Air Force Base, Albuquerque, New Mexico (the Respondent or Kirtland). AFMC and AFGE were signatories to a Master Labor Agreement (MLA) that was in effect from July 31, 1998 to April 1, 2002 (G.C. Exhibit 2), as well as a successor MLA that has been in effect since April 1, 2002 (G.C. Exhibit 3).[1] AFGE Local 2263 (the Charging Party or Union) is an agent of the AFGE for the purpose of representing employees at Kirtland.

Article 6 of the MLA sets forth the parties' negotiated grievance procedure. Under Section 6.08, employees may file a grievance by completing a standard grievance form, AFMC Form 913, within 20 calendar days of the incident being grieved. Under Section 6.09, the president of a local union, or his designee, may file a grievance by submitting the grievance in writing (no particular form is specified) to the Agency's commander within 20 days of the incident. Section 6.09 similarly permits management to file grievances with the local union president.

Article 12 of the MLA concerns merit promotions, and it contains a number of provisions governing the filling of vacancies on a competitive and noncompetitive basis.

[1] Since the language of the 1998 and 2002 agreements does not significantly differ regarding any of the relevant provisions, I will refer to both contracts collectively as the MLA.

Section 12.02 states that Article 12 applies to positions within the bargaining unit, but in Section 12.06 the Respondent agrees to consider eligible bargaining unit employees for positions (even supervisory positions) outside the unit. Section 12.09 provides that candidates for competitive promotion will be screened and evaluated, and that candidates who meet basic eligibility and minimum qualification requirements will then be evaluated in accordance with criteria set forth in Promotion Evaluation Patterns, or PEPs.[2] PEPs must be job related, identical positions must have consistent PEPs, the Union has a right to review and comment on new or changed PEPs, and employees have a right to obtain copies of existing PEPs. Pursuant to Sections 12.10 and 12.13, the selecting official has the discretion, "subject to regulatory controls," to make the promotion selection from any candidate on the promotion certificate, which lists not more than 10 (15 in the new MLA) "best qualified candidates," with one additional name permitted for each additional vacancy. Under Section 12.14, a "nonselected" employee may demand that the selecting official explain the reasons for the decision.

Because the next two sections of the Merit Promotion article are in particular dispute, I will quote them in their entirety:

> SECTION 12.15: ACCESS TO PROMOTION INFORMATION
>
> Employees or their designated representative may request the following information concerning specific promotion actions in which they are individually affected. This information will be made available to the employee and the Union representative upon request to the servicing Civilian Personnel Office at the activity where the action occurred:
>
> a. Whether the employee was considered for promotion to a specific bargaining unit position, and if so, whether the employee was found eligible for the position on the basis of minimum qualification standards and other evaluation factors.
>
> b. Whether the employee was among the best qualified candidates referred on the promotion certificate; if not, the highest progression level

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[2] The 2002 MLA changed the terminology and refers to these documents as Promotion Plan Templates, but I will use the terminology from the 1998 MLA throughout this decision.

reached by the employee in the screening process, if applicable.

c. Who was selected for the vacant position in question.

SECTION 12.16: POST AUDIT OF PROMOTION ACTIONS

To the extent permitted by applicable law, rule or regulation, the Union may post-audit a promotion action in conjunction with the processing of a grievance under the Negotiated Grievance Procedure.

On May 14, 2001,[3] Union President Steve Remenar sent a letter to Kirtland's Labor Relations Officer, John Houha, noting his "concern" that some employees had been denied their rights to promotions to two specified positions, and citing several sections of the MLA allegedly violated (Tr. 149-51). On May 22, the Union sent a request that Houha furnish it with the certificates and PEPs for the two previously-cited positions (Tr. 41-42, 154-55).[4] On May 24, Houha responded by furnishing the Union with the PEP and certificate for one position but not for the other, and by stating that the Union was not entitled to the information on the second position, because it was a confidential position outside the bargaining unit (Tr. 155-57). Mr. Houha met on June 3 with Leslie Maxwell, Office Manager and Second Vice President of the Union, concerning the Union's information request. Maxwell explained why the Union needed additional information, and Houha explained his reasons why the Union was not entitled to it. There apparently was also some general discussion of the promotion selection process, but Houha's explanations did not satisfy Maxwell, and the Union did not receive the information it wanted on the nonbargaining unit position (Tr. 160-62).

On July 11, the Union sent two separate, but nearly identical, letters to the Kirtland Civilian Personnel Office, requesting certain information "in accordance with

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[3] Hereafter, all dates are in 2001, unless otherwise noted.

[4] None of the correspondence relating to the May information request was offered into evidence, and there is a discrepancy in Ms. Maxwell's testimony as to precisely what information the Union requested and received. Compare Tr. 41-42 and Tr. 154-57. Since the latter testimony was given as Maxwell was reading from the Union's letter requesting the information, I take that account as the more reliable one.

MLA Article 12.15 and 12.16" (G.C. Exhibits 4 and 5). After noting that "a grievant" had advised the Union that certain vacant positions had been filled, the Union "request[ed] Post-Audit information on these Merit Promotion actions." The letters specified the positions that had been filled (five different positions in G.C. Exhibit 4 and one position in G.C. Exhibit 5) and asked Mr. Houha to provide the following information for each position:5

a. Name(s) of every person considered for the above vacant position
b. Ranking factors used to select the above individual
c. Name(s) and ranking of everyone on the certificate including their Service Computation Date considered for the vacancy
d. PEP of the above position
e. Certificates, (including supplement) if appropriate (sanitized, no SSN, B-day) used for the selection of the above position
f. The highest progression level reached by employees on the certificate
g. SF 52 fill action
h. Copy of position description of above position
i. Copy of EEO goal sheet(s) for the certificate and for any supplemental certificates
j. Selectee's career brief (sanitized with current position and past experience only; delete name, SSN, appraisal, education, training, etc.)
k. If appropriate, copy of staff summary
l. Interview questions and benchmarks
m. Interview rating sheet (sanitized with selectee(s), name(s) only and total scores of everyone interviewed)

5 It appears that after her meeting with Houha on June 3, Maxwell discussed the subject of merit staffing with someone (likely an official of a sister union) at Hill Air Force Base, which is also covered by the same MLA covering Kirtland. Maxwell learned that Hill management had made a settlement agreement with the local union at Hill, agreeing to provide the union with a wide range of information in merit staffing cases. Maxwell was sent a copy of that agreement, and she used it as a "template" for her July 11 information requests and all future information requests (Tr. 250-65). The actual settlement agreement at Hill was not offered into evidence, so the precise terms of the agreement and circumstances surrounding it cannot be evaluated, but it appears there are some differences between the items of information listed in the Hill settlement and those requested by the Union in this case (Tr. 256-58).

n. A copy of the performance plan relative to the position being filled
o. Nationality of the selectee of the above positions

In G.C. Exhibit 5, the Union asked for the same information, except it did not ask for Item o, nationality of the selectee. Both letters explained the need for the information as follows: "AFGE Local 2263 is requesting the above information in order to perform Post-Promotion Audit (s), and ensuring compliance with Merit System Principles, 5 CFR 335 Section 103, and to monitor contract compliance." On July 23 Houha acknowledged receipt of these requests and told the Union that he had forwarded them and was awaiting a response (Resp. Exhibit 3).

On July 25 and 30, the Union sent three additional letters to Houha (G.C. Exhibits 6-8), requesting the same information as in G.C. Exhibit 4 regarding five other specified promotion actions. The Union again cited MLA Articles 12.15 and 12.16 as the basis of its request, and it explained its need for the information in the same language as in G.C. Exhibit 4. In none of these letters (nor in any of the letters that were to follow in subsequent months) did the Union name any of the employees who had raised questions about the promotions, nor did the Union or any employee file a formal grievance protesting the promotions.

