

BY-30946

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER,

NORTHPORT, NEW YORK

Respondent

and
NATIONAL FEDERATION OF FEDERAL EMPLOYEES,
LOCAL 387

Case Nos. BY-CA-30946
BY-CA-30949

Charging Party

Christopher Wood, Esq.

For the Respondent

Jordan Marks

For the Charging Party

Peter F. Dow, Esq.

For the General Counsel

Before: SALVATORE J. ARRIGO

Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon unfair labor practice charges having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Boston Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by failing to reply to the Union concerning information it requested and failing to furnish the Union with information which concerned alleged overpayments of money

to bargaining unit employees.

A hearing on the Complaint was conducted in New York, New York, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

The National Federation of Federal Employees, Veterans Administration Council (NFFE) is the certified exclusive collective bargaining representative of a nationwide unit of employees appropriate for collective bargaining, including employees at Respondent's facility in Northport, New York. The Union is an agent of NFFE for representing unit employees at Respondent's Northport facility.

Case No. BY-CA-30946

In early February 1993 three police officers, members of the collective bargaining unit, were notified by Respondent that they had been previously paid one-half hour more than what they were entitled and that the correction would be made through Respondent's payroll office. The Union and Respondent have established a procedure whereby Respondent would notify affected employees of their right to seek a waiver when notifying the employee of the overpayment and employees could thereafter request a waiver of overpayment. On February 12, 1993 the three police officers filed a "Complaint" with the Union in an effort to obtain a waiver.

The Complaint description stated:

OT - Waiver notice never received Police Secretary asked for waiver of rights

no bill of collection received See E-mail

As part of the Complaint the employees signed a request that the Union represent them "in the aforementioned matter."⁽¹⁾

On February 19, 1993 Union President Georgiana Kachura sent Donna Cardillo, Respondent's Chief of Human Resources, a request for "all pay, time and leave records" for the three officers, including "time cards, VA form 10-2912, overtime records, SF 71's memos." Laura Oechsle, secretary to Michael Picerno, Respondent's Chief of Employee and Labor Relations, signed for the receipt of the request. Cardillo sent the Union the following reply on February 24:

This is in response to your requests for pay and leave records

Under Title 5, U.S.C., Section 7114(b)(4)(B), management is required to furnish to the Union that data which is reasonably available and necessary for full and proper discussion of subjects within the scope of collective bargaining. Accordingly, at your earliest convenience, kindly forward a statement of the relevance of the information to the representational activities of the Union.

Please be aware, too, that the Privacy Act, 5 U.S.C. 552a, prohibits the release of personal information unless an employee consents to the release of the requested information. In turn, the Freedom of Information Act, 5 U.S.C. 552, provides that agencies will withhold information when "disclosure . . . would constitute a clearly unwarranted invasion of personal privacy." It is clear that overtime and leave records are not covered under the Freedom of Information Act, and, as such, a release of information is required before any of the requested information can be made available to the Union.

Union President Kachura testified without contradiction that on February 26, 1993, after receiving Cardillo's letter, she provided Cardillo with a copy of each of the "Complaints" from the three police officers. Cardillo asked Kachura to show the documents to Seth Schulman, a Labor Relations Specialist working for Cardillo's subordinate Chief of Employee and Labor Relations Picerno. Kachura complied with Cardillo's request and provided Schulman with copies of the Complaints.

Kachura did not receive the information she requested concerning the three Complaints and accordingly on April 23, 1993 she sent Human Resources Chief Cardillo the following memorandum:

This is in response to your memo requesting a statement of relevancy for requested information of time, leave and pay records on the above four-named employees.

Please be advised that each of the above employees have signed complaint

forms which were provided to you in connection with complaints and request for representation. Waivers of overpayment would be forth coming.

Please provide information per request by COB 4-26-93 to Frank Valenti.

