

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: June 22, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF HOMELAND
SECURITY, BORDER AND
TRANSPORTATION SECURITY
DIRECTORATE, CUSTOMS AND BORDER
PROTECTION, BALTIMORE FIELD
OFFICE, BALTIMORE, MARYLAND

Respondent

and

Case No. BN-CA-04-0464

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2012, AFL-CIO

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER AND TRANSPORTATION SECURITY DIRECTORATE, CUSTOMS AND BORDER PROTECTION, BALTIMORE FIELD OFFICE, BALTIMORE, MARYLAND	
Respondent	
and	Case No. BN-CA-04-0464
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2012, AFL-CIO	
Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 25, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

— PAUL B. LANG
Administrative Law Judge

Dated: June 22, 2005
Washington, DC

**UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY**
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF HOMELAND SECURITY, BORDER AND TRANSPORTATION SECURITY DIRECTORATE, CUSTOMS AND BORDER PROTECTION, BALTIMORE FIELD OFFICE, BALTIMORE, MARYLAND	
Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2012, AFL-CIO	Case No. BN-CA-04-0464
Charging Party	

Gary Lieberman, Esquire
For the General Counsel

Joseph M. Liberta, Esquire
For the Respondent

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge which was filed by the American Federation of Government Employees, Local 2012, AFL-CIO (Union) against the U.S. Department of Homeland Security, Border and Transportation Security Directorate, Customs and Border Protection, Baltimore Field Office, Baltimore, Maryland (Respondent or CBP) on July 6, 2004. On September 28, 2004, the Regional Director of the Boston Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed unfair labor practices in violation of §7116(a) (1), (5) and (8) of the Federal Service Labor-Management Relations Statute (Statute) by failing and refusing to provide the Union with certain information that it had

requested. It was also alleged that the Respondent had failed to comply with §7114(b)(4) of the Statute.

A hearing was held in Philadelphia, Pennsylvania on December 9, 2004. Both parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel maintains that, since on or about January 27, 2004, the Respondent has unlawfully refused to provide the Union with information that it had requested in spite of the fact that the information is normally maintained by the Respondent and is reasonably available. The General Counsel further maintains that the Union established a particularized need for the information inasmuch as it was made clear to the Respondent that the Union was seeking comparative information as to discipline in order that it might adequately represent Scott Lucian, a member of the bargaining unit represented by the Union, in a grievance regarding a proposed five day suspension for inattention to duty.

The General Counsel asserts that, in responding to the Union's request for information, the Respondent did not articulate a countervailing interest or request that the Union express a more detailed particularized need. Furthermore, the Union had requested that the information be sanitized, thus avoiding a violation of the Privacy Act, 5 U.S.C. §552a.

The Respondent maintains that the requested information is not maintained in the regular course of business and is not reasonably available. In addition, the Respondent argues that the Union did not articulate a particularized need and that the requested information is neither necessary nor relevant to the grievance over Lucian's suspension.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization as defined in §7103(a)(4) of the Statute and is the exclusive representative of a unit of employees of CBP which

is appropriate for collective bargaining.¹ The Union is the agent of AFGE for the purpose of representing employees of the Respondent who are members of the bargaining unit.

The Organizational Structure of the Respondent

The Department of Homeland Security (DHS) was created on March 1, 2003, by virtue of the Homeland Security Act of 2002, 6 U.S.C. §101, et. seq. DHS is composed of 22 agencies including CBP. Each of the agencies is under the supervision of a Commissioner and each Commissioner reports to one of five Under Secretaries, each of whom is in charge of a directorate. The Under Secretaries report to the Secretary of Homeland Security through the Deputy Secretary. The Commissioner of CBP is one of three who report to the Under Secretary of Border and Transportation Security (BTS) (Jt. Ex. 8(a) and (b)).

CBP was formed by the transfer of employees from the U.S. Customs Service of the Department of the Treasury, the Immigration and Naturalization Service (INS)² of the Department of Justice and the Border Patrol of the Department of Agriculture. Not all of the former INS and Customs employees went to CBP. Some were transferred to the Bureau of Immigration and Customs Enforcement (ICE) which is one of the three bureaus that make up BTS; others were transferred to the Bureau of Citizenship and Immigration Services (CIS) which is part of a different directorate. The former Customs Service and INS were abolished.

