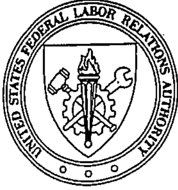


FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-06

SOCIAL SECURITY ADMINISTRATION
OFFICE OF DISABILITY ADJUDICATION AND REVIEW
FORT SMITH, ARKANSAS

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 215, AFL-CIO

CHARGING PARTY

Case Nos. DA-CA-12-0078
WA-CA-12-0408

Douglas J. Guerrin
For the General Counsel

Eric Garcia
For the Respondent

James E. Marshall
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority/FLRA), Part 2423.

On August 14, 2012, the American Federation of Government Employees, Council 215, AFL-CIO (Union) filed an amended unfair labor practice (ULP) charge with the Dallas Regional Office of the FLRA against the Social Security Administration, Office of Disability Adjudication and Review (Respondent). (Case No. DA-CA-12-0078) (G.C. Ex. 1(c)). On September 26, 2012, the Acting Regional Director issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by failing to

comply with § 7114(b)(4) of the Statute when it refused to provide the Union with information related to the grievance of a performance appraisal. (G.C. Ex. 1(e)). On October 15, 2012, the Respondent filed an answer to the complaint in which it admitted certain allegations and denied others, including the allegation that a violation of the Statute occurred. (G.C. Ex. 1(f)).

On April 16, 2012, the Union filed a second ULP charge against the Respondent with the Washington Regional Office of the Authority. (Case No. WA-CA-12-0408) (G.C. Ex. 1(j)). The case was transferred to the Chicago Regional Office of the Authority on April 17, 2012. *Id.* On November 1, 2012, the Regional Director of the Chicago Region of the Authority issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by failing to comply with § 7114(b)(4) when it refused to provide the Union with sanitized copies of certain employees' fiscal year (FY) 2011 performance appraisals. (G.C. Ex. 1(l)). The Respondent filed an answer on November 15, 2012. (G.C. Ex. 1(m)). It admitted certain allegations and denied others, including the allegation that a violation of the Statute occurred. *Id.*

On November 21, 2012, the Chief Administrative Law Judge of the Authority issued an order granting the Respondent's motion that the two complaints be consolidated for hearing. (G.C. Ex. 1(n)). A hearing was held in Washington, D.C. on March 7, 2013. The parties were afforded a full opportunity to be represented and heard, to examine and cross-examine witnesses, introduce evidence and make oral arguments. The General Counsel and the Respondent filed timely post-hearing briefs that have been fully considered.

Based upon the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (G.C. Exs. 1(e) & 1(f)). The Union is a labor organization under 5 U.S.C. § 7103(a)(4) and is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

1. Case No. DA-CA-12-0078

The Respondent developed a performance appraisal system known as the "Performance Assessment and Communications System" (PACS). (Jt. Ex. 3; Tr. 49). PACS was incorporated into Article 21 of the parities' collective bargaining agreement (CBA). (Tr. 48). Under PACS, there is a one year appraisal period from October to September. (Jt. Ex. 3).

PACS is essentially a three-step rating system. First, at the beginning of the appraisal period, a supervisor will meet with an employee to discuss performance expectations. (Jt. Ex. 3; Tr. 54). The discussion serves to "let the person know exactly what's expected of

them" and to define the "elements" used to determine level of performance. *Id.* Performance expectations must be documented in a performance plan, signed by the employee, and placed in the employee's local personnel folder. (Jt. Ex. 3).

Second, there is a formal performance discussion that occurs near the mid-point of the appraisal year. (Jt. Ex. 3; Tr. 55). During the discussion, supervisors discuss with employees individually their results and contributions and outline expectations going forward. *Id.* The discussion is documented, signed, and placed in the employee's personnel folder. (Jt. Ex. 3).

Third, there is an annual performance appraisal that occurs at the end of the appraisal year. (Jt. Ex. 3; Tr. 55, 56). The annual appraisal is documented, signed by the employee, and placed in the employee's personnel file. (Jt. Ex. 3).

