



**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges  
WASHINGTON, D.C. 20424

OALJ 16-19

DEPARTMENT OF THE NAVY, U.S. MARINE CORPS  
CHERRY POINT FIRE AND EMERGENCY SERVICES  
CHERRY POINT, NORTH CAROLINA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2065, AFL-CIO

CHARGING PARTY

Case No. AT-CA-15-0004

Brian R. Locke  
For the General Counsel

Ken Couchman  
For the Respondent

Benjamin Leither  
For the Charging Party

Before: RICHARD A. PEARSON  
Administrative Law Judge

**DECISION ON MOTION FOR SUMMARY JUDGMENT**

The Camp Lejeune fire department announced that it would be conducting a weeklong course on arson investigation. Supervisors in the department were required to take the course and were accordingly paid for doing so; bargaining unit employees, however, were told that while they could take the course on a voluntary basis, they could do so only on their regular days off and would not be compensated. In response, the Union submitted an information request asking for the position descriptions for supervisors and nonsupervisors in the department. The Union indicated that it would analyze the position descriptions to determine whether there was a valid reason for the Agency not to compensate bargaining unit employees for attending the course. The Union also asked the Agency to provide a letter the fire chief had supposedly written concerning the course.

The Agency denied the Union's request, asserting that the Union had not established a particularized need for the position descriptions and that the letter was a confidential management communication. Only much later was it discovered that no such letter had been written at all.

The main question before me is whether the Agency violated the Statute by failing to provide the position descriptions to the Union. Because the Union explained with specificity why it needed the position descriptions, including how it would use that information and the connection between that use and the Union's representational responsibilities, the Union established a particularized need for the position descriptions, obligating the Agency to provide the position descriptions to the Union. By failing to comply with this obligation, the Agency violated the Statute.

A subsidiary question is whether the Agency violated the Statute by failing to tell the Union that the requested letter did not exist. It is well established that an agency must tell a union in a timely manner if information it requested does not exist. Since it is undisputed here that the letter did not exist and that the Agency failed to advise the Union of this fact, this constituted an independent unfair labor practice.

### STATEMENT OF THE CASE

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

On October 2, 2014, the American Federation of Government Employees, Local 2065, AFL-CIO (the Union or Charging Party) filed a ULP charge against the Department of the Navy, U.S. Marine Corps, Cherry Point Fire and Emergency Services, Cherry Point, North Carolina (the Agency or Respondent) in Case No. AT-CA-15-0004, alleging that the Agency violated the Statute by refusing to provide information requested by the Union. GC Ex. 1(a). On October 9, 2014, the Union filed another ULP charge against the Agency, Case No. AT-CA-15-0013, alleging that an Agency representative threatened a Union official. GC Ex. 1(b). After investigating the charges, the Regional Director of the FLRA's Atlanta Region consolidated the cases and issued a Consolidated Complaint and Notice of Hearing on April 8, 2015, on behalf of the FLRA's General Counsel (GC). With respect to Case No. AT-CA-15-0004, the Consolidated Complaint<sup>1</sup> alleged that the Agency violated § 7116(a)(1), (5), and (8) of the Statute when it failed to provide the Union with "all position descriptions for all employees in the Security and Emergency Services Directorate and a letter sent by [Fire Chief Rodney] Wade that outlines which employees would be compensated for an Arson Investigation course."<sup>2</sup>

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<sup>1</sup> Subsequently, the parties reached a settlement of Case No. AT-CA-15-0013, and I granted the GC's motion to sever the two cases. Case No. AT-CA-15-0013 is no longer before me.

<sup>2</sup> This letter is referred to as "the Wade Letter."

The Respondent filed its Answer to the Consolidated Complaint on May 4, 2015, admitting many of the GC's factual allegations relating to Case No. AT-CA-15-0004 while denying others, and denying that it violated the Statute. Specifically, the Respondent denied that the requested information was necessary for full and proper discussion of subjects within the scope of collective bargaining, and it further denied that Chief Wade sent "a letter outlining which employees would be compensated." GC Ex. 1(d) at 2, 5. However, Respondent admitted that it had refused to furnish the information requested by the Union, and that the requested information was normally maintained in the regular course of business; reasonably available; did not constitute guidance for management relating to collective bargaining; and was not prohibited by law from being disclosed. *Id.* at 5.

The General Counsel filed a Motion for Summary Judgment on May 27, 2015, arguing that there were no material facts in dispute, and submitted a Brief in Support of Motion for Summary Judgment (GC Br.).<sup>3</sup> In its brief, the GC argued, among other things, that the Union had demonstrated a particularized need for the information it requested and that the reasons cited by the Agency for refusing to provide the information were not legally justifiable. The GC also noted that the Agency asserted, for the first time in its Answer, that the Wade Letter did not exist. By failing to tell the Union, at the time of the information request, that the Wade Letter did not exist, the GC argued that the Agency also violated the Statute.

