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

OALJ 15-52

DEPARTMENT OF VETERANS AFFAIRS
VA MEDICAL CENTER
RICHMOND, VA
RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145, AFL-CIO
CHARGING PARTY

Case No. WA-CA-13-0056

Jessica S. Bartlett
Melissa K. Owens
For the General Counsel

Timothy M. O'Boyle
For the Respondent

Jennifer Marshall
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

After losing an arbitration grievance regarding the distribution of overtime in the police department, AFGE Local 2145 decided that it needed to monitor the Agency's overtime policies and procedures more carefully. The arbitrator had denied the grievance, in part because of the Union's failure to object to the Agency's overtime practices over a period of several years. Determined not to make this mistake again, the Union submitted an information request to the Agency, asking for the overtime procedures in all departments and sections of the Medical Center. The Agency replied by stating only that it "follows" the overtime provisions of the collective bargaining agreement "implicitly."

At the hearing, the Agency's witness acknowledged that the Medical Center had at least one written overtime policy (the one for the police officers), and that he did not provide the Union a copy of the police department's policy in response to the request, since the Union already had a copy of that document. Also at the hearing, the witness indicated for the first time that he believed the rest of the requested information did not exist. The witness added, however, that he had not checked with every department to see if they had overtime procedures that might be responsive to the request.

There are three main questions for me to resolve. The first question is whether the Union established a particularized need for the requested information. By referencing the arbitration award and the relevant portion of the parties' agreement, and by indicating that it would use the requested information to ensure that the Agency was complying with the contractual requirement of distributing overtime in a "fair and equitable" manner, the Union gave the Agency enough information to make a reasoned judgment as to whether it was required to furnish the requested data. Accordingly, the answer to the first question is yes.

The second question is whether the requested information, to the extent it existed, was reasonably available. Although the Agency claims that obtaining the information would have been burdensome, the Agency provided virtually no evidence to support that claim. Accordingly, the answer to the second question is yes.

The third question is whether the Agency violated the Statute by failing to tell the Union that it believed most of the requested information did not exist. Although the Agency asserted in its response that a union is entitled only to information that actually exists, it did not say that the specific overtime procedures requested by the Union did not exist. Moreover, the cryptic reply it gave the Union (that it follows the contract) was deceptive and inaccurate. Accordingly, the answer to the third question is yes.

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 November 5, 2012, the American Federation of Government Employees, Local 2145, AFL-CIO (the Union), filed an unfair labor practice charge against the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia (the Agency, Respondent, or Medical Center). GC Exs. 1(a), 1(b). After investigating the charge, the Regional Director of the FLRA's Washington Region issued a Complaint and Notice of Hearing on May 3, 2013, on behalf of the FLRA's General Counsel (GC), alleging that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by failing to furnish the Union with information it had requested. GC Ex. 1(b). The Respondent filed its Answer to the Complaint on May 20, 2013, denying that it violated the Statute. GC Ex. 1(c).

A hearing was held in this matter in Richmond, Virginia, on June 12, 2013. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the 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 within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide bargaining unit of employees of the Department of Veterans Affairs (VA). GC Exs. 1(b) & 1(c). The Union is an agent of the AFGE for the purpose of representing bargaining unit employees of the Respondent. The AFGE and the VA are parties to a collective bargaining agreement, known as the Master Agreement. *Id.*

The Medical Center employs approximately 2300 people, including about 2000 bargaining unit employees. Tr. 33. The Medical Center is organized into a number of departments (called "services"), and there are a variety of subdivisions ("sections," "clinics," etc.) within each service. According to Union President Jennifer Marshall, there are approximately fifty-three departments and subdivisions at the Medical Center; according to Human Resource Specialist James Kielhack, there are somewhere between sixty and eighty. Tr. 34, 103.

This dispute has its origins in a Union grievance filed in 2010, alleging that the Agency failed to distribute overtime to officers in the Medical Center's Police Service in a fair and equitable manner, in violation of the "Hours of Work and Overtime" article of the Master Agreement.[1] GC Ex. 4 at 1, 4.

The grievance was unresolved and went to arbitration before Arbitrator Stephen M. Schmerin, who issued his award on March 26, 2012. The arbitrator determined that the Agency had distributed overtime in a fair and equitable manner in the past, had no obligation to provide back pay, and had no obligation to turn over old overtime records. The arbitrator

[1] The arbitrator in the grievance was at least partially relying on the previous Master Agreement, which went into effect in 1997. Tr. 16, 27-28. The current Master Agreement went into effect March 15, 2011. Tr. 14. In the arbitration, the article titled "Hours of Work and Overtime" was Article 20. GC Ex. 4 at 1. In the current Master Agreement, the "Hours of Work and Overtime" provision is Article 21; Section 4A of Article 21 provides, "Overtime shall be distributed in a fair and equitable manner." GC Ex. 3 at 92. On the local level, the parties have also negotiated a Supplemental Agreement; Article 15 covers overtime and addresses issues such as seniority, the preference for voluntary before mandatory overtime, and the maintenance of overtime call-in lists, "by groups," in each service. GC Ex. 4 at 2-3, 15.