On August 15, Houha sent a letter to the Union, responding more fully to the Union's several pending information requests. G.C. Exhibit 13. He apologized that it had taken so long, but he insisted that "progress is being made." He noted that "some of the information" had to be obtained from different parts of the Air Force bureaucracy, and that "[I]n a few cases, I don't believe what you are asking for exists; but we will look for it." *Id.* at 1. He further noted that some of the records requested contained information protected by the Privacy Act, that this information would have to be sanitized, and that the entire process was "turning out to be very consuming in both time and labor." G.C. Exhibit 13 at 1.

Notwithstanding the above assurances to the Union, Mr. Houha then proceeded in the same letter to raise a number of "questions" about, and objections to, the Union's information requests. He first argued that neither Section 12.15 nor 12.16 of the MLA was applicable in these cases: 12.15 was not applicable because the language of that provision was expressly limited to information requests by specific named "employees," and none of the letters named any employee; 12.16 was not applicable because it required

that an actual grievance have been filed. He also argued, based on MLA Section 12.02, that the Union was not entitled to information about the filling of positions outside the bargaining unit. *Id*. at 2.

Without specifically citing section 7114(b)(4) of the Statute, Mr. Houha then challenged (in the same August 15 letter) the Union's requests in terms that closely parallel Authority case law on this issue. He asked the Union to explain, with respect to each piece of information sought, why the Union needed it, what it would be used for, how the intended use was connected to the Union's representational responsibilities, and how it was required for the Union to represent its members. He explained why he needed the Union to answer these questions (G.C. Exhibit 13 at 2-3):

> In most situations, it is obvious why the information was asked for and how it will be used. The reasons behind your requests for promotion information, however, are not so obvious. . . . I could not . . . explain how the information you asked for could be used to effectively show that the nonselection of a particular candidate was a violation of any law, merit principle or the Master Labor Agreement. . . . If there was a violation, it is my opinion that it would not be found in that data. Consequently, I really need your assistance.

Houha himself outlined what he believed to be legitimate representational needs of the Union in regard to information about promotion actions, and finally he proposed a compromise set of arrangements, for these as well as future cases of this kind. He ended the letter by offering to discuss the cases with the Union upon request. *Id.* at 5.

On August 16, the Union sent two additional letters requesting the same Items a-o of information relating to the filling of two different positions. G.C. Exhibits 15, 16. On the same date, the Union also renewed one of its earlier requests, and for the first time, the Union phrased its request for information "per 5 U.S.C. 7114(b)(4)" (G.C. Exhibit 14). The Union explained its need for the information in these three letters identically as in G.C. Exhibits 4-8. The newest letters made no reference to Houha's letter dated August 15, because the Union did not receive that letter until August 22.

On August 23, Ms. Maxwell sent a letter to Houha in response to his August 15 letter. G.C. Exhibit 17. She noted that the Union was now requesting the information

under Section 7114(b)(4) of the Statute, since the Respondent had denied it under the MLA. Citing the contract's provision on timely response to correspondence, Maxwell protested the Respondent's consistently late responses, and more significantly, its failure to provide any of the requested documents to that date. She emphasized that for each request, "we have a grievant" and that each grievant had requested to remain anonymous, out of fear of reprisal. For that same reason, the Union rejected the compromise procedure suggested by Houha, since that procedure would require employees seeking information to identify themselves. Finally, the Union refused to provide any additional explanation for its information requests, insisting "we have provided sufficient information to your request. Our letters to you are specific in what we need to address our grievant concerns and our concerns of contract compliance with merit promotion issues." *Id.* at 2.

Houha responded to Maxwell again in a letter dated August 31 (G.C. Exhibit 18), in which he essentially restated the positions he had made in his August 15 letter. Noting that he and other employees in his office had "spent tens of hours gathering the information you asked for[,]" he stated that the Union's requests were not justified under either the MLA or the Statute. He said that the FLRA and the Statute require a union to "establish a particularized need for the information by articulating, with specificity, why it needs it." *Id.* at 1, 2. He further emphasized that a union must show not simply that the information is "relevant" but that the information is "required in order to adequately represent its members." *Id.* at 2. He went on to state (*Id.* at 2-3):

> I agree that in each of your letters for promotion information you outlined reasons for desiring the information. I sincerely do not believe, however, that the general reasons you stated contain the specificity the Authority looks for to establish a particularized need. In personally asking the questions above, I hoped to receive more explicit and unambiguous rationale which, in turn, could be used to advance Kirtland's responses to your inquiries. But you did not answer them.

Houha concluded his letter saying, "I suggest we should meet and discuss this matter. There must be something we can do to resolve this." G.C. Exhibit 18 at 3.

Ms. Maxwell responded to Houha on September 18 (G.C. Exhibit 21), reiterating that the Union's information requests were based on Section 7114(b)(4) of the Statute as

well as on the MLA. She also sought to answer some of the specific questions posed to her previously by Houha, and I quote her answers in full (*Id.* at 1-2):

> 4b. Specifically, why does the union need the information?
>
> **Ans. To address bargaining unit employees concerns. To represent the employee in obtaining the information, since the employee is refused the information through his/her own actions by CPO personnel.**
>
> 4c. Specifically, to what use will the union put the information?
>
> **Ans. The Union will use the information requested to support the employee in any further legal actions needed or required to fully satisfy the employee's rights and to make the employee whole.**
>
> 4d. Specifically, what is the connection between the Union's use of the information and it's [sic] representational responsibilities?
>
> **Ans. It is the Union's responsibility to represent employees, and whatever action is needed to address an employee's concerns will be taken within the scope of Union activities and rights covered by prescribed statutes.**
>
> 4e. Specifically, how is the information required to adequately represent bargaining unit employees?
>
> **Ans. Read above.**

Houha responded to this letter on October 3 (G.C. Exhibit 22), asserting that the Union's answers to the questions cited above were inadequate under FLRA case law. Among other things, he noted again that no grievances had been filed on any of the underlying merit staffing actions cited by the Union. If the Union sought the information in order to decide whether or not to file a grievance, Houha argued that the information was not "required," because employees and the Union can file a grievance without having any of this information.

In letters dated January 23, 2002 (G.C. Exhibit 23), February 28, 2002 (G.C. Exhibit 26) and April 29, 2002 (G.C. Exhibit 28), the Union submitted three more information requests regarding additional merit promotion actions. G.C. Exhibits 23 and 28 cited MLA Sections 12.15 and 12.16 as the basis of the request, while G.C. Exhibit 26 cited 5 U.S.C.

Section 7114(b)(4), but all the letters asked for the same items a-o that had been sought in all but one of the prior requests, and they all explained the need for the information in language virtually identical to the previous letters. The Respondent replied to these requests on February 4, 2002 (G.C. Exhibit 25), March 6, 2002 (G.C. Exhibit 27) and May 2, 2002 (G.C. Exhibit 29). In each of these letters, Houha restated his contractual and statutory arguments that the Union had not demonstrated a need for the specific information, and he suggested that the parties meet to try to work out a resolution of the dispute. In his March 6 letter, he also reiterated the Privacy Act considerations weighing against the disclosure of name-identified information about all applicants for the many jobs in dispute, especially in light of the Union's oft-expressed interest in protecting the anonymity of its grievants.

