FEDERAL LABOR RELATIONS AUTHORITY OALJ 15-37
Office of Administrative Law Judges
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION OFFICE OF DISABILITY ADJUDICATION AND REVIEW, REGION III PHILADELPHIA, PENNSYLVANIA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 215, AFL-CIO CHARGING PARTY	Case No. BN-CA-12-0431

Douglas J. Guerrin
For the General Counsel

Dé Famuyiwa
For the Respondent

James E. Marshall
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

One of the most basic principles of journalism is "don't bury the lede." This rule applies equally to most forms of communication,[1] and if it had been followed in this case, a great deal of time, energy, and frustration might have been saved.

Cheryl Mosco was having a hard time getting along with her supervisor, Gardner Blizzard. She objected to various aspects of his periodic appraisals of her work, and she demanded to see any notes he was making to assist him in keeping track of her performance. When her union became aware that Blizzard might be using "memory joggers" to remind him

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[1] *See generally*, www.scilogs.com/communication_breakdown/do-not-bury-the-lead/

of things to discuss with her, the union filed an information request for those memory joggers. Blizzard denied the request on legalistic grounds, but neglected to tell Mosco and the union that he had stopped making such notes, and therefore they did not exist. An unfair labor practice dispute ensued, but it was not until the hearing itself that the union learned that the memory joggers and notes never existed. In other words, Blizzard buried the lede, misled Mosco and the union, and turned a simple problem into a very protracted dispute.

There are two main questions before me. The first is whether the Agency violated the Statute by failing to provide the Union with the requested information. Because an agency cannot be required to provide information that does not exist, the answer is no. The second question is whether the Agency violated the Statute by failing to tell the Union that the requested information did not exist. It is well settled that an agency must tell a union that requested information does not exist. Accordingly, the answer to the second question is yes.

Lest I be accused of burying the lede in this decision, I will emphasize that this case has no winner. The Agency has succeeded in preventing the disclosure of documents that never existed; the Union has succeeded in showing the Agency committed an unfair labor practice, but it will obtain no information as a result. If either side emerges with the belief that this is effective labor-management relations, then the system has lost.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On August 23, 2012, the American Federation of Government Employees, Council 215 (the Union or Charging Party) filed an unfair labor practice charge (ULP), which it amended on August 31, 2012, against the Social Security Administration, Office of Disability Adjudication and Review, Region III, Philadelphia, Pennsylvania (the Agency or Respondent). In that charge, the Union asserted that the Agency violated the Statute when it denied the Union's information request seeking certain supervisory notes pertaining to an employee. GC Exs. 1(a), 1(c). After investigating the charge, the Regional Director of the FLRA's Boston Region issued a Complaint and Notice of Hearing on December 31, 2012, on behalf of the FLRA's General Counsel (GC), alleging that the Agency committed an unfair labor practice in violation of § 7116(a)(1), (5) and (8) of the Statute by denying the information request and refusing to furnish the Union with the requested information. GC Ex. 1(e). The Respondent filed its Answer to the Complaint on January 22, 2013, denying that it violated the Statute. GC Ex. 1(f). The case was transferred to the FLRA's Washington Region on February 14, 2013.

A hearing was held in Washington, D.C., on April 26, 2013. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent 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

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the Social Security Administration. The Charging Party is an agent of AFGE for the purpose of representing bargaining unit employees at the Social Security Administration's Office of Disability Adjudication and Review (ODAR), including employees assigned to work in the Agency's Pittsburgh hearing office. At all relevant times, AFGE and the Social Security Administration were parties to a collective bargaining agreement (CBA).[2] GC Exs. 1(e), 1(f).

This case involves a contentious relationship between an employee and supervisor at the Pittsburgh hearing office. The employee, Cheryl Mosco, is a case intake technician. She also holds the titles of Local President and Regional Vice President for the Union and is on fifty percent official time. Tr. 15, 80, 170. The supervisor, Gardner Blizzard, oversees the work of Mosco and about seventeen other employees. He is responsible for monitoring the processing of cases at the office from the time they are filed to the time they are closed. Tr. 19, 165-66, 191.

In October or November of 2011, Mosco received her annual performance appraisal from Blizzard for the fiscal year ending September 30, 2011; on November 17, 2011, Mosco filed a grievance alleging that Blizzard had rated her performance unfairly. Tr. 16, 21, 26-28; GC Exs. 2, 5. Mosco chose James Marshall, President of AFGE Council 215, to be her representative. Tr. 14, 19. In connection with the grievance, Marshall submitted an information request to Blizzard, in which he asked for all documents Blizzard considered in preparing the appraisal, "including memory jogger notes prepared by you . . . relating to Ms. Mosco's performance . . . ." GC Ex. 3 at 1.[3] Blizzard denied Marshall's request and stated that any supervisory notes used to appraise Mosco's performance were destroyed after the appraisal was written, in accordance with Agency policy. GC Ex. 4 at 4.