Sometime thereafter the Union received time and attendance records for the three police officers involved but none of the other information requested. On May 7, 1993 the Union sent Cardillo three two-page documents captioned "Waiver of Over-Payment."⁽²⁾ Cardillo's secretary signed a receipt on the first page of each of the documents. The documents stated they were claims on behalf of the police officers and noted, "An authorization of representation . . . appears below." The signed "Authorization of Representation" appeared on the second page of the correspondence. The claims stated they were attaching "all pay records received from management in connection with this overpayment."

The information requested by the Union concerning the alleged overpayment of the three police officers, except for the time and attendance records, was never provided the Union and the unfair labor practice charge concerning Respondent's failure was filed (received by the Authority) on May 27, 1993.⁽³⁾

Case No. BY-CA-30949

On March 27, 1993 employee Catherine Stroh, a nurse and member of the collective bargaining unit, filed a "Complaint" with the Union, citing overpayments made to her by Respondent. The Complaint contained a portion stating Stroh was requesting representation by the Union in the matter. On April 2, 1993 Union President Kachura gave Seth Schulman, as noted above a Labor Relations Specialist on Chief of Employee and Labor Relations Picerno's staff, the following request:

PLEASE BE ADVISED THAT C. STROH HAS BEEN OVER PAID A VERY
LARGE AMOUNT OF MONEY TWO TIMES IN RECENT PAST TO THE TUNE
OVER \$1000. PLEASE CEASE IN REMOVING ANY FURTHER REPAYMENT
FROM HER CHECKS SINCE A HARDSHIP HAS NOW BEEN CREATED. A
WAIVER OF OVERPAYMENT WILL FOLLOW. PLEASE PROVIDE TO US A
COMPLETE LISTING OF ALL MONEY OWED BY C. STROH. ATTACHED
PLEASE NOTE REQUEST FOR REPRESENTATION ON WAIVER. WE WILL
NEED COMPLETE LISTING OF DATES, AMOUNTS AND REASON
OVERPAYMENTS OCCURRED. THIS INFORMATION IS REQUESTED UNDER

7114(b)(4). PLEASE PROVIDE INFORMATION TO G. KACHURA BY 4-9-93.

Schulman signed for receipt of the request and noted: "need release fr. employee before request for info can be met."

Kachura testified without contradiction that on April 4 she had the complainant, Catherine Stroh, hand deliver to Schulman a copy of Stroh's specific authorization of Union representative dated March 27, 1993, which stated:

I DO HEREBY GIVE THE NATIONAL FEDERATION OF FEDERAL
EMPLOYEES AND ITS AGENT GEORGIANA KACHURA, PRESIDENT
LOCAL 387 PERMISSION TO REPRESENT ME ON A WAIVER OF
OVERPAYMENT.

At the same time Stroh also delivered to management representative Schulman a copy of Stroh's handwritten statement addressed to Chief of Human Resources Cardillo, "thru . . . Kachura," which she wrote to establish hardship to procure waiver of the overpayment. The statement also contained the following comment: "I have asked NFFE to represent me and to go over the exact amount of overpayment and why this has occurred twice."

According to Kachura's uncontradicted testimony, three or four days later Schulman told her during a phone conversation that he received Stroh's statement of hardship and request for representation.

On May 7, 1993 Kachura submitted to Respondent a claim for waiver of overpayment. The two page document received in evidence contains a stamp captioned "Personnel Services" dated May 7, 1993 and signed by the secretary to Chief of Human Resources Cardillo.⁽⁴⁾ The claim mentions that a request for information on the overpayment was made on April 2 but no response had been received. The second page of the document, the signature page, contained a signed "Authorization of Representation," authorizing the Union to represent Stroh in her waiver of overpayment case.

Respondent never supplied the requested information and the Union filed an unfair labor practice charge concerning the failure on May 27, 1993.⁽⁵⁾

Additional Findings, Discussion and Conclusions

The General Counsel alleges Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to furnish the Union with the information it requested on February 19, 1993 and April 2, 1993 and by failing to respond to the Union's information request of April 2, 1993.