The annual performance appraisal is based on the first two steps: the performance plan and the mid-year performance discussion. (Jt. Ex. 3). Employees have the option of documenting a self-assessment which highlights accomplishments relevant to the performance plan. *Id.* If an employee provides a self-assessment, the supervisor should consider it. *Id.* Supervisors should also consider appropriate feedback from team leaders, factors outside the employee's control, and appropriate numeric data. *Id.* However, only the initial, midyear, and final performance appraisal are required to be documented by the supervisor. (Jt. Ex. 3; Tr. 75).

Generally, the Respondent's employees are rated at a level 5, 3, or 1 on each of the following "elements": (1) interpersonal skills, (2) participation, (3) demonstrates job knowledge, and (4) achieves business results. (Jt. Ex. 3; Tr. 50). A level 5 ranking is an outstanding contribution, a level 3 ranking is a successful contribution, and a level 1 ranking is not successful. (Jt. Ex. 3).

Marcia Witcher is a GS-8 Case Intake Technician at the Respondent's Fort Smith, Arkansas office. (G.C. Exs. 1(e) & 1(f)). Witcher is an employee under 5 U.S.C. § 7103(a)(2) and is a bargaining unit employee represented by the Union. *Id.* On October 25, 2011, Witcher received her annual performance appraisal. (Jt. Ex. 2). Jerry Jenkins, the Hearing Office Director at the Fort Smith office, was Witcher's supervisor and appraiser. (Jt. Ex. 2; Tr. 16, 17). Witcher received a rating of 3 for interpersonal skills, 3 for participation, 5 for demonstrates job knowledge, and 3 for achieves business results; her final rating was "fully successful" for FY 2011. (Jt. Ex. 3; Tr. 34, 35).

Witcher was dissatisfied with her rating and, with the aid of the Union, filed a grievance on October 26, 2011 challenging the appraisal. (Jt. Ex. 2). Within the grievance, the Union submitted the following information request:

> All documents, including memory jogger notes prepared by HOD Jenkins, that were considered and/or not considered in the appraisal of Ms. Witcher, but relating to items 1, 2 and 4. This includes, but is not limited to e-mail messages between HOD Jenkins and the HOCALJ and any other documents maintained on a computer or electronic storage media. *Id.*

The Union required the information to "fully understand how Mr. Jenkins arrived at his final rating for items 1, 2, and 4 and to help present the grievance to the Agency's grievance decision makers." *Id.* On November 8, 2011, the Respondent replied to the request contending that the Union failed to state a particularized need, that the request was overbroad, that the request failed to make a connection between the necessity for the information and the Union's representational purposes, and that the information was internal, intra-agency documentation not subject to disclosure. (Jt. Ex. 3).

Despite its various arguments against disclosure, the Respondent provided the Union with the "documents used in determining the grievant's final rating." *Id.* This included the PACS Manual, the official job description for a case intake technician, and a copy of Witcher's FY 2011 initial performance plan, mid-year performance discussion; annual performance appraisal; and self-assessment. *Id.* The Respondent also informed the Union that it did not maintain any additional information relied upon for the appraisal in written form. *Id.*

On November 14, 2011, the Union sent a "resubmission" of its earlier information request. (Jt. Ex. 4). It requested:

(1) "the statistical measurements and the application used to assess Ms. Witcher's performance." *Id.*

(2) "the procedures that were utilized to gather information to evaluate Ms. Witcher's actual performance for Items 1, 2 and 4 and how the accuracy of such information was determined." *Id.*

(3) the "records that relate to Ms. Witcher's performance appraisal covered by Article 21, Section 6 G.6." *Id.*

(4) the "factors that [Jenkins] considered that were beyond the control of Ms. Witcher and how it affected her performance." *Id.*

The Union provided a separate particularized need statement for each request. In summary, the Union claimed that the information was necessary to determine the appropriate representational course of action in Witcher's grievance. *Id.*

On November 17, 2011, the Respondent denied the request for information. (Jt. Ex. 5). The Respondent contended that it previously provided the Union with copies of "all written documents which contain information or evidence relied upon by the Agency as the basis of its performance evaluation" of Witcher. *Id.* In response, the Union filed a ULP complaint in Case No. DA-CA-12-0078. (G.C. Ex. 1(a)).