In fact, the Union and Kirtland management never did sit down together to discuss any of the information requests that are the subject of the complaint. After Houha and Maxwell met on June 3, 2001 regarding an earlier information request, they did not meet again until June 7, 2002 (Tr. 42, 262), when they discussed a new merit staffing program called STAIRS. Even at this later meeting, however, it does not appear that the multiple unresolved information requests (or the ULP charges involving those same requests) were discussed in any detail. After Maxwell obtained a copy of the Hill Air Force Base settlement regarding promotion information (which she used as a template for her own subsequent information requests), she failed to tell Houha that her requests were based on that agreement at Hill (Tr. 260-65).6

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

In each of these ten consolidated cases, the General Counsel alleges that the Respondent failed to comply with section 7114(b)(4) of the Statute by refusing to furnish the Union with Items a through o of its ten information

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Maxwell testified that she never informed Houha in writing about the Hill precedent (Tr. 260-61), and this is corroborated by the documents in evidence. She also said she believes she told Houha about it verbally, but she could not be specific as to when or how (Tr. 261-65), and the lack of any meetings on the subject for over a year make it unlikely that she told it to Houha during the time that the requests were fresh.

requests,[7] thereby violating section 7116(a)(1), (5) and (8). Tracking the language of section 7114(b)(4), the General Counsel asserts that each requested item was: normally maintained by the Respondent in the regular course of business; reasonably available and necessary for full and proper understanding of the merit staffing actions in dispute; did not constitute guidance or advice for management officials; and its release was not prohibited by law. Then, noting the standards identified by the Authority in information cases, the G.C. insists that the Union established a "particularized need" for each item of information. As the General Counsel states at page 27 of its Post-Hearing Brief, the Union:

> explained that it was requesting the information to address the concerns of bargaining unit employees/grievants regarding the filling of several employment positions. The Union further explained that it needed the information to perform post-promotion audits to ensure compliance with Merit System Principles and monitor contract compliance in order to address the complaints of the grievants regarding the filling of the above positions.

In doing so, the G.C. insists that the Union made it "absolutely clear" to the Respondent why it needed each piece of information, how it intended to use it, and how that item was necessary for it to represent the employees, as required by *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 669 (1995) (*"IRS Kansas City"*). This was particularly true here, since Sections 12.15 and 12.16 of the MLA require Kirtland to furnish a great deal of information in promotion grievances, and since Maxwell and Houha had recently met in June 2001 to discuss information in a prior promotion grievance. Finally, the General Counsel cites numerous decisions in which the Authority has found that particularized need was established for promotion-related information similar to the items requested here. *See, e.g., Health Care Financing Administration*, 56 FLRA 503 (2000) ("*HCFA*"); *National Weather Service, Silver Spring, Maryland*, 21 FLRA 455 (1986).

The Respondent argues that the Union was not entitled to the requested information under either the Statute or the

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[7] Except for G.C. Exhibit 5 (which formed the basis of the charge in DA-CA-01-0877), where the Union did not request Item o.

MLA. Looking first at the Union's statutory claim for the information, Respondent asserts that the Union's explanation of its need for the information was vague and conclusory, never answering with any specificity the questions required by the *IRS Kansas City* decision, 50 FLRA at 669-70. As a result, Kirtland management could not "make a reasoned judgment as to whether information must be disclosed." *Id.* at 670. The Respondent also points to its several lengthy responses to the Union's information requests (such as G.C. Exhibit 13), in which Mr. Houha explained the Authority's *IRS Kansas City* standards to the Union and asked the Union to answer those specific questions for each item of information sought. Houha acknowledged that employees and the Union had legitimate interests in obtaining certain information relating to a merit staffing action, but he said it was unclear how the information sought by the Union would achieve any of those legitimate purposes. Despite Houha's repeated offers to meet with the Union to reach a resolution of the disputes, the Union never accepted, instead simply repeating its earlier assertion that it had adequately explained its need for the information. In the Respondent's view, this did not satisfy the requirements of "particularized need" for any of the information, as set by *IRS Kansas City.*

Regardless of whether the Union was entitled to any of the requested information under the Statute, the Respondent argues that the Union had contractually limited itself in merit promotion cases to the specific types of information listed in Article 12 of the MLA, and to the specific circumstances set forth in that article. At this point, the precise contours of the Respondent's argument become a bit murky, as it uses language about "waiver" of a statutory right, as well as language and case citations relating to the Authority's "covered by" doctrine. *See* Respondent's Post-Hearing Brief at 21-24; Answer to the Complaint and Notice of Hearing, First Affirmative Defense (G.C. Exhibit 1 (v)). Regardless of the terminology, the Respondent is arguing that because Article 12 of the MLA (and particularly Sections 12.15 and 12.16) "fully and comprehensively addresses the subject of information regarding merit promotions[,]" the Union is only entitled to promotion information as permitted in the MLA. Respondent's Brief at 23. Section 12.15 entitles an employee or his representative to specific pieces of information, but since the Union has refused to identify those employees, it is not entitled to the information. Section 12.16 entitles the Union to a broader range of information by conducting a "post-audit" of a promotion action, but Respondent argues that either the Union or an employee must have filed a grievance to trigger the right to this information. By

refusing to comply with the contractual requirements for promotion information, the Union has also lost its right to the information under section 7114(b)(4) of the Statute, argues the Respondent.

Analysis

1. The MLA Does Not Justify Respondent's Refusal To Furnish Information

Preliminarily, it is worth noting that only one witness, Ms. Maxwell, testified at the hearing; the Respondent chose not to call any witnesses. One consequence of this decision is that the Respondent passed up the opportunity to offer testimony concerning the parties' bargaining history, past practices and understandings regarding any of the disputed terms of the MLA. To the extent that the Respondent continues to assert any affirmative defenses to its alleged unfair labor practices, it must find support for its defenses in Maxwell's testimony and the documentary evidence.

Indeed, the Respondent devoted a considerable portion of its post-hearing brief (as Mr. Houha had devoted a large part of his responses to the Union's information requests) to asserting that the Union "clearly and unmistakably restricted its broad right to information about merit promotions under the Statute to specific information when representing an employee, and to the circumstance where a grievance has been filed under the negotiated grievance procedure when post-auditing a promotion action." Respondent's Brief at 17. Respondent relies on the "plain language" of Article 12 and further insists that Article 12 "fully and comprehensively" covers (and thereby limits) the Union's right to promotion information. *Id.* at 23.

The Respondent's use of the "covered by" defense is not, strictly speaking, appropriate in this case. As explained by the Authority in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 47 FLRA 1004, 1016 n.7 (1993), this doctrine "is intended to apply only to cases in which an agency asserts that it has no obligation to bargain based on the terms of a negotiated agreement." The doctrine is appropriately asserted as a defense when an agency refuses a union demand to bargain during the term of a contract or when an agency unilaterally changes a condition of employment. In this case, however, Kirtland is using the language of the MLA as a defense to its refusal to furnish information. The appropriate legal standard, therefore, is the one set forth

in *Internal Revenue Service, Washington, D.C.*, 47 FLRA 1091, 1103 (1993):

> [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.

In adopting this approach, the Authority noted that it would no longer apply either the "differing and arguable interpretations" or the "clear and unmistakable waiver" standard in such cases. However, since the Respondent is the party asserting the contract language as a defense, it has the burden of proving that the contract restricts the Union's section 7114(b)(4) right to promotion information to only the information specified in Article 12, and only under the circumstances specified therein. I conclude that Kirtland has not met this burden.

The Union first invoked Section 12.15 of the MLA as a basis of its information requests, and on this point I fully agree with the Respondent that this provision is of no help to the Union. By its very terms, Section 12.15 entitles employees or their designated representative to specific information "concerning promotion actions in which they are individually affected." The specified types of information (whether the employee was considered, was found eligible, or made the best-qualified list) can only be provided by Kirtland if the employee is named. By insisting on the anonymity of the employees, the Union made it impossible for the Respondent to comply with the request. The language of this provision cannot be interpreted in any way to support the Union's demand for information.

