**ORAL ARGUMENT REQUESTED**

**No. 05-9543**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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**AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2263,**
**Petitioner**

**v.**

**FEDERAL LABOR RELATIONS AUTHORITY,**
**Respondent**

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**ON PETITION FOR REVIEW OF A DECISION AND ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY**

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# BRIEF FOR THE FEDERAL LABOR RELATIONS AUTHORITY


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**BRIEF HAS ATTACHMENTS SUBMITTED IN SCANNED PDF FORMAT**

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## STATEMENT OF RELATED CASES

There are no prior or related appeals in this case.

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## STATEMENT OF JURISDICTION

The Federal Labor Relations Authority (Authority) issued the Decision and Order under review in this case on March 31, 2005. The Authority's decision is published at 60 F.L.R.A. (No. 152) 791 (Petitioner's Appendix (App.) 105). The Authority exercised jurisdiction over the case in accordance with § 7105(a)(2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101 *et seq.* (Statute).[1] This Court has

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[1] Pertinent statutory provisions are set forth in an Addendum to this brief.

jurisdiction to review final orders of the Authority pursuant to § 7123(a) of the Statute.

## STATEMENT OF THE ISSUE

Whether the Authority reasonably held that an agency employer did not commit unfair labor practices by declining to provide some 15 different categories of documents to the union, when the union's single conclusory statement of need for all the documents failed to show the requisite "particularized need" for them, despite repeated requests by the agency employer for elaboration of the union's statement of need.

## STATEMENT OF THE CASE

This case arises as an unfair labor practice (ULP) proceeding brought under § 7118 of the Statute. The American Federation of Government Employees, Local 2263 (Union), made a series of requests for 15 different categories of documents relating to promotion actions involving civilian employees at Kirtland Air Force Base, Albuquerque, New Mexico (Agency). The Union's document requests were made pursuant to § 7114(b)(4) of the Statute, which, provided certain conditions are met, entitles federal sector unions to obtain data needed to perform their representational duties.

The Agency declined to provide the documents to the Union, asserting, among other things, that the Union had not demonstrated

sufficient need for the documents. The Union then filed a series of ULP charges with the Authority, challenging the Agency's refusal to provide the documents. The Authority's General Counsel issued a consolidated ULP complaint based on the Union's charges. The Authority ruled, however, that the Union had not demonstrated the requisite need for the documents, and dismissed the complaint. The Union now seeks review of this Authority decision.

## STATEMENT OF THE FACTS

### A. Background

At all relevant times in this case, the American Federation of Government Employees (AFGE) and the Air Force Materiel Command (AFMC) were parties to a nationwide collective bargaining agreement. (App. 68.) This agreement contained an article setting out various procedures for conducting civilian employee promotion actions at all AFMC facilities. Among other things, this article provided for certain promotion information to be made available to employees and their representatives. (App. 121.) It also provided that the Union could "post-audit" a promotion action in conjunction with processing a grievance filed under the agreement. (*Id*.) The Union, AFGE Local 1163, was the designated agent of AFGE at Kirtland Air Force Base. (App. 189.)

In May 2001, the Union's President sent a letter to the Agency's labor relations representative, John Houha, noting his concern that some employees had been denied their rights to promotions to two specified positions. (App. 70.) Several days later, the Union followed up with another letter, asking for the documents certifying the selections made for the positions, and the Promotion Evaluation Pattern (PEP) for the positions.[2] Houha responded by providing the documents for one position, but not the other, because it was not a bargaining unit position. (App. 195.)

The parties met in early June 2001, to further discuss the production of these documents, as well as the promotion selection process in general at the Agency. (App. 194-96.) It appears that the discussion did not satisfy the Union representative. Accordingly, in July 2001, the Union sent letters to the Agency's personnel office, requesting some 15 different categories of information concerning six different promotion actions that had been taken at the Agency. (App. 122-25.) The letters stated that certain unnamed "grievant[s]" advised the Union that certain vacant positions had been filled.

The categories of information requested were as follows:

a. Name(s) of every person considered for the above vacant position
b. Ranking factors used to select the above individual

[2] PEPs set forth the qualifying skills and evaluation factors that will be used in making promotion decisions. (App. 120, 213.)

c. Name(s) and ranking of everyone on the certificate including their Service Computation Date considered for the vacancy
d. PEP of the above position
e. Certificates, (including supplement) if appropriate (sanitized, no SSN, B-day) used for the selection of the above position
f. The highest progression level reached by employees on the certificate
g. SF 52 fill action
h. Copy of position description of above position
i. Copy of EEO goal sheet(s) for the certificate and for any supplemental certificates
j. Selectee's career brief (sanitized with current position and past experience only; delete name, SSN, appraisal, education, training, etc.)
k. If appropriate, copy of staff summary
l. Interview questions and benchmarks
m. Interview rating sheet (sanitized with selectee(s)[']name(s) only and total scores of everyone interviewed)
n. A copy of the performance plan relative to the position being filled
o. Nationality of the selectee of the above positions.[3]

The Union's stated need for the information was to enable it to "perform Post-Promotion Audit[s], and ensuring compliance with Merit System Principles . . . , and to monitor contract compliance." (App. 123, 125.)

[3] It appears that these Union data requests were patterned after a settlement agreement involving similar issues that was reached at Hill Air Force Base. (App. 227.) Hill was covered by the same national agreement as Kirtland Air Force Base. However, the Union did not inform Kirtland officials of its reliance on the Hill settlement. (App. 77 n.6.)

In late July and early August 2001, the Union sent several more letters to the Agency, requesting the same information, for the same reasons, in connection with several other promotion actions that had been conducted by the Agency.[4] (App. 126-139.) On August 15th, Houha sent a letter to the Union President, responding to the various information requests. Houha apologized for the delay in responding, and said that compiling some of the information was proving to be time consuming. (App. 140.)