On November 30, 2011, the Union submitted another information request related to the performance appraisal of Witcher. (Jt. Ex. 6). The Union requested that Jenkins explain how his personal "observations" affected Witcher's appraisal. *Id.* The Union also requested that Jenkins provide the date and time of each observation and further explain when and how

each observation was communicated to Witcher. *Id.* The Union required the information to "determine the appropriate representational course of action" for Witcher's grievance and to employ the information in term bargaining over Article 21. *Id.*

On December 9, 2011, the Respondent informed the Union that it already provided all copies of documents relied upon for its performance appraisal of Witcher. (Jt. Ex. 7). The Respondent also notified the Union that it did not possess any documentation containing Jenkins's personal observations. *Id.*

On August 14, 2012, the Union amended its original ULP charge; the amended charge did not include the denial of the November 30, 2011 information request. (G.C. Ex. 1(c)).

1. Case No. WA-CA-12-0408

In February 2012, the Union submitted Witcher's grievance for arbitration. (Tr. 13). On March 13, 2012, the Union requested that the Respondent provide sanitized copies of FY 2011 appraisals of Case Intake Technicians, in Region VI, by office location, who were rated at least a Level 5 for items 1, 2, or 4 under PACS. (Jt. Ex. 8; Tr. 13). The Union contended that it required the information to prepare for Witcher's arbitration. (Jt. Ex. 8). The Union also required the information "for national contract negotiations of Article 21 scheduled for June 2012 to address the possible arbitrariness or inconsistencies of the Agency's evaluation methods . . . in connection with the PACS appraisal system." *Id.*

On April 4, 2012, the Respondent denied the Union's request, stating that it failed to articulate a particularized need for the information. (Jt. Ex. 9). The Respondent asserted that Case Intake Technicians in other offices were not similarly situated to Witcher. *Id.* Instead of sending the requested information, the Respondent sent one sanitized FY 2011 appraisal of the other Case Intake Technician in the Fort Smith, Arkansas office. *Id.* The following day, the Union re-sent the request, along with the Respondent's reply, and asked the Respondent to provide the requested documentation or address the Union's necessity for the information in contract negotiations. (Jt. Ex. 10; Tr. 32).

On April 13, 2012, the Respondent informed the Union that it would not provide the information because the Union "failed to make a connection between how the information request will help the Union in fulfilling its representational responsibilities." (Jt. Ex. 11).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the information requested in Case Nos. DA-CA-12-0078 and WA-CA-12-0408 met the statutory requirements of § 7114(b)(4) and that the Respondent's failure to furnish this information violated § 7116(a)(1), (5) and (8) of the Statute. The GC contends that the information requested by the Union was normally maintained by the Respondent in the regular course of business, reasonably available, and does not constitute guidance, advice, counsel or training related to collective bargaining.

1. Case No. DA-CA-12-0078

The GC utilizes the analytical framework set forth in *IRS, Wash., D.C.*, 50 FLRA 661 (1995) (*IRS*), to argue that the Union articulated a particularized need for each request and established that the information was "necessary," as defined by the Statute. Specifically, the GC contends that the requested information was related to Witcher's grievance and was necessary to present the grievance. The GC relies on *DHH, SSA, Balt., Md.*, 37 FLRA 1277, 1284-85 (1990) (*HHS, SSA*) to contend that memory joggers are normally maintained by an agency and are subject to disclosure.