based his ruling mainly on the fact that the overtime procedures for police had been in place for at least fifteen years, and the Union had "permitted the current system to exist without challenge" for that entire time. *Id.* at 16; *see also id.* at 13-15. At the same time, he found that the Agency had failed to properly maintain overtime records, and he directed it to implement new procedures and to keep accurate overtime records, so that the parties can determine, going forward, whether overtime is being distributed fairly and equitably as required by the Master Agreement. *Id.* at 15-17. The arbitrator further required that the Union participate in the implementation of the new procedures, and that the Union "have the right at any time to view the records to insure compliance with overtime hours worked." *Id.* at 17.

Almost immediately after the arbitrator's award was issued, the Union and the Agency negotiated a new overtime procedure for the Police Service, which was agreed to on April 11, 2012.[2] Tr. 19, 22; GC Ex. 5.

Meanwhile, Union President Jennifer Marshall was grappling with Arbitrator Schmerin's award. She believed that the arbitrator was effectively saying, "[S]hame on you, Union, you didn't police overtime policies and procedures." Tr. 16. "I should have asked for [the overtime procedures] back in . . . 1997, when the old master agreement . . . was implemented, in order to ensure that they were complied, and by me not doing that, it had demonstrated a past practice." Tr. 27-28. Determined not to make the same mistake twice, Marshall decided that she would "[do] what [the Arbitrator] told me to do . . . , that is to request the information to ensure that [the Agency] was in compliance with the new master agreement. . . ." Tr. 28. By doing so, Marshall believed that "later on down the road, when I have a bunch of people come to me and say, hey, they're still not . . . distributing that overtime in a fair and equitable manner, they can't say I didn't try to ask for it. . . ." *Id.*

Marshall wanted to determine which departments and subdivisions at the Medical Center had individualized procedures for overtime (both voluntary and mandatory), as the Police Service did. She believed that some departments had developed specific overtime procedures for their employees. Through grievances, she had learned that separate overtime policies and procedures had been established for dialysis technicians in the Medicine Service (Tr. 51), the Engineering Service (Tr. 56-57), the Chaplain Service (Tr. 77), and for registered nurses in the Nursing Service (Tr. 53).[3] The procedures for nurses had been

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[2] The copy of the overtime policy entered into evidence has a computer-generated date of March 21, 2012, at the bottom, indicating that it existed (at least in draft form) prior to the arbitrator's award. GC Ex. 5. Marshall speculated that the Agency might have started work on the proposal at that time, but she was certain that the parties had not started negotiations over the policy until after the award was issued. Tr. 24-25.

[3] The record is unclear whether an overtime policy existed in the Pathology and Laboratory Medicine Service when the information request was sent in October 2012. In December 2012, not long after the Agency responded to the Union's information request, the Agency sent the Union a draft proposal for an overtime policy for the Pathology and Laboratory Medicine Service, and the parties successfully negotiated such a policy in January 2013. GC Ex. 6; Tr. 26, 39. But it is not clear whether this policy replaced an earlier policy or was entirely new.

developed to take into account the many different service lines of the nurses and to indicate what other service lines a nurse could perform overtime (Tr. 53). But Marshall did not know exactly how many services and subdivisions had such individualized procedures. So, on October 1, 2012, the Union submitted an information request to the Agency asking for "[a]ll [c]urrent Service, Sub-Service/Sections/Clinics/and Service Line Overtime Procedures (Mandatory and Volunteer Overtime Procedures)." GC Ex. 2 at 1 (emphasis omitted). Marshall asserted that the Union was "entitled to the requested information under the provision of the DVA/AFGE Master Agreement, Article 21." *Id.*

Marshall then described the Union's "particularized needs" for the information:

1. The Union requires this information to review for compliance or lack thereof to the DVA/AFGE Master Agreement provisions.

2. The Union requires this information to demonstrate which Services [and subdivisions] Overtime Procedures . . . are not in compliance with the provisions of the DVA/AFGE Master Agreement.

3. The Union requires this information in order to engage in negotiations, informally or formally with Agency representatives to ensure non-complian[t] Services [and subdivisions] Overtime Procedures . . . [are in] compliance with the DVA/AFGE Master Agreement provisions[.]

4. This request is in compliance with the Arbitrator's decision regarding Union review of Overtime Procedures for all Services [and subdivisions] Overtime Procedures . . . .

5. The Union requires this information to ensure that Overtime is being distributed in a fair and equitable basis.

6. It is the Union's hope that upon receipt of this information, all Services [and subdivisions] Overtime Procedures . . . will be implemented under the provisions of the DVA/AFGE Master Agreement thereby avoiding grievances and 3rd party review.