He also had some questions about, and objections to, the information requests. (App. 141-43.) Chief among these concerns was Houha's difficulty in identifying "how the specific information asked for, paragraph by paragraph, is necessary or useful for the union to carry out is responsibilities." (App. 141.) He therefore asked the Union to answer several questions concerning its purposes in making the data requests. (App. 142.) In conclusion, he proposed a compromise set of arrangements for resolving the data requests at issue, based on the negotiated national agreement. These arrangements centered on providing to non-selected bargaining unit employees and their representatives a statement as to the

[4] Not all the data requests included item "o.", above, i.e., the nationality of the selectee.

reasons for their non-selection for a vacant position. Houha then offered to discuss the matter with the Union on request. (App. 143-44.)

Leslie Maxwell, a Union representative, responded to Houha's letter on August 23, 2001.[5] (App. 151.) In this response, Maxwell specified for the first time that the Union's data requests were made under § 7114(b)(4) of the Statute.[6] She also complained about the agency's delay in responding to the data requests, and its failure to provide any of the requested information. She also rejected Houha's offered compromises for dealing with the situation, since, in her view, they would require potential grievants to identify themselves. (App. 152.) She concluded by stating that the Union had "provided sufficient information" to enable the agency to respond to the Union's data requests. (*Id.*)

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[5] Between August 15th and August 23rd, the Union submitted several more data requests virtually identical in all relevant respects to the previous ones. (App. 145-150.) These letters did not reference Houha's August 15th letter because the Union did not receive it until August 22nd. (App. 74.)

[6] The nation-wide collective bargaining agreement between AFGE and AFMC contained an article calling for employees and their representatives to receive certain specified items of information concerning promotion actions. (App. 121.) These items included whether the employee was considered for promotion to a vacant position, whether the employee was deemed among the "best qualified" for the position, and who was selected. (*Id.*) The Union's previous data requests made reference to only this agreement provision as their legal foundation.

Houha responded to Maxwell's letter on August 31, 2001, essentially restating much of what he had said in his August 15th letter. (App. 153.) He mentioned that he and other employees in the agency's personnel office had spent "many hours" working on gathering data and addressing the questions raised by the Union's data requests. (*Id.*)

However, he stated that that the Union had not yet made sufficient showings, either under the negotiated national agreement or § 7114(b)(4) of the Statute, to warrant providing the data requested. (App. 154.) In this connection, Houha noted particularly that the Union had not answered the specific questions concerning the Union's need for the information that he had set out in his August 15th letter, and that he did not believe that the "general reasons [the Union] stated contain the specificity the Authority looks for to establish a particularized need." (App. 154-55.) He concluded by saying that he wanted to do all that he could to resolve the matter successfully, and was again asking for the Union's help in achieving that resolution. (App. 155.)

Maxwell responded to Houha's letter on September 18, 2001. (App. 161.) She purported to address the questions concerning the Union's need for the requested information that Houha had originally asked of the Union

in his August 15th letter. Houha's questions and Maxwell's responses were verbatim as follows:

> 4b. Specifically, why does the union need the information?
> **Ans. To address bargaining unit employees concerns. To represent the employee in obtaining the information, since the employee is refused the information through his/her own actions by CPO personnel.**
> 4c. Specifically, to what use will the union put the information?
> **Ans. The Union will use the information requested to support the employee in any further legal actions needed or required to fully satisfy the employee's rights and to make the employee whole.**
> 4d. Specifically, what is the connection between the Union's use of the information and it's [sic] representational responsibilities?
> **Ans. It is the Union's responsibility to represent employees, and whatever action is needed to address an employee's concerns will be taken within the scope of Union activities and rights covered by prescribed statutes.**
> 4e. Specifically, how is the information required to adequately represent bargaining unit employees?
> **Ans. Read above.**

(App. 161-62.)[7]

Houha responded to Maxwell by letter dated October 3, 2001. (App. 163.) In this letter, Houha reviewed Maxwell's' answers to his questions, finding those answers to be insufficient to establish the requisite showing of need under Authority case law on this subject. (App. 165.) Houha again

[7] Maxwell did not reply to Houha's first question, which was "why is the union's request for information not satisfied by the data prescribed for release under the provisions of the Master Labor Agreement?"

said that he thought it would be a good idea for the parties to meet, to explore ways to resolve the matter. (*Id.*) He also denied Maxwell's claim, made in her response to Houha's second question, that the personnel office had refused to provide promotion information to employees upon request. (App. 164.)

In January and February 2002, the Union continued to submit data requests virtually identical to those it submitted in July through September 2001. (E.g., App. 168, 176.) In response, Houha continued to raise the same concerns about the Union's failure to establish the requisite showing of need for the data. (E.g., App. 172, 178.) The parties never did meet to discuss Houha's concerns. (App. 76.) In all, the Union submitted 10 letters requesting information concerning various promotion actions, all of which were virtually identical to the first ones submitted on July 11, 2001. The Union filed ULP charges concerning each of these 10 requests, and the Authority's General Counsel issued a consolidated ULP complaint on the charges under § 7118(a) of the Statute, alleging that Kirtland Air Force Base violated § 7116(a)(1), (5), and (8) of the Statute by refusing to provide the requested data to the Union.

## B. Proceedings before the Authority

### 1. The Administrative Law Judge's decision

An Authority Administrative Law Judge (ALJ) first heard the ULP complaint. In relevant part, the ALJ first noted that the Union seemed motivated by a desire to make Kirtland management do as much work as possible, while itself doing as little work as possible. (App. 86.) The ALJ also noted that the Union's requests were "couched . . . in only the most general and brief terms." (*Id.*) On the other hand, the ALJ found that Houha tried to apply the legal principles applicable to data requests under § 7114(b)(4) of the Statute, and his responses to the Union were "detailed and conciliatory." (App. 87.)