The GC further alleges that the Respondent's information disclosure was inadequate. The GC stresses that the information provided by the Respondent failed to illustrate what Jenkins relied on in his appraisal of Witcher.

2. Case No. WA-CA-12-0408

Utilizing the *IRS* framework, the GC argues that the Union's information request stated a particularized need and was "necessary." In particular, the GC asserts that the Union articulated that it required the information for arbitration to show that Witcher was treated unfairly, and the request was made in conjunction with the Union's representation of Witcher.

The GC also refutes the Respondent's contention that only employees with the same supervisor are similarly situated, stating that the Respondent's argument is based on non-precedential Merit System Protection Board case law.

As a remedy, the GC seeks an order requiring the Respondent to provide the Union with all documents, including memory joggers, emails, personal observation notes and performance tracking measurements used by Jenkins to evaluate Witcher for her 2011 performance appraisal and copies of all FY 2011 appraisals, covering October 1, 2010 through September 30, 2011, for GS-08 Case Intake Technicians for Region VI, broken down by office location, who received at least a level 5 for items 1, 2, or 4. The GC also requests that the Respondent post a notice and send a copy of the notice via electronic mail to all employees in Region VI, informing them that it violated § 7116(a)(1), (5) and (8) of the Statute. The GC requests that the Regional Chief Judge of the Office of Disability Adjudication and Review, Region VI, sign the notice.

Respondent

1. Case No. DA-CA-12-0078

The Respondent argues that the Union failed to establish a particularized need. It asserts that the Union only provided a conclusory and overbroad request that failed to draw a connection between the information requested and the information's necessity for the Union's representational responsibilities.

The Respondent further contends that it provided the Union with all of the documentation used to determine Witcher's final rating, as requested by the Union. The Respondent avers that it does not possess any of the additional information requested and that it is not required to provide nonexistent records or create documents based on information that it does not maintain. *U.S. Dep't of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 37 FLRA 987 (1990) (*McClellan AFB*).

The Respondent also alleges that the Union's November 30, 2011 information request cannot be reviewed by the Authority because it was not contained in the complaint or charge.

2. Case No. WA-CA-12-0408

The Respondent argues that its refusal to provide copies of all FY 2011 appraisals for GS-08 Case Intake Technicians was not a violation of the Statute because the other Case Intake Technicians were not similarly situated to Witcher, and therefore the information was not "necessary." The Respondent asserts that by providing the appraisal for the other Case Intake Technician in the same office as Witcher, it provided the Union with all the necessary information.

The Respondent also asserts that the Union's request failed to state a particularized need. Specifically, the Respondent contends that the purpose of the request is to conduct a general audit of the Respondent's actions, which is not necessary.

The Respondent argues that, if a remedy is ordered, an electronic posting is inappropriate because the GC did not provide physical evidence that the Respondent typically communicates via email with its bargaining unit employees. The Respondent also contends that any posting or email Order should be limited to the Fort Smith, Arkansas Office.

ANALYSIS AND CONCLUSIONS

Section 7114(b)(4) of the Statute provides that an agency has the duty to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. 5 U.S.C. § 7114(b)(4).

1. Case No. DA-CA-12-0078

a. Preliminary issues

As a general rule, the Authority does not review allegations that are not included in the complaint. *See e.g., AFGE, Local 2501, Memphis, Tenn.*, 51 FLRA 1657, 1660 (1996). However, the Authority does not judge a complaint based on rigid pleading requirements and

will review matters that are "fully and fairly litigated" between the parties, even if such matters are not specified in the complaint. *Id.* The test of full and fair litigation is whether the Respondent knew what conduct was at issue and whether the Respondent had a fair opportunity to present a defense. *Id.* at 1661.