On April 30, 2012, Blizzard gave Mosco her mid-year performance appraisal for the 2011-2012 appraisal year. Mosco disagreed with some of what Blizzard wrote in the appraisal, and Marshall submitted a two-page rebuttal on Mosco's behalf, in May 2012. Jt. Ex. 5; Tr. 83.

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[2] There is some evidence that the 2005 CBA had expired (Tr. 38; Jt. Ex. 3). There is no question, though, that the parties were continuing to apply the provisions of the CBA at issue here.

[3] Agency policy defines memory joggers as "personal notes, written or electronic, that supervisors may create for their own use to help them remember and possibly consider, at some future date, something significant with respect to an employee's work situation." GC Ex. 7.

Meanwhile, the grievance filed on November 17, 2011, was winding its way through the parties' negotiated grievance procedure. Ultimately, the grievance was unresolved and went to arbitration in July 2012. Tr. 18, 27; GC Ex. 5. According to Marshall, an Agency attorney stated at the arbitration hearing that Blizzard was maintaining memory joggers and other types of notes regarding Mosco's performance in the 2011-2012 appraisal year. Tr. 31. This revelation prompted Marshall to file a new information request on July 25, 2012, which is the request at issue in our case. Tr. 32, 36-37.

Marshall stated in the new request that he was representing Mosco in "several Union Management National grievances" and would also be Mosco's "representative for her next PACS Performance appraisal to be issued to her in October 2012." Jt. Ex. 3. Marshall asked Blizzard for the following information: "your supervisor notes and/or memory joggers of Ms. Mosco's performance during the appraisal period October 1, 2011, through the current date" (July 25, 2012). *Id.* Marshall stated that he was seeking the information now to "avoid any pre-destruction" of the requested information and to "provide Ms. Mosco her contractual right to rebut any supervisory conclusion you may reach based on your observation of her overall performance," since Mosco had received no such documentation directly from Blizzard. *Id.* Marshall said the Union's "particularized need" for the information was:

> [T]o determine whether you have complied with Article 21, Section B,[4] in monitoring Ms. Mosco's performance and timely communicating your observations to Ms. Mosco so that she has the opportunity to submit a written rebuttal to your conclusions on each case you observed or your observation of her performance on a specific date prior to you using such information in

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[4] Marshall mistakenly cited "Section B" rather than "Section 6(B)" of Article 21. Tr. 38; Jt. Ex. 3. As relevant here, Article 21, Section 6(B) of the CBA, entitled "Monitoring Performance and Communications," states:

> Ongoing two-way communication between the manager and the employee is an effective tool for successful performance. Discussions should be a candid, forthright dialogue between the manager and the employee aimed at improving performance, the work process, or product. These discussions will provide the employee the opportunity to seek further guidance and understanding of his/her work performance, to surface [sic] needs, or to participate in a dialogue about his /her contribution. Discussions may be initiated by the manager or by the employee.
>
> Supervisory conclusions based upon observations of an employee by management will be timely communicated to the employee during informal discussions and/or the progress review. If the employee disagrees with the supervisory conclusions on individual cases or overall performance to date, he/she may provide management with written rebuttals that will be placed in the SF-7B Extension File.

Jt. Ex. 2 at 5.

> appraising her as well as compliance with Section 6(G).[5] The Union will use this information to determine the appropriate representational course of action that will be necessary in pursuing pending Union Management National grievances, including amending the grievances for possible other violations, as well as proceeding to a third party if necessary. The Union may also use this information to determine whether you have committed violations of Title V and/or Title VII. Without this information, the Union will be unable to determine the extent of the contractual violations and Statutory violations, as well as how such violations have adversely affected Ms. Mosco in her performance of all 4 elements [on the performance appraisal], including the scope and the effect the charges of retaliatory discrimination and reprisal have in rating these items.

