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

OALJ 17-06

U.S. DEPARTMENT OF THE AIR FORCE
SELFRIDGE AIR NATIONAL GUARD BASE, MICHIGAN

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2077, AFL-CIO

CHARGING PARTY

Case No. CH-CA-15-0556

Alicia E. Weber
For the General Counsel

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Eugene Ingrao
For the Respondent

Kevin Ashbeck
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

This case involves two employees, a civilian and a dual-status technician, who work in the same office at Selfridge Air National Guard Base. The civilian came to believe that the Agency had offered the technician opportunities to earn compensatory time without offering similar opportunities to him. His union initiated a grievance alleging that the Agency failed to distribute overtime opportunities to the civilian in an equitable manner, and it filed an information request for the time and attendance (T&A) records of the two employees for one pay period. The Agency asked the Union several times to clarify its request, and each time the Union did so. Among other things, the Union explained that it needed the information to support a grievance alleging that the Agency violated a specific provision of the parties' Memorandum of Agreement (MOA) relating to overtime. The Agency felt that these explanations were insufficient, and it refused to furnish most of the information requested.

There are three main questions in this case. The first is whether the Authority has jurisdiction over this dispute. The Agency insists that the technician's work was military in nature, and that such military matters are outside the Authority's jurisdiction. Because this case pertains to an information request that concerns civilian matters, and there is no evidence that the information request would affect the Agency's military operations, I find that I have jurisdiction over this dispute.

The second question is whether the Union established a particularized need for the requested information. Because the Union explained in detail how the information would be used to support the allegations in its grievance, the answer to this question is yes.

Finally, does the Privacy Act prohibit the disclosure of the technician's time and attendance records? Because the requested information is relevant and necessary under the routine use exception to the Privacy Act, and because disclosing the information would not implicate any employee privacy interests, the Privacy Act does not prohibit disclosure. Therefore, the Agency's refusal to provide the information to the Union was an unfair labor practice.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) 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 July 17, 2015, the American Federation of Government Employees, Local 2077, AFL-CIO (the Union) filed a ULP charge against the U.S. Department of the Air Force, Selfridge Air National Guard Base, Michigan (the Agency, Respondent, or Selfridge). On January 11, 2016, after investigating the charge, the Chicago Regional Director of the FLRA, on behalf of the General Counsel (GC), issued a Complaint and Notice of Hearing, alleging that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute by failing to provide the Union with an employee's time and attendance records (often referred to as timecards) for the period of April 5-17, 2015, with personally identifiable information (PII) redacted. On February 3, 2016, the Respondent filed its Answer to the Complaint, denying that it had violated the Statute.

On April 1, 2016, the GC filed a Motion for Summary Judgment and Brief in Support of its Motion for Summary Judgment and Motion to Indefinitely Postpone the Scheduled Hearing (GC's brief), arguing that there were no material facts in dispute. The Respondent filed a Response to Motion for Summary Judgment on April 12, 2016, arguing that summary judgment would be inappropriate, because there were material facts in dispute. Based on these pleadings, I issued an Order Indefinitely Postponing Hearing on April 13, 2016. In the Order, I explained that the factual disputes cited by the Respondent were not material to the alleged ULP, and therefore a hearing before me was not necessary. I gave the parties the opportunity to submit supplemental briefs, and the GC submitted a supplemental brief.

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 Complaint. The undisputed evidence shows that on April 17, 2015, the Union requested that the Agency furnish time and attendance records for Rachel Alexander for the period April 5-17, 2015, with PII redacted. The Union indicated that the requested information was needed in connection with a grievance. GC Ex. 4. The grievance alleged that the Agency failed to offer the grievant, Jon Suminski (the Union's President and Alexander's coworker) the opportunity to work overtime in an equitable manner, as required by the collective bargaining agreement between the Agency and the Union. *See* GC Ex. 5. Subsequently, Suminski engaged in an email dialogue with Monica Caughell, a Labor Relations Officer at the Agency, as to whether the Union had demonstrated its need for the requested information. Caughell Aff. at 1; GC Ex. 3. Ultimately, Caughell refused to provide the Union with the requested information. *See* Complaint ¶13; Answer ¶13. In its Answer, the Respondent admitted that the requested information was normally maintained in the regular course of business, was reasonably available, and did not constitute guidance for management relating to collective bargaining. Answer ¶¶8-9, 11. The Respondent argued, however, that the Union failed to establish a need for the requested information and that the Privacy Act prohibited the Agency from disclosing the requested information. *Id.* ¶¶12-13.

The Respondent has also offered exhibits as part of its Response to Motion for Summary Judgment (Respondent's brief), and in its brief it lists numerous facts which it contends are still in dispute, and which require a hearing to resolve. But as I noted in the Order Indefinitely Postponing Hearing, Respondent conflates factual disputes that are material to the merits of the Union's grievance with factual disputes that are material to the ULP charge. While there are many of the former type of facts in dispute, there are none of the latter. For example, the Respondent argues (or at least suggests) that Suminski was in fact offered opportunities to work overtime; that there was no past practice of treating civilian employees and dual-status technicians similarly for overtime; and that any failure to offer Suminski an opportunity to work overtime was justified by applicable collective bargaining agreements and the needs of the Agency's mission. Resp. Br. at 18-20. While these factual issues might be material to resolving the parties' underlying grievance, I do not need to resolve them in order to decide the Union's ULP charge, which alleges that the Agency unlawfully refused to provide the Union with Alexander's timecard. The evidence of record provides me with all the facts I need to make that determination. The factual disputes cited by the Respondent do not support a conclusion that a hearing is needed.

The Respondent also asserts legal justifications for refusing to furnish the requested information. It argues, for instance, that the Union failed to demonstrate a need for Alexander's timecard (*id.* at 16); that the Union failed to show how the requested information would support the claims raised in the Union's grievance (*id.* at 16, 20, 22); that the Union failed to respond adequately to requests for clarification (*id.* at 23-24); and that disclosing the requested information would violate the Privacy Act (*id.* at 13, 17-18). In addition, the Respondent suggests that I lack jurisdiction over this matter, based on the military matters involved. *Id.* at 14-15, 22. While these objections show that the parties disagree on how to apply the law to the undisputed facts, I do not need to conduct an evidentiary hearing to resolve them. I will address the Respondent's legal arguments on their merits in my Analysis and Conclusions.

For these reasons, 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 United States Air Force, is an agency within the meaning of § 7103(a)(3) of the Statute. Complaint ¶3; Answer ¶3. The Union is labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees. Complaint ¶4; Answer ¶4.

The Union represents civilian employees (referred to as Title 5 employees) at Selfridge. Suminski Aff. at 1. The Union and the Respondent are parties to an MOA, which serves as their collective bargaining agreement. GC Ex. 1. The Association of Civilian Technicians (ACT) represents "dual status" technicians (referred to as Title 32 employees or Title 32 technicians). Suminski Aff. at 1. The ACT and the Adjutant General of Michigan are parties to a separate collective bargaining agreement (ACT CBA). Resp. Ex. 3. Dual status technicians are federal civilian employees who, as a condition of their employment, must become and remain military members of the state National Guard in which they are employed. *AFGE, Local 3936, AFL-CIO v. FLRA*, 239 F.3d 66, 68 (1st Cir. 2001) (citing 32 U.S.C. § 709). Title 5 and Title 32 employees at Selfridge work side by side and frequently perform the same or similar duties. Suminski Aff. at 1-2; *see also* Caughell Aff. at 1. Approximately 200 Title 5 employees and 300 to 400 Title 32 employees work at Selfridge. Suminski Aff. at 1.

