

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

MEMORANDUM

DATE: September 28, 2011

TO: The Federal Labor Relations Authority

FROM: CHARLES R. CENTER
Chief Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
MARION, ILLINOIS

RESPONDENT

AND

Case No. CH-CA-08-0601

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 2343, 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 and motions filed by the parties.

Enclosures

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RESPONDENT

Case No. CH-CA-08-0601

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2343, AFL-CIO

CHARGING PARTY

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Chief 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. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 31, 2011**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

CHARLES R. CENTER

Chief Administrative Law Judge

Dated: September 28, 2011
Washington, D.C.

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

OALJ 11-14

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
U.S. PENITENTIARY
MARION, ILLINOIS

RESPONDENT

Case No. CH-CA-08-0601

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2343, AFL-CIO

CHARGING PARTY

Gary W. Stokes, Esq.
For the General Counsel

Scot L. Gulick, Esq.
For the Respondent

Greg Shadowens
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2343, AFL-CIO (Union), a Complaint was issued by the Regional Director of the Chicago Regional Office. The complaint alleges that the Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (Respondent) violated § 7116(a)(1), (5) and (8) of the Statute when it failed to furnish information requested pursuant to § 7114(b)(4) of the Statute. (G.C. Ex. 1(c)). The

Respondent timely filed an Answer denying the allegations of the complaint. (G.C. Ex. 1(d)). On January 27, 2010, Respondent filed a petition to revoke a subpoena *duces tecum* issued to Lisa Hollingsworth, warden of the U.S. Penitentiary, Marion, Illinois and the motion was granted during a prehearing conference as noted at the hearing. (Tr. 8).

A hearing was held in Benton, Illinois on February 4, 2010, at which time the parties were afforded a full opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence and make oral argument. The General Counsel and the Respondent filed timely post-hearing briefs that have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

FINDINGS OF FACT

The Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois (Respondent/BOP), is an agency within the meaning of 5 U.S.C. § 7103(a)(3). (G.C. Exs. 1(c) and 1(d)).

The American Federation of Government Employees, Local 2343, AFL-CIO (AFGE/ Charging Party) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining. (G.C. Exs. 1(c) and 1(d)).

On May 17, 2006, Elmer Eugene (Gene) Langheld, a correctional treatment specialist (case manager) at the U.S. Penitentiary in Marion, Illinois and a member of the bargaining unit represented by the Union was assigned to his home address as a duty station Monday through Friday with a tour of duty from 7:30 a.m. to 4:00 p.m. (G.C. Ex. 3). His work at home duty station remained effective until August 16, 2006, when his duty location was changed to the U.S. Penitentiary, Marion, Illinois, where he was assigned to work as a correctional treatment specialist (case manager) at the Federal Prison Camp with a tour of duty from 8:00 a.m. to 4:00 p.m. (G.C. Ex. 4).

On February 28, 2008, Greg Shadowens, President of AFGE 2343 and the representative for Langheld, filed a grievance over Langheld's "placement on 'home-duty' status and the subsequent assignments . . ." (G.C. Ex. 6). On March 27, 2008, the Respondent denied the grievance (G.C. Ex. 7). On May 22, 2008, Greg Shadowens as president of AFGE Local 2343, invoked arbitration on the grievance and appointed Langheld, who was a union steward, as the Union's representative on the matter.

On July 3, 2008, Langheld, as union steward, submitted to the Respondent a request for information pursuant to 5 U.S.C. § 7114(b)(4) seeking:

1. All S.I.S. (Special Investigative Supervisor) reports with summaries relating to the staff assault on October 3, 2005 . . . to include any subsequent S.I.S. investigations and summaries relating to alleged staff misconduct during the incident. Additionally, copies are requested of any documents relating to Grievant Langheld in these investigations.