The Union also requested the information as part of a "post-audit" pursuant to Section 12.16, and interpreting this provision is a much more difficult task. First of all, the term "post-audit" is nowhere defined in the MLA, and the testimony of Ms. Maxwell sheds no significant light on the question. She referred to a post-audit as "information that was gathered together and used, or reviewed by staffing individuals for the placement of an individual into a vacant position[,]" but she also admitted that she was aware of no governing definition of what specific documents should be included in a post-audit (Tr. 37, 334-35). She was not asked about any bargaining history concerning the origin or

meaning of the term "post-audit," and her only prior experience with obtaining promotion information was one case that arose in May and June of 2001. (It is not clear whether the information request in May was phrased in terms of a post-audit.) She therefore began using the Hill settlement as a template for her subsequent requests, but her testimony doesn't indicate whether the Hill settlement was crafted in order to define the term "post-audit." The general meaning of the word "audit" implies a broad range of documents, but how that is applied (as the contract requires) "to the extent permitted by applicable law, rule or regulation," is explained nowhere in the record.

The Respondent argues that the meaning of "post-audit" is irrelevant in this case, because the Union failed to meet the threshold requirement for a post-audit: by providing that the Union may post-audit a promotion action "in conjunction with the processing of a grievance under the Negotiated Grievance Procedure[,]" the contract requires that a written grievance must already have been filed. Although the Respondent's interpretation of the phrase "in conjunction with the processing of a grievance" is certainly a reasonable one, I do not believe that it is self-evident in the language of Section 12.16. Ms. Maxwell voiced a contrary interpretation in her testimony. She insisted that the Union's evaluation of an employee's complaint and the Union's request for information to determine whether to file a grievance are part of "the processing of a grievance." Neither party's interpretation of the contract language was supported by other evidence, except that the Union's May 2001 information request (which the Respondent partially complied with) was apparently based on an earlier letter from the Union to Mr. Houha expressing the Union's "concern" that employee rights had been violated in the filling of two promotions (Tr. 151). Although the documents from that earlier request were not offered into evidence, it appears that the Respondent furnished the Union with promotion information even though a formal grievance had not been filed (Tr. 149-57).

If Section 12.16 means, as Respondent insists, that the Union may post-audit only when a grievance "has been filed," it would have been simple to say so in precisely those terms. Sections 6.08 and 6.09 of the MLA refer to the "filing" of a grievance as the beginning of the grievance procedure, but the post-audit procedure cited in Section 12.16 is tied to the "processing" of a grievance. "The processing of a grievance" might refer to the actions of the parties after a grievance has been filed, or it might reasonably include the actions of the Union in deciding whether to file a grievance. Testimony from witnesses who

participated in the negotiation of the disputed contractual language, or from Union or management officials who conducted other post-audits, could have shed light on the parties' intent in drafting and applying Article 12, but neither side offered such evidence. In the case cited by Respondent, *Department of the Navy, Portsmouth Naval Shipyard*, 4 FLRA 619, 625 (1980), it was testimony on the bargaining history of the disputed provision which persuaded the ALJ and the Authority that the Union had restricted its statutory right to information by agreeing to modified language in the contract. In the current case, however, the Respondent has not shed any light on the parties' intent in negotiating the disputed language, and the language of Section 12.16 by itself is too vague to support the Respondent's proposed interpretation.

After initially making its information requests under Sections 12.15 and 12.16 of the MLA, the Union also sought the information pursuant to section 7114(b)(4) of the Statute. The Respondent advised the Union at the time, and continued to argue at the hearing, that the Union limited its statutory right to information by agreeing to the more restrictive language of Article 12. I cannot view the plain language of Article 12 or its reasonable intent as an all-inclusive expression of the Union's right to promotion information, absent more specific language to that effect. Sections 12.14, 12.15 and 12.16 each describe limited situations in which an employee or the Union may obtain information about particular aspects of a merit staffing action, but these limited situations do not encompass "the full range of union responsibilities" that may prompt the Union to seek information about Kirtland's promotion selections and other merit staffing actions. *See, American Federation of Government Employees, AFL-CIO, Local 1345 v. FLRA*, 793 F.2d 1360, 1364 (1986), cited with approval in *Department of Housing and Urban Development, San Francisco, California*, 40 FLRA 1116, 1121-22 (1991) ("*HUD*"). There are many other situations, besides those described in Article 12, in which the Union may be called upon to evaluate the Respondent's merit staffing process and to obtain information from Respondent relevant thereto. For instance, the Authority has held that information may be necessary under section 7114(b)(4) when it is required to enable a union to evaluate whether to file a grievance,[8] or to enable the union to understand the application of a

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[8] *United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas*, 51 FLRA 768, 776 (1996).

policy or prepare for negotiations.[9] It would be wholly unwarranted, based on the sparse record in this case, to read into Article 12 an intent that this article was to constitute the Union's sole source for promotion-related information.

The Respondent also argued that it was not statutorily or contractually obligated to furnish information to the Union about promotions to positions outside the bargaining unit.[10] Although MLA Section 12.02 states that Article 12 applies to positions within the bargaining unit, Section 12.06(c) provides that the Respondent will consider bargaining unit employees for vacancies outside the unit. Neither of these provisions resolves whether the Union is entitled to information concerning the filling of a non-unit vacancy. The Authority, however, has held that a union may be entitled to information about non-bargaining unit employees pursuant to the Statute. *U.S. Department of Transportation, Federal Aviation Administration, New England Region, Bradley Air Traffic Control Tower, Windsor Locks, Connecticut*, 51 FLRA 1054, 1067-68 (1996); *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Region X, Seattle, Washington*, 39 FLRA 298, 309 (1991). Therefore, the non-unit status of some of the positions in question was not a sufficient basis for the Respondent to reject the Union's request.

For all these reasons, I conclude that the terms of the MLA do not justify Kirtland's refusal to furnish the requested information to the Union. It is necessary, therefore, next to evaluate the Union's multiple information requests in the context of section 7114(b)(4) of the Statute.

2. The Analytical Framework For Evaluating The Union's Information Requests

As the Respondent and General Counsel recognized, the Authority's decision in *IRS Kansas City* sets forth a framework for unions and agencies to process information requests under section 7114(b)(4), as well as for litigating such disputes. Under this framework, a union has the underlying responsibility to articulate its particularized need for the information and to explain how its intended use

9
HUD, supra, 40 FLRA at 1121-22.

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The first of five vacancies cited in G.C. Exhibit 4, and the supervisory position cited in G.C. Exhibit 23, are outside the bargaining unit.

of the information relates to its representational duties. It cannot meet this obligation by making simple declarations of need or conclusory assertions. Moreover, if the dispute reaches litigation, the union's need for the information will be judged by how well it articulated its need at or near the time it made the request, not at the hearing. Agencies have a parallel set of responsibilities. Once a union has made its request for information and articulated why it needs it and how it will use it, the agency must respond by either furnishing the information or asserting and establishing its countervailing anti-disclosure interests. And like the unions, agencies cannot meet this obligation with bare conclusions or by simply saying "no." In other words, the framework calls for the parties to undertake an ongoing exchange concerning their respective interests. It requires the exchange to occur in a timely manner when the request is made, not months or years later during litigation, and it encourages the parties to accommodate the other's interests by considering alternative forms or means of disclosure. 50 FLRA at 670-71. If the parties do not reach agreement, *IRS Kansas City* provides (50 FLRA at 671):

> an unfair labor practice will be found if a union has established a particularized need, as defined herein, for the requested information and either: (1) the agency has not established a counter-vailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need.

In cases since *IRS Kansas City*, the Authority has emphasized the dynamic and mutual nature of the process. One party's satisfaction of its obligation often depends on the degree to which it has responded to the countervailing interests articulated by the other party. Therefore, unions have not established particularized need when they have failed to respond adequately to agency requests for clarification or to agency expressions of countervailing interests. *U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and U.S. Department of the Treasury, Internal Revenue Service, Oklahoma City District, Oklahoma City, Oklahoma*, 51 FLRA 1391, 1395-96 (1996); *U.S. Equal Employment Opportunity Commission*, 51 FLRA 248, 257-58 (1995) ("*EEOC*"). On the other hand, when a union met with the agency and discussed its need for information in detail, and the agency failed to raise a particular concern about the information, the Authority has allowed the union to explain its need for the information as late as the ULP hearing. *U.S. Department of Justice, Immigration and*

Naturalization Service, Northern Region, Twin Cities, Minnesota, 51 FLRA 1467, 1475-76 (1996). These holdings further the Authority's stated purposes of facilitating a timely and mutual exchange between union and agency concerning their respective interests in disclosure, and of encouraging the parties to reach accommodations of their interests short of litigation. They encourage parties to express their interests at or near the time of the information request, and they penalize parties that make bare or conclusory assertions or simply say "no."