Maintenance and Disposition of Personnel Records

Diane Shepherd is the Director for Employee Relations Policy for CBP. Shepherd testified that, shortly after the creation of DHS, representatives of the legacy Customs Labor and Employee Relations (LER) Division contacted their counterparts in legacy INS during the transition period

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Petitions to consolidate the bargaining units represented by the AFGE and two other labor organizations are now pending before the Authority.

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The former INS employees are sometimes referred to as "legacy INS" while former Customs employees are called "legacy Customs".

between March 1 and October 1 of 2003.³ Shepherd attended a series of meetings which were held in May and June of 2003 between legacy Customs and legacy INS representatives to discuss how each organization was servicing its legacy organization and how they would continue to function after future assignments of legacy employees to the various component agencies of DHS (Tr. 142-144). The results of those discussions which are pertinent to this case are set forth below:

1. The Eastern Records Center, which had been established by INS in Burlington, Vermont would continue in operation and would be staffed by legacy INS employees. Five of those employees were transferred to CBP and the remainder were transferred to CIS.

2. The Burlington facility would maintain the personnel records for legacy INS employees, regardless of the DHS agencies to which they were assigned, who were located in the 25 states east of the Mississippi River and certain other designated locations including Washington, DC. (Two other facilities would continue to exist for other geographic regions.)

3. The Burlington facility would maintain custody of closed personnel files for the Eastern Region.

4. Open personnel files from legacy INS employees now employed by CBP were transferred from Burlington to CBP in Washington, DC.⁴

5. The official personnel files (OPFs) of CBP employees were not physically transferred. CBP has access to the OPFs of its employees even though some of them are in the custody of another DHS agency.

Further details are contained in the minutes of a legacy INS and Customs LER Program Management Meeting that was held on May 14 and 16, 2003, (Jt. Ex. 9). On the second page of the minutes, under the heading "**ER Issues**" and the subheading "Transfer of ER Program Case Tracking Data", is the notation, "In the future we will need data from each other's systems for prior discipline information."

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October 1 marked the beginning of the first fiscal year after the creation of DHS. Budget decisions for that and subsequent years would be affected by the allocation of responsibilities between the various agencies within DHS.

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According to Shepherd, open files are those for which a labor and employee relations action is pending (Tr. 144).

According to Shepherd the participants at the meetings discussed the need to exchange information as to prior discipline only in "very general terms." They did not reach any conclusion but recognized the need to exchange such information to some extent. Shepherd cited as an example the need to obtain the record of a prior suspension so as to determine the need for progressive discipline in the event of subsequent misconduct. She is aware of no regulation that would preclude the exchange of sanitized information between CIS, ICE and CBP (Tr. 148). There is no evidence of discussions among the agencies as to the sharing of master lists of discipline for various offenses, nor is there evidence that such master lists exist for legacy agencies or for DHS agencies.⁵

Lucian's Proposed Suspension and the Union's Request for Information

By letter of December 29, 2003 (Jt. Ex.1), Allan Martocci, the Acting Port Director for Philadelphia, informed Lucian that the Respondent proposed to suspend him without pay for five days because of inattention to duty. The incident upon which the suspension was based occurred on November 8, 2002, while Lucian was still employed by INS. By letter of January 7, 2004 (Jt. Ex. 2), from Ivan Lebron, the Union President, to Steven Knox, Director of Field Operations, in care of Loretta G. Lowe, a Labor and Employee Relations Specialist, Lebron stated that he was representing Lucian with regard to the proposed suspension.⁶ He further requested certain information, "In order to properly respond to the allegations set forth in the proposal" Among the items of information requested were:

3. All proposal and decision notices for disciplinary and/or adverse cases within the Eastern Region of the legacy Immigration and Naturalization Service from three years prior to

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The Respondent's response to the Union's information request (Jt. Ex. 3), which states that there were no prior instances of inattention to duty, supports the inference that a master list may exist for the Baltimore Field Office. Shepherd testified that some of the regions of legacy INS had databases but that she did not recall whether the Eastern Region had one (Tr. 149).