Id. at 1-2.

In closing, Marshall asserted that the requested information was "normally maintained by the Agency," and that the Agency had a "duty to respond, whether affirmative or negative to requests. . . ." *Id.* at 2.

James Kielhack, a Human Resource Specialist, was the Agency representative who responded to Marshall's request. Tr. 89. Kielhack was familiar with Marshall's requests – of the 100 or so information requests Kielhack received each year, about 90 came from Marshall. Tr. 91-92. Kielhack sent a memorandum (the Acknowledgement Memo) to Marshall, on October 11, 2012, stating that he had received the information request regarding

"Overtime . . . procedures" and indicating that the Agency would "address[] issues raised in the request[;] . . . analyze the stated 'particularized needs'; compile releasable data and prepare a written reply." GC Ex. 7. In addition, Kielhack stated that the Agency would "like to make available to the union the option of discussing the relevant issues involved in the request prior to any written response." *Id.*

At the hearing, Kielhack and Marshall both described the offer to discuss matters further as "boilerplate." Tr. 29, 59, 99. "[Y]ou literally can go back seven years and you're going to see this. It's a disclaimer," Kielhack explained. Tr. 99. If an information request is unclear, Kielhack added, "I'll send back a clarification question, and I think I've done that recently." Tr. 100. For her part, Marshall testified that she and Kielhack did not discuss this particular information request, based on her experience that such discussions have "[n]ever been productive . . . no communication. I always get a blanket no." Tr. 32.

The Union's request for each department's overtime procedures led Kielhack to call some of the Medical Center's departments, though at the hearing he could not recall exactly which departments he talked to. "I talked to different – a couple of sections in HAS [Health Administration Service]. . . . I think I called Surgery and I think I called a couple of other services just out of the blue," Kielhack stated. "[T]hey all came back with, yeah, we do on occasion do overtime, but we follow the master agreement, like you said to." Tr. 98. Asked whether he called the Medicine Service, Kielhack replied, "There's a couple of services that I can't remember who I called. Medical could have been one." Tr. 106. He added, "as I was going down the people I called or the services I called, I was all getting negative responses." Tr. 107. Through these conversations, Kielhack came to believe that "there is nothing to really procure." Tr. 94. However, Kielhack also acknowledged that he did not talk to every department to confirm that they didn't have their own overtime procedures. With prodding on cross-examination, he admitted that he didn't contact anyone from the Nursing Service or the Chaplain Service. Tr. 107.

Subsequently, Kielhack sent the Union another memorandum (the Response Memo) on October 31, 2012. Kielhack began by reiterating that the Union had submitted a request regarding "Overtime . . . procedures." GC Ex. 8 at 1. He described the requirements for providing information under § 7114(b)(4) of the Statute, and he then wrote, "Item 1. The Agency follows Article 21, Section 4 – General Overtime Provisions, of the Master Agreement implicit[l]y." GC Ex. 8. At the hearing, Kielhack confirmed that he intended this sentence to constitute a denial of the Union's request. Tr. 113.

Below Kielhack's signature on the Response Memo was a postscript (in a smaller font), several paragraphs long, containing general statements of law pertaining to information requests under the Statute. As relevant here, this portion of the response memo stated: "The union is only entitled to information which actually exists and is maintained in the normal

course of business"; and "Requests for information which are indeterminate, overbroad, all inclusive or unduly burdensome may constitute information 'available only through extreme or excessive means.'" GC Ex. 8 at 1.

At the hearing, Marshall and Kielhack elaborated on a number of additional issues raised by the information request. Marshall clarified that when she wrote that the request was "in compliance with the Arbitrator's decision regarding Union review of Overtime Procedures," she was referring to Arbitrator Schmerin's award. Tr. 36. She also stated that her request encompassed the Police Service's overtime policy, even though the Union already had a copy of it. Tr. 38.

Kielhack confirmed that he believed that the Police Service was the only department that had an overtime procedure of its own. *See* Tr. 98, 101. He testified that he did not provide the Union a copy of the Police Service's overtime procedure because the Union already possessed a copy. "It would be a redundant request," he explained. Tr. 105; *see also* Tr. 98-99.

Kielhack was asked whether he told the Union that the requested information did not exist; he said that he did, by virtue of the line in the Response Memo's postscript stating, "The union is only entitled to information which actually exists and is maintained in the normal course of business." Tr. 111; GC Ex. 8 at 1. He conceded, however, that this statement was boilerplate, a part of all of his responses to information requests. Tr. 112.