2. A copy of Bureau of Prisons form BP-S716.012, resulting in Grievant Langheld's investigatory interview with the agency's O.I.A. (Office of Internal Affairs) conducted on April 20, 2006.
3. All O.I.A. reports and documents related to the above referenced October 3, 2005, incident to include summaries and specific documents relating to Grievant Langheld's alleged involvement.
4. All sworn statements, complaints, or allegations made by any person, employee of the agency, or inmate confined within the agency, resulting in Grievant Langheld's interview with F.B.I. authorities on or about May 16, 2006, and subsequent placement under F.B.I. investigation.
5. Cop[ies] of all F.B.I. reports, statements, interviews, investigations, conclusions, or summaries released/forwarded to the Bureau of Prisons during the course of the FBI investigation and at the conclusion of the FBI investigation relating to Grievant Langheld.
6. Copy of the policy authorizing Grievant Langheld's placement on Home Duty status and all correspondence/documents used in placing Grievant Langheld on Home Duty status on May 17, 2006. Specifically, these documents need to include any written justification/request submitted to the Department of Justice.
7. Cop[ies] of all O.I.A. reports and documents related to the second investigation of the above referenced incident to include summaries and specific documents relating to Grievant Langheld's alleged involvement.
8. Copies of any other documents, reports, recordings, statements, affidavits, or allegations utilized by the agency in their justification for placing Grievant Langheld under prolonged investigation beginning as early as April 20, 2006 through January 24, 2008. (G.C. Ex. 9).

In making the request, Langheld provided nearly three pages explaining why the Union wanted each enumerated request as well as indicating that the information was "needed by the Union to fulfill our representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of Grievant Langheld in an investigatory process, in direct violation of the contract between the parties." (G.C. Ex. 9). When the request for information was submitted, the only grievance to which Langheld was a grievant was the February 28, 2008, grievance upon which the Union invoked arbitration. (G.C. Ex. 16; Tr. 29).

The request explained that the information was needed to "determine how best [to] prepare and argue its case before the deciding official" and to determine "if any actions should be reported to an outside agency for a full investigation." (G.C. Ex. 9).

On July 24, 2008, the Respondent answered the request for information with a five page explanation of its denial, responding to each numerated request. (G.C. Ex. 11).

In response to Item 1, the Respondent asserted that no particularized need had been articulated because the request failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. Finally, the agency asserted that release of the information was prohibited by the Privacy Act, that it could impact ongoing investigations and disciplinary actions, and that it was not routinely released for preparation of third party hearings where the grievant was not disciplined as the result of the investigation.

In response to Item 2, the Respondent asserted that no particularized need had been articulated because it failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. Finally, the agency asserted that release of the information was inconsistent with its right to determine internal security and that the grievant was not disciplined as the result of the investigation.

In response to Item 3, the Respondent repeated the justifications set forth to Item 1.

In response to Item 4, the Respondent repeated the justifications set forth to Item 1 while adding its right to determine internal security as another reason for not providing the information.

In response to Item 5, the Respondent asserted that no particularized need had been articulated because it failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. The response also cited its right to determine internal security, noted that the grievant was not disciplined, and stated the Respondent did not have control or release authority over FBI investigations. The Respondent further asserted that a release of the information would violate the Privacy Act and could impact ongoing investigations and disciplinary actions.

In response to Item 6, the Respondent asserted that no particularized need had been articulated because it failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. The response also cited its right to determine internal security and noted that the grievant was not disciplined as a result of the investigation.

In response to Item 7, the Respondent asserted that no particularized need had been articulated because it failed to explain with specificity why the information was needed for the grievance. The response also asserted that no use was explained, nor was a connection between the use and the Union's representational responsibilities established. The response also cited the right to determine internal security, noted that the grievant was not disciplined,

and stated that release of the requested information would violate the Privacy Act and could impact ongoing investigations and disciplinary actions. Finally, the Respondent asserted that the information was not routinely released for preparation of third party hearings where the grievant was not disciplined as the result of the investigation.

In response to Item 8, the Respondent repeated the justifications set forth to Items 1, 3, 4, 5 & 7.

While the Respondent refused to release any information pursuant to the Union's information request, it did release information related to Item 6 in response to a request Langheld made under the Freedom of Information Act (FOIA). Pursuant to Langheld's FOIA request, the Respondent provided its own employee with a policy memorandum related to Home Duty/Administrative Leave and a completed form submitted as justification for assigning Langheld to Home Duty/Administrative Leave in excess of ten days. (G.C. Ex. 17).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the information requested by the Union met the statutory requirements of § 7114(b)(4) and that the Respondent's failure to furnish this information violated the Statute.

The General Counsel contends that the information requested by the Union was normally maintained by the Respondent in the regular course of business, reasonably available, and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. The General Counsel asserts that the Union stated a particularized need for the eight items of information it requested, that the Union needs the information to prepare for an arbitration hearing on grievance filed over the actions taken by the Respondent as a result of the investigation, and that the Respondent's refusal to provide the information violated § 7116(a)(1)(5) and (8) of the Statute. As a result, the General Counsel requests that an order be issued and that Respondent post a notice to all employees.