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LeBron's letter, as well as his subsequent correspondence to the Respondent, was on Union letterhead; LeBron identified himself below the signature as the Union President. Therefore, it was apparent that LeBron was acting on behalf of the Union rather than as an individual.

the date of the instant alleged offense to the present for the following or similar specifications. Please include settlement agreements.

a. **Inattention to Duty**

The Union needs this information in order to compare the discipline the agency has proposed against Mr. Lucian with that given to other employees who have committed similar offenses [citation to Authority decision]. The Union anticipates that any findings of disparate treatment will be incorporated into the written and oral replies.

. . .

5. For the documents provided in response to request 17 and 3 above, copies of **all final agency decisions**. (These documents will be accepted in a sanitized fashion in order to protect the privacy of the individuals involved);

6. For the documents provided in response to request 5 above, copies of **all decisions after appeal**, whether through EEOC, MSPB, FLRA, Grievance/Arbitration, or any other court or administrative forum. (These documents will be accepted in a sanitized fashion in order to protect the privacy of the individuals involved); and

7. For the documents provided in response to request 5, and 6 above, copies of **any settlement agreements**. (These documents will be accepted in a sanitized fashion in order to protect the privacy of the individuals involved).

If you decide not to disclose any of the documents requested above, then you are to consider this request to be made pursuant to the [F]reedom of Information Act, **5 USC 552** and the Privacy Act, **5 USC 552a**.

. . . If this request is denied in whole or in part, please inform me of the name and the

position title of the official making the decision to deny each item, and the statutory or regulatory basis of representation.

On February 27, 2004, Lowe issued a written response to LeBron (Jt. Ex. 3) with which she enclosed some of the material requested by the Union. With regard to requests 3, 5, 6 and 7 Lowe stated:

The Agency Department of Homeland Security (DHS), Customs and Border Protection (CBP), did not come into being until March 1, 2003. Mr. Lucian works for CBP, Baltimore Field Office, which encompasses the Ports of Baltimore, Philadelphia, Pittsburgh, Harrisburg, Wilmington, and Washington, D.C. (Dulles). There is no Eastern Region. From March 1, 2003 until the present, in the Baltimore Field Office area no one has committed a similar offense. Further, no settlement agreements were made since there have been no cases. Because of this, there are no disciplinary or adverse action proposals, final decisions, decisions after appeals from any forum, or settlement agreements that exist.

By letter of March 8, 2004, to Knox in care of Lowe (Jt. Ex. 4(a)), LeBron requested that Lucian's proposed suspension be reduced to a written reprimand with "time served". Among the reasons in support of the Union's request LeBron cited as a "harmful procedural error" the Respondent's failure to provide the information described in request 3. LeBron further stated:

I am astounded at the fact that the agency refused to provide the information that I requested especially since it provided me with a copy of Mr. Lucian's **Official Personnel File** and the information contained therein dating back to 1985. Additionally, faxed copies (from the Eastern Region legacy INS) of Mr. Lucian's **Performance Appraisal Record** dating back to 1999 were included in Ms. Lowe's package. The Agency also failed to provide requested items numbers 5, 6 and 7.

LeBron cited a portion of the Respondent's Administrative Manual⁸ which allegedly states that employees are entitled to review "relevant nonrestrictive documents or information with the Department of Justice for purposes of preparing an answer to a notice of proposed action" and that, upon

request of the employee or his or her representative, information relevant to the reprimand or adverse action shall be made available for review. LeBron also referred to Article 31 H of the collective bargaining agreement⁹ which requires that suspensions of less than fifteen days and adverse actions which are not based on unacceptable performance must be supported by "just and sufficient [cause] and only for reasons as will promote the efficiency of the Service".

As enclosures to LeBron's letter of March 8, 2004, he submitted copies of three sanitized letters to INS employees (Jt. Ex. 4(b), (c) and (d)). Each of the letters informs the employee of either a proposed one-day suspension for inattention to duty or of a final decision to impose such a suspension. There is no evidence as to how the Union obtained those documents.

LeBron testified that he made no effort to negotiate with the Respondent regarding the information request, nor did he narrow the request (Tr. 98).