However, the ALJ went on to find that, despite the inadequacies of the Union's articulation of need, the need for some of the requested categories of information was "apparent" or "evident." (App. 92, 97.) Accordingly, he held that the Agency committed ULPs for failing to provide documents referenced in six of the 15 categories in the Union's request, and issued a recommended order that the Agency provide the documents in those six

categories.[8] (App. 100-02.) The Agency filed exceptions to the ALJ's decision with the Authority.

**2. The Authority's decision**

The Authority held that the Agency did not violate the Statute and dismissed the complaint in its entirety. (App. 116.) The Authority began its analysis by noting that the sole issue in the case was whether the information requested by the Union was "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" under § 7114(b)(4) of the Statute. (App. 112.)

The Authority stated that under its precedent, a union must establish a "particularized need" for data by "articulating, with specificity," why it needs the requested information, "including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute."[9] (App. 112-13; internal quotations and citations omitted.) The union must establish this need in

[8] The six categories of documents the ALJ said should be disclosed were designated on the list set out at p. 4, above, as "d." (the PEPs); "h." (position descriptions for the positions to be filled); "j." (the selectee's "career brief"); the interview questions in "l."; "m." (the interview rating sheet for all candidates interviewed) and "n." (the performance plan for the position to be filled).

[9] In this connection, the Authority cited its lead decision in this area, *Internal Revenue Service, Washington, D.C., and Internal Revenue Service, Kansas City*, 50 F.L.R.A. 661, 669 (1995) (*IRS, Kansas City*).

more than a conclusory fashion, to enable the agency employer to make a reasoned judgment as to whether disclosure of the data is required under the Statute. (App. 113.) When a union has established a particularized need for the documents, then the employing agency must establish, also in more than conclusory fashion, any "countervailing anti-disclosure interests" to justify withholding the documents. (*Id.*)

The Authority then noted that the purpose of this framework, which requires parties to "articulate and exchange their respective interests in disclosing information," serves several purposes. (App. 113.) First, it facilitates and encourages the "amicable settlements of disputes," consistent with the purposes of the Statute. (*Id.*) Second, it facilitates the exchange of information, thus enabling both parties to "effectively and timely discharge their collective bargaining responsibilities under the Statute." (*Id.*) Third, this system permits the parties to "consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed." (*Id.*)

Thus, under this analytical framework, if a union fails to respond to a reasonable agency employer request for clarification of the union's data request, such fact is "taken into account" in assessing whether the union established "particularized need" for the data. (App. 113.) The Authority

noted that it has held that it will not find a union's need for information to be "reasonably obvious" to an agency employer where the union failed to respond to the agency's reasonable request for clarification.[10] (App. 113-14.)

Turning to the particulars of this case, the Authority first observed that the Union provided only a single explanation for all the categories of information it had requested. (App. 114.) Further, the Authority noted that the Agency reasonably asked the Union to explain why it needed each individual item; provided an explanation to the Union as to why it questioned the necessity of the information; and requested to meet with the Union. (*Id.*) However, the Union never provided an explanation of its need for the individual items requested, and did not meet with the Agency to discuss the matter. (*Id.*)

Based on these facts, the Authority held that the Union's statements failed to articulate with specificity why the Union needed all the requested information. (App. 114.) The requests were "merely conclusory," and did not permit the Agency to make a "reasoned judgment as to whether the disclosure of all the requested information was required under the Statute."

[10] The Authority cited *United States Department of the Treasury, Internal Revenue Service, Washington, D.C.*, 51 F.L.R.A. 1391, 1396 (1996) (*Treasury*), for this proposition.

(App. 115.) Further, the ALJ's finding, that the Agency's requests for clarification were not "unreasonable or disingenuous," was not excepted to. (*Id.*)

In conclusion, the Authority noted that the ALJ held that the Agency was required to assess each individual item in the Union's data requests, and provide the Union with any materials for which the Union's need was "apparent." (App. 115.) The Authority rejected the ALJ's ruling on this point for two reasons. First, the Authority had held that where a union fails to establish its need for *all* the information requested, an agency employer is not required to provide the requested information, even if the Union has established a need for *some* of the information.[11] Second, the Authority indicated that it held in *Treasury* that it will decline to consider whether a union's need for data is "apparent" when the union has failed to reply to an agency employer's reasonable request for clarification. Accordingly, as the Agency's clarification requests in this case were concededly reasonable, it was not required to determine whether the Union's need for data was "apparent." (App. 115-16.)

In conclusion, the Authority held that the Union had not met its burden of establishing a particularized need for the data requested, and

therefore, the Agency did not violate the Statute in declining to provide the data. (App. 116.) Accordingly, the Authority dismissed the ULP complaint in its entirety. (*Id.*)

## STANDARD OF REVIEW

Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7123(c), incorporating 5 U.S.C. § 706(2)(A); *American Fed'n of Gov't Employees, Local 1592* v. *FLRA*, 288 F.3d 1238, 1240 (10th Cir. 2002). Where, as here, the Authority is interpreting the statute that it is charged with implementing, its conclusions are reviewed under the standard set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*). *See Fort Stewart Schools* v. *FLRA*, 495 U.S. 641, 644-45 (1990) (*Fort Stewart Schools*); *see also* 5 U.S.C. 7105. Under *Chevron*, if the relevant statutory language is clear, the Court "must give effect to the unambiguously expressed intent of Congress." *Fort Stewart Schools*, 495 U.S. at 645 (quoting *Chevron*, 467 U.S. at 842-43). If, on the other hand, the relevant statutory provisions are "silent or ambiguous" on the point at issue, the Court should affirm the Authority's conclusions if they are based on a "permissible construction of the Statute." *Id.*

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[11] The Authority cited *United States Department of Labor, Washington,*

Deference to the Authority is especially appropriate where, as here, the Authority is required to fill in statutory gaps. *United States Dep't of Energy* v. *FLRA*, 880 F.2d 1163, 1165 (10th Cir. 1989). Under the Statute, the obligation of an agency employer to provide data is stated only in general terms, leaving it to the Authority to define the precise contours of that obligation. As the Supreme Court has stated, the Authority is entitled to "considerable deference" when it exercises its "'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA,* 464 U.S. 89, 97 (1983); *see also NLRB* v. *Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990) (the NLRB must have the authority to fill the interstices of the broad statutory provisions).