In this case, neither the amended charge nor the complaint includes the November 30, 2011, information request. (G.C. Exs. 1(c) & 1(e)). However, the record demonstrates that the Respondent fully understood that the November 30, 2011 information request was part of the allegation. The Respondent contested the November 30, 2011, request at the hearing and in its post hearing brief. (R. Br. 22-24). Moreover, the November 30 request did not propagate additional legal theories or allegations; it was merely a clarification of earlier information requests, which were properly included in the charge and complaint. Because the Respondent was aware of the allegations against it and those matters were fully and fairly litigated, the Respondent's defense in this matter is rejected.

b. The alleged failure to provide information

The Respondent argues that it fulfilled its statutory obligation on November 8, 2011, when it provided the Union with all of the "documents [it] used in determining the grievant's final rating." (Jt. Ex. 3). The Respondent contends that any additional information related to the appraisal was not normally maintained in the regular course of business. *Id.*

Under the Statute, if the requested information exists and is physically maintained by the agency, the agency must extract the information and provide it to the Union. *See e.g.*, *McClellan AFB*, 37 FLRA at 993. If the agency denies an information request on the basis that the information is not maintained in any form, the agency must notify the Union of that reason. *SSA, Dallas Region, Dallas, Tx.*, 51 FLRA 1219, 1226-27 (1996) (*SSA, Dallas*). The Authority has consistently held that a ULP cannot be founded upon denial of access to non-existent records. *E.g.*, *Div. of Military & Naval Affairs, State of N.Y., Albany, N.Y.*, 8 FLRA 307, 320 (1982) (*Military & Naval Affairs*).

On October 26, 2011, the Union requested Jenkins's memory joggers and emails related to Witcher's appraisal. (Tr. 17-18). The Respondent provided the "documents used in determining the grievant's final rating" and informed that Union that Jenkins may "have taken into consideration other observations not documented in writing" but the agency did not maintain the information in any form. (Jt. Ex. 3). On November 14, and November 30, 2011, the Union attempted to clarify its initial request by seeking "procedures," "statistical measurements," and explanations of observations. (Jt. Exs. 4 & 6). In both instances, the Respondent replied that it previously provided all of the information it relied upon and that no additional documentation existed. (Jt. Exs. 5 & 7).

The record demonstrates that the Respondent provided the Union with all of the information it relied upon in appraising Witcher. Under the PACS system, a supervisor must rely on a limited number of documents when performing a final appraisal: a performance expectation plan, a documented formal performance discussion, and an optional employee self-assessment. (Jt. Ex. 3). A supervisor may also rely on other information, such as

personal observations or factors that may affect employee performance beyond the control of the employee. *Id.* But, under the PACS system, the supervisor is not required to document personal observations or factors; PACS is "not designed to be a very onerous record keeping-based system." (Tr. 74). It is undisputed that the Respondent provided the Union with Witcher's performance plan, performance discussion, and self-assessment. (Tr. 19).

The GC's reliance on *HHS, SSA* to assert that it is entitled to memory joggers is misplaced. In that case, it was uncontested that the Respondent possessed a memory jogger relevant to the information request. *HHS, SSA*, 37 FLRA at 1284. In this case, there is no evidence in the record that the Respondent maintains, in the regular course of business, any of the information sought by the Union. At the hearing, there was no testimony that Jenkins used memory joggers, that supervisors are required to utilize memory joggers, or that any emails existed between Jenkins and the HOCALJ. Furthermore, no evidence was presented that any procedures were utilized outside of the procedures outlined in Article 21 and the PACS system manual, which was provided to the Union.

Moreover, the Respondent properly informed the Union at every step that it did not maintain any additional information and that it had no duty to explain Jenkins's personal observations or create information under § 7114(b)(4). *See Military & Naval Affairs*, 8 FLRA at 320 (no duty to create records which are not in existence).

The Respondent provided the Union with the requested data that it normally maintained; it was under no obligation to furnish non-existent information. The Respondent appropriately informed the Union, at the time of the denial, that the information did not exist. I find that the Respondent's failure to furnish the requested information did not violate the Statute.