Id. Finally, Marshall asked for "the location of where and how each of your supervisory notes and/or memory joggers are being maintained. . . . This request includes both paper and/or electronic notes or memory joggers and any other documents maintained on a computer or electronic storage media regarding Ms. Mosco's performance." *Id.*

On August 9, 2012, Blizzard responded to Marshall's request. After summarizing the information request, Blizzard stated, "Because no course of action has been taken based on the requested information and you are instead basing your request on supervisory conclusions that may be reached, your request for information is denied." Jt. Ex. 4. The Union then filed the ULP charge at issue here.[6]

Marshall's request raised a number of questions that the parties sought to answer at the hearing. Although witnesses defined "memory joggers" in a way that was generally consistent with the language of the Agency's policy (GC Ex. 7), there continued to be disputes as to the precise meaning of the term. Marshall opined that memory joggers cannot list an employee's name, saying that if "you [can] identify the employee by name on the document, it's not a memory jogger." Tr. 63. I asked Marshall what he based this on, and Marshall admitted that he could not cite a source for his definition. Tr. 66. On the Agency side, Louis Watley, Senior Advisor at the Social Security Administration's Office of Labor-Management and Employee Relations and one of the Agency's representatives who negotiated the CBA, asserted that memory joggers could have employee names on them, adding that memory joggers without employee names would be of little use to supervisors. Tr. 161-62. David Landes, the Project Manager for the Agency's Employee and Labor Relations Office, also asserted that memory joggers can include an employees' names. Tr. 113.

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[5] Article 21, Section 6(G) of the CBA, entitled "Considerations in Assessing Performance," states, as relevant here, that management "will . . . consider the approved use of official time when evaluating employee performance," and that management "will timely disclose to each employee all records that relate to his/her performance appraisal." Jt. Ex. 2 at 7.

[6] Subsequently, the Union filed a grievance challenging the year-end appraisal Blizzard gave Mosco for the 2011-2012 performance year. Tr. 36, 44, 82, 188-89; R. Ex. 3.

A related issue was whether there was a difference between "memory joggers" and "supervisory notes," as implied in the request. According to Marshall, memory joggers are short notes of three or four words that are "not being recorded for [the] sole purpose of an appraisal." Tr. 51; *see also* Tr. 60. Supervisory notes, by contrast, are lengthier than memory joggers and pertain to "performance matters for specific . . . employee[s] for the specific purpose of appraisal." Tr. 51; *see also* Tr. 57-58. Marshall acknowledged, however, that supervisors might not know of or agree with this distinction. "[U]nfortunately," he stated, "there's managers that use memory joggers which are not memory joggers by the definition. They're actually supervisory notes because they're recorded under the employee's name. They're being maintained on a computer. They're pulled up under the employee's name. It's a record of the employee. It's not a memory jogger."[7] Tr. 52. Marshall added, "When you're collecting and maintaining records throughout on a day-to-day basis of a specific event of an employee's performance, that is not a memory jogger." Tr. 61. On the Agency's side, Watley testified that he saw memory joggers and supervisory notes as "one [and] the same." Tr. 153.

Witnesses at the hearing testified about the connections between the information request and various provisions of the CBA. Marshall explained that while he sought Blizzard's notes and records pursuant to Article 21, Section 6 of the CBA, the term "memory jogger" is referenced in Article 3, Section 4(D).[8] Tr. 54-57. Marshall asserted that if a supervisor used a memory jogger to make an observation about an employee's performance, and then to withhold the document from the employee, it would preclude the employee from rebutting the observation, something the employee is entitled to under Article 21, Section 6. Tr. 56-57. This "would be an attempt to circumvent disclosure," in violation of Article 3, Section 4(D), and it would "take[] away the so-called open communication and fair system

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[7] Landes acknowledged that memory joggers cannot be stored on network hard drives, but added that memory joggers can be stored electronically via portable drives, like a USB flash drive. Tr. 115-16.

[8] Article 3, Section 4(D) provides:

> Personal notes pertaining to an employee not qualifying as a system of records under the Privacy Act may only be kept and maintained by and for the personal use of the management official who wrote them. Such notes will not be disclosed to anyone. These notes must be maintained in a secure location. Personal notes shown or circulated to anyone must be maintained in accordance with this Section. These personal notes or memory joggers will not be used to circumvent timely disclosure to an employee, nor may they be used to retain information that should properly be contained in a system of records such as the SF-7B file. The personal notes will be kept or destroyed as the manager who wrote them sees fit. If any of these conditions are broken, these personal notes are no longer mere extensions of the supervisor's memory and become records subject to the Privacy Act.

Jt. Ex. 1 at 4. In its brief, the Respondent alternately referred to this provision as "Article 4 § (d)" and "Art. 3 §4(d)". *Compare* R. Br. at 10 *and* 11. The latter citation is correct. An SF-7B file contains documents such as performance appraisals, rebuttals to performance appraisals, as well as other documents pertaining to an employee's performance. *See* Tr. 30-31, 118, 161.

which Section B [of Article 21, Section 6] requires." Tr. 57; *see also* Tr. 39. Marshall also stated that Article 21, Section 6(G)(6) requires "timely disclosure of information throughout the appraisal period so the employee is fully aware of information they have and [is] going to be rated on . . . ." Tr. 39.