The 127th Wing of the Michigan Air National Guard is based at Selfridge. Suminski works in the 127th Logistics Readiness Squadron Deployment and Distribution Command (DDC) within the Transportation Management Office, which handles inbound and outbound cargo and passenger movements at Selfridge. *Id.* at 1-2. Suminski and Alexander are both Transportation Assistants and are the only two employees in their office. *Id.* at 2. They often work next to each other and perform the same duties. *Id.* For example, Suminski and Alexander both procure aircrafts for passengers and large trucks for cargo, and both perform work relating to military and civilian travel.

Suminski is a civilian Title 5 employee; Alexander is a Title 32 technician with a dual status as a civilian and military employee. *Id.* At least some of Alexander's work as a Transportation Assistant is performed in her civilian capacity. Caughell Aff. at 4; Suminski Aff. at 2, 4. Alexander wears the military uniform and is a member of the National Guard as a condition of her employment. Suminski Aff. at 2. Alexander is entitled to compensatory time off ("comp time") for overtime work, but she is not entitled to overtime pay; Suminski, as a Title 5 employee, is entitled to overtime pay. *Id.*

Before March 2015,[1] there had not been regular opportunities to earn overtime or comp time in Suminski's and Alexander's office. *Id.* at 5. In late March or early April, Suminski heard that Alexander had been "called in during nights and/or weekends . . . to process one or more aircrafts going on military deployment." *Id.* at 3. Suminski believed that the work Alexander performed on nights and weekends was the same as what he regularly performed during normal work hours, and that he and Alexander were both qualified to perform it. *Id.* Suminski believed that he was not offered an opportunity to work overtime during this period. *Id.*

On April 16, Suminski initiated an informal "adjustment of a grievance" concerning the "inequitable distribution of overtime/compensatory time" in his office. Suminski Aff. at 3. Suminski and Kevin Ashbeck, the Union's Chief Steward, met with Captain Shaun Modock, Distribution Flight Commander, and Matthew Tabor, Traffic Manager, to discuss the matter. *Id.* During the meeting, Modock or Tabor asserted that Suminski had been offered the chance to work overtime on three separate occasions, on April 4, 6, and 7, and that Suminski had been either unable or unwilling to accept those offers. Resp. Ex. 11.

On April 17, Ashbeck delivered an information request to Modock on behalf of the Union. As relevant here, the information request stated:

> The Union is requesting the following information for the purpose of representation of bargaining unit members. This information is required to establish if a grievance is warranted or in support of such grievance, within the 127th WG Transportation. . . .
>
> 1. Time and attendance records for the following individuals within the Transportation Assistant function, Jon Suminski and Rachel Alexander. For the period of, 5 APR 15 thru 17 APR 15. (Please redact any PII)
>
> 2. A copy of all concerned employee requests for compensatory time.
>
> This information will be used to determine if the [MOA] . . . was violated by the agency. . . .

GC Ex. 4.

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[1] Hereafter, all dates are in 2015, unless otherwise noted.

On April 23, Ashbeck submitted a written grievance for Suminski on behalf of the Union. GC Ex. 5. Citing Article 18, ¶7 of the MOA,[2] Ashbeck alleged that management "did not offer the opportunity for the Grievant to perform overtime, while allowing" Alexander to perform overtime, in violation of the contractual requirement that management distribute overtime "as equitably as possible among qualified employees within the shop." *Id.*

On April 30, Modock denied the Union's grievance. Resp. Ex. 11. On that same date, Ashbeck notified the Agency that the Union intended to file a ULP charge to obtain the requested information. *See* Resp. Ex. 4.

On May 1, Caughell responded to the information request. After summarizing the request, Caughell asked the Union the following questions:

> 1) Why and how is Mr. Suminski's timecard needed to show the agency violated the collective bargaining agreement.
>
> 2) Rachel Alexander is not a unit employee. She is employed under a different employment authority than Mr. Suminski. Please explain why and how her timecard is needed to show the agency violated the [MOA].
>
> 3) Please clarify who is the employee concerned in item #2 of your request.

Resp. Ex. 5.

Suminski responded on May 5, and an email dialogue between Suminski and Caughell ensued. Suminski explained that the requested information would be used for the purpose of "pursuing a grievance for myself as an employee within the [Transportation Management Office] shop," and that the request thus showed "the connection between what we need and our representational duty of representing grievances." Resp. Ex. 6 at 2. Suminski added that "[t]he grievance has been filed and therefore the data is necessary to continue pursuit of the grievance." *Id.* Suminski further asserted that the Union "intended to use the information to determine if a violation of the [MOA] had been made" by the Agency. *Id.* "SPECIFICALLY," Suminski continued, "Mr. Ashbeck and the union are alleging that Article 18 Paragraph 7 was violated." *Id.* Addressing Caughell's questions, Suminski stated

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[2] As relevant here, Article 18, ¶7 of the MOA states:

> The opportunity to perform overtime will be distributed as equitably as possible among qualified employees in each shop or office contingent upon the nature of the work. An employee will be charged overtime credit only upon working or not being available for said overtime. Management recording of a call made will constitute a valid attempt to offer overtime. A record of overtime is to be posted for review.

GC Ex. 1 at 23.

that the Union needed his timecard because "Suminski is the grievant." *Id.* (emphasis omitted). He asserted that without a timecard "provided by the Agency [and] certified by the Agency, the grievance would be without proof." *Id.* (emphasis omitted). Regarding her second question, Suminski asserted that Alexander, "a unit employee of the 127th Wing," is "Suminski's co-worker [and] thus would be given the same opportunities in civilian status as Mr. Suminski 'fairly and equitably . . . .'" *Id.* at 2-3 (emphasis omitted). With regard to Caughell's third question, Suminski clarified that he was referring to himself and Alexander. *Id.* at 3. Suminski further asserted that disclosing the requested information "is no task whatsoever." *Id.*

Caughell wrote back on May 8.[3] She agreed to provide Suminski's timecard. Resp. Ex. 8. With regard to Alexander's timecard, however, Caughell asked Suminski to "clarify your particularize[d] need for the information requested for Ms. Alexander as she [is] a Title 32 employee, represented by another union and is not subject to the procedures outlined" in the MOA for overtime. *Id.*

Suminski replied about an hour later. Resp. Ex. 9. He acknowledged that while Alexander "is a title 32 employee" who "is not covered under" the MOA, "her status is not part of this request for data." *Id.* Suminski contended that Alexander's timecard "is necessary for the union[']s ability to represent the grievant . . . and will thus be used to . . . make an argument throughout the grievance process and at arbitration." He continued that "we will use the data to fully understand the nature of the grievance and determine if in fact a . . . violation occurred or not." *Id.* Although the Union did not represent Alexander, it said it needed her T&A information "to analyze the complaint further and present arguments . . . of fairness and equality." Suminski also stated that he wanted to determine if a grievance is necessary or if the current grievance is with or without basis." *Id.* He elaborated that the Union might make "an argument of 'past practice' with this data, alleging that although two separate types of employees, they serve the same function and have been used as equals for overtime in the past." *Id.*

On May 13, Caughell informed Suminski that he could pick up his timecard with PII redacted. Resp. Ex. 12. With respect to Alexander's timecard, Caughell stated:

> I am still unable to ascertain . . . how Ms. Alexander's . . . timecard is necessary or relevant to your grievance (5113-1) which is alleging a . . . violation of a Title 5 collective bargaining provision which only provides procedures for Title 5 BUEs. . . You have not addressed why her timecard is necessary or relevant regarding an alleged management[] decision to assign work to a Title 32 employee . . . . Therefore, I am again asking you to clarify why Ms. Alexander's timecard is necessary and relevant to your representational duties.