With regard to the reasonable availability of the requested information, Kielhack asserted that contacting all departments regarding the information request would be "very cumbersome." Tr. 112. "[Y]ou'd literally have to talk to every supervisor, every lead in this facility, and that would be 500 people, 400 people, 300 people. And it would take an insurmountable – I couldn't fathom how many hours it would take to do that." *Id.* Kielhack added that if the request encompassed every supervisor responsible for employees' time and leave, then there would be 190 subdivisions he would have to contact. Tr. 103. Kielhack acknowledged, however, that it was likely that the human resources office had copies of overtime procedures in use throughout the Medical Center. Tr. 109.

Kielhack also acknowledged that he did not tell the Union that retrieving the requested information would be unduly burdensome. Tr. 106. Counsel for the Respondent countered by asking him whether the statement in the Response Memo's postscript – "Requests for information which are indeterminate, overbroad, all inclusive, or unduly burdensome may constitute information 'available only through extreme or excessive means'" – meant that "in fact, you did tell Ms. Marshall in this memo that her request was unduly burdensome." He replied, "Now that you've – for – now that you bring that to my mind, yes, I did." Tr. 111. However, upon further questioning from Counsel for the General Counsel, Kielhack admitted that the postscript was "all boilerplate." Tr. 112. Marshall agreed, testifying that the statements were "standard on all of their responses." Tr. 31.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Respondent committed an unfair labor practice under § 7116(a)(1), (5), and (8) by failing to furnish the Union with the overtime procedures it sought in its information request. GC Br. at 12. The GC argues that the Union established a particularized need for the requested information, as the Union established a connection between the overtime procedures and its representational duties: submitting proposals for negotiations, complying with the arbitrator's decision regarding Union review of overtime procedures, and ensuring compliance with the Master Agreement, among other purposes. *Id.* at 6-7. Further, the GC contends that the Respondent did not ask the Union to clarify its request, did not object to the scope of the request, and did not raise any anti-disclosure interests at or around the time it responded to the request. *Id.* at 9.

In addition, the General Counsel argues that the requested procedures are normally maintained by the Agency, citing Marshall's testimony that the Nursing Service, the Medicine Service, and the Engineering Service all had overtime procedures. *Id.* at 8. The GC contends that the procedures were reasonably available, asserting that gathering the information would be as easy as sending out emails to the heads of the Medical Center's departments and subdivisions. *Id.* Finally, since Kielhack acknowledged that he was aware of the existence of a written overtime policy for the Police Service and failed to mention that in his response, the Agency has at least partially admitted it violated the Statute. *Id.* at 10.

Respondent

The Respondent asserts that it did not violate the Statute, because the Union failed to establish a particularized need for the requested information, and because the requested information was not reasonably available. With respect to particularized need, it contends that the Union's claimed needs were "conclusory" and that the Union did not connect its request to a "pending or potential grievance." R. Br. at 8-9. The Respondent also contends that although the information request mentions "the Arbitrator's decision," it does not expressly refer to Arbitrator Schmerin or explain how his award is related to the information request. *Id.* at 9, 11. Further, the Respondent alleges that Marshall failed to take up Kielhack's offer to discuss the information request further, and claims that this failure is "fatal" to the Union's establishment of particularized need. *Id.* at 11 (citing *U.S. Dep't of the Air Force, Air Force Materiel Command, Kirtland AFB, Albuquerque, N.M.*, 60 FLRA 791, 794-95 (2005) (*Kirtland AFB*)).

The Respondent also contends that the requested information was not reasonably available to the Respondent, arguing that obtaining the requested information would involve communicating with up to 80 departments and possibly 190 subdivisions within the Medical Center, involving somewhere between 300 and 500 people. R. Br. at 5-6. Further, the Respondent argues that Marshall did not know how many departments and subdivisions had overtime procedures, and that her request was "simply a request for Respondent to set off on a wild goose chase . . . the very definition of extreme and excessive. . . ." *Id.* at 7.

ANALYSIS AND CONCLUSIONS

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).

At the hearing, the Respondent argued that the requested information was not "necessary," and that the information was not reasonably available to the Respondent. But the Agency did not raise these objections when it responded to the Union's request. Rather, the Response Memo answered the request for the overtime policies in all its departments very directly and tersely: it said, in effect, "there is only one policy or procedure, throughout the Medical Center, and that is Article 21, Section 4."

The Union established a particularized need for the requested information

In order for a union to demonstrate that requested information is "necessary" within the meaning of § 7114(b)(4) of the Statute, it must establish a "particularized need" by articulating, with specificity, why it needs the requested information, including how it will use the information, and how its use of the information relates to the union's representational responsibilities under the Statute. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495 (2015) (*FCI Ray Brook*).[4] The requirement that a union establish such need will not be satisfied merely by showing that requested information would be useful or relevant to it. Instead, the union must show that the requested information is required in order for it to adequately represent its members. *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 978 (2010) (*IRS*). The union must articulate its interests in disclosure of the information at or near the time of the request, not for the first time at an unfair labor practice hearing. *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 261, 263 (2004) (*Randolph AFB*). However, in reviewing a union's information request, circumstances surrounding the request, like other relevant evidence, are appropriate to consider in evaluating its overall sufficiency. *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195, 1207 n.12 (1997).