Landes acknowledged that "[t]hroughout the year there's an expectation or obligation . . . on the part of management to have ongoing communication." Tr. 109. And while the system is "designed to be not document heavy," Landes acknowledged that supervisors may provide employees with written documents about their performance throughout the year. *Id.* In this regard, Landes testified that the term "supervisory conclusions" referenced in Article 21, Section 6(G) of the CBA includes matters communicated both orally and in writing (as a "record") during mid-year reviews, year-end reviews, and also "along the way," over the course of the year. Tr. 117-19. Watley similarly testified that a supervisor may write a document about an employee's actions on a given day. Tr. 161.

Landes further acknowledged that supervisors use memory joggers to aid them in writing performance appraisals. Tr. 120-21. I asked Landes whether memory joggers would be helpful to an employee if a supervisor made positive comments to the employee but failed to incorporate those incidents into the subsequent performance appraisal. Landes replied, "I can't disagree with that statement." Tr. 140-41. Similarly, I asked Watley whether it could be beneficial for employees to see notes taken about them, Watley replied, "Well, I guess it could be." Tr. 158.

Another question raised by the information request was what Marshall meant when referring to "pending grievances." Marshall explained:

> I have filed various national grievances regarding Ms. Mosco, including anti-Union, discriminatory conduct. It's not just the appraisal. It's been somewhat ongoing from 2011 up through 2012. So it's – I filed them with Mr. Blizzard. I have filed them with the commissioner. I have filed them with [Assistant Deputy Commissioner] Borland. There's a lot of litigation going on about this. . . . So in answer to your question, it was a lot of litigation going on regarding Ms. Mosco.

Tr. 72-73.

Marshall further stated that at least one of these grievances "was filed due to [Mosco's] official time usage and her performance, trying to accommodate the official time for her to conduct union activities . . . and also her agency work." Tr. 85; *see also* Tr. 79-83. Marshall asserted that there is a connection between official time and work performance, stating that "a supervisor has to accommodate an employee that's using official time." Tr. 86. This accommodation could be done "by reducing the workload of the employee, adjusting things according to what the employee does in their job, but making adjustment in their day-to-day work to accommodate the employee so they can use official time. So it does

affect the performance." Tr. 86-87. Marshall added that Article 21 states that "in the appraising of an employee that official time must be considered." Tr. 87. Marshall reiterated that the information sought in the July 25, 2012, request "could contain information that could be utilized in some of these pending grievances." Tr. 73.

Counsel for the Respondent entered into evidence two grievances, one filed July 24, 2015, the other filed July 25, 2015, that related in some way to Mosco, but did not relate directly, or at all, to her work performance. R. Exs. 1, 2; Tr. 91-92, 95. Marshall did not claim that either of the grievances was among the "pending grievances" he was referring to in the information request. Tr. 91-95. Blizzard testified that when he received the Union's information request dated July 25, 2012, he was unaware of any pending grievances regarding Mosco. Tr. 174-75.

I asked Marshall whether he referred at all to the April 30, 2012, mid-year appraisal in the information request. Marshall replied, "Well, I thought I had done it generally . . . based on Mr. Blizzard's statements" at the mid-year review "that were based on observations" for which Mosco "hadn't been provided any documentation . . . ." Tr. 83.

I also asked Marshall what he meant when he wrote "Title VII." He replied that he was referring to "discrimination for sex" under Title VII of the Civil Rights Act of 1964. Tr. 74. As for Marshall's reference to "Title V," he explained that he was referring to the Statute, which is in Title 5 of the U.S. Code, adding, "I guess I should've been clearer on that." Tr. 75. When Marshall was asked whether he explained how Blizzard violated "Title V" or "Title VII," Marshall stated, "I didn't see the need to explain it in the information request . . . ." Tr. 78.

Toward the end of the hearing, and to the surprise of many, a fundamental question arose: did the requested information actually exist? Blizzard indicated that it did not. Previously, Blizzard explained, Mosco and Marshall had "had some issues" about him writing memory joggers regarding Mosco. Tr. 174. After Mosco's mid-year appraisal in April 2012, Blizzard decided to accommodate these concerns by no longer writing memory joggers or supervisory notes on Mosco's performance. Tr. 172-73. Blizzard added that any notes he might have written earlier in the performance year would have been destroyed by the time of the mid-year review. Tr. 176, 186, 199. After April, instead of writing notes about Mosco's work, Blizzard decided to communicate directly with her, either in person or by email. Tr. 172.