[3] Caughell addressed the email to Ashbeck and cc'd Suminski and others, but Suminski and Caughell continued to be the only active participants in the conversation. Resp. Ex. 8.

Id. Finally, she indicated that the Agency lacked documentation concerning employee requests for compensatory time. *Id.* Suminski responded about fifteen minutes later, explaining:

> [Alexander's] Timecards will be used to illustrate that management unfairly assigned additional work outside of normal tour of duty (overtime/ compensatory time work opportunity) based on practices throughout the 127th wing to offer such opportunities fairly to all employees within a work office (title 32 title 5). Based on the union[']s need to argue practices and a violation, her Timecards [are] very relevant . . . status is irrelevant because . . . employees have always been given an opportunity to perform overtime/comp fairly and equitably regardless of their status. I can't very well make an argument of practice if I don't have her Timecards now can I?

Resp. Ex. 13.

Suminski picked up his timecard from Caughell on May 15. Caughell Aff. at 3. Caughell told Suminski that she was not providing Alexander's timecard, because Suminski "had not met his particularize[d] need" and because Caughell "would not be able to protect Ms. Alexander's privacy regardless of the amount of redaction." *Id.*

On May 28, Suminski emailed Caughell to clarify that the request would "'encompass' the dates between late March 2015 and 7 April 2015." Resp. Ex. 14. Suminski stated that the Union was "looking for the timecard that included the date at a minimum of 4, 6, and 7 April 2015." *Id.* He clarified that "5 April" in the information request "meant the timecards that came out after that period which would have included 4 April 2015." *Id.*

Suminski sent Caughell another email about fifteen minutes later, reiterating and summarizing the Union's need for Alexander's timecard. He stated:

> [W]e are in need of proving that management has violated a practice that has been in place for many years regarding the equal distribution of overtime amongst qualified employees. The practice has been for many years that Article 18 Paragraph 7 has been extended to incorporate similarly situated employees such as title 32's who perform the same practical day-to-day job function. Hence, Jon Suminski and Rachel Alexander, although different statuses, have been used interchangeably much like all other title 5's and title 32's in the same shop.
>
> The practice[s] throughout the base where Title 5 bargaining unit employees co-exist in the same shop with [Title 32] employees remains the same throughout the base as of today. However, the instance[s] referred to in the grievance, management "changed" the normal practice and did not offer the title 5 employee the opportunity to perform overtime nor did they even have an overtime roster posted like in all other shops . . . .

> Therefore, we have proven the relevance of our particularized need that although Alexander is not part of our bargaining unit, we are still entitled to the information to support our grievance because it supports the argument we will make at arbitration. . . .

Resp. Ex. 15.

Caughell did not respond to Suminski's May 28 emails, leading the Union to file its ULP charge. *See* Suminski Aff. at 5.

Caughell, Suminski, and Ashbeck elaborated on several issues related to the information request in their affidavits. Caughell asserted in her affidavit that she was unable to determine why the Union needed the requested information, especially because it was unclear how that information would help the Union prove that the Agency violated the MOA. *See* Caughell Aff. at 2-6. Caughell acknowledged that "information relative to non-unit employees may be needed to assess management's treatment of unit employees in similar situations and whether the application is consistent," but she insisted that Suminski "had not provide[d] to me any information that would clarify . . . how the timecard . . . would be required to establish . . . a . . . violation[]" of the MOA. *Id.* at 2-3. Caughell also asserted that Alexander's timecard "only addresses when the employee [w]as at work or not for pay purposes." *Id.* at 3. In addition, Caughell contended that a timecard "does not indicate the nature of the overtime work performed" and does not show that Suminski and Alexander "have been used as equals in the past." *Id.* at 5.

In his affidavit, Suminski asserted that General Counsel's Exhibit 7, a "sample" time and attendance record with PII redacted, "is an example of the time and attendance records we were seeking." Suminski Aff. at 4. The record contains information regarding the employee's name and the type of hours (including regular time, overtime, compensatory time earned, sick leave, suspension, and AWOL) the employee worked. GC Ex. 7. Caughell countered that the sample timecard "not only shows the PII redaction but other privacy issues that could be of concern regarding an employee's privacy concerns which Mr. Suminski was aware of." Caughell Aff. at 6. She did not identify those privacy concerns.

With regard to whether Alexander was working during the disputed time period in her civilian capacity and her military capacity, Suminski stated in his affidavit:

> I do not know whether Alexander was performing the duties in her civilian capacity using compensatory time or whether she was on military orders. I also do not know how many times Alexander was called in or how much compensatory time she was granted (if any at all). I suspect she was on civilian time. If she was in a civilian capacity and earned compensatory time, the compensatory time should show up on her time and attendance records. If she was on military orders and did not receive compensatory time that would also be revealed on the time and attendance records. . . .

Suminski Aff. at 4.

Caughell agreed with Suminski that Alexander "performs the same type of work in a military or civilian capacity and can receive compensatory time for military functions such as a deployment activity." Caughell Aff. at 4. She asserted, however, that a timecard "would not provide a direct connection that the nature of work that [Alexander] performed and received compensatory time for was not performing her military mission. . . ." *Id.* at 4-5.

POSITIONS OF THE PARTIES

General Counsel

As an initial matter, the General Counsel asserts that the Authority has jurisdiction over this dispute. While the GC acknowledges that the Authority lacks jurisdiction over the military aspects of a dual-status technician's employment, it submits that this case involves "a request for information related to Alexander's civilian capacity." GC Supp. Br. at 12-13. The GC emphasizes that the Agency has never asserted (much less demonstrated) that Alexander was on military orders when she worked during the period covered by the information request. *Id.* at 12. The mere possibility that she was working in her military capacity cannot uproot the Authority's jurisdiction.

With respect to the information request, the GC argues that the Agency violated the Statute by failing to provide the Union with all of the information it had requested. In this regard, the GC contends that the Union established a particularized need for the requested information. The Union explained that it needed the information to assess whether the Agency violated a past practice of distributing overtime and compensatory time equitably between Title 5 and Title 32 employees working together. It cited a specific provision of the MOA regarding the equitable distribution of overtime, and it referred to a specific Agency action, namely, the failure to offer Suminski overtime. In this manner, the Union established a particularized need for Alexander's time and attendance information. GC Br. at 12; GC Supp. Br. at 4-5, 12.