Respondent

The Respondent contends that the refusal to provide any information in response to the eight items requested was justified and not a violation of the Statute because no particularized need was established for any of the eight items, some of the items were subject to the Privacy Act, some were subject to its right to determine internal security, some were not under its control, and finally, that information related to investigations was not routinely released for third party hearing preparation when the requestor was not disciplined as a result of the investigation.

ANALYSIS AND CONCLUSIONS

Under the Statute, an agency must furnish information requested by an exclusive representative if it is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, 5 U.S.C. § 7114(b)(4)(B). In this case, the eight items of information requested by the Union were sought to prepare for an arbitration hearing resulting from an employee grievance filed under the collective bargaining agreement. Thus, the information was for a subject within the scope of collective bargaining. However, a union must also demonstrate that the information is “necessary” before an agency is required to come forward with counter veiling interests that would militate against furnishing such information. *National Labor Relations Board*, 60 FLRA 576 (2005).

Particularized Need

To demonstrate that requested information is "necessary," a union "must establish a particularized need for the information 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." *IRS, Wash., D.C.*, 50 FLRA 661, 669 (1995)(*IRS*). The union's responsibility for articulating its interests in the request requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the disclosure of the information is required under the Statute. *Id.* at 670. Further, the union is required to explain the scope of its request, including the temporal aspects of its request. *U.S. Customs Serv., S. Cent. Region, New Orleans Dist., New Orleans, L.A.*, 53 FLRA 789, 799 (1997)(*Customs Service*). Thus, if a union requests information from multiple years and fails to articulate with requisite specificity why it needs information relating to that extended period, then the Authority will not find a violation of the Statute for failure to provide the information. See *U.S. Dep't of Labor, Wash., D.C.*, 51 FLRA 462, 476-77 (1995)(*DOL*).

The request the Union submitted to the Respondent on July 3, 2008, asked for eight distinct documents or categories of information and the first question that must be answered is whether a failure to establish a particularized need for any one of the eight items obviated the Respondent's obligation to provide any of the requested information or if the particularized need for each item must be assessed independently from the others. In *U.S. Dep't of the Air Force, AFMC, Kirtland AFB, Albuquerque, N.M.*, 60 FLRA 791, 795 (2005) (*Dep't of the AF*), the Authority considered a case wherein an ALJ found the union had established a particularized need for some items in a request but not for others, and concluded that the agency violated the Statute by not providing the items for which a particularized need was established. Upon review of the ALJ decision, the Authority rejected the judge's determination and dismissed the complaint, holding that “where a union fails to establish its need for all the information requested, a respondent is not required to provide the requested information, even if the union has established a need for ‘some’ of the information”, citing *DOL*, 51 FLRA at 476. Thus, at first glance, it would appear that a union needs to establish a particularized need for each item requested or the agency is at liberty to reject the entire request. However, upon appeal of *Dep't of the AF*, the 10th Circuit Court of Appeals held that the Authority's application of particularized need to excuse disclosure of any information

when particularized need was established for some items, but not for others was incorrect, indicating that such an interpretation of § 7114(b) contradicted the plain language of the Statute and was not supported by the FLRA's own precedent. *AFGE, Local 2263 v. FLRA*, 454 F.3d 1101 (10th Cir. 2006).

It should be noted that while the Authority cited *DOL* in support of its decision in *Dep't of the AF*, a review of *DOL* demonstrates that the partial nature of the particularized need presented in that case actually related to a period of time covering a single request rather than multiple items. In *DOL*, the Authority concluded that while the union may have stated a particularized need for the requested documents over some period of time, it had not stated a particularized need for the entire period of time set forth in the request. Thus, the Authority concluded that the agency had no obligation under the Statute to provide the documents requested for some smaller period of time. Therefore, the "some" that was present in *DOL* related to the period of time for which documents were requested and not to different items within a single request.