[4] Although the Agency did not object to the necessity of the requested information at the time it responded to the Union, I believe that the General Counsel must nevertheless prove the Union articulated a particularized need for the information in order to prove an unfair labor practice. However, since the Agency expressed no statutory objections to the information request at the time it responded, the GC's burden is significantly lighter than it might otherwise be.

A union also has the burden of establishing the necessity of the scope of the request. *Soc. Sec. Admin.*, 67 FLRA 534, 538 (2014). Where the information sought is broader than the circumstances covered by the request, and the union has not been able to establish a connection between the broader scope of the information requested and the particular matter referenced in the request, the Authority has found that the union has not established a particularized need for the information. *Randolph AFB*, 60 FLRA at 264.

The Authority has found that a union establishes a particularized need where the union states that it needs the information: (1) to assess whether to file a grievance; (2) in connection with a pending grievance; (3) to determine how to support and pursue a grievance; or (4) to assess whether to arbitrate or settle a pending grievance. *FCI Ray Brook*, 68 FLRA at 496 (*see* cases cited therein). The Authority has also held that a union's citation to specific collective bargaining agreement provisions served to notify the agency that the requested information was necessary for the union to administer and enforce the agreement.

The union's explanation of need must permit an agency to make a reasoned judgment as to whether the Statute requires the agency to furnish the information and, thus, must be more than a conclusory assertion. *FCI Ray Brook*, 68 FLRA at 496. For instance, the Authority held that an assertion that requested information was necessary to "assist in developing proposals for . . . negotiations" was, in the circumstances of that case, a "conclusory or bare assertion that [was] insufficient to establish particularized need." *IRS*, 64 FLRA at 979 (citation omitted).

Nevertheless, a union's request may contain a certain level of ambiguity. The request need not be so specific as to reveal the union's strategies. *FCI Ray Brook*, 68 FLRA at 496. Also, in many cases, a union will not be aware of the contents of a requested document, and the degree of specificity required of a union must take that into account. *Internal Revenue Service, Wash., D.C.*, 50 FLRA 661, 670 n.13 (1995) (*IRS, D.C.*).

As appropriate under the circumstances of each case, the agency must either furnish the information, ask for clarification of the request, identify its countervailing or other anti-disclosure interests, or inform the union that the information requested does not exist or is not maintained by the agency. *See, e.g.*, *Fed. Aviation Admin.*, 55 FLRA 254, 260 (1999) (*FAA*); *Soc. Sec. Admin., Balt., Md.*, 39 FLRA 650, 656 (1991) (*SSA Balt.*). The agency must explain its anti-disclosure interests in more than a conclusory way, and the agency must raise these interests at or near the time of the union's request. *Soc. Sec. Admin.*, 64 FLRA 293, 295-96 (2009) (*SSA*). An agency may not wait until the hearing to argue that it fulfilled its statutory obligation by producing all of the requested information. *U.S. Dep't of the Navy, Naval Air Depot, Jacksonville, Fla.*, 63 FLRA 455, 455, 463 (2007).

As an initial matter, it is clear that the Union was referring to Arbitrator Schmerin's award when it said it needed the information "in compliance with the Arbitrator's decision regarding Union review of Overtime Procedures." GC Ex. 2 at 2. Although the letter did not cite Arbitrator Schmerin by name, the Agency was well aware of the award. Marshall testified that the head of the Agency's human resources office was familiar with the award

(Tr. 43), and the Agency negotiated an overtime policy for police officers in April 2012, as a direct result of the award. Tr. 19. The Agency did not express any confusion, or ask for clarification, as to what arbitration decision Marshall was referring to, in either its Acknowledgement Memo or Response Memo.

By stating that it needed the requested information "in compliance with" the award, the Union put the Agency on notice that it was incorporating the award into its request. The arbitrator ruled in that case against the Union because it failed to raise objections to the Agency's overtime procedures in the past. GC Ex. 4 at 14-16. The obvious implication was that the Union must monitor the administration of overtime and raise objections on a timely basis going forward, or suffer the same fate in future grievances. Further, by directing the Agency to provide the Union with records necessary to ensure that the Agency was distributing overtime properly, the arbitrator indicated to the Agency that the Union needed to know whether overtime procedures varied in different departments. *Id.* at 16, 17. Indeed, it was precisely this right of access to Agency overtime information that the Union cited in its information request, thereby tying the information request to its statutory responsibility.