On June 15, 2004, Knox issued a letter to Lucian (Jt. Ex. 5) informing him that the charge and proposed penalty had been affirmed. On June 28, 2004, the Union invoked arbitration on behalf of Lucian (Jt. Ex. 6).

Lowe is a LER Specialist who works for CBP in Baltimore. Her immediate superior is Mel Steurman who is the Branch Chief for LER and who works in New York. Since joining CBP Lowe has responded to about four information requests from unions including the request that is at issue in this case. However, Lowe does not have the authority to provide information without first consulting with Steurman. Lowe testified that, upon receiving an information request, she usually notifies Steurman, either by telephone or e-mail, and will send him copies of pertinent documents if he so desires (Tr. 108).

According to Lowe, CBP maintains personnel files on all of its employees but she is not certain where the files are kept. She does know that some files are maintained in Washington and some in Burlington; she is certain that OPFs for legacy INS employees are not kept in her office. If she were asked for a copy of an OPF she would contact Steurman,

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Presumably LeBron was referring to the collective bargaining agreement between INS and the National Immigration and Naturalization Service Council (Jt. Ex. 7).

but is not certain what he would do (Tr. 108-110).¹⁰ She has dealt with CBP employees who are at the Burlington facility¹¹ but does not know if they formerly worked for INS.

Lowe is certain that all federal agencies are required to maintain the complete OPF on each of their employees and that, when an employee is transferred, the OPF is also transferred to the receiving agency. In the absence of a settlement, each OPF contains a permanent record of all suspensions of at least one day as well as of more serious disciplinary actions (Tr. 113, 114).

Lowe was responsible for responding to the Union's information request concerning Lucian. After receiving the request she contacted Steurman who advised her to contact Nichole Charbonneau, a CBP employee who worked at the Burlington facility. Steurman instructed Lowe to request Lucian's performance appraisals as well as his OPF. He also told Lowe that the Respondent was not obligated to provide the comparative data because the Respondent did not maintain those records and that they were under the control of another agency. Lowe subsequently drafted the reply letter to the Union (Tr. 121, 122).

Lowe also testified that the "old INS people" would probably still have the records for former INS employees. However, she did not know whether the records would currently be maintained by CIS. Lowe further stated that the comparative data requested by the Union would not be reasonably available because, to retrieve it, it would be necessary to go through over 2,000 files by hand looking for the "one or two" files that had the requested disciplinary information. She has no idea of how long such a process would take. Lowe stated that CBP has a computer system which is known as DAT; the DAT system allows for the retrieval of the comparative data for CBP and legacy Customs. She does not know what sort of a retrieval system, if any, that INS has (Tr. 124, 125). Lowe did not provide Charbonneau with a copy of the Union's information request, nor did Lowe tell her what had been requested.

In view of Lowe's testimony and the response by CBP to the Union's information request, it is clear that the

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Steurman was present at the hearing as one of the representatives of the Respondent but did not testify.

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Lowe stated that, prior to the day of the hearing, she had never heard the Burlington facility referred to as the Eastern Region Records Center (Tr. 113).

Respondent failed to provide the comparative information as a result of Steurman's conclusion that the Respondent either was unable or was not obligated to retrieve it because it supposedly was not under the control of CBP. Steurman did not testify and there is no evidence as to the basis for his conclusion. While Lowe apparently believed that the information was not reasonably available, her testimony as to the difficulty in obtaining the information is not convincing. By her own admission, Lowe had no knowledge of whether INS or any of the other component agencies of DHS maintained a master list or other system that would have allowed either the Respondent or any other component agency to readily identify the OPFs, if any, which contain comparative information. Accordingly, it is not necessary to resolve the factual question of whether it would have required an unreasonable effort to review all of the OPFs maintained in Burlington or elsewhere because there is no evidence that the Respondent even inquired as to whether it could gain access to the files in the first place.¹² Even if that were not so, the only evidence as to the difficulty of obtaining the information was the testimony of Lowe to the effect that (a) she does not know whether INS has a data retrieval system such as the one maintained by CBP, (b) if there was no such system it would be necessary to go through 2,000 files by hand to obtain the information¹³ and (c) she had "no clue" as to how long that process would take and had never explored the option (Tr. 123, 124).¹⁴ That evidence is insufficient to support the Respondent's contention that the information could not have been obtained with a reasonable effort.