Next, the GC argues that the Authority has long required agencies to furnish information about employees outside the bargaining unit, when it is necessary to investigate a unit employee's grievance. GC Br. at 14-15 (citing *U.S. Dep't of Transp., FAA, New Eng. Region, Bradley Air Traffic Control Tower, Windsor Locks, Conn.*, 51 FLRA 1054, 1067-68 (1996) (*FAA Bradley*)), among other cases. Thus, when, as here, unit and non-unit employees occupy similar positions, and information about the treatment of non-unit employees is necessary to evaluate whether they were treated differently than unit employees who have filed a grievance, the Authority has required the production of that information. *See also Health Care Financing Admin.*, 56 FLRA 503 (2000) (*HCFA*); *Internal Revenue Serv., Wash., D.C.*, 50 FLRA 661 (1995) (*IRS*).

The GC further asserts that the Agency failed to raise any interests in nondisclosure at or near the time of the Union's request. GC Br. at 12-13. Moreover, the Union fully responded to the Agency's requests for clarification. *Id.* at 13. The GC argues that the Union did not need to demonstrate that Suminski's grievance was meritorious in order to establish a particularized need for the information. *Id.* at 13-14.

The General Counsel disputes the Respondent's assertion that the Privacy Act applies to the information requested by the Union; but even if it does apply, the information is disclosable under FOIA and under the "routine use" exception to the Privacy Act. GC Supp. Br. at 5-6. With respect to FOIA, the GC contends that while the Respondent identified a system of records in its Answer, the Respondent failed to demonstrate that disclosure would implicate employee privacy interests and failed to describe the nature and significance of those interests. GC Br. at 17; GC Supp. Br. at 6-8. Because the requested information does not implicate any privacy interests, there is no need to determine whether there is a public interest in disclosure. GC Br. at 17-18, 21; GC Supp. Br. at 9.

The Respondent admits that the requested information is contained in the Defense Civilian Pay System, whose system of records notice allows, as a routine use, disclosure to labor organizations when "relevant" and "necessary" to their duties of exclusive representation. Resp. Ex. 16 at 2. The GC argues that the Union met this "relevant and necessary" test. GC Br. at 19-21. The requested information is relevant, the GC contends, because it helps show whether the Agency offered Suminski and Alexander overtime and compensatory time opportunities in an equitable manner, and thus will help the Union investigate and prosecute its grievance on behalf of Suminski. *Id.* at 20. The requested information is necessary, the GC maintains, because there exists no alternative, less invasive means of obtaining the information. *Id.* at 20-21.

To remedy the ULP, the General Counsel argues that the Respondent should be ordered to furnish Alexander's time and attendance records as requested, and that Respondent refrain from alleging as a defense in any subsequent grievance or arbitration that the grievance is untimely. In this regard, the GC asserts: "Although the Union could have expended the resources to arbitrate this grievance, without the information it could not make a realistic assessment of the likely merits of the grievance and the cost-benefit of so proceeding." *Id.* at 21-22 (citing *HCFA*, 56 FLRA at 507) (footnote omitted). In order to recreate the conditions that would have existed if the Agency had not violated the Statute, the Union should be allowed to assess the merits of its grievance after receiving Alexander's time and attendance records, and to pursue the grievance to arbitration, if necessary.

Respondent

The Respondent's positions are based on the brief it filed in opposition to the motion for summary judgment. It did not file a subsequent brief. Respondent argues first that the Authority lacks jurisdiction to adjudicate this case, because the case involves the Agency's decision to assign Alexander to a military mission. Resp. Br. at 14-16 (relying on decisions such as *U.S. Dep't of the Air Force, Seymour Johnson AFB*, 57 FLRA 884 (2002) (*Johnson AFB*), and *NFFE, Local 1623 v. FLRA*, 852 F.2d 1349 (D.C. Cir. 1988), *aff'g NFFE, Local 1623*, 28 FLRA 633 (1987)). In this regard, it asserts:

> The Union never clarified whether the work of Ms. Alexander was military or civilian in nature. Ms. Caughell in her declaration notes that this assignment of work to Ms. Alexander was while she was assigned to her military position. . . . If Ms. Alexander was assigned work in her military position, then it is beyond the jurisdiction of this proceeding. . . .

Resp. Br. at 22. The Respondent asserts that "Alexander performs the same type of work in a military capacity [as she performs in her civilian capacity,] and as such, her presence at a deployment activity is part of her military duties . . . ." *Id.* at 21. In addition, the Respondent argues that there is "no indication that a timecard would provide . . . whether or not she was performing a military mission. The event that is described is a military mission." *Id.*

With regard to the merits of the Union's information request, the Respondent acknowledges that Suminski "described the possible representational activities that the information may be used for," in his May 8, 2015 email. *Id.* at 18. However, it argues that the Union failed to establish a particularized need for Alexander's timecard. *Id.* at 16-17. To support this claim, Respondent argues that the Union failed to show how Alexander's timecard would establish a violation of the MOA. Specifically, Alexander's timecard (1) pertains to a Title 32 technician and therefore would not establish a violation of the MOA, which pertains to Title 5 employees (*id.* at 16-17); (2) would not establish a past practice concerning the distribution of overtime opportunities (*id.* at 21); (3) would not indicate whether Alexander was "in a civilian or military status" (*id.* at 22); (4) would not "address who was qualified to perform the overtime work"[] (*id.* at 22); and (5) "only addresses when the employee was at work or not and for pay purposes" (*id.* at 19). Further, Respondent contends that the Union failed to show how Alexander's "status" for April 4, 6, and 7 "is required to show that a practice was in place; management's knowledge of the practice; the purpose of the overtime; and whether Mr. Suminski was in fact offered the ability to work." *Id.* at 20. With regard to Caughell's requests for clarification, the Respondent contends that the "Union's attempt[s] to clarify in this case were negligible at best . . . ." *Id.* at 23-24 (citing *Dep't of the Air Force, Wash., D.C.*, 52 FLRA 1000 (1997) (*Air Force*)).

With respect to the Privacy Act, the Respondent argues that the Union failed to demonstrate that the requested information was "relevant" or "necessary" to constitute a routine use. Resp. Br. at 17, 19. The Union did not establish a "traceable, logical, and significant connection to the purpose to be served by providing [Alexander's] timecard to the Union." *Id.* at 19. Thus, the requested information was not relevant. Citing *U.S. Dep't of Transp., Fed. Aviation Admin., Little Rock, Ark.*, 51 FLRA 216, 226 (1995) (*FAA Little Rock*), Respondent asserts that in determining whether a union's information request constitutes a routine use, the Authority continues to defer to OPM guidelines on this issue, even though the source of those guidelines has been revoked by OPM. Resp. Br. at 13. In addition, the Respondent contends that the sample timecard submitted by the General Counsel (GC Ex. 7) illustrates "privacy issues that could be of concern regarding an employee's privacy . . . ." *Id.* at 23.