Accordingly, the Court must uphold the Authority's decision in the instant case if it is based on a reasonable interpretation of the Statute. In that regard, the Court's task is not to determine whether the Authority's interpretation of the Statute is the best or most reasonable one, but only whether it is a permissible one. *Am. Fed'n of Gov't Employees* v. *FLRA*, 744 F.2d 73, 75 (10th Cir. 1984).

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*D.C.*, 51 F.L.R.A. 462, 476 (1995) (*DOL*), as the basis for this conclusion.

## SUMMARY OF ARGUMENT

1. The Authority reasonably applied its *IRS, Kansas City* analytical framework, and concluded that the Union did not establish the requisite "particularized need" for the disclosure of documents it requested under § 7114(b)(4) of the Statute. The Union offered only vague, conclusory statements of need for a wide variety of documents concerning numerous promotion actions. The Agency could not make a reasoned judgment from these statements as to whether disclosure of all the requested documents was required under the Statute. Moreover, it is undisputed that the Agency's repeated requests for clarification of these need statements, to which the Union made no meaningful response, were reasonable.

The Authority also correctly rejected the argument that, despite the facial inadequacy of the Union's need statement, a finding of need can nonetheless be based on the ALJ's speculation during ULP litigation that the need for six categories of documents is "apparent" or "self-evident." Reliance on such *post hoc* speculation is contrary to *IRS, Kansas City*, which calls on unions and employer agencies to engage in meaningful and timely dialogue concerning union data requests, so such matters can be resolved without recourse to litigation. Further, the Authority's rejection of *post hoc*

speculation concerning need is supported by the Authority's case law, in particular its *DOL* and *Treasury* decisions.

2. The Union's arguments for reversal of the Authority's decision are without merit, and should be rejected. First, the Union argues that it made an adequate showing of need as to 6 of 15 categories of documents it requested. The Union claims that the Authority erroneously refused to order disclosure of these documents mainly because the Union conjoined its request for those six categories with other categories of documents for which the Union had not adequately established a need. This argument misconstrues both the facts of this case and applicable Authority case law.

The Union presents itself as in fact having made adequate individualized showings of need for each of the six categories of documents to which it claims entitlement. However, the Union never made such individualized statements. Rather, it made conclusory "one-size-fits-all" need statements. Accordingly, the Union had to rely on the ALJ's conjecture as to the "apparent" or "self-evident" need for the six categories of documents. Such reliance is improper under *IRS, Kansas City*.

Second, the Union argues that the Authority's ruling will lead to "absurd" results. The Union asserts that under the Authority's ruling, it is required to make *seriatim* individual requests for various categories of

documents, as opposed to the single conjoined request it made in this case, to be able to receive the six categories documents. The Union also queries what would have happened if it had made adequate need statements for 13 or 14 categories of documents. Both points arise from the same erroneous premise discussed above, i.e., that the Union in fact made adequate individualized need showings as to six categories of documents. In fact, no "absurd" results arise from the Authority's decision. If the Union in this case had in fact made adequate, individualized need statements as to six, or any other number of categories of documents, and other disclosure criteria were met, the Authority would have ordered disclosure of those categories.

Finally, contrary to the Union's claim, the Authority's decision is fully consistent with its case law. The facts in *Health Care Financing Administration*, 56 F.L.R.A. 156 (2000) (*HCFA I*), are materially different from those in the instant case. In *HCFA I*, the union responded substantively to an agency request for clarification and tailored its data request so that there was considerable congruence between the data requested and the stated need for the data. This is the kind of appropriate conduct by a union that the Authority found lacking in this case.

In *Health Care Financing Administration*, 56 F.L.R.A. 503 (2000) (*HCFA II*), the agency employer never responded at all to the union's data

requests. This is in contrast to the present case, in which the Agency made repeated reasonable requests for clarification of the Union's need for the data requested. The Authority noted in *HCFA II* that if the agency employer had requested elaboration of the union's need statement in that case, the union would have had to respond, or run the risk of failing to meet its responsibility to establish particularized need for the requested data.

Based on the foregoing, the Union's petition for review should be denied.

## ARGUMENT

### THE AUTHORITY REASONABLY HELD THAT AN AGENCY EMPLOYER DID NOT COMMIT UNFAIR LABOR PRACTICES BY DECLINING TO PROVIDE SOME 15 DIFFERENT CATEGORIES OF DOCUMENTS TO THE UNION, WHEN THE UNION'S SINGLE CONCLUSORY STATEMENT OF NEED FOR ALL THE DOCUMENTS FAILED TO SHOW THE REQUISITE "PARTICULARIZED NEED" FOR THEM, DESPITE REPEATED REQUESTS BY THE AGENCY EMPLOYER FOR ELABORATION OF THE UNION'S STATEMENT OF NEED.

In its decision in this case, the Authority properly applied its well-established analytical framework for deciding when a union has shown a "particularized need" for data under § 7114(b)(4) of the Statute, and reasonably concluded on the facts of this case that the

Agency did not commit ULPs. The Union's arguments to the contrary are without merit and should be rejected.