Respondent's Counsel asked Blizzard directly whether the information requested by the Union existed, and Blizzard replied that it did not: "I had no memory joggers on this particular time for Ms. Mosco at all . . . ." *Id.* I also asked Blizzard whether he had any memory joggers at the time of the request, and he replied, "No, sir." Tr. 182. Counsel for the GC also asked him whether he used memory joggers in preparing Mosco's midterm performance review, and Blizzard replied, "[T]here wasn't none. I mean, there really wasn't. There was none for her. So there was none." Tr. 199.

Respondent's Counsel then asked Blizzard, "Why didn't you tell him [Marshall]" "that you did not have this information"? Tr. 174. Blizzard responded, "Well, to be honest with you, it's because I didn't think I needed to give a negative response. I mean, I was basically saying . . . I don't have anything . . . ." *Id.* Blizzard noted that there were email conversations between him and Mosco, but he did not think the Union was asking for those emails, especially since Mosco and Marshall "already had access to them." Tr. 187.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Agency was obligated, under § 7114(b)(4) of the Statute, to provide the Union with the requested information, and that by failing to provide that information, the Agency violated § 7116(a)(1), (5), and (8) of the Statute. GC Br. at 1.

The GC contends that the Union established a particularized need for the requested information. The Union stated why it needed the information ("in order to represent Mosco"); how it would use the information ("to determine what Statutory, contractual or other violations occurred"); and how the use related to the Union's representational duties ("representing an employee in her performance review and in national grievances"). *Id.* at 9; *see also id.* at 7 (citing *Internal Revenue Serv., Wash., D.C.*, 50 FLRA 661, 671 (1995) (*IRS Kansas City*)). Specifically, the GC asserts that the Union told the Agency that it needed the information to determine whether the Agency had complied with Article 21, Section 6(B) of the CBA, and that the Union would use this information in connection with pending grievances. GC Br. at 8. In addition, the GC argues that information must be disclosed "regardless of whether [it] would help or hurt the union's allegations." *Id.* at 8-9 (citing *Health Care Fin. Admin.*, 56 FLRA 503 (2000)).

With regard to whether the memory joggers were "normally maintained" by the Agency, the GC asserts that "the Authority has ruled that 'memory joggers' are 'normally maintained' by an Agency in the regular course of business." GC Br. at 5 (citing *Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 37 FLRA 1277, 1284-85 (1990) (*HHS*)). As to whether memory joggers were "reasonably available," the GC asserts that information is "reasonably available" if it is "not extremely hard for the agency to get . . . ." GC Br. at 5 (citing *Dep't of HHS, Soc. Sec. Admin.*, 36 FLRA 943, 950 (1990) (*HHS II*)). The GC also argues that even "[i]f . . . Blizzard never created any supervisor notes and/or memory joggers, the Respondent is still obligated to inform the Union of this fact." GC Br. at 5-6 (citing *Soc. Sec. Admin, Balt., Md.*, 60 FLRA 674, 679 (2005); *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326-27 (1987) (*Naval Supply*)).

As for the Respondent's defense that Article 3, Section 4(D) of the CBA justified its refusal to furnish memory joggers to the Union, the General Counsel argues that this is wrong, both procedurally and substantively. GC Br. at 9-11. Procedurally, the GC argues that the Agency was obligated to raise any countervailing anti-disclosure interests at or near the time of the information request. *Id.* at 12 (citing *U.S. Dep't of Justice, Fed. Bureau of*

Prisons, Fed. Corr. Inst., Forrest City, Ark., 57 FLRA 808, 812 (2002), *rev'd in part on other grounds*, *FLRA v. U.S. Dep't of Justice*, 395 F.3d 845 (8th Cir. 2005)). But the only reason Blizzard gave, in denying the Union's request, was that "no course of action had been taken regarding the information . . . ." GC Br. at 12 (quoting Jt. Ex. 4). Thus, the Respondent cannot argue (as it did in its Answer to the Complaint) that the information was not normally maintained or reasonably available. Substantively, the GC maintains that Article 3 in general, and Section 4 in particular, pertain to the rights of individual employees regarding personnel records, not to the right of the Union to records and information. GC Br. at 10. Section 4(D) addresses the specific issue of memory joggers in relation to the Privacy Act, but doesn't address their disclosability to the Union. Moreover, the Respondent's interpretation of Section 4(D) directly conflicts with the requirement in Article 21, Section 6(G)(6) that management disclose to employees all records relating to their performance appraisal. In light of this conflict, Article 3, Section 4(D) cannot be interpreted as a waiver of the Union's right to information under the Statute. *Id.* at 11; *see also Soc. Sec. Admin.*, 13 FLRA 409, 411 (1983).

With respect to a remedy, the General Counsel asks for an order requiring the Respondent to provide the Union with the requested information or, if the information does not exist, to explain why the information does not exist. GC Br. at 13. The GC requests that any notice pertaining to the Respondent's violation of the Statute be signed by the Regional Chief Judge of the Office of Disability Adjudication and Review, Region III, and that the notice be distributed to "all bargaining unit employees." *Id.* at 14.