The Respondent filed an Agency Objection Brief to General Counsel's Motion for Summary Judgment (Resp. Br.), on June 8, 2015. The Respondent claimed that summary judgment would be inappropriate because there were material facts in dispute. However, nearly all of the points the Respondent characterized as disputed material facts were actually legal arguments. The only material fact that the Respondent referred to was the question of the Wade Letter's existence. In this regard, the Respondent stated:

[The] GC identifies the union request for an email from Fire Chief Rodney Wade and asks for production of said email in the [GC's proposed] "Notice" . . . . The Agency has stated that there is no known email and has repeatedly asked the Union to clarify its request. The Agency has further asked the Union to produce this email or provide an explanation as to why they believe that such an email exists. To date the Union has failed to address this issue. The "Notice" cannot address a document that is non-existent. . . .

Resp. Br. at 5.

Based on these pleadings, I asked the parties to submit supplemental statements as to whether the Wade Letter existed. The GC asserted in its Response to the Administrative Law Judge's Request for Additional Information that, regardless of whether or not the letter exists,

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<sup>3</sup> Also on May 27, 2015, the GC filed a Motion to Postpone Hearing Pending Ruling on General Counsel's Motion for Summary Judgment. The parties agreed that the hearing should be postponed, and on June 2, 2015, I issued an Order Indefinitely Postponing Hearing.

the Respondent violated the Statute. Nonetheless, the GC stated that it had no evidence that the letter exists and attached an affidavit to that effect. GC Supp. Br. at 1-2. In the Agency's Response to ALJ for Information, the Respondent asserted that it had searched for a letter written by Chief Wade and had found nothing to that effect. Resp. Supp. Br. at 1.

### DISCUSSION OF MOTION FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment, filed under § 2423.27 of its Regulations, 5 C.F.R. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in United States District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). If the pleadings, and additional evidence submitted in support, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law, the motion for summary judgment should be granted. *Id.*

The General Counsel has offered exhibits to corroborate the material factual allegations of the Consolidated Complaint. The undisputed evidence shows that on September 18, 2014, Union representative Benjamin Leither requested that the Agency furnish the Union "with the Position Description (PD's) for both supervisory and non-supervisory General Schedule (GS) 7-13 government employees . . . located within the Security and Emergency Services Directorate . . ." GC Ex. 2 at 12 (emphasis omitted). Leither also requested "the e-mail letter of direction sent by Fire Chief Rodney Wade that outlines specific employees being compensated for the Arson Investigation Course offered September 29-October 4, 2014." *Id.* Over the next two weeks, Leither and Gary Hawkins (Labor and Employee Relations Supervisor for the Agency) engaged in an email dialogue as to whether the Union had demonstrated its need for the position descriptions and the Wade Letter. GC Ex. 2 at 1-13. Ultimately, Hawkins denied the information request, on the grounds that the Union had not articulated a particularized need for the PDs; the PDs were already available to Leither as a member of the Fire Department's accreditation team; and the Wade Letter "constitutes internal communications between members of management and is therefore not releasable." GC Ex. 2 at 2-3. As noted above, the Respondent subsequently admitted in its pleadings that the Wade Letter does not exist. In its Answer it further admitted that the PDs are normally maintained in the regular course of business; reasonably available; do not constitute guidance for management relating to collective bargaining; and are not prohibited by law from being disclosed.

The Respondent has also submitted exhibits, but these exhibits do not contradict the facts alleged by the GC or otherwise illustrate the existence of any genuine dispute of any material facts. Instead, the exhibits, as well as the Respondent's Answer and Brief, assert legal justifications for refusing to furnish the requested information. Respondent argues, for instance, that the PDs were not subject to a grievance under the parties' collective bargaining agreement; that the Union has no right to object to disparate treatment between bargaining unit employees and supervisors; that compensation for training is controlled by government-wide regulation; and that Leither could have obtained the PDs on his own as a member of the

accreditation team. These objections do not identify any genuine factual disputes however; they simply demonstrate that the parties disagree on how to apply the law to the admitted facts. I will address the Respondent's arguments on their merits in my Analysis and Conclusions, but they do not require a hearing to resolve.

Accordingly, I agree with the General Counsel that there is no genuine issue of material fact in this case. Therefore, it is appropriate to decide the case on the motion for summary judgment, and the hearing is cancelled. Below I will summarize the material facts that are not in dispute and make the following conclusions of law and recommendations.