## I. The Authority Reasonably Applied Its Analytical Framework Established in *IRS, Kansas City* to the Facts of This Case

### A. The *IRS, Kansas City* framework

In *IRS, Kansas City*, the Authority set out the analytical framework it uses to resolve cases under § 7114(b)(4) that involve the issue of whether requested data is necessary for a union to perform its duties as an exclusive representative.[12] As the Authority made clear in its decision in *IRS, Kansas City*, this analytical framework was derived largely in response to several decisions of the D.C. Circuit on this issue.[13] *IRS, Kansas City*, 50 F.L.R.A. at 665-66. The D.C. Circuit subsequently approved the Authority's *IRS, Kansas City* framework. *Am. Fed'n of Gov't Employees, Local 2343* v. *FLRA*, 144 F.3d 85 (D.C. Cir. 1998) (*AFGE, Local 2343*) (affirming an

[12] Other criteria must be met under § 7114(b)(4) to warrant disclosure of information. For example, the information must be "reasonably available," and disclosure must not be prohibited by law. These other criteria are not at issue in this case.

[13] Among the D.C. Circuit decisions cited by the Authority in *IRS, Kansas City* were *National Labor Relations Board* v. *FLRA*, 952 F.2d 523 (D.C. Cir. 1992); *United States Department of Veterans Affairs, Washington, D.C.* v. *FLRA*, 1 F.3d 19 (D.C. Cir. 1993); *United States Department of Justice, Bureau of Prisons* v. *FLRA*, 988 F.2d 1267 (D.C. Cir. 1993); and *United States Department of the Air Force, Scott Air Force Base* v. *FLRA*, 956 F.2d 1223 (D.C. Cir. 1992).

Authority decision holding under *IRS, Kansas City* that a union had not adequately established particularized need for certain documents, and rejecting a union claim that the need was "self-evident").

Under this framework, a union first has the responsibility to articulate a "particularized need" for the information, and to explain how its intended use of the information relates to its representational duties. *IRS, Kansas City*, 50 F.L.R.A. at 669. A mere showing of relevance or usefulness will not satisfy this burden. Instead, a union must show that the requested information is "required" for it to perform its representation duties. 50 F.L.R.A. at 669-670. Further, the statement of need must not be "conclusory or bare assertion." 50 F.L.R.A. at 670. Rather, it must be sufficient to enable an agency employer to make a "reasoned judgment" as to whether information must be disclosed under the Statute. *Id.*

Once a union has met its burden of demonstrating need, the agency employer must either provide the information or establish "countervailing anti-disclosure interests" that warrant withholding the data. *Id.* As with the union, this agency statement cannot be merely conclusory. *Id.* The Authority also made clear in *IRS, Kansas City* that the union's statement of need will be judged by how well it articulated its need at or near the time it made the request, not in subsequent litigation. *Id.*

In short, the framework set out in *IRS, Kansas City* calls on the parties to engage in an ongoing and timely exchange of views concerning their respective interests in data request cases. The Authority has also made clear that this mandate for the parties to work these matters out for themselves, to the maximum extent possible, is dynamic in nature. Thus, a union will be found not to have established particularized need when it does not adequately respond to reasonable agency requests for clarification of the union's statement of need. *E.g., Equal Employment Opportunity Comm'n*, 51 F.L.R.A. 248, 257-58.

As the Authority pointed out in this case (App. 113), the *IRS, Kansas City* framework serves several beneficial purposes under the Statute: encouraging the amicable settlements of disputes without resorting to litigation; facilitating the exchange of information between the parties, thereby enabling them to better carry out their responsibilities under the Statute; and permitting the parties to accommodate their respective interests, thereby facilitating their agreement on the extent to which data should be disclosed.

B. The Authority reasonably applied the *IRS, Kansas City* framework to the facts of this case

There is no question in this case that the *IRS, Kansas City* framework is an eminently reasonable implementation of § 7114(b)(4) of the Statute. The only issue here is whether the Authority reasonably applied the framework to the facts of this case. An examination of those facts reveals that it did.

The entire sum and substance of the Union's statement of need for the 15 different categories of documents it requested was provided in two places: in the essentially identical series of letters the Union sent to the Agency starting in July 2001 (e.g., App. 122-23); and in its response on September 18, 2001, to several questions about the data requests put to the Union by the Agency (App. 161-62).

In its series of letters, the Union merely stated that it needed all 15 categories of the requested data "in order to perform Post-Promotion Audit(s), and ensuring compliance with Merit System Principles, 5 CFR 335 Section 103, and to monitor contract compliance." (E.g., App. 123.) The Union's September 18th response to the Agency's reasonable clarification questions, as the Authority pointed out (App. 114), amounted to nothing more than saying that it needed the requested data to "address bargaining unit employee concerns," and to represent employees "in any further legal

actions needed or required to fully satisfy the employee's rights and to make the employee whole."

The conclusory, "one-size-fits-all" nature of these statements is evident. The Agency could not make a reasoned judgment from these statements as to whether disclosure of all the requested data was required under the Statute. For example, if a bargaining unit employee applied for a promotion, but was not referred to the selecting official because he was not deemed to be among the "best qualified" applicants, no good reason appears as to why the Union would need to see the selectee's "career brief." Similarly, a PEP would not be of any apparent use to the Union in the case of an employee who was deemed "best qualified," because the PEP sets forth the job skills that are necessary for an employee to perform a certain job. (App. 237-39.) If the employee is deemed "best qualified," he has of necessity been found to possess the skills needed for the job he has applied for, and has been referred on to the selecting official for consideration.