Discussion and Analysis

The Controlling Law

The legal standards governing a union's right to obtain information are well established and are undisputed by the parties. Pursuant to §7114(b)(4) of the Statute, the duty of an agency to negotiate in good faith includes the duty to provide the union:

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There is no evidence as to whether anyone representing the Respondent questioned any of the CBP employees at Burlington as to the effort required to obtain the comparative data.

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Lowe did not indicate how she got that number.

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Shepherd estimated that the process would take more than two days (Tr. 210).

. . . 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 order for a union to invoke its right to information it must establish a particularized need for the information by articulating, with specificity, the basis of its need, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute. The union's responsibility for articulation requires more than a conclusory statement; it must be specific enough to permit the agency to make a reasoned judgment as to its obligation to provide the information. The agency is, in turn, responsible for establishing its countervailing anti-disclosure interests, if any, and must do so in a nonconclusory manner, *Internal Revenue Service, Washington, D.C.* and *Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 669 (1995) (*IRS Kansas City*). Furthermore, the agency must articulate its nondisclosure interests in response to the information request and not for the first time at an unfair labor practice hearing, *Federal Aviation Administration*, 55 FLRA 254, 260 (1999) (*FAA*).

The Information is Normally Maintained by the Respondent in the Regular Course of Business

In disputing the proposition that the comparative data, whether located in OPFs or in other files, is not normally maintained by it in the regular course of business, the Respondent emphasizes that CIS, which allegedly operates the Burlington facility, is a separate agency over which it has no control. The Respondent's position is contrary to the evidence. It is clear that, while the component agencies of DHS may operate with a degree of independence, they are not

totally autonomous or independent of each other. Indeed, the purpose for the creation of DHS was to facilitate the exchange of information between organizations that were formerly part of separate entities within the executive branch. It is true, as the Respondent maintains, that the focus of DHS is the exchange of security information, rather than personnel data, between its components. Nevertheless, it is reasonable to assume, in the absence of evidence to the contrary, that the relationship between the DHS components, regardless of its purpose, also allows for the exchange of personnel data as to legacy INS and Customs employees. Such an assumption is consistent with the organization of DHS as shown by the various organizational charts which the parties have submitted as joint exhibits and is further corroborated by the fact that the Respondent has five LER Specialists working at the Burlington facility. There is no evidence that those employees are on loan to CIS. Rather, their obvious purpose is to perform functions for the Respondent which require access to pertinent personnel records even if those records are in the physical possession of another DHS agency.¹⁵

Lowe acknowledged that CBP, like all other agencies, is required to maintain the OPFs of its employees. Those OPFs are obviously under the Respondent's control since it apparently had no problem in accessing Lucian's OPF and the information contained therein. In *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, et al.*, 37 FLRA 1277, 1285 (1990) the Authority held that information is "normally maintained" by an agency within the meaning of §7114(b)(4) of the Statute if the agency processes and maintains the information. The comparative data at the Burlington facility falls squarely within that definition. Furthermore, the preparation of a response to the Union's information request falls within the scope of the "regular course of business" of the Respondent's LER unit.¹⁶

The Comparative Data is Reasonably Available

In deciding whether information is reasonably available to an agency, the Authority will determine whether the

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The Respondent did not present evidence as to the specific functions of the CBP employees who are assigned to the Burlington facility.