2. Case No. WA-CA-12-0408

a. Preliminary issue

In this case, in its answer to the complaint, the Respondent denied that the information requested by the Union was not prohibited from disclosure by law. (G.C. Ex. 1(m)). However, the Respondent did not contend at the time of the original denial, at the hearing, or in its post-hearing brief, that providing the information in sanitized form, as requested, would be prohibited by the Privacy Act, 5 U.S.C. § 552a. Therefore, I will consider the Respondent to have abandoned its earlier claim that the requested information was prohibited from disclosure by law, and I will not review it further.

b. The alleged failure to provide information

As stated above, under § 7114(b)(4) of the Statute, an agency has a duty to furnish, upon the request of the exclusive representative, information that is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. The record demonstrates that the Union asserted two particularized needs for the sanitized FY 2011 performance appraisals for GS-08 Case Intake

Technicians in Region VI: (1) to prepare for Witcher's arbitration, and (2) to prepare for imminent contract negotiations of Article 21. (Jt. Ex. 8). Information requested for the purpose of grievance arbitration and contract negotiations is unquestionably within the scope of collective bargaining. *See U.S. Dep't of Transp., FAA, New England Region Burlington, Mass.*, 38 FLRA 1623, 1629 (1991). However, the information must still be "necessary," under the Statute.

To demonstrate that information is "necessary", a Union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the Union will put the information and the connection between those uses and the Union's representational responsibilities under the Statute." *IRS*, 50 FLRA at 669-70. A Union's responsibility for articulating its interests requires more than a conclusory or bare assertion. *Id.* at 670. A Union's request must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. *Id.* A Union's interest must be articulated at or near the time of the request and not for the first time at an unfair labor practice hearing. *U.S. DOJ, INS, W. Reg'l Office, Labor Mgmt. Relations, Laguna Niguel, Cal.*, 58 FLRA 656, 659 (2003).

After an information request, the agency must furnish the information, ask for clarification of the request, or identify countervailing disclosure interests. *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 261, 264 (2004) (*Randolph AFB*). An agency does not satisfy its burden by making conclusory or bare assertions. *Id.* Countervailing disclosure interests must be raised at or near the time of the Union's request. *Id.*

When an agency raises legitimate anti-disclosure interests, it is incumbent on the Union to respond in a productive manner. *Id.* at 265. This exchange in dialogue supports the accommodation of both parties' interests through mutual communication and cooperation. *IRS*, 50 FLRA at 670-71.

If the parties do not agree on the disclosure of information, the agency will have committed a ULP if the Union has established a particularized need for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the Union's demonstration of particularized need. *Id.* at 671.

With respect to the first particularized need–the asserted need to prepare for arbitration–the Union stated that it required the information to "help prepare and present to an arbitrator" that Witcher "was [rated] unfairly and inequitably." (Jt. Ex. 8). The Union indicated that the information would help determine whether the Respondent demonstrated "acts of retaliatory discrimination" toward Witcher via the appraisal. *Id.*

In denying the Request, the Respondent stated that the request was overly broad and failed to demonstrate how the performance appraisals of "Case Intake Technicians who are supervised by various different supervisors in 16 hearing offices will aid the Union in

showing that Ms. Witcher was treated unfairly and inequitably." (Jt. Ex. 9) (internal quotations omitted). In the Respondent's view, Case Intake Technicians located in different offices and appraised by different supervisors, were not similarly situated.

Instead of providing the requested information, the Respondent furnished the FY 2011 appraisal of the one other Case Intake Technician who worked in the same office as Witcher and was supervised by Jenkins. *Id.* The Respondent also notified the Union to "provide further clarification," if it wished. *Id.*

Under these circumstances, it was incumbent on the Union to provide an additional explanation or clarification, and it failed to do so. *See U.S. Dep't of the Air Force, AFMC, Kirtland AFB, Albuquerque, N.M.*, 60 FLRA 791, 794 (2005) (A "Union's failure to respond to the request is taken into account in determining whether the Union has established a particularized need for the information."). When the Union replied to the Respondent, it simply resent the request with the same particularized need statement. The Union did not explain why the provided appraisal was inadequate; it did not establish how the Case Intake Technicians were similarly situated; and it did not clarify how a meaningful comparison could be made if the Case Intake Technicians were not similarly situated.