The Union's superficial and perfunctory attitude towards informing the Agency of its need for the data, despite repeated entreaties from the Agency for elaboration, left hanging questions such as the foregoing. [14] The

[14] The Union concedes that on their face, its statements of need are inadequate. (Un. Br. at 36 ("it is not disputed that the Union did not set forth

Agency could not hope to understand the Union's need for these documents, and respond intelligently, without such elaboration and specificity from the Union. The Union's failure at any time to so explain its need for the data means that the Authority reasonably concluded that the Union did not fulfill its responsibilities under *IRS, Kansas City*, while the Agency did.[15]

The Authority also correctly rejected the view (App, 115-16) that the "particularized need" requirement of § 7114(b)(4) can be satisfied by a determination during ULP litigation that, notwithstanding an inadequate union statement, the need for data is "apparent" or "self-evident." Such a view, which was adopted by the ALJ in finding that the Agency should have provided six of the 15 categories of data (App. 89-100), is completely antithetical to the purposes of *IRS, Kansas City. See AFGE, Local 2343*, 144 F.3d at 88-89.

As set out at p. 13, above, a fundamental purpose of the Authority's analytical framework in this area is to create a structure in which unions and agency employers communicate effectively with each other, so they can work out their own resolutions to these situations without resorting to

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its need for all requested items with a requisite specificity so as to receive all requested items.")).

[15] The Union does not challenge the Authority's holding that the Agency's clarification requests were reasonable and made in good faith.

litigation. Compelling the Authority to provide during litigation a *post hoc* conjecture about a union's need for documents, based on what it believes may be "apparent" or "self-evident," would relieve a union of the responsibility of having to communicate clearly and effectively with an agency at the time the data request is being made. Moreover, the Authority is not in the best position to know a union's reasons for asking for data. The union is. If a union cannot adequately articulate its need when it seeks data, then it should not receive the data. Any other result is inconsistent with *IRS*, *Kansas City* and should be rejected.

Further in this connection, as the Authority pointed out in its decision (App. 115), allowing a showing of need to be supplied after the fact, based on conjecture as to what may be "apparent," is directly contrary to its case law. First, in *DOL*, 51 F.L.R.A. 462, a union requested 5 years of name-identified disciplinary records from the agency employer, to prepare for an arbitration hearing on a disciplinary action. The Authority found that the union could state a need for some disciplinary records. 51 F.L.R.A. at 476. However, as to why it needed 5 years' worth of records, the union stated only that the agency possessed such records. Further, the union could not give a concrete reason for why it wanted name-identified, as opposed to

sanitized, records. The Authority thus found that the Union had failed to state the requisite particularized need for the data requested.

In other words, the Authority said in *DOL* that it will take at face value a union's statement of need for the data requested. The Authority will not on its own initiative consider whether there might be some variant or subset of the union's document request which might better accord with the union's statement of need for the documents. Similarly, in the instant case, it is irrelevant under *IRS, Kansas City* whether the Union might have been able to fashion an adequate statement of need, had it sought just the six categories of data found disclosable by the ALJ and explained specifically why it needed each of those categories of documents.[16]

[16] The Union tries to distinguish *DOL* (Union's Brief (Un. Br.) at 46-48) by pointing out that it involved only one category of information (i.e., disciplinary records), which the employer there was "incapable of parsing" in trying to determine the union's need for different portions of that single category. In the instant case, the Union argues by contrast, there were numerous categories of data requested, some of which were found by the ALJ to be necessary for the Union to represent employees. However, the premise for this argument is faulty. As discussed at p. 27, above, an ALJ's *post hoc* speculation about the Union's possible need for certain categories of data cannot, under *IRS, Kansas City*, substitute for a failed Union statement of need at the time the request is made. The fact is that the Union here contented itself with a single, generic statement of need for an array of different documents, and this statement was insufficient on its face to satisfy its burden of demonstrating need for the full array of documents requested. This is highly analogous to the union's actions in *DOL*.

The Authority also relied on its decision in *Treasury*, 51 F.L.R.A. 1391. In that case, a union asked for sanitized performance appraisals of various employees, to consider whether a particular employee occupying a "one-of-a-kind" job was being discriminated against in her appraisal. The agency employer said the union had not demonstrated the requisite need for the appraisals, because the appraisals of employees in other jobs would not help the union show disparate treatment. The union only said the documents "are necessary in order to support our allegations." *Id.* at 1392.

The Authority rejected a suggestion that, notwithstanding the union's inadequate need statement, the need for the documents should have been "reasonably obvious" to the agency employer at the time the request was made. 51 F.L.R.A. at 1396. It therefore found that the union in that case had not satisfied its burden of establishing particularized need for the requested documents. *Id.* Despite the Union's contrary claim (Un. Br. at 49-50), this holding is squarely on point with the Authority's ruling in this case.

In sum, the Authority reasonably applied its *IRS, Kansas City* analytical framework to the facts of this case, and dismissed the ULP complaint. The Court should therefore affirm the Authority's decision.

## II. The Union's Arguments Are Without Merit and Should Be Rejected

The Union argues that the Authority's decision is contrary to the language of the Statute (Un. Br. at 35-41); that it leads to absurd results (Un. Br. at 41-45); and that it is contrary to Authority precedent (Un Br. at 45-54). None of these claims has merit, however, and they should be rejected.

### A. The Authority's decision is not inconsistent with the Statute

The gist of the Union's argument (e.g., Un. Br. at 35) is that the Authority erroneously refused to order the disclosure of certain categories of data for which the Union has shown a particularized need, because the request for those items was conjoined with a request for documents for which there is no particularized need. According to the Union, this supposed "all-or-nothing" approach by the Authority is contrary to § 7114(b)(4) of the Statute. The Union's argument, however, misconstrues both the facts of this case and the Authority's case law in this area.

The Union presents itself as a data requester that in fact made adequate individualized showings of need for each of six categories of documents, but not as to nine other categories. From this faulty factual premise, it argues that an agency employer's duty to furnish "necessary" information under § 7114(b) "is not extinguished when information shown

to be necessary is requested simultaneously with other information for which 'necessity' has not been shown." (Un. Br. at 32.)