### FINDINGS OF FACT

The Respondent, an activity within the U.S. Marine Corps, is an agency within the meaning of § 7103(a)(3) of the Statute. The U.S. Marine Corps and the American Federation of Government Employees (AFGE) are parties to a nationwide collective bargaining agreement, referred to as the Master Labor Agreement (MLA).<sup>4</sup> Resp. Ex. 1. The Union, an agent of AFGE for the purpose of representing employees of the Respondent, is a labor organization within the meaning of § 7103(a)(4) of the Statute.

On August 20, 2014,<sup>5</sup> the Agency sent members of the Agency's fire department an email announcing there would be a weeklong course on arson investigation, which could be used as part of the requirements to become Certified Fire Investigators. Resp. Ex. 4. The Agency advised that bargaining unit employees – who had not been directed to take the course – could attend the training on their regular days off, but unlike supervisors, they would be attending “on a voluntary basis and uncompensated for attendance on off days.” GC Ex. 1(d) at 2-3.

On September 18, Leither emailed Hawkins an information request on behalf of the Union.<sup>6</sup> Leither asked for “Position Descriptions (PD's) for both supervisory and non-supervisory General Schedule (GS) 7-13 government employees . . . within the Security and Emergency Services Directorate, Cherry Point Fire and Emergency Services.” GC Ex. 2 at 12 (emphasis omitted). In addition, Leither asked for “the e-mail letter of direction sent by Fire Chief Rodney Wade that outlines specific employees being compensated for the Arson Investigation Course offered September 29-October 4, 2014.” *Id.* With regard to the Union's need for the requested information, Leither stated:

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<sup>4</sup> Article 27 of the MLA is entitled “Training and Employee Development.” GC Ex. 5. Article 27, Section 2 of the MLA states: “Nomination for, and selection of, employees for training will be based on the needs of the Activity without regard to race, color, religion, sex, age, national origin, handicap, GINA or other non-merit factor.” *Id.* Article 27, Section 3 of the MLA states, in pertinent part: “The Activity, in accordance with applicable regulations, will pay for the costs associated with an employee's job-related training that it requires and has approved. . . .” *Id.*

<sup>5</sup> Hereafter, all dates are 2014, unless otherwise noted.

<sup>6</sup> All discussions cited here between Leither and Hawkins were by email.

The Union's particularized need for the requested information is to verify and validate that the agency is not creating disparity and allowing fair and equitable work conditions and treatment. The requested information will be used to verify and validate if the major job duties of both supervisory and non-supervisory employees have performance indicators or condition of employment requirements to conduct or maintain knowledge, skills, and abilities in addition to certifications specific to Arson Investigation. The information will also be used for any grievance or future action needing to be taken to enable the union to fulfill its representational responsibilities. The union has an interest to ensure fair and equitable work conditions exist. . . .

*Id.* at 12-13 (emphasis omitted).

Later that day, Hawkins denied the request, asserting that the Union had not identified a sufficient particularized need. *Id.* at 11. Leither explained his request further the next day, stating:

The union's particularized need for the requested information is to compare job performance indicators or condition[s] of employment requirements between Supervisory and Non-supervisory employees to ensure that management is not creating disparate treatment and affording fair and equitable work conditions to include compensation to attend an Arson Investigation course. Fire Department management sends notice to all department employees, supervisory and non-supervisory, that an arson investigation course will be offered the week of September 29 and that, 'If anyone is interested in attending the entire week and taking the test for certification this will be allowed on a voluntary basis and uncompensated for attendance on off days.' Later, the Fire Chief makes the determination to compensate a specific category of individuals only, a change in direction from a previous e-mail sent by management. The union has an interest to ensure fair and equitable work conditions exist for its bargaining unit employees.

*Id.* at 10 (emphasis omitted).

On September 22, Hawkins informed Leither that management was reviewing the request. On September 27, Leither asked Hawkins for an update. *Id.* at 8. Hawkins responded on September 29, stating that the Agency was still in the process of responding to the request. With regard to "particularized need," Hawkins stated:

You and I have agreed in the past the assignment of work is a management right. Training falls into the category of a work assignment and therefore not open to bargaining (with some very limited exceptions). It appears the particularized need you have identified for the Position Descriptions (PD's) is to review them to see if the union agrees with Chief Wade's assessment of

what personnel the Arson Investigations training should be mandatory/ optional for. Since training is a work assignment and therefore a management right, the purpose for your review does not seem to meet a particularized need that would authorize the release of the PD's. . . .

*Id.* at 7-8.<sup>7</sup>

Leither replied about an hour later, asserting that he had explained why the Union needed the requested information and that the Union had “no further obligation to provide . . . justification” for its request. *Id.* at 7.