Based on the record in this case (including my impressions of the demeanor of the witness), it appears to me that Mr. Houha and the Respondent generally tried to apply the principles of *IRS Kansas City* and its progeny, whereas the Union seems to have been motivated by the twin goals of making Kirtland management do as much paperwork as possible while doing as little work itself as possible. Ms. Maxwell was singularly uninformed about the entire process of handling merit staffing grievances, and as late as the hearing she didn't know what many of the documents were that she was requesting from the Respondent. She had only recently assumed the position of Office Manager for the Union in June 2001, but if she did not fully understand the merit staffing process, it was incumbent on her and the Union to utilize other Union representatives to pursue their information requests and potential grievances with the Respondent. Although Union President Steve Remenar signed many of the information requests, he does not appear to have taken any personal role in resolving the lengthy dispute between Houha and Maxwell, and nobody from the Union accepted Houha's many requests to meet and discuss the issues. Similarly, even though Maxwell clearly didn't know anything about several of the documents in question, the General Counsel didn't present any other witnesses to explain the nature of (much less the need for) those documents.

Looking at the Union's correspondence as a whole in these cases, it is also true that it couched its information requests in only the most general and brief terms; and when Houha asked the Union to explain its requests more fully, the Union simply responded that it had already done so sufficiently (*see, e.g.*, G.C. Exhibit 17, paragraph 7, and G.C. Exhibit 21, paragraph 6). While I will examine the sufficiency of the Union's articulated need for each item individually below, it is worth noting that its explanation for each piece of information, and for each of the many vacancies in question, was the same: the Union said it needed the information "in order to perform Post-Promotion Audit(s), and ensuring compliance with Merit System

Principles, 5 CFR 335 Section 103, and to monitor contract compliance." The Union's stated representational purpose was "to address bargaining unit employees' concerns quickly." G.C. Exhibits 4, 5 *et al*. When Mr. Houha asked Maxwell to explain the Union's need for the information more specifically, she responded, "To address bargaining unit employees concerns. To represent the employee in obtaining the information . . . ." G.C. Exhibit 21, paragraph 4b. In response to Houha's query as to what use the Union would put the information, Maxwell replied, "to support the employee in any further legal actions needed or required to fully satisfy the employee's rights and to make the employee whole." *Id.* at paragraph 4c. None of these answers related specifically to the merit promotion process or how the information would help the employees. It is clear that the Union was relying entirely on one-size-fits-all boilerplate language for its requests, in the apparent hope that these phrases (like magical incantations) would justify all their requests and open all doors. This is not in the spirit of *IRS Kansas City*.

In comparison, Houha's letters to the Union were detailed and conciliatory. After telling the Union how its information requests had fallen short of the law, he set forth the specific questions it had to answer for each piece of information. He then articulated in his own words some of the Union's legitimate interests in obtaining information in promotion cases, and he even pointed out that the Union had failed to ask for the most important piece of information: the reason why an employee was not placed on a certificate (G.C. Exhibit 13, page 4, second bulleted paragraph; G.C. Exhibit 18, page 3). He practically pleaded with the Union to meet with him to resolve the problem, but the Union never took him up on his offer (Tr. 336-37, 339-40). Even after Maxwell learned of the Air Force's settlement with the union at Hill Air Force Base, she didn't bother to tell Houha (who does not work at Hill) that she based her information requests on that settlement. Indeed, the Union seems to have gone out of its way to avoid direct discussion of its requests with Kirtland management. This again is not in the spirit of *IRS Kansas City*.

Although Houha continued to raise objections to the information that I have found to be insufficient under the Statute, other questions he raised warranted a substantive response by the Union. For instance, he noted that some of the information requested (*e.g.*, the name of every person considered for each vacant position) was very broad and ambiguous and would require obtaining documents from other Air Force activities. Houha asked the Union to explain what it meant by "considered" for a position - whether this meant

everyone who applied for the position (which could include hundreds of people), everyone who was found qualified, or everyone who was placed on a best-qualified certificate. He also noted (albeit briefly) that the Privacy Act may prohibit disclosure of some of the name-identified information requested by the Union, such as the names of employees "considered" but not listed on the certificate, or the names of employees listed on the certificate but not selected. Since the MLA specifically provides for the Union or employee to obtain certain types of information upon request (or in conjunction with the processing of a grievance), Houha further asked the Union why the information specified in Article 12 would not satisfy its representational needs. Even if a union's right to information is broader under the Statute than under a collective bargaining agreement, it is legitimate for an agency to ask what representational interests are not satisfied by the items specified in the contract. The Union never answered this last question.

Houha's requests for elaboration from the Union were particularly relevant in the context of promotion grievances, because of the many stages of a merit staffing action. Applicants must first be screened to determine whether they meet the minimum qualifications of a vacancy, then evaluated to select a best-qualified list, before the selecting official chooses the successful candidates. Information that might help an applicant who made the best-qualified list ascertain whether he was treated fairly, may be totally different from the information needed by an employee who applied but was not found minimally qualified. Houha tried to explain the importance of these distinctions in his replies to Maxwell (*see, e.g.* G.C. Exhibit 13 at 4), but Maxwell refused to identify the grievants or even to specify what part of the promotion procedure was being questioned in each case. The Union refused to narrow the scope of its requests at all, without properly explaining why.[11]

It is the contrast between the Union's lack of specificity and the Respondent's detailed explanations that distinguishes this case from *Health Care Financing Administration*, 56 FLRA 503 (2000). The Authority found there that the Union was entitled to a great deal of information relating to the filling of promotions, much as

[11] Although a union is not required to reveal its strategies or compromise the anonymity of a potential grievant, it must still provide management with enough information to make a reasoned judgment about the disclosability of the requested information. *IRS Kansas City*, 50 FLRA at 670.

in the instant case. But the Authority also noted that if the agency had been uncertain about the union's need for any information, it should have explained its questions to the union at the time of the request, thereby shifting the responsibility to the union to clarify its request. 56 FLRA at 507 n.3. This is precisely what Mr. Houha did in the instant case, and the Union's failure to clarify its requests reflects its misunderstanding of section 7114(b)(4).

On the other hand, a glaring weakness in the Respondent's case is its failure to furnish the Union with any information whatever. Indeed, Mr. Houha's letters to the Union never offered a specific response to each piece of information it had requested. Rather, he asked the Union for a detailed explanation of its need for each item, and when the Union refused to provide any additional explanation, he simply refused the entire request. Notwithstanding the Union's failure to offer anything additional, I believe the Respondent was still obligated to respond individually concerning the items on the information request to the best of its ability, and to furnish those documents meeting the requirements of section 7114(b)(4).

3. The Union's Specific Information Requests

With these general observations in mind, I will discuss each item requested by the Union.

a. Name(s) of every person considered for the above vacant position

This request is phrased in the broadest manner possible, and the Union resisted all efforts by the Respondent to narrow the request or to explain why a narrower range of information wouldn't meet the Union's needs. If the anonymous grievants for each position were on the best-qualified list, the names of the persons considered would be irrelevant. Even for a grievant who was not "considered" (and the Union refused Houha's request to define this term), it is unclear why he would need to know the identity of all employees who were considered. Moreover, employees' privacy rights are implicated when it is revealed that they were considered for a position and not selected. *United States Air Force Headquarters, 442nd Fighter Wing (AFRES), Richards-Gebaur Air Force Base,*

Missouri, 50 FLRA 455, 459 (1995).[12] The Union refused to elaborate on its initial statement that this (and all other) information was needed to ensure "compliance with Merit System Principles . . . and to monitor contract compliance."