ANALYSIS AND CONCLUSIONS

The Authority Has Jurisdiction to Resolve the Unfair Labor Practice Charge

Although military matters are generally nonjusticiable before the Authority, not all aspects of technician employment are irreducibly military in nature. *Mich. Army Nat'l Guard*, 69 FLRA 393, 395 (2016). Rather, "the technician's dual status has been recognized by virtually every court and administrative forum to address the issue," including the Authority. *P.R. Air Nat'l Guard, 156th Airlift Wing (AMC), Carolina, P.R.*, 56 FLRA 174, 178-79 (2000) (*P.R. Nat'l Guard*). It is well settled that although technician employment takes place in a military environment, the technicians are federal civilian employees who have rights under the Statute. *Mich. Army Nat'l Guard*, 69 FLRA at 395. Moreover, the National Guard Technician Act expressly designates technicians as "dual status" civilian and military employees. 32 U.S.C. § 709(b)(1); *see also* 10 U.S.C. § 10216(a)(1)(C) (defining military technicians as "[f]ederal civilian employee[s]" who are "assigned to . . . civilian position[s]").

Accordingly, although the Authority does not have jurisdiction over military matters arising out of technician employment, it does have jurisdiction over civilian matters of technician employment that arise under the Statute. *Mich. Army Nat'l Guard*, 69 FLRA at 395. To accommodate this dual nature of technician employment, the Authority determines whether an issue relates to the civilian aspect of that employment – and is therefore within the protection of the Statute – or whether the issue relates to the military aspect, which is outside the Statute's coverage. *Id.*

Three Authority decisions illustrate what the Authority has considered to constitute civilian matters and military matters. In *Mich. Army Nat'l Guard*, two dual-status technicians were terminated from their civilian positions for misconduct, and their union represented them in appealing. While the technicians awaited their hearings, the agency issued a directive restricting the union from communicating with the employees outside the presence of an agency attorney. 69 FLRA at 393. When the union filed a ULP charge alleging that the directive interfered with employees' statutory right to communicate with their exclusive representative; the agency argued that the dispute concerned a military matter over which the Authority lacked jurisdiction. The Authority disagreed, ruling that the ULP charge "does not stem from the subject matter of the administrative hearing." Instead, it found that the charge "concerns only the Respondent's directive," which "extends beyond any military aspect of the administrative hearing and into the civilian realm of bargaining-unit employees' employment." *Id.* at 395. Accordingly, the Authority held that it had jurisdiction over the dispute.

The Authority reached the opposite conclusion in *Johnson AFB.* In that case, a dual status Air Reserve Technician volunteered for deployment to France as part of an Air Expeditionary Force to support NATO action in Kosovo, a deployment requiring all personnel to be in a military status. A flight chief placed the technician on the alternate list for the deployment but later removed the technician from the list because he "caused too

many waves." 57 FLRA at 887-88. The Union charged that the agency violated § 7116(a)(1) and (2) of the Statute by discriminating against the technician for his protected union activity, but the Authority held that the agency's decision to remove the technician from the list of employees selected for deployment concerned a military matter, as it pertained to "the staffing of, or personnel assigned on, a military mission . . . ." *Id.* at 887. The Authority also found that it lacked jurisdiction to resolve the claim concerning the flight chief's "too many waves" statement, because it was "inextricably related" to the agency's decision to remove the technician from the deployment list.

In *P.R. Nat'l Guard*, 56 FLRA at 178-80, a union representing dual status technicians announced that it was going to conduct informational picketing to protest working conditions. A brigadier general ordered the union president not to picket on the access road leading to the military base and warned him that picketers should wear masks, as they might be photographed. Subsequently, the agency suspended the employees for picketing and advised the union president that he would be terminated. In upholding findings that the general's order and surveillance threat violated § 7116(a)(1) of the Statute, the Authority determined that the picketing and the general's order and surveillance threat all related to civilian, not military, matters. In this regard, the Authority noted that the general's "order" was not a military order; the order and the surveillance threat related to the civilian aspects of technician employment; the picketing raised grievances concerning civilian working conditions; the technicians were wearing civilian clothes and were off duty during picketing; and the picketing did not disrupt the agency's military operations. Accordingly, the Authority determined that it had jurisdiction over the dispute. *Id.* at 179-80.

In our case, it is clear that the ULP charge and complaint pertain to civilian, not military, matters. In this regard, the Union, which represents civilian employees exclusively, sought data for Suminski, a civilian employee, and Alexander, a dual status technician who occupies the same civilian position as Suminski, in order to determine whether the Agency violated the MOA, which covers only civilian employees. Further, the Union sought the data in connection with Article 18, ¶7 of the MOA, which pertains to the equitable distribution over overtime among qualified employees in a "shop or office," which are clearly civilian realms. GC Ex. 1 at 23; Resp. Ex. 6 at 2. Suminski repeatedly indicated to Caughell that the Union was interested in Suminski's and Alexander's timecards to compare the opportunities each received as similarly situated civilian employees. Specifically, on May 5, 2015, Suminski asserted that Alexander's time and attendance information was needed because Alexander is "Suminski's co-worker" and would be given "the same opportunities *in civilian status* as Mr. Suminski . . . ." Resp. Ex. 6 at 2-3 (emphasis added). Subsequently, Suminski asserted to Caughell that while he and Alexander had different statuses, they nevertheless performed the same civilian work (they "serve the same function" and work in the "same office") and therefore have been "used as equals" for overtime and compensatory time opportunities in the past. Resp. Ex. 9; *see also* Resp. Exs. 13 & 15. Suminski's clarifications plainly show that the Union sought to compare the opportunities that Suminski received with the opportunities Alexander received in her civilian capacity only. Therefore, the record clearly indicates that the information request concerned civilian matters only.

Finally, while the Respondent suggests in its pleadings that Alexander was performing work in connection to a military deployment, it has not explained with any specificity what military work Alexander was performing, or when she was performing it. Caughell did not raise this objection in her communications with the Union. Accordingly, the Respondent has failed to demonstrate that the ULP charge in this case would affect or be inextricably related to a military matter. The ULP case involves only the request for Alexander's timecard. When the Union and the Agency debate the merits of Suminski's grievance and the question of whether overtime was distributed equitably, the Agency may have a valid objection to the Union challenging a military assignment decision; but such an objection is premature in this forum. Even if Alexander's timecard reflected compensatory time earned while working in a military capacity, there is no indication that requiring the Agency to properly respond to the Union's information request (such as by providing the timecard or raising countervailing anti-disclosure interests) would affect its ability to deploy Alexander or interfere with its ability to conduct its military operations. At least with regard to the information request, the Union was not challenging the Agency's right to deploy Alexander to a military assignment; rather, the Union simply sought information as to what hours she worked, and in what status. At most, the fact that Alexander might have earned compensatory time off suggests a tangential connection between the information request and military matters, but that connection is far weaker than the connections to military matters that existed (or arguably existed) in the three Authority decisions discussed above.

For all of these reasons, I find that the dispute involves civilian, not military, matters. Accordingly, I reject the Respondent's jurisdictional argument.