That afternoon, Hawkins replied by summarizing the Union's request and stating, “[M]anagement is not guessing as to the intent of your [request], as the intent was made clear. The issue is that the [request] interferes with a management right (the assignment of work).” *Id.* at 6. Hawkins added, “If training was a working condition/condition of employment and therefore bargainable under the Statute, management would be in agreement with the [request] and the information would be given without delay.” *Id.* However, Hawkins continued, the request “seems to be an attempt to either confirm or disagree with the Fire Chief's assessment of who the training should be mandatory for. As a management right (training), this type of review/audit is not appropriate.” *Id.*

That evening, Leither replied that “we totally disagree with management's position” and argued:

Our request has to do with whether management is creating disparate treatment, not over an assignment of work, and the determination whether the union will pursue the matter with a grievance, ULP, or any other avenue within our right. The union has and will continue to support training that is conducted subject to meeting the requirements outlined under the contract and statute, supports the mission of the organization, and is in compliance with the negotiated agreements and established past practices.

In support of the union's position on disparate treatment, conveniently you never make any mention with regard to the union's identification of a change in management's direction regarding our identified issue. Furthermore, the change of direction by Fire Chief Rodney Wade was informed to a particular group of individuals (management) and then revealed by a Supervisor to an employee that management was now being compensated under the direction of the Chief, but you guys (employees) are not. Clearly this raises question[s] that may substantiate our position that management has created an unfair and inequitable work conditions, singled out individuals or a group of individuals,

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<sup>7</sup> Hawkins also asserted that position descriptions were “protected” from disclosure, but he later determined that position descriptions were disclosable. GC Ex. 2 at 4, 8.

and generated disparate treatment within the force place [sic] . . . .  
Are you refusing to provide the union with its properly requested information?  
. . . Failure to respond by COB Tuesday[,] September 30, 2014 will be implied  
that the information requested is being denied in whole.

*Id.* at 5-6.

The dialogue continued on September 30. That morning, Hawkins told Leither, "I understand through the accreditation documentation process, you (AFGE) may already have copies" of the position descriptions sought by the Union. *Id.* at 4. Leither responded that while he may have access to the position descriptions in his role as Assistant Accreditation Team Manager, he kept that position separate from his position as a Union officer. In this regard, Leither stated, "I will not use the accreditation program to receive documents requested as a union officer unless specifically informed in writing by Fire Chief Wade." *Id.*

That afternoon, Hawkins replied, "You already have access to the PD's. Chief Wade has verified that the PD's used for the accreditation process are readily available for use and are not restricted." *Id.* at 2. In addition, Hawkins asked:

Can you further explain how AFGE would determine if the assignment of training was fair and equitable working conditions and treatment? What standard would be applied to make this determination? How would AFGE make this determination without interfering with management's right to assign work under the statute?

. . . . The email you requested [the Wade Letter] constitutes internal communications between members of management and is therefore not releasable.

*Id.* at 3.

Leither replied on October 1, stating that the Union's position "remains unchanged." *Id.* at 2. Leither also provided Hawkins a copy of the Union's ULP charge, which was filed the next day. About two hours later, Hawkins responded, confirming receipt of the ULP and asserting that management "assumes . . . AFGE has chosen not to respond to management's latest clarifying questions to help both parties be clear on the purpose of the RFI." *Id.* at 1. Leither replied the next day, asserting that the Union "has provided you sufficient references and clarification throughout our . . . request." *Id.*



## POSITIONS OF THE PARTIES

### General Counsel

The General Counsel contends that the Union established a particularized need for the requested information, asserting: (1) "Leither stated he wanted the information to evaluate whether the position statements included performance elements that would require knowledge of arson investigation[;]" (2) Leither "wanted to compare the position descriptions to determine whether the Respondent's decision to compensate supervisors, but not bargaining unit employees, was fair[;]" and (3) Leither stated that he "wanted to investigate whether employees were treated unfairly and to potentially file a grievance." GC Br. at 3. In addition, the GC points to Article 27, Sections 2 and 3, of the MLA. Section 2 requires that the Agency select employees for training "based on the needs of the Activity without regard to . . . [any] 'non-merit factor.'" GC Ex. 5. Section 3 requires the Agency to "pay for the costs associated with an employee's job-related training . . . ." *Id.* Therefore, the GC argues, "the parties' MLA contemplates that the Union may have a cause of action if it believes that the Respondent based its decision to compensate employees on a 'non-merit factor,' in this case, bargaining unit status." GC Br. at 3.

Finally, the General Counsel asserts that the Respondent violated the Statute by failing to inform the Union that the Wade Letter did not exist. *Id.* at 4. When Leither and Hawkins were debating the merits of the Union's information request, Hawkins told Leither that he could not release the Wade Letter because it constituted internal management communications, when in fact Wade had not written such a letter. Citing *Soc. Sec. Admin., Dall. Region, Dall., Tex.*, 51 FLRA 1219, 1226 (1996) (*SSA Dallas*), the GC asserts that the Agency violated § 7116(a)(1), (5), and (8) by failing to tell the Union that the letter did not exist.