Respondent

The Respondent asserts that Blizzard "did not have Mosco related memory joggers or personal notes" at the time of the information request. R. Br. at 11 n.13. Therefore, while Respondent "concede[s] that Blizzard was supposed to communicate the non-existence of the memory joggers to the union," it argues that it did not violate § 7116(a)(1), (5), and (8) of the Statute by declining to provide the requested information to the Union. *Id.*

In this regard, the Respondent claims that the Union failed to establish a particularized need for the requested information.[9] R. Br. at 4-5. As a general matter, a union fails to establish a particularized need when its information request is "conclusory, overbroad or demand[s] information that bear[s] no relevance to the grievance it has filed." R. Br. at 7 (citing *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195 (1997) *petition for review denied sub nom. AFGE, Local 2343 v. FLRA*, 144 F.3d 85 (D.C. Cir. 1998)); *see also* R. Br. at 8 (citing *Dep't of HHS, Soc. Sec. Admin., N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133 (1997); *Dep't of the Air Force, Wash., D.C.*, 52 FLRA 1000 (1997)). More specifically, the Respondent asserts that Article 21, Section 6(B) and 6(G) do not entitle the Union to memory joggers and therefore do not

[9] At the hearing, the Respondent conceded that disclosure of the requested information is not prohibited by law and that the requested information did not constitute guidance, advice, counsel, or training provided to management. Tr. 7-8.

establish a need for them. R. Br. at 6. Further, the Respondent argues that there was no need for memory joggers because Blizzard had not yet written Mosco's performance appraisal. *Id.* at 7-8. The Respondent also argues that the Union failed to show how it would use the requested information. In this regard, the Respondent claims that there was no grievance "related to Mosco's performance" for the 2011-2012 performance year that was pending at the time of the request. *Id.* at 8-9. Moreover, the Respondent contends that the Union's reference to "Title V and/or Title VII" provided no explanation as to the use for which the Union would put the requested information. *Id.* at 9.

Further, the Respondent asserts that Article 3, Section 4(D) of the CBA supports the Agency's decision not to provide the requested information, as that section bars disclosure of memory joggers to "anyone," including the Union. *Id.* at 10-11 (citing *IRS, Wash., D.C.*, 47 FLRA 1091 (1993)).

If a violation is found, the Respondent is "opposed to" an order that the Regional Chief Judge of the Office of Disability Application and Review, Region III, sign a notice because that individual "was not involved in this case." R. Br. at 11. Instead, the Respondent argues, a notice should be signed by "the person who denied the Union's information request." *Id.* To support this claim, the Respondent cites *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149 (1996), for the proposition that nontraditional remedies should not be used when traditional remedies will suffice. R. Br. at 12. Finally, it argues that a notice should be limited to "the office where the events took place," that is, the Pittsburgh office. *Id.* at 11.

ANALYSIS AND CONCLUSIONS

1. The Respondent did not commit an unfair labor practice by failing to provide the Union with the requested information

Section 7114(b)(4) of the Statute requires an agency, upon request and, to the extent not prohibited by law, to provide a union with data that is: (1) normally maintained by the agency; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (4) not guidance, advice, counsel, or training to management. 5 U.S.C. § 7114(b)(4); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Fort Dix, N.J.*, 64 FLRA 106, 108 (2009). The General Counsel bears the burden of establishing that all of the requirements of § 7114(b)(4) have been satisfied. *Dep't of Veterans Affairs, Hunter Holmes McGuire VA Med. Ctr., Richmond, Va.*, 51 FLRA 170, 175 n.9 (1995). An agency that fails to comply with § 7114(b)(4) of the Statute commits an unfair labor practice in violation of § 7116(a)(1), (5), and (8) of the Statute.

A. The information was not "normally maintained" and was not "reasonably available"

Information is "normally maintained" by an agency, within the meaning of § 7114(b)(4) of the Statute, if the agency possesses and maintains the information.

HHS, 37 FLRA at 1285. Information is "reasonably available" if it is "accessible or attainable," and if obtaining it would be reasonable, meaning that it would not require extreme or excessive means. *HHS II*, 36 FLRA at 950. Accordingly, information that is not possessed by an agency is neither "normally maintained" nor "reasonably available." *See U.S. Dep't of the Treasury, IRS*, 63 FLRA 664, 666 (2009); *see also Dep't of Justice, U.S. INS, U.S. Border Patrol*, 23 FLRA 239, 240 (1986); *Internal Revenue Serv. & Brooklyn Dist. Office, IRS*, 1 FLRA 797 (1979) (*IRS Brooklyn*).