Aside from being flatly rejected by the Tenth Circuit, further reason for not applying the precedent of *Dep't of the AF* in this case is provided by the Authority's own precedent, wherein it found a violation of § 7114(b) when particularized need was established for some items within a single request while determining that a particularized need was not provided for other items within the same request. *U.S. Dep't of Justice, Immigration & Naturalization Serv.*, 58 FLRA 656 (2003)(*DOJ, INS*); *U.S. Dep't of Justice, Fed. Bureau of Prisons, FCI Forrest City, Ark.*, 57 FLRA 808 (2002)(*Forrest City*). In the *Forrest City* case, it was the Authority who did the parsing, ruling that particularized need was established for only two of three items in an information request after the ALJ had found a particularized need for all three items requested. *Id.* at 812-13. While *DOJ, INS* and *Forrest City* were decided only a few years before *Dep't of the AF*, the latter decision provided no discussion of why, less than two years after *DOJ, INS* and three years after *Forrest City*, the failure to establish a particularized need for a single item in a request for information now excused an agency from providing any information in response to a request. Given the Tenth Circuit's ruling and the prior precedent established by the Authority in *DOJ, INS* and *Forrest City*, I find that contrary to *Dep't of the AF*, the failure to state a particularized need for a single item within a request for information is not fatal to the entire request and that each item within a request should be reviewed independently to determine if a particularized need was established for that item. Having concluded that the failure to state a particularized need for some items in a request does not excuse an Agency from providing information pursuant to a request wherein a particularized need is established for other items, a discussion of each item in the Union's request is appropriate.

Item 1

All S.I.S. (Special Investigative Supervisor) reports with summaries relating to the staff assault on October 3, 2005 . . . to include any subsequent S.I.S. investigations and summaries relating to alleged staff misconduct during the incident. Additionally, copies are requested of any documents relating to Grievant Langheld in these investigations.

In support of its request for SIS reports related to the October 3, 2005, assault that prompted the agency to place Langheld on administrative leave to work at home, the Union indicated that it needed the reports to fulfill its representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process. The Union further indicated that the documents or lack of documents would reflect the Agency's behavior during the grievance time frames and would support the grievant's position at a third party hearing. The Union indicated that it wanted these reports to determine what allegations were made against the grievant at the onset of the investigation and whether any conclusions or recommendations were made to the Marion administration to continue or pursue disciplinary action against the grievant, indicating that the reports would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement.

In rejecting the Union's request for Item 1, the Respondent indicated that the request failed to state a particularized need by failing to explain with specificity why the Union needed this information. The Respondent determined that the assertion that the documents would show a violation of Article 6 was not specific and that the Union did not explain how the information requested will show that the Agency violated the agreement. The Respondent then claimed that the request did not explain how the Union would use the information and failed to establish a connection between the use and the Union's representational responsibilities under the Statute. The Respondent also indicated that providing the information would violate the Privacy Act because other inmates and staff members were involved in the investigations, that release of the reports could potentially impact ongoing investigations and disciplinary actions and that the reports were not routinely released for preparation of third party hearings where the grievant was not disciplined as a result of the investigation.

First, it should be noted that the Respondent's reply to the information request made no request for clarification or explanation and is best described as a flat and total denial. Just as a union must articulate its interest in the requested information with more than a conclusory assertion, an agency is responsible for establishing any counter veiling anti-disclosure interest in more than a conclusory way. *IRS*, 50 FLRA at 669. In short, the analytical framework set forth in *IRS* requires parties to articulate and exchange their respective interests in disclosing information for several important purposes. *Id.* at 670. It "facilitates and encourages the amicable settlements of disputes" and, thereby, effectuates the purposes and policies of the Statute. *Id.* (quoting 5 U.S.C. § 7101(a)(1)(C)). It also facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. *Id.* In addition, it 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.* at 670-71.

After considering the Union's request and the Respondent's reply, it is clear that the Union made a good faith effort to comply with the requirements of *IRS* and in reply the Respondent provided conclusory boilerplate that demonstrates a fundamental failure to comply with the requirements of *IRS*. The Union's request explained why it needed the SIS reports, how it would use those reports and the connection between that use and its representational responsibilities. Given the explicit and detailed nature of the Union's

request, the Respondent's reply was little more than a laundry list of potential justifications for non-disclosure that might apply to any case with no application to the facts presented by

this particular request. In fact, the reply to Item 1 was internally inconsistent as it asserted a failure to show how the information would be used while also acknowledging that a third party hearing was going to take place. This reply represents the mindless stonewalling *IRS* is intended to eliminate and is the opposite of the consideration and accommodation of interests that leads to exchanges of information and settlement of disputes. In this case, the Union provided the Respondent with ample basis for making a reasoned judgment as to whether the disclosure of the information was required under the Statute and thus, the Respondent's claim that a particularized need was not provided for Item 1 is without merit.