### Respondent

The Respondent argues that the Union failed to establish a particularized need for the requested information because it "has not demonstrated a connection between the use of supervisory PDs and the Union's representational responsibilities." Resp. Br. at 4. Further, the Respondent asserts that while the Union "claims disparate treatment . . . between supervisory personnel and [bargaining unit employees]," supervisory position descriptions "are not subject to a grievance" under the MLA. *Id.* at 2-3.

In addition, the Respondent contends that in *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 51 FLRA 1391 (1996) (*IRS*), the Authority found that "particularized need was not met when performance appraisals were requested for employees not in like positions," and the Respondent asserts that the position descriptions for bargaining unit employees and supervisors at issue here "are not 'like' in any way." Resp. Br. at 3.

The Respondent also argues that Leither, as Assistant Accreditation Team Manager for the Cherry Point Fire Department, “knew the accreditation plan required the Fire Department to maintain current position descriptions for all personnel, to include supervisors, in the Fire Station(s) which is the duty location of Mr. Leither. So, Mr. Leither has access to the position descriptions and they are readily available to him.” GC Ex. 1(d) at 4.

### 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. *See, e.g., Health Care Fin. Admin.*, 56 FLRA 503, 506 (2000) (*HCFA II*). An agency that fails to do so commits an unfair labor practice in violation of § 7116(a)(1), (5), and (8) of the Statute.

The issues raised by the Union’s request are different for the position descriptions and the Wade Letter. I will address the two portions of the request in turn.

#### The Position Descriptions

The Respondent admits that the PDs are normally maintained by the Agency, that they are reasonably available, that they do not constitute guidance to management, and that their disclosure is not prohibited by law. Respondent insists, however, that it was not required to provide the Union with the requested PDs, because the Union failed to establish a particularized need for them. Resp. Br. at 4.

In order for a union to demonstrate that requested information is “necessary” within the meaning of § 7114(b)(4) of the Statute, a union 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 its 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*). The Authority has stated that “[d]etermining whether to file a grievance is a basic union responsibility under the Statute.” *Health Care Fin. Admin.*, 56 FLRA 156, 160 (2000) (citation omitted); *see also NLRB v. FLRA*, 952 F.2d 523, 526 (D.C. Cir. 1992) (“[S]ection 7114 creates a duty to provide information that would enable the Union to process a grievance or to determine whether or not to file a grievance.”). In this regard, the Authority has held that a union established a particularized need for requested information when the union needed the information to assess whether to file a grievance. *U.S. Dep’t of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669, 672 (2012) (*USP Marion*) (citing *U.S. Dep’t of Transp., FAA, New Eng. Region, Bradley Air Traffic Control Tower, Windsor Locks, Conn.*, 51 FLRA 1054, 1068 (1996)). Further, the Authority has overruled an agency’s objections to an information request when the union:

(1) referenced a specific agency action; and (2) specified that the information was needed to assess whether the agency violated established policies and whether to file a grievance, even though the union did not fully explain how the information would enable it to determine whether to file a grievance. *USP Marion*, 66 FLRA at 672 (citing *HCFA II*, 56 FLRA at 506-07).

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; the union cannot meet its burden with conclusory assertions. *FCI Ray Brook*, 68 FLRA at 495-96. It is not enough for a union to say that information is needed to "prepare" a grievance, *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 979-80 (2010), or to "pursue possible grievances and [EEO] complaints," *Dep't of HHS, Soc. Sec. Admin., N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133, 1148 (1997). Nevertheless, an information request need not be so specific as to reveal the union's strategies. *FCI Ray Brook*, 68 FLRA at 496. Moreover, a union frequently 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 Serv., Wash., D.C.*, 50 FLRA 661, 670 n.13 (1995).

Whether the requested information would actually accomplish a union's purpose is not determinative of whether it is necessary under § 7114(b)(4). *Soc. Sec. Admin.*, 64 FLRA 293, 296 (2009) (*SSA*). Similarly, the Authority has stated that an agency's contention that a potential grievance is not grievable does not relieve the agency of its obligation to furnish requested data. *Dep't of HHS, Soc. Sec. Admin., Balt., Md.*, 39 FLRA 298, 309 (1991) (*SSA Balt.*). Moreover, a union may be entitled to obtain information concerning non-bargaining unit positions. *Id.*

As appropriate under the circumstances of each case, the agency must either furnish the requested 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. The agency must explain its anti-disclosure interests in more than conclusory terms, and the agency must raise these interests at or near the time of the union's request. *See SSA*, 64 FLRA at 295-96; *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 261, 264-65 (2004). 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 in determining whether the union has established a particularized need for the information. *SSA*, 64 FLRA at 297; *see also IRS*, 51 FLRA at 1396 (declining to find agency's requests for clarification were disingenuous or unreasonable).