Blizzard testified persuasively that Mosco had objected to him writing memory joggers or supervisory notes about her, and that by Mosco's mid-year appraisal in April 2012, he had stopped writing such notes (and had already destroyed any previously written notes). Instead, he communicated his concerns to Mosco either in person or by email. This provides a sound explanation as to why Blizzard did not have memory joggers or supervisory notes in July 2012. Further, while most of the questions Blizzard faced pertained specifically to memory joggers, the testimony of Marshall and Watley suggests that memory joggers and supervisory notes are essentially the same. Tr. 52, 152-53. Thus, I find that when Blizzard said he didn't have "anything" responsive to the information request, "anything" included memory joggers and supervisory notes. Tr. 174, 180-82.

The GC does not attack Blizzard's credibility and does not otherwise attempt to show that the Agency actually possessed the requested information. GC Br. at 5. Further, the GC does not rely on the one sliver of evidence that it might have used to counter Blizzard's testimony – Marshall's claim that an Agency attorney (whom Marshall did not identify) told him that Blizzard had memory joggers and supervisory notes about Mosco. Even if the GC had relied on this, Marshall's statement is vague and unconfirmed, and there is no indication that the information was up to date; accordingly, I give it no weight. While the attorney may have correctly stated that Blizzard had been using memory joggers, the evidence indicates that he had stopped doing so by July 2012.

The GC argues nonetheless that in *HHS*, memory joggers were found to be normally maintained. *HHS* is distinguishable, however: there, the memory joggers existed; here, they do not. 37 FLRA at 1285. I accept the GC's premise that an agency may be required to furnish memory joggers when a supervisor maintains them, but it seems obvious that an agency is not required to furnish something that doesn't exist. Moreover, while an agency normally cannot assert a countervailing anti-disclosure interest unless it raises it at the time of its reply to the information request, such an approach would produce an absurd result here, regarding the nonexistence of the requested information. If the information did not exist (as is the case here), it would make no sense to hold that the Agency was required to furnish the information nonetheless.

Based on the foregoing, I find that the GC has failed to prove that the requested information was normally maintained by, or reasonably available to, the Respondent, under § 7114(b)(4) of the Statute. Accordingly, the Respondent did not violate § 7116(a)(1), (5), and (8) of the Statute by failing to provide the requested information to the Union. The

Authority has consistently held that a data request must meet all the requirements set forth in 7114(b)(4). *See, e.g., Soc. Sec. Admin., Balt., Md.*, 39 FLRA 650, 655-56 (1991) (*SSA Baltimore*). Thus, as in the latter case, once it is determined that the requested information was not normally maintained or reasonably available, there is no need to decide (and I express no opinion) whether the memory joggers and supervisory notes were "necessary," within the meaning of 7114(b)(4), or whether the Union had contractually waived its right to obtain memory joggers. *Id.* at 656.

II. The Respondent violated the Statute by failing to inform the Union that the requested information did not exist

When an agency does not have the information that a union has requested, § 7114(b)(4) requires that the agency tell the union that the requested information does not exist. An agency's failure to do so is an unfair labor practice under § 7116(a)(1), (5), and (8) of the Statute. *SSA Baltimore*, 39 FLRA at 656; *Naval Supply*, 26 FLRA at 326-27. An agency may commit this violation even though it was shown that the agency's failure to furnish the requested information did not violate the Statute. *Id.* As the Authority stated in *Soc. Sec. Admin., Dallas Region, Dallas, Tex.*, 51 FLRA 1219, 1227 (1996) (*SSA Dallas*) (another case involving a request for memory joggers that no longer existed), "failure to inform a union that information requested under section 7114(b)(4) does not exist is inconsistent with the statutory requirement that parties bargain in good faith." Here, Blizzard knew that the Agency did not possess the requested information, but he did not communicate that fact to Marshall. By failing to do so, the Agency violated its obligations under § 7114(b)(4) of the Statute, and therefore violated § 7116(a)(1), (5), and (8) of the Statute.

In so finding, I acknowledge that the General Counsel did not specifically assert in the Complaint that the Respondent violated the Statute by failing to inform the Union that the requested information did not exist. However, the Authority has indicated that such a claim is encompassed in a complaint alleging a failure to furnish requested information. *See Veterans Admin., Wash., D.C.*, 28 FLRA 260, 266-67 (1987). The Respondent appeared to acknowledge this principle, as it "concede[d] that Blizzard was supposed to communicate the non-existence of the memory joggers to the union . . . ." R. Br. 11 n.13. *Cf. U.S. Dep't of Justice, Office of Justice Programs*, 50 FLRA 472, 477 (1995) ("[I]t is clear that the Respondent understood the allegations against it; the Respondent addressed those allegations in its submission to the Authority and before the Judge."). Thus, even if the Complaint did not explicitly put the Respondent on notice of the alleged unfair labor practice, the issue was fully and fairly litigated, as Counsel for the Respondent examined Blizzard and asked him specifically why he didn't tell Marshall that the requested information did not exist. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 393 (1999) (*OIA*).