The obvious flaw in this argument is that the Union never did offer individualized, substantive statements of need as to each category of information requested, even after repeated reasonable requests by the Agency to do so. Instead, as the Authority found (App. 114-15), the Union made a conclusory, "one-size-fits-all" need statement for all 15 categories of documents that was properly found to be inadequate.

As pointed out at p. 26, n.14, above, the Union recognizes that its need statements are inadequate on their face.[17] Thus, in order to make this argument, the Union must resort to the ALJ's decision to supply the requisite individualized findings of adequate need for each of the six categories of information. (Un. Br. at 42 ("Under the ALJ's decision, the Union established 'particularized need' for information for six of the fifteen information items sought.")) However, as set out at p. 27, above, the ALJ's conjectures about what should be "apparent" or "self-evident" about the

[17] The Union suggests (Un. Br. at 44-45) that the Authority should have been mindful that the Union's data requests in this case were drafted by a non-lawyer who may have lacked "articulation skills." However, it was not inartful drafting that doomed the Union's requests before the Authority. Rather, it was the Union's inability to demonstrate why it was asking for the documents it sought.

Union's need for documents are not properly considered under the Authority's *IRS, Kansas City* framework. The Union therefore cannot, either as a matter of fact or law, position itself as a data requester that satisfied its burden of showing sufficient need for certain categories of data, but not others.[18]

It is worth noting in this regard that the Union makes a misleading statement when it claims (Un. Br. at 50) that "the ALJ correctly found . . . the initial information request by itself contains enough explanation to show 'particularized need.'" To the contrary, the ALJ made clear (App. 86) that he did not find the six categories of data to be disclosable based on the four corners of the Union's need statement. Rather, he indicated (e.g., App. 92) that the Union's "minimal explanation" of need became adequate only by his added consideration of what he deemed to be the Union's "apparent" or "self-evident" need for the six categories. In short, the Union's argument to the Court is predicated entirely on the ALJ's surmise about the Union's

[18] Indeed, when the Authority is confronted with a data requester that does in fact make the kind of individualized, substantive showings of need that is missing here, it will order disclosure of the data, provided other conditions for disclosure are met. *E.g., United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Correctional Institution, Forrest City, Ark.*, 57 F.L.R.A. 808 (2002), *enf. granted in part, denied in part on other grounds, and remanded sub nom. FLRA* v. *U.S. Dep't Justice, Fed. Bureau of Prisons, Fed. Correctional Institution, Forrest City, Ark.*, 395 F.3d 845 (8th Cir. 2005) (*Forrest City*).

"apparent" need for the six categories of documents. Because such a *post hoc* surmise is not an appropriate factor to rely on in assessing the adequacy of a union's statement of need, the argument must fall.

B. The Authority's decision does not lead to absurd results

The Union first relies on a hypothetical to demonstrate the supposedly "absurd" results of the Authority's decision. (Un. Br. at 39 to 40, 41-42.) In this hypothetical, the Union suggests that if it had made a series of 15 separate, individualized information requests for each of the categories of documents at issue, it would have received the six categories of documents found releasable by the ALJ. Thus, it continues, it should not be penalized by not receiving those six categories of documents, simply because it conjoined its request for those documents with requests for other documents that it failed to show an adequate need for. Moreover, the Union posits (Un. Br. at 41-42) that it would be "absurd" to require it to submit individual requests *seriatim*, as opposed to single requests encompassing all documents at issue.

Again, the Union's argument on this point suffers from the same faulty premise as discussed at pp. 31 to 33, above. It is sheer speculation whether the Authority would have found that the Union had established sufficient need for each of the six categories of documents, if the Union had

made individualized concrete statements of need for each one of those categories. The fact of the matter is that the Union did not make its statement of need in those terms. Such speculation is not a basis for overturning the Authority's decision.[19]

The Union next queries what would have happened if it had shown particularized need for 13 or 14 categories of documents, instead of the six categories found by the ALJ to be disclosable. (Un. Br. at 43.) The answer to this question, however, is irrelevant. As with the other arguments the Union makes in this case, it proceeds from the erroneous premise that the Union in fact made an adequate statement of need for each of the six categories of documents. As we have shown, this was not the case.

If the Union had made an adequate statement of need as to each of the six categories, and other criteria for disclosure were met, the Authority

[19] The Union points to the fact that the Agency provided the Union with the PEP and promotion certificate, two of the categories of information at issue in this case, for a promotion action taken before the series of requests at issue here were made. (Un. Br. at 38-39.) However, this fact does not cure the deficiencies in the Union's need statements. First, there is no indication that the Union asked for those documents pursuant to § 7114(b)(4) of the Statute, thus bringing into play the Authority's *IRS, Kansas City* analysis. Second, the fact that the Agency may not have doubted the Union's need for these two items in this earlier action does not detract from the undisputed reasonableness of its inquiries about the Union's document needs for the subsequent promotion actions. There is nothing in the record to show that information provided by the Agency in connection with this earlier

would have ordered disclosure of those documents. If the Union had made an adequate statement of need as to each of 13 or 14 categories of documents, and other criteria for disclosure were met, the Authority would have ordered disclosure of those documents. *Cf.*, *Forrest City*, 57 F.L.R.A. at 812-15. The fact of the matter is that the Union did neither in this case. Therefore, the Union's question simply leads nowhere.[20]

C. The Union erroneously claims that the Authority's decision is inconsistent with Authority precedent

The Union argues that the Authority's decision is contrary to its decisions in *Health Care Financing Administration*, 56 F.L.R.A. 156 (2000) (*HCFA I*); and *Health Care Financing Administration*, 56 F.L.R.A. 503 (2000) (*HCFA II*). (Un. Br. at 38-39, 51-52.) However, neither of these decisions conflict with the Authority's holding in this case.

In *HCFA I*, the union asked for four documents, all of which related to the rating and ranking of applicants, to determine which of them were "best qualified," and therefore eligible to be considered for selection for a vacant

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promotion action mandated similar conduct by the Agency in the later actions.