In his initial message to Hawkins, Leither requested supervisory and nonsupervisory position descriptions in connection with the upcoming arson investigation course. Leither explained that the Union needed this information in order to answer a specific question: whether the "major job duties of both supervisory and non-supervisory employees have performance indicators or . . . requirements" pertaining to arson investigation. Further, Leither showed that the Union would use the information in connection with its

representational responsibilities. Specifically, he said that the Union would use the information to determine whether the Agency was “creating disparity” and “allowing fair and equitable work conditions and treatment,” and that the Union might use the information to file a grievance. GC Ex. 2 at 12-13 (emphasis omitted).

After Hawkins summarily denied the request, Leither further explained that the request was made in connection with the Agency’s decision “to compensate a specific category of individuals only, a change in direction from a previous e-mail by management.” *Id.* at 10. Leither further clarified that the Union needed the position descriptions to assess whether the Agency was acting fairly with regard to “compensation to attend [the] Arson Investigation course.” *Id.*

Hawkins indicated, in two emails he sent on September 29, that he fully understood the Union’s information request. *Id.* at 6, 8. In the first email, Hawkins told Leither: “It appears the particularized need you have identified . . . is to review [the position descriptions] to see if the union agrees with Chief Wade’s assessment of what personnel the Arson Investigations training should be mandatory/optional for.” *Id.* at 8. Later that day, Hawkins stated, “[M]anagement is not guessing as to the intent of your [request], as the intent was made clear.” *Id.* at 6. Nevertheless, he refused to furnish the PDs. “Since training is a work assignment and therefore a management right, the purpose for your review does not seem to meet a particularized need that would authorize the release of the PDs.” *Id.* at 8.

Confronted with Hawkins’s denial, Leither clarified the Union’s request again, telling Hawkins that the Union needed the requested information to ensure that training is conducted consistent with the “requirements” in the “contract and statute,” as well as other “negotiated agreements and established past practices.” *Id.* at 5. Citing statements that Chief Wade allegedly made to other supervisors about the training, Leither said, “this raises question that may substantiate our position that management has created an unfair and inequitable work conditions, singled out individuals or a group of individuals, and generated disparate treatment. . . .” *Id.* at 5-6. Leither further stated that the requested information would help the Union to determine whether to file a grievance or ULP. *Id.* at 5.

Looking at these statements as a whole, I conclude that Leither established a particularized need for the position descriptions. Leither explained that the request was connected to a specific Agency action, namely the Agency’s decision not to compensate bargaining unit employees attending the course during their regular days off. Leither explained that the Union needed the information to determine whether there was a difference between supervisory and nonsupervisory position descriptions justifying the Agency’s decision to compensate supervisors, while not compensating bargaining unit employees for attending the same training. And Leither connected the Union’s use of the information to its representational responsibilities: specifically, he showed that he would use the information to determine whether the Agency was acting unfairly, in violation of agreements between the parties, or of the Statute, and to determine whether the Union should file a grievance or a ULP charge. Obtaining the PDs would enable the Union to compare the duties and

expectations of bargaining unit and non-bargaining unit personnel in the fire department, and to evaluate whether the Agency made a job-related distinction in deciding to compensate supervisors but not bargaining unit employees. Leither's explanation was specific and detailed, providing the Agency with enough information to make a reasoned judgment as to whether it was required to provide the requested information. *USP Marion*, 66 FLRA at 672.

In addition, Leither consistently replied to matters raised by Hawkins in response to the request, including Hawkins's claim that the request would affect management rights, and his suggestion that Leither obtain the requested information through his position as Assistant Accreditation Team Manager.

I reject any claim that Leither was obligated to respond to the questions Hawkins posed late in the afternoon of September 30, 2014, the day after Leither stated his intent to file a ULP charge if Hawkins refused to furnish the PDs. Hawkins's questions were argumentative, if not rhetorical, and they were unnecessary, as Leither had already clarified the Union's request, and Hawkins had previously acknowledged that he understood what the Union was requesting. It is apparent that Hawkins was asking these questions not to gain further clarity, but rather to frustrate the Union's attempt to obtain the requested information, which it first sought almost two weeks earlier. At this point Hawkins's questions were disingenuous, and Leither did not need to clarify his request further. *See SSA*, 64 FLRA at 297; *IRS*, 51 FLRA at 1396.