In fact, the Union did not respond to the Respondent's contention that other Case Intake Technicians were not similarly situated until the hearing. At the hearing, the Union's President stated that "[a]ll case intake technicians have the same performance standards." (Tr. 31-32). However, that clarification was not provided to the Respondent at or near the time of the Union's information request. Therefore, it may not be considered in determining whether the Union established a particularized need. *See e.g., Randolph AFB*, 60 FLRA at 264. The Union failed to display the type of dialogue envisioned by the Authority that allows parties to timely evaluate their respective interests in disclosure and reach agreement. *See IRS*, 50 FLRA at 670-71.

The GC correctly recognizes that performance appraisal data requested for the purpose of making comparisons among similarly situated employees has been found "necessary" within the meaning of § 7114(b)(4). *E.g., IRS*, 50 FLRA at 671-73. However, if a Union seeks information that is broader than the circumstances of the request, and it fails to establish a connection between the broader scope of the request and the particular matter referenced, the Union does not establish a particularized need. *See Randolph AFB*, 60 FLRA at 264.

Here, the issue at arbitration is the individual fairness of one appraisal for one employee. The Union requested appraisals from multiple employees covering various offices, region-wide. *Dep't of Justice v. FLRA*, 991 F.2d 285, 290 (5th Cir. 1993) (When the number of affected employees is limited, the Union should be able to meet its representational obligation with less extensive information). As stated above, the Union did not adequately explain the connection between the broad scope of the request (the entire

Region) and the specific matter referenced (Witcher's arbitration). Consequently, the Union's request was not sufficiently specific for the Respondent to make a reasoned judgment as to whether a particularized need for the information existed in connection with the arbitration.

I find that the Union failed to articulate and establish, in a timely fashion, why it required the requested information for Witcher's arbitration. I conclude that the information requested is not "necessary" within the meaning of § 7114(b)(4) for Witcher's arbitration.

As for the second asserted particularized need, the Union articulated, with specificity, why it needed the information (imminent national contract negotiations), the uses for which it would put the information (negotiation of Article 21), and the connection between those uses and the Union's representational responsibilities under the Statute ("to address the possible arbitrariness or inconsistencies of the Agency's evaluation methods in determining who should be rated a Level 5 for Items 1, 2, and 4 in connection with the PACS appraisal system.").

I disagree with the Respondent's contention that the Union's request fails to articulate a particularized need and is tantamount to a general audit request. The Union specifically referenced Article 21 of the parties' CBA in its request. (Jt. Ex. 8). Identifying Article 21 serves to reinforce the Union's need for the information because that Article incorporates the PACS system and deals directly with the Respondent's responsibilities concerning performance appraisals. *Library of Cong.*, 63 FLRA 515, 519 (2009) (a Union's citation to specific provisions in the CBA served to notify the agency that the requested information was "necessary"). The grievance and impending arbitration over the PACS system lend further support to the necessity of the information: it reveals the potential misapplication of the PACS system to the Union's entire membership. *See DHHS, SSA & SSA, Field Operations, N.Y. Region*, 21 FLRA 253, 276 (1986), *rev'd sub nom., AFGE, AFL-CIO v. FLRA*, 811 F.2d 769 (2nd Cir. 1987) (the "necessity" of the information may be evident from the surrounding circumstances). Finally, the Union's request for information came just three months prior to national contract negotiations. *See Id.* (where a request is made when contract negotiations are imminent, the necessity of information may be apparent). The Union specifically referenced the forthcoming date of contract negotiations in its request. (Jt. Ex. 8).