This case illustrates a problem that is apparently at least as old as our Statute: the reflexive denial of an information request on technical legal grounds, along with the failure to advise the requesting party that the information does not even exist. Even if the failure of the agency official is inadvertent, it needlessly prolongs a dispute that could have been nipped in the bud. This identical problem occurred in the very first volume of FLRA decisions, in *IRS*

Brooklyn, above.[10] The judge in that case expressed his frustration that such conduct can convert unfair labor practice proceedings "into an academic exercise in futility," and the Authority echoed that it was "deeply concerned" that the failure to indicate the nonexistence of the documents "may have caused unnecessary litigation which hinders the effective administration of the federal labor-management relations program." 1 FLRA at 799 and n.1. Sadly, the judge's confidence there that "the new Federal Labor Relations Authority . . . will prevent similar occurrences[]" has not yet borne fruit. *Id.* at 799.

Accordingly, I find that the Agency committed an unfair labor practice in violation of § 7116(a)(1), (5), and (8) of the Statute by failing to inform the Union that the requested information did not exist.

REMEDY

The GC requests that the notice be distributed to "all bargaining unit employees," and that the notice be signed by the Regional Chief Judge of the Office of Disability Application and Review, Region III. GC Br. at 13-14. The Respondent counters that the notice should be signed by Blizzard and distributed only at the Pittsburgh office. R. Br. at 11.

In determining the scope of a posting requirement, the Authority considers the two purposes served by the posting of a notice. *OIA*, 55 FLRA at 394. First, the notice provides evidence to unit employees that the rights guaranteed under the Statute will be vigorously enforced. Second, in many cases, the posting is the only visible indication to those employees that a respondent recognizes and intends to fulfill its obligations under the Statute. *Id.* at 394-95. Typically, notices are posted at the location or organizational level where the violation occurred. *AFGE, Local 3937, AFL-CIO*, 64 FLRA 17, 23 (2009). The Authority has denied requests for nationwide postings where violations were committed solely at the local level and did not involve higher-level organizational components of the agency. *U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 699-700 (2000). Here, the violation occurred only at the Respondent's Pittsburgh office. As such, and as the GC provides no explanation as to why the notice should be distributed to *all* bargaining unit employees, I find that the notice should be distributed to bargaining unit employees at the Pittsburgh office.

The Authority typically directs the posting of a notice to be signed by the highest official of the activity responsible for the violation. *Id.* at 699. The Authority has stated that, by requiring the highest official to sign the notice, a respondent clearly acknowledges its obligations under the Statute and shows that it intends to comply with those obligations. *Id.* Thus, the Hearing Office Director of the Pittsburgh office of ODAR should sign the notice.

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[10] In *IRS Brooklyn*, the complaint was dismissed, as the judge held that "an unfair labor practice cannot be founded upon denial of access to non-existent records." 1 FLRA at 798. The Authority has subsequently adopted the principle that the failure to advise a union of the nonexistence of requested information is, in itself, an unfair labor practice. *See SSA Dallas*, 51 FLRA at 1219 and *Naval Supply*, 26 FLRA at 324.

Finally, in accordance with the Authority's recent decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and electronically whenever an agency uses such methods to communicate with bargaining unit employees, I find that both types of postings are appropriate here. *See U.S. DOJ, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Social Security Administration, Office of Disability Adjudication and Review, Region III, Philadelphia, Pennsylvania, shall

1. Cease and desist from:

(a) Failing and refusing to inform the American Federation of Government Employees, Council 215, AFL-CIO, that information requested under § 7114(b)(4) of the Statute does not exist.

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

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

(a) Post at its Pittsburgh office 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 Hearing Office Director, Pittsburgh Hearing Office, and shall be posted and maintained for sixty (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. The Notice shall also be disseminated by email or other electronic media customarily used to communicate to employees.

(b) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Washington Regional Office, Federal Labor Relations Authority, in writing, within thirty (30) days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., July 22, 2015

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 Social Security Administration, Office of Disability Adjudication and Review, Region III, Philadelphia, Pennsylvania, 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 inform the American Federation of Government Employees, Council 215, AFL-CIO, that information requested under § 7114(b)(4) of the Statute does not exist.

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

____
(Agency/Respondent)

Dated: ________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for sixty (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, N.W., 2nd Flr., Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.