Even if the Agency was unclear exactly how the Union's information request was "in compliance" with the arbitration award, the Union indicated that it needed the information in order to determine whether the Agency's overtime procedures were "compliance" with Article 21 of the Master Agreement, including the requirement that the Agency distribute overtime in a "fair and equitable" manner. GC Ex. 2 at 1, 2. The Union could not monitor compliance with Article 21 without knowing what the Agency's overtime procedures were in the first place. *See Library of Congress*, 63 FLRA 515, 519 (2009) (information regarding RIF needed to "police" the agreement); *FAA*, 55 FLRA at 259-60 (1999) (information needed in order to understand seniority policy and administer the agreement). The Union's need to understand the Agency's practices existed, even if the Union had no immediate plans to file a grievance. *See FAA*, 55 FLRA at 259-60. In any event, and contrary to the Respondent's claim, the Union indicated that it would use the information to bring the Agency into compliance with the Master Agreement, either through negotiations (like the ones involving the police officers), or through filing grievances (like those pending at the time of the hearing, involving dialysis technicians, engineering, and chaplains) (Tr. 51-57, 77). *See FCI Ray Brook*, 68 FLRA at 496. For these reasons, I find that the Union provided a sufficient explanation for the Agency to make a reasoned judgment as to whether the Statute required it to furnish the requested information.

The Respondent did not challenge the scope of the information request, but in any case, the Union's request for all current overtime policies in all services and subdivisions of the Medical Center was warranted. While the grievance before Arbitrator Schmerin involved only the overtime procedures in the Police Service, the language and rationale of that decision was applicable to any department within the Medical Center, since the overtime provisions in the Master Agreement and the local Supplemental Agreement are the same for all departments. It was therefore appropriate for the Union to request overtime procedures for each department and subdivision there.

The Respondent argues that Kielhack offered to discuss the request with Marshall, and that Marshall's failure to take him up on his offer was "fatal" to the Union's establishment of particularized need. R. Br. at 11. This is about half right. When an agency "reasonably requests clarification" of a union's information request, the union's failure to respond to the request is "taken into account" (but is not determinative) in figuring out whether the union has established a particularized need for the information. *SSA*, 64 FLRA at 296-97; *see also Kirtland AFB*, 60 FLRA at 794. Further, while a request for further discussion of the union's asserted need may constitute an implicit request for clarification, that does not mean that *any* reference to a future discussion is a request for clarification. *SSA*, 64 FLRA at 297. Specifically, in *U.S. Dep't of the Army, Army Corps of Eng'rs, Portland Dist., Portland, Or.*, 60 FLRA 413, 415-16 (2004), the Authority found that the respondent's statement, "If you have any questions regarding this response please do not hesitate to contact me," was not a request for clarification, as it did not give "any indication that the Respondent was unclear as to the Union's reasons for needing" the requested information.

Here, the only request for "clarification" was a throwaway line in the Acknowledgement Memo ("The Agency would also like to make available to the union the option of discussing the relevant issues involved in the request prior to any written response.") (GC Ex. 7) that both Marshall and Kielhack described as "boilerplate." Further, there was no indication that Kielhack actually wanted to discuss the information request further with Marshall. If Kielhack had specific questions about the request, he should have sent Marshall a specific request for clarification, as he had done in the past.

The Respondent alleges that the Union's request was an invitation for the Agency to go on a "wild goose chase," implying that Marshall was asking for information that she knew did not exist. R. Br. at 7. However, Marshall indicated that she requested the information based on evidence that several departments did have overtime procedures. Kielhack himself knew that such procedures existed for the Police Service, and it is not "wild" for a union to expect an agency's human resources office to know the overtime policies in effect in its various departments. More importantly, it is perfectly reasonable for a union to request copies of all overtime policies in existence at the hospital, in order to ensure that those policies are consistent with the collective bargaining agreements.

Based on the foregoing, I find that the Union established a particularized need for the requested information.

To the extent the requested information existed, it is reasonably available to the Agency

At the hearing, Kielhack asserted that most of the information requested by the Union did not exist, because the individual departments had no overtime procedures other than the contractual provisions of Article 21, Section 4. But he acknowledged that the Police Service had its own overtime procedures, and that there were some other departments, including the Nursing Service, that he did not contact regarding the information request. Contradicting

Kielhack at least in part, Marshall testified that the Nursing, Medicine, Engineering, and Chaplain services did have overtime policies or procedures applicable to their own employees, and the Respondent did not rebut these specific allegations. Tr. 51-57, 77.

Moreover, the assertion in the Response Memo that Article 21 of the Master Agreement was the Agency's only overtime policy is flatly contradicted by Article 15 of the parties' locally-negotiated Supplemental Agreement, which contains a series of detailed overtime rules applicable throughout the Medical Center. *See* GC Ex. 4 at 2-3, 15. Besides the general provisions of Article 15, Section 1C provides that when volunteers are not sufficient to fill an overtime need, employees will be called by reverse seniority from call-in lists "maintained by groups," and Section 4 provides that those lists will be maintained by the service chiefs. *Id.* at 2-3. This corresponds closely with Marshall's testimony about how overtime was supposed to be assigned by "service lines" and "sister units" in the Nursing Service; it suggests that most, if not all, services and subdivisions in the Medical Center should have had call-in lists, and those lists should have been available for the Union's inspection, in response to its information request.