The Agency Was Obligated to Provide the Union with the Requested Information

Section 7114(b)(4) of the Statute requires an agency, upon request and to the extent not prohibited by law, to provide a union with data that is (1) normally maintained by the agency; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (4) not guidance, advice, counsel, or training to management. An agency that fails to comply with § 7114(b)(4) commits a ULP in violation of § 7116(a)(1), (5), and (8) of the Statute. *See, e.g.*, *HCFA*, 56 FLRA at 506.

As noted above, the Respondent admits that the requested information was normally maintained in the regular course of business; was reasonably available; and does not constitute guidance for management relating to collective bargaining. It defends its refusal to fully comply with the Union's information request on the grounds that the Union failed to demonstrate a particularized need for Alexander's T&A information and that the Privacy Act prohibits its disclosure. I will, therefore, focus on those issues.

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, 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. The union's explanation must be more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the Statute requires the agency to furnish the requested information. *U.S. Dep't of Justice, Fed. BOP, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495-96 (2015) (*FCI Ray Brook*). A union must articulate its interests in disclosure of the information at or near the time of the request, not for the first time at a ULP hearing. *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 261, 263 (2004) (*Randolph AFB*).

The Authority has found that a union established a particularized need where the union stated that it needed 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. The Authority has emphasized that such information is necessary because arbitration can function properly only when the grievance procedures leading to it are able to sift out unmeritorious grievances and to document meritorious ones. *Id.*

A union's request for information need not be so specific as to reveal its strategies. Thus, the Authority has rejected claims that a union failed to articulate its need with requisite specificity, where the union's information request referenced a specific agency action and specified that the union needed the information to assess (1) whether the agency violated established policies and (2) whether to file a grievance, even though the union did not explain exactly how the information would enable it to determine whether to file a grievance. *Id.* In addition, the Authority has 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. *Id.*

The Authority has also indicated that a union may establish a need for information pertaining to non-bargaining unit employees where, for example, the union seeks to compare the agency's treatment of the non-bargaining unit employee with the agency's treatment of the unit employee. *See, e.g.*, *IRS*, 50 FLRA at 671-73. Finally, the Authority has noted that the question of whether requested information would accomplish a union's purpose is not determinative of whether it is necessary within the meaning of the Statute. *Soc. Sec. Admin.*, 64 FLRA 293, 296 (2009) (*SSA*).

As appropriate under the circumstances of each case, the agency must either furnish the information, ask for clarification of the request, identify any countervailing 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 a conclusory way, and the agency must raise these interests at or near the time of the union's

request. *See id.* at 295-96; *Randolph AFB*, 60 FLRA at 264-65. If the agency fails to raise its objections at or near the time of the request, the objection will not be considered by the judge or the Authority. *FCI Ray Brook*, 68 FLRA at 496-97; *Library of Cong.*, 63 FLRA 515, 520 (2009). 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 requested information. *SSA*, 64 FLRA at 297.

The Union established its particularized need for the requested information here. While it is true that the Union spoke in fairly general terms in its information request (saying only that it sought the requested information to determine if a grievance was warranted or to support a grievance; that it needed the information to determine if the Agency violated the MOA; and that it would use the information to represent bargaining unit employees), Suminski amply supplemented the Union's initial explanation of need in his month-long dialogue with Caughell. In particular, on May 5, 2015, Suminski clarified that the Union would use the requested information to pursue a grievance filed on his behalf regarding his work in the Transportation Management Office, and he cited Article 18, ¶7 of the MOA, which pertains to the equitable distribution of overtime, as the specific contractual provision the Agency may have violated. Resp. Ex. 6 at 2. Suminski further explained that his timecard was needed to prove the Union's case, and that Alexander's timecard was relevant because she and Suminski were co-workers who were supposed to receive the same opportunities for overtime. *Id.* at 2-3. When Caughell asked for additional clarification on May 8, 2015, Suminski obliged, stating that the Union could use Alexander's timecard to support a "past practice" argument that "although two separate types of employees, they [Suminski and Alexander] serve the same function and have been used as equals for overtime in the past." Resp. Ex. 9. In providing these explanations, Suminski said enough to shed light on the Union's litigation strategy, even though he was not required to do so. In addition, Suminski noted that while the Union had already filed the grievance, the Union also needed the requested information to determine whether it would continue to pursue the grievance, or whether it would look to resolve the matter in "another avenue . . . ." Resp. Ex. 9. On May 13, 2015, Suminski went into even more detail, describing the Agency's actions ("unfairly assign[ing] additional work outside of normal tour of duty") and explaining that the Union needed Alexander's timecard to help prove at arbitration that the Agency had violated a past practice of offering overtime and compensatory time opportunities equally to Title 5 and Title 32 employees who work in the same office. Resp. Ex. 13. By explaining that the Union needed the requested information to (among other things) support its grievance that the Agency had violated a specific provision of the MOA and a past practice (points Suminski reiterated on May 28, 2015), Suminski provided the Agency with more than enough information to conclude that the Statute required it to furnish the information.

In her correspondence with Suminski, Caughell seemed to be fixated on the fact that Alexander was in a different bargaining unit than Suminski, and that her overtime and comp time was therefore governed by a different CBA and different rules. But this misses the point of the Union's data request. The Union sought only to enforce its own CBA, and it simply needed the information about Alexander in order to evaluate whether Suminski was given an equitable opportunity for overtime under that agreement. In this respect, cases such as *IRS* and *FAA Bradley*, above, make it clear that information concerning non-bargaining unit employees may be required under § 7114(b)(4).

The Agency's arguments to the contrary are unconvincing. It contends that the Union failed to show that Alexander's T&A information would actually support its grievance and therefore failed to establish a particularized need for the requested information. *See* Resp. Br. at 16-19, 21-22. But Suminski did explain how Alexander's timecard would be used to support the allegations in its grievance. In order to show that Alexander was given a greater opportunity to work extra hours (either comp time or overtime), the Union first needed to show that Alexander worked beyond her regular work hours in a particular week, and that Suminski did not. That fact, by itself, might not prove that overtime was distributed inequitably, but it was an essential fact that the Union needed to establish. In any event, the Agency's belief that Alexander's timecard would not support the Union's grievance is irrelevant to determining whether the Union established a particularized need for Alexander's timecard. *See SSA*, 64 FLRA at 296; *U.S. Dep't of Justice, Fed. BOP, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 808, 813 (2002). The Respondent also contends that the Union failed to adequately respond to Caughell's requests for clarification, but as I explained above, Suminski responded to each of her requests, explaining in detail why the Union needed the requested information. As such, the facts in this case are unlike the facts in *Air Force*, 52 FLRA at 1007-08, where the union did not respond at all to the agency's request for clarification.

For all of these reasons, I find that the Union established a particularized need for the information it requested.

The Privacy Act Does Not Bar Disclosure of the Requested Information

As discussed above, the Agency asserted in its Answer that the Privacy Act prohibited disclosure of the requested information, and that none of the exceptions to the Privacy Act apply. Answer ¶12. In the lengthy email exchange between Caughell and Suminski regarding the Union's information request, Caughell did not cite the Privacy Act, but she asserted in her affidavit that she told Suminski she could not disclose Alexander's T&A records in part because of the need to protect Alexander's privacy. Caughell Aff. at 3. While an agency is required to explain its anti-disclosure interests at or near the time it responds to an information request, the Authority has, on occasion, addressed vague or belated Privacy Act claims. *See U.S. Dep't of Justice, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669, 673-74 (2012); *U.S. Dep't of Justice, Fed. BOP, Fed. Det. Ctr., Hous., Tex.*, 60 FLRA 91, 95 (2004) (*Det. Ctr.*). Therefore, in order to ensure the fullest record possible, I will consider whether disclosure of the requested information would violate the Privacy Act.