The Respondent claims that the Union did not need the requested information, especially with regard to supervisors, because the information would not have shown a contract violation and would not have supported a grievance. However, whether the information would have supported a Union grievance, or accomplished any other Union goal, is not determinative of whether the Union established a particularized need for the information. *See SSA*, 64 FLRA at 296; *SSA Balt.*, 39 FLRA at 309. Moreover, the claim that the information would not support a Union grievance is actually an argument in favor of disclosure, since the information might persuade the Union not to file the grievance. *See NLRB v. FLRA*, 952 F.2d at 526.

The Respondent also cites *IRS* for the proposition that there is no particularized need for position descriptions of employees who are not similarly situated (i.e., supervisors and nonsupervisors). In *IRS*, the union requested performance appraisals for all bargaining unit and non-bargaining unit employees in a particular department in connection with a grievance alleging employment discrimination. The union acknowledged that the grievant was performing a different job function from other employees whose appraisals the union sought, but asserted that the appraisals were "necessary in order to support our allegations." 51 FLRA at 1392. The agency asked the union to explain its request, but the union declined to do so. *Id.* at 1396-97. The Authority determined that the union's initial explanation – that the appraisals were necessary "to support our allegations" – was insufficient to establish particularized need and that it was "incumbent on the Union to provide additional explanation as to why it needed the information." *Id.* at 1396. By failing to do so, the union failed to establish a particularized need for the requested information. *Id.* at 1397.

The situation in *IRS* is distinguishable from the situation here. Unlike the union in *IRS*, the Union here provided a detailed explanation as to why it needed supervisory and nonsupervisory position descriptions. And unlike the union in *IRS*, the Union here responded to the Respondent's denial by further clarifying its need for the requested information. These differences show that the Respondent's reliance on *IRS* is misplaced.

As for the assertion that Leither could have obtained the requested information by virtue of his position as Assistant Accreditation Team Manager, I reject that claim. Under § 7114(b)(4), an agency must furnish information specifically to the "exclusive representative involved, or its authorized representative." The Authority has rejected, as a justification for denying a request, that the union could obtain the information from another source. *U.S. Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 38 FLRA 3, 7 (1990); *U.S. Army Reserve Components Personnel & Admin. Ctr., St. Louis, Mo.*, 26 FLRA 19, 27 (1987); *see also Internal Revenue Serv., Austin Dist. Office, Austin, Tex.*, 51 FLRA 1166, 1178 (1996). Leither reasonably explained to Hawkins that he felt it would be an abuse of his status as a member of the Accreditation Team for him to take the PDs directly, since the PDs were needed for Union purposes, not for use on the Accreditation Team. Furthermore, it is undeniable that the PDs were readily accessible to Hawkins. Therefore, the Agency was obligated to furnish the information to the Union.<sup>8</sup>

Finally, it is unclear whether the Respondent continues to assert that the request for information was improper because the Union was challenging the Agency's exercise of its management right to assign training. Hawkins repeatedly made this argument in his emails denying the request (G.C. Ex. 2 at 3, 6), but it was not made in the Respondent's Brief. In any case, I reject the argument, as there is no evidence that providing the requested information would have required the Agency to act in a way that would have intruded on management's rights. *Cf. Library of Cong.*, 63 FLRA 515, 520-21 (2009) (arbitrator considering information request did not require the agency to take actions that would have intruded on management rights). Although the Agency may argue in the parties' grievance procedure that the Union cannot challenge a training assignment, that is not a valid reason to deny the Union's information request. *SSA Balt.*, 39 FLRA at 309. The Union believes that the Agency may have violated a contract provision by denying compensation to bargaining unit employees, and it is entitled to information that would help it to determine whether a grievance is justified. The Agency's management rights arguments are relevant to the merits of the grievance, but not to the Union's need for the underlying information.

Based on the foregoing, I find that the Respondent was obligated to provide the Union with the position descriptions it requested. By failing to provide the Union with this information, the Respondent violated § 7116(a)(1), (5), and (8) of the Statute.

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<sup>8</sup> Putting aside the question of who was legally correct in this case, it is a sad commentary on the state of labor-management relations at Camp Lejeune, when the parties cannot find a compromise on this issue. Both Hawkins and Leither agreed that the PDs were public documents available to any employee, yet each man insisted that the other obtain the documents. Hawkins and Leither each expended more time justifying their positions than it would have taken to obtain the handful of documents.