Accordingly, the evidence demonstrates irrefutably that in addition to Article 21, Section 4 of the Master Agreement, Article 15 of the Supplemental Agreement also applied Agency-wide to overtime situations, and that at least one service (Police) had its own specialized overtime policy. Furthermore, the evidence supports a finding that other services or subdivisions (Nursing, Medicine, Engineering, Chaplain and possibly others) had special procedures, such as call-in lists, that were used to administer overtime in those subdivisions. Thus, the Agency's response to the Union's information request was demonstrably false and incomplete in failing to furnish those policies.

Kielhack testified that he didn't mention the Police Service overtime policy in his Response Memo because it had just been negotiated with the Union, and that the Union obviously was in possession of that document. Tr. 105. But the Response Memo didn't advise the Union that he was excluding the Police Service's overtime policy because the Union already had a copy of it; instead, it misled the Union by offering a false answer (that the only overtime policy the Agency follows is Article 21, Section 4 of the Master Agreement). If he had given the Union an accurate response ("As far as we are aware, the only service or subdivision that has an overtime policy, other than the provisions of Article 21, Section 4 of the Master Agreement, is the Police Service. You already have a copy of that policy. . . "), his omission of the Police Service procedures would at least have been apparent to the Union, allowing the Union to follow up by insisting on getting a copy of the Police Service document if it needed a new copy. The Agency's response – rather than

helping the Union to make a full accounting of the Agency's overtime policies – was crafted to mislead the Union, by creating the false impression that the only applicable policy was Article 21, Section 4.[5]

The Statute requires an agency to provide data that is reasonably available. *Randolph AFB*, 60 FLRA at 272. Consistent with this requirement, an agency is not required to provide data that is available only through "extreme" or "excessive" means. *Id.* Determining whether extreme or excessive means are required to retrieve available data requires case-by-case analysis of relevant facts and circumstances. Such facts and circumstances include the efforts required to make the documents available, including costs and displacement of the agency's workforce. *See Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1255 n.9 (2000).

The Authority has found information to be reasonably available when, for example, retrieval would have taken 150 hours and cost $1,500, *U.S. Dep't of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 37 FLRA 987, 993-94 (1990), or taken three weeks to accomplish, *Dep't of Health & Human Servs., Soc. Sec. Admin.*, 36 FLRA 943, 950-51 (1990). The Authority has also found information to be reasonably available where the agency provided no evidence that obtaining the requested information would be costly, time consuming, or difficult. *Dep't of the Navy, Naval Submarine Base New London, New London, Conn.*, 27 FLRA 785, 796-97 (1987).

At the hearing, Kielhack acknowledged that he did not tell the Union, in his Response Memo, that retrieving the information would be unduly burdensome. He further acknowledged that the references to "reasonable availability" in the memo's postscript were mere "boilerplate," rather than an allegation that the Union's specific request was overly burdensome. Tr. 106, 112. Because the Agency failed to tell the Union, in a timely manner, that the requested information was not reasonably available, it should not be allowed to raise that argument now. *See U.S. Dep't of Justice, INS, W. Reg'l Office, Labor Mgmt. Relations, Laguna Niguel, Cal.*, 58 FLRA 656, 659-60 (2003).

But even if I were to address the "reasonable availability" defense on its merits, I would reject it. There is virtually no evidence that it would take extreme and excessive means to obtain the information. Kielhack asserted that investigating whether there were localized overtime procedures in each subdivision of the Medical Center would be "cumbersome," would require an "insurmountable" amount of time, and might require him to talk to up to "500 people." Tr. 112. But the Respondent provided nothing specific to corroborate these claims, which seem implausible and in conflict with Kielhack's own earlier statement that there were about sixty to eighty subservices and sections in the Medical Center. Tr. 103. While Kielhack described some of the phone calls he made to some

[5] In *IRS, D.C.*, 50 FLRA at 670-71, the Authority sought to establish a framework for adjudicating information requests that "requires parties to articulate and exchange their respective interests" and encourages "the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement . . . ." *Id.* The Respondent's answer to the Union's information request in this case was a repudiation of that standard.

managers to find out about their overtime policies, he and the Respondent seem to be living in a pre-computer universe. He could have obtained the answer to the Union's request much more efficiently, and with a digital paper trail, by sending a group email to all service and section managers and forwarding their replies to the Union. There is no evidence that the Agency would have needed to spend an unreasonable amount of time obtaining the requested information. Accordingly, I reject the Respondent's claim that the information was not reasonably available. The Respondent was obligated to furnish the information, and its refusal to do so violated § 7116(a)(1), (5), and (8) of the Statute.