The Privacy Act generally prohibits the disclosure of any information concerning an individual if that information is contained in a system of records – i.e., a system that allows information to be retrieved by name – and the individual to whom that record pertains has not consented to the disclosure. *Pension Benefit Guar. Corp., Wash., D.C.*, 69 FLRA 323, 327 (2016) (*PBGC*). The parties do not dispute that Alexander's time and attendance records are contained in a system of records. *See* Answer ¶12; GC Supp. Br. at 6.

There are exceptions to the Privacy Act's rule on nondisclosure, two of which – the routine use exception and FOIA – are relevant here. *See PBGC*, 69 FLRA at 327. Each exception to the Privacy Act operates independently. *Bureau of Indian Affairs, Uintah & Ouray Area Office, Ft. Duchesne, Utah*, 52 FLRA 629, 639 (1996).

Subsection (b)(3) of the Privacy Act permits disclosure of information "for a routine use." 5 U.S.C. § 552a(b)(3). A "routine use" is the use of a record for a purpose which is compatible with the purpose for which it was collected. *Id.* § 552a(a)(7). As already noted, the Agency acknowledges that its own regulation recognizes as a routine use the disclosure of information "[t]o officials of labor organizations . . . when relevant and necessary to their duties of exclusive representation" (Resp. Ex. 16 at 2), but it maintains that Alexander's records were neither relevant nor necessary. *See* Answer ¶12; Resp. Br. at 17, 19. The Agency does not explain how it has interpreted the terms "relevant" and "necessary" from its regulation. Instead, it assumes that Authority precedent concerning OPM's interpretation of routine use is controlling, even though those cases were based on a now-expired Federal Personnel Manual (FPM) Letter. Resp. Br. at 13 (citing *FAA Little Rock*, 51 FLRA at 226). The Authority has stated, however, that it is "unclear" whether precedent based on the FPM letter continues to apply. *PBGC*, 69 FLRA at 329.

Assuming that these Authority decisions are still good law, I find that the disclosure of Alexander's time and attendance records to the Union, as requested here, constituted a routine use. In this regard, the Authority has stated that information is "relevant" if it bears a traceable, logical, and significant connection to the express purpose to be served by the data request. *Id.* Information is "necessary" if there are no adequate alternative means or sources for satisfying the union's informational needs. *Id.* As articulated by the Authority in *FAA Little Rock*, 51 FLRA at 226, the information is necessary if the union's information needs "cannot be satisfied through less intrusive means, such as by releasing records with personally-identifying information deleted."

As discussed above, the Union and Suminski requested Alexander's T&A records to (among other things) show in a grievance or arbitration that the Agency violated the MOA and past practice by failing to distribute overtime or compensatory time opportunities equitably between Alexander and Suminski. Alexander's records would help the Union make its case, or at least determine whether it had a case. For example, the Union could use Alexander's and Suminski's records to show an arbitrator that Alexander did in fact earn compensatory time, and for which days, while Suminski earned neither compensatory time nor overtime. Because Alexander's time records are directly and logically connected to the purpose identified by the Union, I find that the records are "relevant" under the routine use test.

I also find that Alexander's time records are "necessary." During his dialogue with Caughell, Suminski clarified that the Union was looking for "the timecard that included the date at a minimum of 4, 6, and 7 April 2015." Resp. Ex. 14. In his affidavit, Suminski stated that the Union would even be willing to "accept the number of days in the time period that [Alexander] worked compensatory time and the number of hours on each day, without the actual dates attached." Suminski Aff. at 5. While Suminski allowed the Agency to provide the bare minimum of information, he indicated that the Union still needed an authentic Agency document (one "provided by the Agency [and] certified by the Agency") showing Alexander's work and leave during this time to help prove its case. Resp. Ex. 6 at 2. The Agency has not pointed to any record other than Alexander's timecard that would provide this information in an authenticated form. *See* Resp. Br. at 17, 19. In the absence of any evidence indicating an adequate alternative means for satisfying the Union's request, I find that Alexander's timecard is "necessary," and that it is disclosable under the routine use exception to the Privacy Act.

In addition, I find that Alexander's time and attendance records are disclosable under FOIA. Although FOIA generally requires the disclosure of government records, it contains an exemption (FOIA Exemption 6) for personnel, medical and similar files, where disclosure would constitute a clearly unwarranted invasion of personal privacy. *PBGC*, 69 FLRA at 327. In *U.S. Dep't of Transp., Fed. Aviation Admin., N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 345 (1995) (*FAA Westbury*), the Authority set forth the analytical approach for assessing whether disclosing information requested under § 7114(b)(4) would constitute a clearly unwarranted invasion of personal privacy within the meaning of Exemption 6 and, therefore, would be prohibited by the Privacy Act. An agency asserting that the Privacy Act bars disclosure must demonstrate (1) that the information sought is contained in a system of records within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. *See also Det. Ctr.*, 60 FLRA at 95 (agency failed to establish that disclosure of an investigatory file would implicate employee privacy interests). In considering whether information is disclosable, the Authority has stated that the "concern is not with the identifying information *per se*, but with the connection between such information and some other detail . . . which the individual would not wish to be publicly disclosed." *Dep't of HHS, Soc. Sec. Admin., N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133, 1141 (1997) (quoting *Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir. 1989) (*Halloran*)). Examples of information for which employees can have significant privacy interests include disciplinary information (*U.S. Dep't of Veterans Affairs, VA Med. Ctr., Dall., Tex.*, 51 FLRA 945, 955 (1996)), and performance data (*U.S. Dep't of the Air Force, 56th Support Grp., MacDill AFB, Fla.*, 51 FLRA 1144, 1152-53 (1996)). Records showing when an employee was on sick leave may also implicate privacy interests. *See Dobronski v. FCC*, 17 F.3d 275, 277-78 (9th Cir. 1994). While redacting PII from records may alleviate privacy concerns and allow for disclosure (*see HCFA*, 56 FLRA at 506), the Authority has indicated that where, as here, requested data involves a single employee, it may not be possible to sanitize the information sufficiently to protect the identity and privacy interests of that employee. *PBGC*, 69 FLRA at 328.

If an agency meets its initial burden of proof, the burden shifts to the GC to (1) identify a public interest cognizable under FOIA and (2) demonstrate how disclosure of the requested information will serve that public interest. *FAA Westbury*, 50 FLRA at 345. In *FAA Westbury*, the Authority held that the only relevant public interest considered in this context is the extent to which the requested disclosure would shed light on an agency's performance of its statutory duties, "or otherwise inform citizens as to 'what their government 'is up to.'" *Id.* at 344 (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The Authority held that the public interest in collective bargaining embodied in the Statute, or specific to a union in fulfilling its obligations under the Statute and in expediting grievances, is not considered in the analysis regarding Exemption 6. *PBGC*, 69 FLRA at 327; *FAA Westbury*, 50 FLRA at 343.