The Wade Letter

As discussed above, it is now undisputed that the Wade Letter does not exist. GC Br. at 4; Resp. Br. at 5; GC Supp. Br. at 1-2; Resp. Supp. Br. at 1. At the time of the information request, however, Leither was under the impression that Wade had written such a letter. See Affidavit attached to GC Supp. Br. In most of his email responses to Leither regarding the information request, Hawkins ignored the request for the Wade Letter and addressed only the position descriptions. GC Ex. 2 at 4, 6-8, 11-12. Finally, in his email dated September 30, Hawkins addressed the Wade Letter: "The email you requested constitutes internal communications between members of management and is therefore not releasable." *Id.* at 3. It was only in its Answer to the Complaint, seven months later, that the Agency asserted that Wade had never sent such a letter at all. GC Ex. 1(d). Hawkins's assertions to Leither about the Wade Letter misleadingly assumed that the letter existed, causing both sides to dig in their heels over a nonexistent document.

An agency cannot provide a document or information that does not exist; thus, its refusal to provide such a document cannot be an unfair labor practice. *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326 (1987) (*Naval Supply*). Nevertheless, when a union requests a document that doesn't exist or that the agency doesn't maintain, the agency is obligated to inform the union of that fact, and the failure to do so constitutes a violation of §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute. *Soc. Sec. Admin., Balt., Md.*, 60 FLRA 674, 679 (2005); *Naval Supply*, 26 FLRA at 326-27.<sup>9</sup>

Applying this precedent to the case at bar, the Respondent's failure to provide the nonexistent Wade Letter did not violate the Statute, but its failure to inform the Union of this fact did. While this may seem like a technical, even trivial, point, the consequences of Hawkins's misstatement on September 30 were significant. As a result of Hawkins's statement that the Wade Letter was a privileged, internal management communication, the Union believed the Agency was hiding material evidence of a contract violation, thus providing further incentive for the Union to pursue its grievance. A diligent, timely search for the Wade Letter in September, combined with disclosure to the Union, would have eliminated at least one issue from the dispute. See also *SSA Dallas*, 51 FLRA at 1227. Accordingly, I conclude that the Respondent violated § 7114(b)(4) of the Statute, which constituted an unfair labor practice under § 7116(a)(1), (5), and (8) of the Statute.

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<sup>9</sup> The General Counsel did not assert in the Complaint that the Respondent violated the Statute by failing to inform the Union that some of the requested information did not exist, but neither the GC nor the Union was aware of that fact when the Complaint was issued. GC Ex. 1(c). 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). Moreover, the issue was fully litigated, as documented in the GC's Brief in Support of its Motion for Summary Judgment at 4, and in the parties' supplemental briefs. The Respondent, therefore, had an opportunity to rebut the GC's claim. See *U.S. Dep't of Justice, Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 393 (1999).

Summary

The Union established a particularized need for the position descriptions it requested, and the Agency did not establish a valid basis for refusing to provide them. By failing to provide them, the Agency violated § 7116(a)(1), (5), and (8) of the Statute. Further, the Respondent was obligated to tell the Union that the Wade Letter did not exist, and the Respondent's failure to do so also violated § 7116(a)(1), (5), and (8) of the Statute.

Accordingly, the General Counsel's Motion for Summary Judgment is granted.

In order to remedy the unfair labor practice, the Respondent will be ordered to furnish the requested information to the Union and to post a notice, signed by the Commander of Camp Lejeune, to employees regarding its unfair labor practice. In accordance with the Authority's decision that unfair labor practice notices should, as a matter of course, be posted on bulletin boards and distributed to employees electronically, I will order both methods of dissemination. *See U.S. Dep't of Justice, 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 Department of the Navy, U.S. Marine Corps, Cherry Point Fire and Emergency Services, Cherry Point, N.C., shall:

1. Cease and desist from:

(a) Refusing to provide the position descriptions that the American Federation of Government Employees, Local 2065, AFL-CIO (Union), requested in its information request of September 18, 2014.

(b) Failing or refusing to inform the Union that the letter it requested in its information request of September 18, 2014, did not exist.

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

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

(a) Provide the position descriptions that the Union requested in its information request of September 18, 2014.



(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, Marine Corps, Camp Lejeune, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Distribute a copy of the Notice, signed by the Commander of Marine Corps Camp Lejeune, through the Respondent's email system to bargaining unit employees of the Fire and Emergency Services Department.

(d) Pursuant to § 2423.41 of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Region, 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., March 22, 2016

A handwritten signature in black ink, appearing to read "Richard A. Pearson", written over a horizontal line.

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 the Navy, U.S. Marine Corps, Cherry Point Fire and Emergency Services, Cherry Point, North Carolina, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to distribute and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL** provide the Union with the position descriptions it requested in its information request of September 18, 2014.

**WE WILL NOT** refuse to provide the American Federation of Government Employees, Local 2065, AFL-CIO (Union) with the position descriptions requested in the Union's information request of September 18, 2014.

**WE WILL NOT** fail or refuse to inform the Union that the letter it requested in its information request of September 18, 2014, did 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, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA, 30303, and whose telephone number is: (404) 331-5300.