Perhaps the most illustrative testimony at the hearing occurred when Maxwell was being cross-examined as to why a grievant who had been placed on a best-qualified list would need to know about applicants who had not been placed on the list (Tr. 194-95):

> Q. How is it going to help you answer questions from this guy who's been referred, but he didn't get selected, to be diddling around with information what goes on prior to referral?
>
> A. Again, the information gives the Union a total complete package of what was initiated from beginning to end.
>
> Q. So no matter what the complaint is, you just need the whole big package, is that it?
>
> A. Well, you cannot make a valid decision based on limited information.
>
> . . . .
>
> Q. You just don't need all of information every time, do you?

[12] With respect to this and other items requested, the Respondent did not directly argue that disclosure of the information was "prohibited by law" under 7114(b)(4); rather, it raised the privacy issue in the context of requesting a more particularized explanation of the Union's need for such a broad range of name-identified information. Similarly, Respondent made vague references to the amount of time spent by personnel staff to respond to the Union's requests, but it never actually offered proof that any of the information requested was not "normally maintained" or "reasonably available," or that the information constituted guidance for management. Accordingly, I will evaluate the objections to the Union's requests, as articulated by Mr. Houha, in the context of determining whether the Union demonstrated a particularized need for the information. If I find that the Union has demonstrated a particularized need for a requested item, I also find that the Respondent has not established a countervailing interest against disclosure.

A. Yes, we do.

Maxwell's assertion here is indicative of the Union's rationale throughout this case, and it conflicts with the concept of particularized need in *IRS Kansas City*. Just as the Authority at times prior to *IRS Kansas City* required agencies to furnish information based on a theory of "relevance" as opposed to "necessity," the Union here has demanded everything that might be helpful in its examination of the Respondent's promotions decisions. I believe the Respondent acted reasonably in asking the Union to explain more specifically why it needed all these names in order to accomplish those stated goals, and the Union failed to carry its burden of establishing "particularized need" for this information. Therefore, the Respondent did not commit an unfair labor practice in refusing to furnish this information.

b. Ranking factors used to select the above individual

The record is unclear as to exactly what these "ranking factors" are. When asked, "would the ranking factors reflect where the grievant ranked or would the ranking factors reflect what these criteria were?" Ms. Maxwell replied, "I believe it's the criteria, plus where they ranked, and other individuals ranked." Tr. 297-98. The MLA does not refer to ranking factors, but in defining Promotion Evaluation Patterns (PEPs) in Section 12.09 it does provide that applicants will be "evaluated in terms of evaluation factors established in" the PEPs. A PEP is further defined as "a description of the specific qualifying skills and educational requirements by which employees are screened and evaluated for particular vacancies." *Id*. Thus the "criteria" described by Maxwell appear to be those specified in the PEP, but she further testified that the "ranking factors" also include where each employee ranked for each criterion. Therefore, it appears that the Union was asking for the rating of every person considered for each position, in addition to the PEP for the position (which the Union requested separately in item d).

This is a very broad and intrusive request, even more so than simply the names of all employees considered (requested in item a). Thus for the same reasons as I stated regarding item a, I find that the Union did not adequately articulate its need for so much name-identified information, particularly in light of Houha's explanation of how this information would often be irrelevant to grievants.

d. PEP of the above position

I address this item next, as it relates directly to my discussion of the Union's previous request for ranking factors. The Respondent is required by Section 12.09 of the MLA to evaluate promotion applicants in accordance with factors established in the PEP for the position, and it is required to furnish new or changed PEPs to the Union as a matter of course. The relevance of the PEP to a promotion action is thus clearly set forth in the MLA. An employee should know the factors on which his application is being evaluated, the Union is entitled under the contract to review and comment on the appropriateness of those factors, and the Respondent is not permitted to utilize factors that are not job-related. Section 12.09(c).

Therefore, even the minimal explanation provided by the Union here was adequate to justify its need for the PEP. In each information request, the Union identified the position in dispute and indicated its intent to review whether the Respondent had complied with the MLA and merit system principles in filling that position. It is apparent that the Union would need to have the PEP to understand whether an employee meets the evaluation factors for the position. Indeed, I do not believe the Respondent seriously disputes the Union's need for the PEP, but it seems to have refused to furnish it because the Union had not fully responded to Mr. Houha's requests for more explanation. While I have already indicated that Houha's request for a more detailed explanation of the Union's need for information was reasonable in many respects, Houha did not need any further explanation in order to evaluate the Union's need for the PEPs. Accordingly, I find the Union established a particularized need for this information, and that the Respondent did not set forth any countervailing interests weighing against disclosure. *See* footnote 12, *supra*. By failing to comply with section 7114(b)(4) of the Statute, Respondent violated section 7116(a)(1), (5) and (8).

c. Name(s) and ranking of everyone on the certificate including their Service Computation Date considered for the vacancy

e. Certificates, (including supplement) if appropriate (sanitized, no SSN, B-day) used for the selection of the above position

I am addressing these two items together, because one request directly follows from the other. Together, these requests seek the names, rank and service computation dates (but not the social security numbers or birthdays) of everyone on the best-qualified certificates for each vacancy

filled by the Respondent. These certificates generally show the names (but not the ranking - see Tr. 299) of the ten applicants referred to the selecting official, who has the discretion (within other legal constraints) to select any of the candidates, regardless of their rating or ranking. MLA Sections 12.10, 12.13. An employee or his representative is entitled under Section 12.15 to find out from the personnel office whether or not he was on the certificate, but of course the employee must identify himself to obtain this information. The Union's requests, however, seek the names of all the employees on the certificates, including the names and rankings of non-grievants who were on the best-qualified list but were not selected.

Thus the Union seeks information that non-grieving employees might consider private and might object to. These employees might not want it disclosed that they were unsuccessful candidates, or what their ratings were, and such information could be the source of jealousy among employees. As part of the Union's carrying out its statutory responsibility to monitor application of the MLA and to assist employees in potential grievances, it may be unavoidable for the Union to receive such private information, but the Statute requires disclosure of that information only when it is shown to be "necessary" for the Union's fulfillment of its duties. Mr. Houha asked the Union why it needed to know the names and rankings of employees on the certificate (other than the employees complaining to the Union), rather than the information provided in Section 12.15. The Union responded that some employees wanted to remain anonymous because they were afraid of retaliation, and there is some legitimacy to this argument. But do the privacy interests of those employees override the privacy of the non-grieving candidates, and does it demonstrate the Union's need to have that information? The Union simply asserted that it needed the information to ensure compliance with the contract and merit system principles. It didn't explain why employees who may never have even been found minimally qualified needed to know information about the best-qualified employees. While preserving the anonymity of its grievants, the Union didn't even identify what stage of the promotion process the complaining employees reached, so that the Respondent could have better evaluated the relevance of the certificates to the complaints of the grievants.