It is difficult to see how a record showing the hours of compensatory time earned by Alexander would implicate any privacy interests of Alexander. The Agency has not provided evidence indicating that information showing that an employee earned compensatory time or worked overtime is the kind of information "which the individual would not wish to be publicly disclosed." *Halloran*, 874 F.2d at 321 (footnote omitted). That the Agency posts such information on rosters in its offices supports the conclusion that this type of information is not generally considered to be sensitive, personal, or private. Further, while it is true that an employee's timecard could implicate her privacy interests if, for example, it revealed that she had been suspended or was on sick leave (*see* Caughell Aff. at 2; GC Ex. 7), the Respondent has failed to demonstrate that that kind of information would be revealed in Alexander's records. *See* Answer ¶12; Resp. Br. at 17, 19. Accordingly, I find that the Respondent has failed to demonstrate that disclosing Alexander's time and attendance records would implicate Alexander's privacy interests. And because disclosure would not implicate any privacy interests, it is unnecessary to engage in a balancing of the privacy and disclosure interests. *See HCFA*, 56 FLRA at 506. As the Authority ruled in *Det. Ctr.*, 60 FLRA at 95, the Respondent has failed to sustain its burden under *FAA Westbury* to establish that disclosure of Alexander's time and attendance records would implicate privacy interests. 50 FLRA at 345. I therefore find that disclosing Alexander's time and attendance records would not constitute an unwarranted invasion of privacy within the meaning of FOIA Exemption 6.

Based on the foregoing, I find that Alexander's time and attendance records are disclosable under both the routine use exception to the Privacy Act, and under FOIA. Accordingly, the Privacy Act does not bar disclosure of those records. Furthermore, since the Union established its particularized need for the requested information, the Agency's justifications for refusing to provide the information are without merit. By refusing to furnish the information, the Respondent violated § 7116(a)(1), (5), and (8) of the Statute.

REMEDY

In cases where an agency has unlawfully refused to furnish necessary information to a union, the typical remedy is to order the agency to provide that information to the union and to post a notice to employees explaining the action. *E.g.*, *FCI Ray Brook*, 68 FLRA at 498-500. The General Counsel argues that I should also order the Respondent not to allege as a

defense in any subsequent grievance or arbitration that the grievance is untimely. GC Br. at 21-22. Respondent has not agreed to such a remedy, but it has offered no legal or public policy objection to it.

In *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149 (1996) (*Warren AFB*), the Authority set forth the standard for assessing whether nontraditional remedies are appropriate in an individual case:

> [A]ssuming that there exist no legal or public policy objections to a proposed, nontraditional remedy, the questions are whether the remedy is reasonably necessary and would be effective to 'recreate the conditions and relationships' with which the unfair labor practice interfered, as well as to effectuate the polices of the Statute, including the deterrence of future violative conduct.

Id. at 161 (citation omitted).

Nontraditional remedies are not ordered merely because they would further a salutary objective. Rather, they are appropriate only where traditional remedies will not adequately redress the wrong incurred by the ULP. *U.S. Dep't of Justice, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221, 223 (2014).

Here, the Union presented Suminski's grievance informally on April 16, 2015, at which time Suminski and Ashbeck discussed the case with Suminski's supervisors. Suminski Aff. ¶9. The next day, the Union submitted its information request. GC Ex. 4. On April 23, it filed a written grievance concerning Suminski's overtime. GC Ex. 5. The Agency denied the grievance on April 30, based on both the merits of the grievance and on its alleged untimeliness.[4] Resp. Ex. 11. As of that date, the Agency had not responded to the information request, and ultimately the Agency refused to provide Alexander's time and attendance records.

Based on this evidence, the Agency's unlawful refusal to provide the Union with Alexander's time and attendance records interfered with the Union's filing of its written grievance. As I explained at length above, the Union needed that information in order to weigh the merits of Suminski's grievance, and the Union should have been able to review the information before deciding whether to pursue the grievance through the various steps of the contractual grievance and arbitration procedure. It was forced to file its written Step 1 grievance without that essential evidence, and in this respect it was forced to go to battle without ammunition. In other words, the Agency sought to penalize the Union for making a filing decision when it lacked information essential for making that decision.

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[4] The Agency asserted that it denied the informal grievance at the April 16 meeting, and that the Union's written grievance was due five calendar days later. Resp. Ex. 11. The Union, however, asserted that neither of the supervisors present at that meeting responded to the Union's proposed adjustment. GC Ex. 5.

As noted by the GC, in *HCFA* the Authority ordered the agency not to assert a defense of untimeliness in any subsequent grievance or arbitration relating to the withheld information, because the union was entitled to decide whether to file a grievance after it had received the requested information. Prohibiting the agency from raising a timeliness defense was necessary "to recreate the conditions and relationships with which the unfair labor practice interfered . . . ." 56 FLRA at 507 (quoting *Warren AFB*, 52 FLRA at 161) (internal quotation marks omitted).

In the current case, the Union should also be allowed to make a decision whether or not to pursue Suminski's grievance after it has received and considered the evidence relating to Alexander's time and attendance records. For this to occur, the Agency must not be able to raise the defense of untimeliness. This is necessary to ensure that the parties are in the position they would have been in, had the Agency complied with the Statute.

Accordingly, the General Counsel's Motion for Summary Judgment is Granted. As such, 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(a)(7) of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of the Air Force, Selfridge Air National Guard Base, Michigan, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 2077, AFL-CIO (the Union), with information it requested on April 17, 2015, in connection with a grievance it filed regarding the distribution of overtime in the 127th Logistics Readiness Squadron.

(b) 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) Furnish the Union with the time and attendance records it requested on April 17, 2015, as clarified by the Union between May 5 and May 28, 2015, and sanitized to include only the number of instances of compensatory hours earned in the time period covered by the request and the number of hours per instance.

(b) Refrain from raising timeliness as a defense, in any subsequent arbitration filed in connection with Grievance 5113-1, filed by the Union on April 23, 2015, so long as the Union promptly pursues arbitration after it receives the requested information.

(c) 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, U.S. Department of the Air Force, Selfridge Air National Guard Base, Michigan, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

(e) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Chicago 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., December 30, 2016

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 U.S. Department of the Air Force, Selfridge Air National Guard Base, Michigan, has violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL furnish the American Federation of Government Employees, Local 2077, AFL-CIO (the Union) with the data it requested on April 17, 2015, as clarified by the Union between May 5 and May 28, 2015, in connection with a grievance it filed regarding the distribution of overtime in the 127th Logistics Readiness Squadron.

WE WILL refrain from raising timeliness as a defense, in any subsequent arbitration filed in connection with Grievance 5113-1, filed by the Union on April 23, 2015, so long as the Union promptly pursues arbitration after it receives the requested information.

WE WILL NOT fail or refuse to furnish the Union with the information it requested on April 17, 2015, as clarified and sanitized as noted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured 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, Chicago Region, Federal Labor Relations Authority, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.