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Lowe testified that, since joining CBP, she has handled about four information requests including the one at issue in this case. The other three requests were initiated by another union (Tr. 106).

information is accessible or obtainable by means that are neither extreme nor excessive. The physical location of the information is not a critical factor so long as it is subject to the agency's control or can be retrieved and provided to the agency at its request, *U.S. Department of Justice, Washington, DC, et al.*, 46 FLRA 1526, 1537 (1993). Even if the Respondent were correct in its assertion that the comparative data was under the control of another agency, it would still not be absolved of the duty to make a reasonable effort to obtain the information. In *U.S. Department of Transportation, Federal Aviation Administration, National Aviation Support Facility, Atlantic City Airport, New Jersey*, 43 FLRA 191, 197 (1991) the Authority held that information maintained by the Civil Rights Division of the Department of Transportation could be retrieved at the respondent agency's request and was therefore reasonably available. In the instant case, the Respondent made no effort to obtain the comparative data and presented no evidence that similar requests, if any, had been denied in the past. Therefore, Steurman's conclusory rationale that the comparative data was not reasonably available is insufficient to relieve the Respondent of its obligation to obtain the information or to at least make a reasonable effort to do so. Each of the parties has cited *U.S. Department of Justice, Office of the Inspector General, Washington, DC, et al.*, 45 FLRA 1355 (1992) as an example of a situation in which the agency did not have control of the requested information or the ability to obtain it. As stated above, that is not the situation in this case.

Similarly, the Respondent's assumption as to the difficulty of going through 2,000 OPFs (assuming that such a process would have been necessary) is not a *per se* justification of its assertion that the requested information is not reasonably available, *U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 37 FLRA 1310, 1323 (1990). The Authority has construed "reasonable means" to denote a process that is not extreme or excessive. Such a determination requires a case-by-case analysis rather than a blanket conclusion that any particular expenditure of time and effort need not be made. For example, in *Department of Health and Human Services, Social Security Administration*, 36 FLRA 943, 950 (1990) the Authority concluded that evidence that a three-week effort would have been necessary to retrieve requested information did not, in itself, mean that the information was not reasonably available.

The Respondent maintains that a review of the OPFs would not have provided all of the information that the Union had requested and that some of it could only have been

obtained from closed files which are in the custody and control of CIS at the Burlington facility. Yet, the Respondent has not justified its failure to even request that additional information or to inquire as to its availability.

In concluding that the requested information was reasonably available, I am mindful of the holding of the Authority in *Federal Bureau of Prisons, Washington, DC, et al.*, 55 FLRA 1250, 1255 (2000) (*FBP*) and of the dissent of then Member Cabaniss. Although the majority in *FBP* acknowledged that, as stated in the dissent, the General Counsel's evidence was "thin", it held that the evidence was of greater weight than the conclusory statement of difficulty by the agency's witness. In this case the General Counsel has shown the relationship between the component agencies of DHS and the availability of the information in files that are located in Washington and Burlington; the requested information in *FBP* was in approximately 90 locations. The Respondent, on the other hand, failed to submit any evidence of the difficulty of retrieving the information other than Shepherd's conclusory statement that the process would take more than two days. There is, for example, no evidence as to the existence of a master list or retrieval system, the location of the OPFs at the Burlington facility or the general work load of the CBP employees who are assigned there. Such evidence is uniquely available to the Respondent. In summary, the evidence submitted by the General Counsel, while circumstantial, is of greater weight than that offered by the Respondent. Therefore, I find as a fact that the General Counsel has carried his burden of showing that the requested information was reasonably available.

The Union Articulated a Particularized Need for the Comparative Data

On the second page of its information request (Jt. Ex. 2), after request 3, the Union explicitly stated that it needed the comparative data to explore the possibility of raising the issue of the disparate assessment of penalties in the grievance which it had submitted on behalf of Lucian. Although the Union did not restate its reasons after the subsequent requests, the Respondent could have had no doubt that the same rationale also applied to those requests. It is significant to note that, in its response to the information request (Jt. Ex. 3), the Respondent did not express any uncertainty as to the reason for the request, nor did the Respondent state that the Union had failed to state a particularized need for any of its

requests.¹⁷ Any uncertainty that the Respondent had concerning the Union's need for the information should have been dispelled by LeBron's letter of March 8, 2004 (Jt. Ex. 4(a)), in which, on the last page, he indicates that the Union was raising the issue of the appropriateness of the proposed penalty.