In many cases, I believe that the names and rankings of the employees on the certificates might well be necessary for the Union, particularly if the complaining employees had made the best-qualified list, because then the relative qualifications of the named employees would be directly

relevant to the grievants. (Indeed, Houha had given Maxwell the certificate in a prior grievance.) But the Union here did not explain the situation and its specific interests in any detail to the Respondent, and this was not sufficient to enable the Respondent to evaluate the requests. In the context of the lengthy correspondence between Maxwell and Houha, I believe Houha's requests to meet and discuss the particulars of the requests with the Union placed the responsibility on the Union to explain its particularized interests in more detail. The Union failed to meet that responsibility, and thus I find that it didn't demonstrate its need for the certificates or the rankings of employees on the certificates.

f. The highest progression level reached by employees on the certificate

The same reasons expressed above, for denying the request for the names and rankings of the employees on the certificates, are applicable here as well. But there is a more fundamental reason for denying this request: it asks for information that is inherently in the certificate itself. Ms. Maxwell's explanation at the hearing (Tr. 305-6) of what the "highest progression level" means, conflicts with the meaning expressed in Section 12.15(b) of the MLA. That section entitles a nonselected employee to be told whether he was among the best-qualified employees on the certificate, and "if not, the highest progression level reached by the employee in the screening process, if applicable." It is clear that, contrary to Maxwell's belief, the "highest progression level" doesn't include information about an employee's education or experience, but simply what stage of the promotion process the employee reached. If the employee is on the certificate, then he reached the final stage of the process. Thus, the Union has asked for nothing in item f that it didn't already request in items c and e.

g. SF 52 fill action

This is the document which actually carries out the decision to fill a particular position with a particular person, and while the contents of the document would certainly have been familiar to employees in Kirtland's civilian personnel office, those contents are not made clear on the record. A sample SF-52 was not offered into evidence, and Ms. Maxwell's testimony at the hearing did not provide much insight into its contents or the Union's need for it in deciding whether to file a grievance protesting a promotion action. In Maxwell's view, the value of the document was the name of the supervisor initiating the personnel action, because it would show a grievant whether he had worked with the supervisor (Tr. 181-82). But when I asked her how this actually helped the Union evaluate the merits of a grievance, she could only say that she was repeating the requests of the grievant (Tr. 183).

From the record, it is impossible for me to determine whether the document is actually necessary for the Union to fulfill its representational purposes. Although it is not clear, it seems entirely possible that the document contains personal identifying information about the promoted employee, and the Union has not asked for the document in sanitized form. It seems unnecessary to me to obtain a document that may contain a wide range of information, if the only thing the Union needs to know is the name of the supervisor on the form. It is also unclear whether the supervisor signing the SF-52 is necessarily the selecting official or someone who provides the selecting official with input on the promotion decision; thus it has not been shown that the document will provide the Union with even the minimal information it seeks. Given these factors, I find that the Union has not demonstrated particularized need for the SF-52 form.

h. Copy of position description of above position

Like the PEP, the need for this document would seem to be self-evident, readily available and uncontroversial. The only reason for the Respondent's failure to furnish it (albeit one not articulated by the Respondent) seems to be the Union's refusal to elaborate on its need for the other documents. As I noted for the PEP, the Respondent should have promptly furnished the Union with those documents whose necessity had been established, rather than treating all of the requests as an inseparable package.

A position description is the logical starting point for any person seeking to understand the duties of a

position being filled. This piece of information, along with the PEP, will educate an applicant, the Union and a potential grievant whether any individual possesses the knowledge, skills and abilities required for the position, and it will enable them to compare their own qualifications to those of the selected individual. Houha gave this document to Maxwell after an earlier request (Tr. 41), and the Union's need for the document is clear, even from the brief explanation offered by the Union in G.C. Exhibit 4 *et al*. I therefore find that the Respondent committed an unfair labor practice in refusing to furnish the position description in response to the Union's multiple requests.

i. Copy of EEO goal sheet(s) for the certificate and for any supplemental certificates

This is another example of Ms. Maxwell asking for something that she really didn't understand, and as a result, the record affords me no factual basis for evaluating its necessity. She testified that the EEO goal sheet is "used for affirmative action to ensure that minority employees are being considered for positions" (Tr. 314); that it "identifies how many employees there are in that section, and what their race and nationality are" (Tr. 327); and that employees had complained about possible unlawful discrimination in the filling of positions (Tr. 314-15). A sample of the document was not offered into evidence. The Union certainly has an important role in monitoring the Respondent's compliance with the MLA and the law regarding nondiscrimination in promotions. But I have no idea, based on the record, how the requested information helps the Union in performing this function, and I don't think Maxwell has any idea either. It may well be that such a document provides useful information that might reveal the basis for suspecting racial or other discrimination, but the information requests and the subsequent explanations submitted by the Union to Houha did not articulate any rationale to support such a conclusion. In light of these gaps, I conclude that the Union did not demonstrate a particularized need for the EEO goal sheets.

j. Selectee's career brief (sanitized with current position and past experience only; delete name, SSN, appraisal, education, training, etc.)

Although a sample of this document was not offered into evidence, it appears to be a record of the promoted employee's education, training and job experience. The Union was seeking only to know the selectee's job experience (Tr. 308-09). As explained by Maxwell, this information would enable other applicants to compare their own

background to the selectee's and to ascertain whether they might have grounds to pursue a grievance. *Id*. Although this explanation was not offered by the Union in its information requests, it seems evident from the request itself. In comparison to other requests that sought information about all employees considered for the vacant position or all employees on the certificate, this request seeks a limited amount of information about the selectee only, and none of that information raises any significant privacy concerns. Information about the past work experience of the selectee is a very useful basis for potential grievants and the Union to make a comparison of qualifications, and thus it would help the grievants and Union to determine whether or not to pursue a grievance. I therefore find that the Union demonstrated a particularized need for this information and that the Respondent violated the Statute in refusing to furnish it.

k. If appropriate, copy of staff summary

Maxwell testified that she did not know what a staff summary is (Tr. 317), and it certainly is not evident to me from the remainder of the record. Regardless of what Hill Air Force Base management might have agreed to furnish to its union, Local 2263 had an obligation to understand the significance and usefulness of each piece of information it sought. How this staff summary relates to the promotion process and helps the Union fulfill its representational duties concerning these promotions is unknown here. The Union has not demonstrated a need for the staff summary, whatever it may be.

l. Interview questions and benchmarks

The MLA establishes certain parameters for a selecting official in conducting interviews. Section 12.12 allows the selecting official to decide whether or not he wishes to conduct interviews of the employees on the best-qualified list, but he is required to interview all certified employees or none. Section 12.09 prohibits the Respondent from using factors that are not job-related at any stage in the process. Therefore, although the Union offered no significant explanation of its reasons for requesting the interview questions, those reasons should have been evident to anyone in the civilian personnel office. In cases where the selecting official didn't interview candidates, Houha would have nothing to furnish the Union, but in situations where interviews were conducted, the interview questions would show the Union what factors the selecting official considered relevant to his selection decision. If the interview question asked for information that was not job-

related, this would provide the Union a basis for a grievance. If the interview questions were all job-related, it would help the Union understand which of many possible criteria the selecting official found most important. If the Union could compare this information with the position description, PEP and the selectee's career brief, it would have a much better idea whether any of the unsuccessful candidates had a legitimate complaint. Therefore I find that particularized need for the interview questions was shown to the Respondent, and it was obligated to respond to the request.

The need for the benchmarks, however, is less clear. Indeed, Maxwell did not know what the benchmarks were (Tr. 317). While it is possible to speculate that the benchmarks identify how the selecting official will rate each interviewee's answers to the interview questions, Article 12 of the MLA does not use this term, and it is equally possible that these benchmarks may contain guidance for management that would give employees an unfair advantage in future interviews.[13] The record simply does not afford me sufficient factual basis to evaluate this portion of the request fully, and thus I cannot find that the Union met its burden of demonstrating a particularized need for the benchmarks.

m. Interview rating sheet (sanitized with selectee(s) name (s) only and total scores of everyone interviewed)

Although Maxwell's testimony describing this request leaves some doubt as to precisely what information she was seeking (Tr. 319-21), the wording of the request itself indicates that the Union wanted to know the identity and interview rating score of the selectee, and the interview score total (without name identification) for each interviewee. As noted previously, the MLA requires the selecting official to interview all of the final candidates or none of them; by obtaining a response to this request, the Union would know whether this provision was complied with, and how the selectee's interview score compared to the other finalists. It would not reveal any potentially private personal information, since only the identity of the selectee would be revealed, and that is not information that can reasonably be kept secret anyway. Thus, while the Union offered little in the way of explanation for this information, the meaning, purpose and use of the information