[20] The Union also posits (Un. Br. at 37) that it is better to allow for document disclosure before the filing of a grievance; that it need not disclose the identity of a bargaining unit employee; and that agency wrongdoing need not be established before a data request is made. While these points may be true, they do not remedy the manifest inadequacy of the Union's data requests in this case.

position at the agency. 56 F.L.R.A. at 156. In its statement of need to the agency, which it clarified in response to an agency request, the union in that case specified that bargaining unit employees had told union representatives that they believed there were mistakes made in the rating and ranking process. 56 F.L.R.A. at 157. Thus, the union in *HCFA I* responded substantively to an employer request for clarification, and tailored its statement of need so that there was considerable congruence between the data requested and the stated need for that data. Moreover, the union there asked for data concerning only a single recruitment action.

All these factors in *HCFA I* are in marked contrast to the Union's conduct in the instant case. Here, the Union did not respond substantively to the Agency's clarification request; did not tailor its data requests to its need statement; and kept providing the identical statement of need for the identical set of documents for a large number of different promotion actions. *See United States Dep't of the Air Force, Randolph Air Force Base, San Antonio, Tex.*, 60 F.L.R.A. 261, 264 (2004) (where information sought is broader than the circumstances covered by the request, and union cannot explain reasons for the disparity, union has not established particularized need). The differences between *HCFA I* and the instant case are, if anything, supportive of the Authority's ruling here.

*HCFA II* is equally distinguishable from the instant case. The union there asked for seven different types of data concerning two recruitment actions taken by the employer. 56 F.L.R.A. at 503-04. The employer never responded at all to either of the requests until one month after the union had filed a ULP charge, nor did the employer provide any of the requested data. The Authority found that the Union had "provided sufficient information for the [employer] to make a reasoned judgment concerning disclosure." 56 F.L.R.A. at 507. However, the Authority specified that if the employer was unclear about the reason the union needed the requested information, it should have sought clarification from the union. Had the employer sought such clarification, the Authority said, "the Union would have been required to provide it or run the risk of failing to meet its burden of establishing a particularized need for the information requested." 56 F.L.R.A. at 507 n.3.[21]

The Agency in the instant case, of course, did seek such clarification, and the Union made no meaningful response to that request. This crucial

[21] The Union makes much (Un. Br. at 51-52) of the fact that the Authority said in *HCFA II* that a union simply "run[s] the risk" of being found not to have satisfied its burden to make an adequate need statement, if it does not respond substantively to an employer clarification request. Although the Authority has not established a *per se* rule on this point, the fact remains that in this case, the Agency's clarification request was indisputably made in good faith, and the Union's need statement was inadequate without further elaboration.

fact caused both the Authority (App. 113-14) and the ALJ (App. 88-89) to correctly distinguish *HCFA II* from the instant case.

The Union also contends (Un. Br. at 46-48) that the Authority wrongly applied its *DOL* decision in the instant case. This claim was addressed in part at p. 29, n.16, above. However, the Union makes the additional point (Un. Br. at 47-48) that, in contrast to the instant case, the Authority appropriately applied *DOL* in *Forrest City*. More specifically, the Union argues that in *Forrest City*, the Authority made individualized determinations about whether the union there had demonstrated sufficient need for four types of information, whereas in the present case, the Authority did not make such individualized determinations.

The critical fact in *Forrest City* that the Union overlooks is that the union in that case made substantive, individualized statements of need as to each of the categories of documents it requested. 57 F.L.R.A. at 809. The Union in this case did no such thing, and as a result, the Authority decided the instant case and *Forrest City* differently.

Finally, the Union attempts to attack the Authority's reliance on *Treasury* by pointing to the ALJ's conclusion in the present case as to the Union's "self-evident" need for six categories of data. (Un. Br. at 49-50.) This factor, the Union claims, distinguishes the present case from *Treasury*.

However, as has been stated several times previously, reliance on the ALJ's findings as to "self-evident" need is impermissible under the *IRS, Kansas City* framework. Accordingly, the Union's argument as to the inapplicability of *Treasury* to this case is without merit.

## CONCLUSION

The Union's petition for review should be denied.

Respectfully submitted.

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September 2005

## STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested because the present case concerns important questions of law concerning how the Authority implements § 7114(b)(4) of the Statute, 5 U.S.C. § 7114(b)(4). These questions may well recur in federal sector labor law, and the Court's resolution of these questions will provide benefit to the parties that operate under the Statute. Allowance of oral argument will allow the Court an opportunity to have any questions the Court may have about this matter to be addressed by counsel. The Authority respectfully submits that fifteen minutes per side should be allotted for argument.

**CERTIFICATE OF COMPLIANCE REQUIRED BY FRAP RULE 32(A)(7)**

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure ("FRAP"), I hereby certify that the attached brief is written in a proportionally-spaced 14-point font and contains 7,738 words.

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September 2, 2005

## CERTIFICATE OF DIGITAL SUBMISSIONS

In accordance with this Court's Emergency General Order, I hereby certify that no privacy redactions were required to be made in this brief and no redactions were accordingly made. I also certify that the digital submissions have been scanned for viruses with a commercial virus scanning program (Computer Associates – E-Trust Antivirus; Release 7.1) and, according to the program, the submissions are free of viruses.

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September 2, 2005

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

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| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2263, Petitioner | ) | |
| v. | ) | No. 05-9543 |
| FEDERAL LABOR RELATIONS AUTHORITY, Respondent | ) | |

## CERTIFICATE OF SERVICE

I certify that copies of the Brief For The Federal Labor Relations Authority (along with a copy of the brief by electronic mail at the time of electronic submission to the Court) have been served this day, by United States mail, upon the following:

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September 2, 2005