The Respondent argues that the comparative data from agencies other than CBP and from the "defunct" legacy agencies has no relevance to the grievance on behalf of Lucian. Yet, the Respondent also acknowledges that questions of admissibility are within the province of the Arbitrator (Resp. brief, p. 20). The latter assertion is correct; the adequacy of the Union's statement of particularized need does not depend upon whether the comparative data will accomplish its purpose in challenging Lucian's suspension. It is for the Arbitrator to determine the weight and relevance of the information. Indeed, an examination of such information by the Union could show that the grievance is without merit, *IRS Kansas City*, 50 FLRA at 673. The Respondent is free to argue to the Arbitrator that the comparative data is of no consequence, but it is not entitled to prevent the Union from offering the data by refusing to provide it.

This is not to say that the subject of a grievance has no bearing on the determination of the necessity of the requested information. When a request for information is obviously broader than the circumstances giving rise to the request and the union has not been able to establish a connection between the scope of information requested and the particular matter referenced in the request, it has not established a particularized need for the information, *United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas*, 57 FLRA 808, 813 (2002). In this case, however, there is a sufficient nexus between the comparative data requested by the Union and the issue of the appropriateness of Lucian's suspension so as to support the validity of the Union's statement of particularized need.

The issue of the Respondent's nondisclosure interests does not arise because it did not articulate such interests in its response to the Union's information request. Furthermore, the Respondent stated in its post-hearing brief

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According to Shepherd, the problem was not that the Union had not adequately stated its reasons for wanting the information, but that the Respondent did not have it (Tr. 201).

that it does not claim that such interests exist (Resp. brief, p. 23).

In view of the foregoing, I have concluded that the Respondent committed unfair labor practices in violation of §7116(a)(1), (5) and (8) of the Statute by failing to provide the Union with comparative data as to penalties assigned to legacy INS employees for inattention to duty and that, by virtue of its failure to provide the requested information, the Respondent was also in violation of §7114 (b)(4) of the Statute. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of Homeland Security, Border and Transportation Security Directorate, Customs and Border Protection, Baltimore Field Office, Baltimore, Maryland shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 2012, AFL-CIO (Union) with sanitized copies of the comparative disciplinary information requested by the Union on January 7, 2004, including proposal and decision notices, agency final decisions, decisions after appeal and any settlement agreements for "legacy INS" employees for the period from November 8, 1999, through November 8, 2002.

(b) 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) Provide the Union with sanitized copies of the comparative disciplinary information requested by the Union on January 7, 2004, including proposal and decision notices, agency final decisions, decisions after appeal and any settlement agreements for "legacy INS" employees for the period from November 8, 1999, through November 8, 2002.

(b) Post at its facilities which are under the direction of the Baltimore Field Office copies of the attached Notice on forms to be furnished by the Authority.

Upon receipt of such forms they shall be signed by the Director of Field Operations, 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 ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, June 22, 2005

PAUL B. LANG
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 Homeland Security, Border and Transportation Security Directorate, Customs and Border Protection, Baltimore Field Office, Baltimore, Maryland violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 2012, AFL-CIO (Union) with sanitized copies of the comparative disciplinary information requested by the Union on January 7, 2004, including proposal and decision notices, agency final decisions, decisions after appeal and any settlement agreements for "legacy INS" employees for the period from November 8, 1999, through November 8, 2002.

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

WE WILL provide the Union with sanitized copies of the comparative disciplinary information requested by the Union on January 7, 2004, including proposal and decision notices, agency final decisions, decisions after appeal and any settlement agreements for "legacy INS" employees for the period from November 8, 1999, through November 8, 2002.

(Agency)

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 its provisions, they may communicate directly with the Regional Director, Boston Regional Office, whose address is: Federal Labor Relations Authority, Thomas P. O'Neill, Jr. Federal Building, 10 Causeway Street,

Suite 472, Boston, MA 02222, and whose telephone number is:
617-565-5100.

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. BN-CA-04-0464, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Gary Lieberman, Esquire 7000 1670 0000 1175
5783
Federal Labor Relations Authority
Thomas P. O'Neill, Jr. Federal Bldg.
10 Causeway Street, Suite 472
Boston, MA 02222

Joseph M. Liberta, Esquire 7000 1670 0000 1175
5790
U.S. Department of Homeland Security
Office of the Asst. Chief Counsel
40 South Gay Street, Room #423
Baltimore, MD 21202

Dated: June 22, 2005
Washington, DC