Respondent takes the position that the information sought by the Union was protected by the Privacy Act and contends that consents or authorizations to release the data from the individual employees whose records were being requested were never received by Employee and Labor Relations Chief, Michael Picerno, one of whose functions was to furnish such data.⁽⁶⁾

Section 7114(b)(4) of the Statute provides that an agency is required:

(4) . . . to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining

In its Answer to the Complaint as amended at the hearing, Respondent admits that the information sought by the Union is normally maintained by the Agency, reasonably available, etc., and does not constitute guidance, advice, etc. within the meaning of section 7114(b)(4) of the Statute. Chief Labor and Employee Relations Picerno admitted under cross-examination that the information at issue herein would be "necessary" for the Union to possess in order to respond to an allegation of overpayment, and I so find.

As Counsel for the General Counsel sets forth in his brief, it is well established that under section 7114(b)(4) an exclusive representative is entitled to information that is necessary to enable it to perform effectively the full range of its representational responsibilities, including information which will assist it in the investigation, evaluation, and processing of a grievance, and that an agency's failure to furnish such information violates section 7116(a)(1), (5) and (8) of the Statute. See, Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 39 FLRA 298 (1991), and cases cited therein. An agency will also be found to have violated section 7116(a)(1), (5) and (8) when it fails to respond to a union's request for information under the Statute. In this regard, the Authority has repeatedly held that a reply to a request for information from an exclusive representative is necessary for the full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining under section 7114(b)(4). See, e.g., Food and Drug Administration, Mid-Atlantic Region, Philadelphia, Pennsylvania, 48 FLRA 424 (1993), [failure of an agency to acknowledge receipt of a request for information from a union or to reply to

that request, violated section 7116(a)(1), (5) and (8), and the agency's eight month delay in responding, without good cause, to a second information request by the union did not constitute a timely response required by the Statute], and U.S. Naval Supply Center, San Diego, California, 26 FLRA 324 (1987), [even the nonexistence of the specific information does not relieve an agency from the obligation to reply to an information request].

Respondent essentially contends that since Chief of Labor and Employee Relations Picerno did not personally receive the Union's request for information, no violation of the Statute has been established. The record reveals that the Union's February 19 and April 2, 1993 requests for information were received by authorized and responsible representatives of the Agency in the course of performing their assigned duties. Thus, the February 19, request for information concerning the police officers' overpayment matter was received by Chief of Human Resources Cardillo, Picerno's superior, and she responded to the request by indicating to the Union that additional information was needed from the Union before Respondent could comply with the Union's request. On February 26, the Union provided Respondent (Cardillo and at Cardillo's request Labor Relations Specialist Schulman, a member of Picerno's staff), with information sufficient to establish the "necessity" of the data sought and the Union further provided authorization for release to the Union from the employees involved of the records which had Privacy Act protection. At this point I conclude Respondent was required to furnish the Union with all the documents it requested regarding the police officer's alleged overpayment matter.

As to the information regarding nurse Stroh, the Union's request of April 9, 1993 was received by Labor Relations Specialist Schulman, who indicated that an employee "release" was necessary before the documents could be turned over. On April 4, 1993 Respondent, through Schulman, a member of Picerno's staff, received the required "authorization." I conclude that at this time Respondent was obligated to furnish the Union all the documents requested concerning the Stroh overpayment issue.

In sum, Respondent had in its possession proper authorizations for the release of the information sought by the Union as well as the reasons why such documentation was "necessary" for the Union to possess. Clearly the Union made its request to authorized and responsible representatives of Respondent.⁽⁷⁾ I specifically reject as unsupported that because Picerno may not have been fully advised as to the Union's requests for information that in the circumstances herein this constitutes a valid reason or excuse for the Agency's failure to furnish the Union all the data it requested and preclude a finding of violation of the Statute by such conduct. See Social Security Administration, Baltimore, Maryland and Social Security Administration, Area II, Boston Region, Boston, Massachusetts, 39 FLRA 650, 654-655 (1991).