To the extent the requested information did not exist, the Agency violated the Statute by failing to tell the Union that it did not exist

While Marshall believed that at least some of the departments in the Medical Center had overtime procedures similar to those for the Police Service, Kielhack believed that the Police Service's overtime procedure was the only one that existed at the time of the information request. As I explained in the preceding section, Kielhack's testimony describing his survey of some department managers was incomplete and unconvincing, and it failed to rebut Marshall's testimony that some other departments had their own procedures. Therefore, I concluded that some services or subdivisions within the Medical Center had their own overtime procedures, and that the Agency's response to the Union's information request was false and misleading regarding them.

Nonetheless, Kielhack listed several departments or sections whose managers he contacted, and who told him that they had no overtime policy other than following the Master Agreement. Tr. 95, 98, 106-08. The evidence of record suggests that some sections of the Medical Center did not have their own overtime procedures; thus, at least some of the information requested by the Union did not exist.

An agency is not obligated to produce information that does not exist. *Dep't of Justice, U.S. INS, U.S. Border Patrol*, 23 FLRA 239, 240 (1986). However, 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. *Soc. Sec. Admin., Dall. Region, Dall., Tex.*, 51 FLRA 1219, 1225 (1996); *SSA Balt.*, 39 FLRA at 656. An agency may commit this violation even though the agency was not required to furnish the requested information. *Id.*

At the hearing, Kielhack claimed that he told the Union that the requested information did not exist, based on the "boilerplate" in the response memo's postscript. Tr. 111. While the memo stated, "The union is only entitled to information which actually exists and is maintained in the normal course of business," the memo did not state that the specific overtime procedures sought by the Union did not exist. GC Ex. 8. Moreover, as discussed above, some services did have specific overtime procedures, and the Agency's Response

Memo shed no light whatsoever as to what policies existed and what didn't. Kielhack's failure to tell the Union that some of the requested information did not exist is an additional basis for finding that the Agency violated § 7116(a)(1), (5), and (8) of the Statute. *SSA Balt.*, 39 FLRA at 656.

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, 271 (1987). Moreover, the Union's information request stated that the Agency had a "duty to respond, whether affirmative or negative to requests" (GC Ex. 2 at 2), and the issue was fully and fairly litigated, as both sides had the opportunity to ask Kielhack about whether he told the Union that the requested information did not exist. Tr. 111-12. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 393 (1999).

REMEDY

In light of the Respondent's unfair labor practice, it will be ordered to cease and desist its unlawful actions, to furnish the Union with copies of all Service, Subservice, Section, Clinic, and Service Line overtime procedures (both mandatory and voluntary) that were in effect on October 1, 2012, and to post a notice to employees regarding its violation of the Statute. Because the unfair labor practice was committed only at the Medical Center, I find that the notice should be distributed there and signed by the Medical Center's highest official. *See U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 699-700 (2000).

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 disseminated 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. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute) it is hereby ordered that the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia, shall

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 2145, AFL-CIO (the Union), with copies of all Service, Sub-Service, Section, Clinic, and Service Line overtime procedures (both mandatory and voluntary) in effect on October 1, 2012, to the extent that this information exists.

(b) To the extent that the requested information does not exist, failing and refusing to inform the Union that the information does not exist.

(c) 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) Furnish the Union with copies of all existing Service, Sub-Service, Section, Clinic, and Service Line overtime procedures (both mandatory and voluntary) in effect on October 1, 2012, to the extent that the requested information exists.

(b) To the extent that the requested information does not exist, inform the Union that the information does not exist.

(c) Post at its facilities where bargaining unit employees 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 Director, VA Medical Center, Richmond, Virginia, and shall be posted and maintained for sixty (60) days thereafter, in conspicuous places, including 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.

(d) In addition to physical posting of paper notices, Notices shall be distributed electronically, on the same date, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees, and sent to all bargaining unit employees.

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

Issued, Washington, D.C., September 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 Department of Veterans Affairs, VA Medical Center, Richmond, Virginia, 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 furnish the American Federation of Government Employees, Local 2145, AFL-CIO (the Union) with copies of all Service, Sub-Service, Section, Clinic, and Service Line overtime procedures (both mandatory and voluntary) in effect on October 1, 2012, to the extent that the requested information exists.

WE WILL to the extent that the requested information does not exist, inform the Union that the information does not exist.

WE WILL NOT fail or refuse to furnish the Union with copies of all Service, Sub-Service, Section, Clinic, and Service Line overtime procedures (both mandatory and voluntary) in effect on October 1, 2012, to the extent that the requested information exists.

WE WILL NOT to the extent that the requested information does not exist, fail or refuse to inform the Union that the information 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)

Date: _____ 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.