13 This information might be comparable to a "crediting plan" for rating and ranking applicants, as discussed by the Authority in *Federal Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania*, 51 FLRA 650 (1995).

here was evident from the MLA, and the Respondent should have furnished it. I find that the Union demonstrated particularized need for this information and that the Respondent unlawfully refused to provide it.

n. A copy of the performance plan relative to the position being filled

As usual, Maxwell's testimony describing this document (Tr. 321-24) was not very helpful, but she did state that it is a general document prepared by Respondent to describe the duties and requirements of a position. In this respect, it seems to resemble either a position description or a PEP (or both), but she stated that it sometimes provides more detail than a position description, perhaps in relation to time targets or quantitative expectations of a job (Tr. 323). In all respects, it appears to be a document that relates to the position itself, rather than to the individuals holding or seeking the position; therefore, it contains no potentially private information. The Respondent did not seek to contradict Maxwell's testimony regarding the document or suggest any countervailing interests against disclosure. For the same reasons as I have already stated for PEP and position description, the performance plan is directly relevant to a union monitoring an agency's promotion decisions, and an understanding of a position's performance plan could be invaluable in evaluating the qualifications of applicants. I therefore find that the Respondent was obligated to furnish the Union with this document.

o. Nationality of the selectee of the above positions

As I noted in relation to item m, there is no privacy interest in the identity of the person selected for each vacancy, since this person's identity will be apparent as soon as the promotion takes effect. The nationality of the selectee does involve privacy considerations, however. The selectee's nationality will not necessarily be apparent, and this could subject the employee to discrimination from others. The General Counsel asserted in its post-hearing brief (at page 54) that item o doesn't request the selectee's identity, but the Union did request that information in item m, and it will soon become apparent anyway. Race, gender and nationality information does not implicate privacy interests when it is given for an entire organization, but here the nationality of the selectee personally would become known. While the Union has a clear and legitimate representational interest in monitoring compliance with prohibitions against the Respondent discriminating in promotions on the basis of nationality,

the Union did not sufficiently explain in this case why it needed to know the nationality of each selectee. If the Union knew, for instance, that the person selected was the member of a particular national minority, or that he was not a minority member, would that help the Union decide to file a grievance? Simply on its face, without specific justification by the Union, I cannot find that this information was essential. And as I have often noted, the Union did not provide the required explanation of how this personalized nationality information would serve its representational interest. Accordingly, I conclude that the Respondent was not obligated to furnish this information.

Conclusion

To summarize, I conclude that the Respondent violated Section 7116(a)(1), (5) and (8) of the Statute by refusing to furnish the Union with items d; h; j; the interview questions in item l; m and n in each of the ten information requests. To remedy the unfair labor practices, it is appropriate to direct the Respondent to cease its unlawful actions and to furnish the Union with this information.

On the other hand, the Respondent was not required to furnish, and did not violate the Statute by refusing, items a; b; c; e; f; g; i; k; the benchmarks in item l; and o. It is appropriate, therefore, to dismiss these portions of the Consolidated Complaints.

For the reasons stated above, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the United States Department of the Air Force, Air Force Materiel Command, Kirtland Air Force Base, Albuquerque, New Mexico (the Respondent) shall:

1. Cease and desist from:

(a) Failing or refusing to furnish the American Federation of Government Employees, AFL-CIO, Local 2263 (the Union), with Items d, h, j, l (interview questions), m and n of the Union's information requests of July 11, 25 and 30, 2001, August 9 and 16, 2001, January 23, 2002, February 1 and 28, 2002, and April 29, 2002, regarding the positions of Equipment Specialist (Weapons Maintenance Section), Inventory Management Specialist (AA/WNL), Cost Analyst (58th

Logistics Group), Program Analyst (377 MSS/DPC), Management Analyst (ABW/XP), Special Emphasis Program Specialist (377 ABW), Secretary (Air Force Inspection Agency), Secretary (Air Force Research Laboratory), Office Automation (Air Force Research Laboratory), Equipment Specialist (Aircraft/ Airframe)(58 OG/OGQ), Purchasing Agent (AFOTEC/RMC), Contract Specialist (377 Contracting Squadron/LGCA), Firefighting Equipment Dispatcher Supervisor (377th SPTG/CEF Fire Department), High Voltage Electrician (Civil Engineering), and Training Management Specialist.

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

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

(a) Furnish the Union with Items d, h, j, l (interview questions), m and n of the Union's information requests of July 11, 25 and 30, 2001, August 9 and 16, 2001, January 23, 2002, February 1 and 28, 2002, and April 29, 2002, regarding the positions of Equipment Specialist (Weapons Maintenance Section), Inventory Management Specialist (AA/WNL), Cost Analyst (58th Logistics Group), Program Analyst (377 MSS/DPC), Management Analyst (ABW/XP), Special Emphasis Program Specialist (377 ABW), Secretary (Air Force Inspection Agency), Secretary (Air Force Research Laboratory), Office Automation (Air Force Research Laboratory), Equipment Specialist (Aircraft/Airframe) (58 OG/OGQ), Purchasing Agent (AFOTEC/RMC), Contract Specialist (377 Contracting Squadron/LGCA), Firefighting Equipment Dispatcher Supervisor (377th SPTG/CEF Fire Department), High Voltage Electrician (Civil Engineering), and Training Management Specialist.

(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 377 Airbase Wing Commander and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that these Notices are not altered, defaced, or covered by other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Dallas Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, August 31, 2004.

_____

RICHARD A. PEARSON
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 United States Department of the Air Force, Air Force Materiel Command, Kirtland Air Force Base, Albuquerque, New Mexico violated the Federal Service Labor-Management Relations Statute (the 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, AFL-CIO, Local 2263 (the Union), with Items d, h, j, l (interview questions), m and n of the Union's information requests of July 11, 25 and 30, 2001, August 9 and 16, 2001, January 23, 2002, February 1 and 28, 2002, and April 29, 2002, regarding the positions of Equipment Specialist (Weapons Maintenance Section), Inventory Management Specialist (AA/WNL), Cost Analyst (58th Logistics Group), Program Analyst (377 MSS/DPC), Management Analyst (ABW/XP), Special Emphasis Program Specialist (377 ABW), Secretary (Air Force Inspection Agency), Secretary (Air Force Research Laboratory), Office Automation (Air Force Research Laboratory), Equipment Specialist (Aircraft/ Airframe)(58 OG/OGQ), Purchasing Agent (AFOTEC/RMC), Contract Specialist (377 Contracting Squadron/LGCA), Firefighting Equipment Dispatcher Supervisor (377th SPTG/CEF Fire Department), High Voltage Electrician (Civil Engineering), and Training Management Specialist..

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

WE WILL, upon request, furnish the Union with the information specified above.

_____
377 Airbase Wing Commander

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, Dallas Regional Office, whose address is: Federal Labor Relations Authority, 525 Griffin Street, Suite 926, LB-107, Dallas, TX 75202-1906, and whose telephone number is: 214-767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case Nos. DA-CA-01-0876, DA-CA-01-0877, DA-CA-01-0963, DA-CA-01-0964, DA-CA-01-0965, DA-CA-01-0968, DA-CA-01-0969, DA-CA-02-0320, DA-CA-02-0373 and DA-CA-02-0603, were sent to the following parties:

_____

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CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

William D. Kirsner **7000 1670 0000 1175 4311**
James P. Hughes
Federal Labor Relations Authority
525 Griffin St., Suite 926, LB-107
Dallas, TX 75202-1906

Steven E. Sherwood **7000 1670 0000 1175 4328**
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1501 Wilson Blvd., 7th Floor
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Michelle Sandoval **7000 1670 0000 1175 4304**
Secretary Treasurer
AFGE, Local 2263
PO Box 5477
Albuquerque, NM 87185

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

Dated: August 31, 2004
Washington, DC