In short, the Union established a particularized need for the information under § 7114(b)(4) of the Statute and satisfied its burden for making a valid information request under the established framework.

The Respondent however, did not satisfy its burden to establish any countervailing anti-disclosure interests. As explained above, the Respondent replied to the initial request by addressing the Union's particularized need relative to the arbitration. (Jt. Ex. 9). When the Union resent the request, it demanded that the Respondent respond to its "Article 21 contract bargaining rationale." (Jt. Ex. 10). In response, the Respondent did not assert any countervailing anti-disclosure interest. Instead, it argued that the information was not necessary. As explained above, I have determined that the information was necessary.

I conclude that the information requested by the Union was necessary within the meaning of § 7114(b)(4) of the Statute for the Union to effectively represent its members in the national contract negotiations concerning Article 21.

REMEDY

The Authority has consistently held that the remedial purposes of the Statute are best effectuated if a Notice is signed by an official designated by the Authority and not by the Respondent. *See U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 36 FLRA 705, 706-07 (1990). By requiring the highest level of the Respondent's management hierarchy to sign, the Respondent acknowledges its obligations under the Statute and its intent to comply with those obligations. *Id.*

I reject the Respondent's contention that the Notice should be limited to the Fort Smith, Arkansas Office and signed by Hearing Office Director Jenkins. Such an order would be inconsistent with the remedial purposes of the Statute. The record demonstrates that the Union's March 13, 2012 request for information was submitted to the Respondent's Office of General Counsel in Region VI. The Notice will be signed by the Regional Chief Judge of the Office of Disability Adjudication and Review, Region VI and posted throughout Region VI.

The Respondent also contends that an electronic posting is inappropriate because the GC failed to provide physical evidence demonstrating that the Respondent communicated via email with bargaining unit employees. The Authority recently held that ULP notices should, as a matter of course, be posted both on bulletin boards and electronically. *See U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014). As such, I will incorporate the electronic dissemination into the Order.

CONCLUSION

I find that the Union provided a particularized need for the March 13, 2012 information request, and the Respondent did not raise a countervailing anti-disclosure interest at or near the time of the request. Thus, the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by not providing the information requested.

It is therefore recommended that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Social Security Administration, Office of Disability Adjudication and Review, Fort Smith, Arkansas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Council 215, AFL-CIO (Union) the exclusive representative of certain of its employees, with sanitized copies of all performance appraisals of Case Intake Technicians in Region VI of the Office of Disability Adjudication and Review, who received at least a Level 5 for items 1, 2, or 4, in FY 2011.

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

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

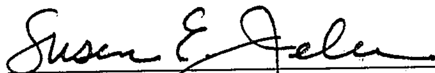
(a) Furnish the Union with sanitized copies of all performance appraisals of Case Intake Technicians in Region VI of the Office of Disability Adjudication and Review, who received at least a Level 5 for items 1, 2, or 4, in FY 2011.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Chief Judge, Office of Disability Adjudication and Review, Region VI, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if the Respondent customarily communicates with employees by such means.

(c) Send the Notice by electronic mail to all bargaining unit employees represented by the Union in the Respondent's Region VI offices. This Notice will be sent on the same day that the Notice is physically posted.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., November 18, 2014



SUSAN E. JELEN
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 Social Security Administration, Office of Disability Adjudication and Review, Fort Smith, Arkansas, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Council 215, AFL-CIO (Union) with sanitized copies of all performance appraisals of Case Intake Technicians in Region VI of the Office of Disability Adjudication and Review, who received at least a Level 5 for items 1, 2, or 4, in FY 2011.

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

WE WILL furnish the Union with sanitized copies of all performance appraisals of Case Intake Technicians in Region VI of the Office of Disability Adjudication and Review, who received at least a Level 5 for items 1, 2, or 4, in FY 2011.

____
(Agency/Respondent)

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 any of its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW., 2nd Flr., Washington, DC 20424, and whose telephone number is: (202) 357-6029.