Accordingly, I conclude that by its failure to supply all the information requested by the Union regarding the alleged overpayments to the three police officers, and by its failure to supply the information requested by the Union concerning nurse Stroh's alleged overpayment and the failure to reply to the Union's request for such information Respondent violated section 7116(a)(1), (5) and (8) of the Statute. I therefore recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Department of Veterans Affairs Medical Center, Northport, New York, shall:

1. Cease and desist from:

(a) Failing or refusing to furnish the National Federation of Federal Employees, Local 387, the agent for the exclusive collective bargaining representative of certain of its employees, with copies of the information requested by the Union, (1) in correspondence of February 19, 1993 concerning alleged overpayment of three police officers, except for time and attendance reports previously supplied, and (2) in correspondence of April 2, 1993 concerning alleged overpayment of employee Catherine Stroh.

(b) Failing or refusing to reply to an April 2, 1993 request from the National Federation of Federal Employees, Local 387 for information concerning alleged overpayments of employee Catherine Stroh.

(c) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Upon request, furnish the National Federation of Federal Employees, Local 387, with copies of the information it requested in its correspondence of February 19, 1993 and April 2, 1993 concerning alleged overpayments of three bargaining unit police officers and nurse Catherine Stroh.

(b) Reply to the request for information made by the National Federation of Federal Employees, Local 387 concerning alleged overpayments made to nurse Catherine Stroh.

(c) Post at its Northport, New York facility 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 facility Director, and shall be posted and shall be posted and maintained for 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for the Boston Regional office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 17, 1995

SALVATORE J. ARRIGO

NOTICE TO ALL EMPLOYEES
AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY
AND TO EFFECTUATE THE POLICIES OF THE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish the National Federation of Federal Employees, Local 387, the agent for the exclusive collective bargaining representative of certain of our employees with copies of the information requested by the Union, (1) in correspondence of February 19, 1993 concerning alleged overpayment of three police officers, except for time and attendance reports previously supplied, and (2) in correspondence of April 2, 1993 concerning alleged overpayments of employee Catherine Stroh.

WE WILL NOT fail or refuse to reply to an April 2, 1993 request for information concerning alleged overpayment of employee Catherine Stroh from the National Federation of Federal Employees, Local 387.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL, upon request, furnish the National Federation of Federal Employees, Local 387, with copies of the information requested by the Union, (1) in its correspondence of February 19, 1993 concerning alleged overpayments of three police officers, except for time and attendance reports previously supplied, and (2) in correspondence of April 2, 1993 concerning alleged overpayments of employee Catherine Stroh.

WE WILL reply to an April 2, 1993 request for information concerning alleged overpayments of employee Catherine Stroh from the National Federation of Federal Employees, Local 387.

(Activity)

Date: _____ By: _____

(Signature)

(Title)

This Notice must remain posted for 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, Boston Region, Federal Labor Relations Authority, and whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110-1200 and whose telephone number is: (617) 424-5730.

1. It is acknowledged by Respondent that such a request for Union representation is tantamount to an authorization to obtain personal files to pursue a waiver of overpayment for an employee.
2. The documents bore the date "2-17-93."
3. The unfair labor practice charge form signed by Kachura bore a May 6, 1993 date after Kachura's signature.
4. Cardillo was identified during the proceeding as both Chief of Human Resources and Chief of Personnel Services.
5. The unfair labor practice charge form signed by Kachura bears a May 6, 1993 date after Kachura's signature.
6. While Picerno testified that requests for information from the Union regarding personnel and payroll records come through him, the record does not establish that he was the only person in management who was designated to receive and comply with such requests.
7. Cardillo, Picerno and Schulman are admitted to be supervisors or management officials under section 7103(a)(10) and (11) of the Statute.