The Respondent also asserted that disclosure of the requested SIS reports "would be a violation of the Privacy Act in that other inmates and staff members were involved in the investigations." I find that this justification is nothing more than a conclusory statement that does not satisfy the requirements set forth in *IRS*. The Authority has held that when an agency defends a refusal to furnish requested information on the basis that disclosure is prohibited by the Privacy Act because it would result in a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6, the agency bears the burden of demonstrating: (1) that the information requested is contained in a "system of records" under the Privacy Act; (2) that disclosure of the information would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If the agency makes those requisite showings, the burden shifts to the General Counsel to: (1) identify a public interest that is cognizable under the FOIA; and (2) demonstrate how disclosure of the requested information will serve that public interest. Once the respective interests are articulated, the Authority balances the privacy interests against the public interest. *U.S. Dep't of Transp., FAA, New York TRACON, Westbury, N.Y.*, 50 FLRA 338 (1995)(*FAA*).

In *FAA*, the Authority found that an agency was in the best position to articulate the privacy interests of its employees and to come forward with information that the records sought were contained within a system of records. Furthermore, and consistent with *IRS*, the nature and significance of those privacy interests can be expressed at the same time the agency determines that they justify the non-disclosure of information. In this case, and without determining if the Respondent's reply actually established that the SIS reports were contained in a system of records subject to the Privacy Act, it is clear that the Respondent provided no explanation of the significance of the privacy interests they were protecting by not providing the requested SIS reports. At the very least, Respondent's reply failed to comply with the third requirement of the framework set forth in *FAA* and was a mere conclusory invocation of the Privacy Act made with no discussion or explanation of the privacy concerns that needed to be weighed. Had the Respondent explained its concern, it is possible that the parties could have achieved a resolution by agreeing to sanitize the documents of any Privacy Act material. Of course, the Respondent could have offered such a solution on its own, but the mutual resolution envisioned by *IRS* was not what the Respondent had in mind. The Respondent intended to deny all of the items requested and its reply used any and every potential excuse to justify the refusal.

It did not matter if the reason made no sense, completely ignored information in the request,

or was inconsistent with an argument it made only a few sentences earlier. Making a good faith effort to find a way to satisfy its obligation under the Statute that also protected its interest in employee privacy was not the message sent by the Respondent's reply, nor did it evidence any intent to make a reasoned judgment. Because the Respondent made only a conclusory argument based upon the Privacy Act, I find that the Respondent did not adequately raise a counterveiling anti-disclosure interest at or near the time of the Union's request. *U.S. Dep't of Justice, FBOP, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91 (2004).

Item 2

A copy of Bureau of Prisons form BP-S716.012, resulting in Grievant Langheld's investigatory interview with the agency's O.I.A. (Office of Internal Affairs) conducted on April 20, 2006.

In addition to indicating that the form would assist the Union in fulfilling its representational duty to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process, the Union also indicated that the document would reflect the Agency's behavior during the grievance time frames and would support the grievant's position at a third party hearing. In support of its request for this form, the Union indicated that it needed the form to determine the Agency's rationale for placing Langheld under investigation by the OIA and that it would show that the agency violated Article 6 of the master agreement.

In rejecting the Union's request for Item 2, the Respondent indicated that the request failed to state a particularized need by failing to explain with specificity why the Union needed the information. The Respondent determined that the assertion that the documents would show a violation of Article 6 was not specific and that the Union did not explain how the information requested will show that the Agency violated the agreement. The Respondent then claimed that the request did not explain how the Union would use the information and failed to establish a connection between the use and the Union's representational responsibilities under the Statute. The Respondent also indicated that providing the information would violate its right to determine internal security and noted the fact that the grievant was not disciplined as a result of the investigation.

I find that the Respondent's justification for nondisclosure on the basis of particularized need must be rejected for the same reasons it was rejected in Item 1. Basically, the Respondent's reply is nothing but a list of reasons a request could fail to state particularize need, with no explanation of how they applied in this case and in complete disregard of the facts actually present. Furthermore, the argument that releasing a form it generated in the course of an investigation that resulted in an employee being placed on administrative leave would violate its right to determine internal security was not explained and is without merit. As for the argument that no discipline resulted, nothing in § 7114(b) of the Statute limits information requests to grievances or arbitrations over disciplinary actions. In fact, the grievance and arbitration for which the information was requested was filed because the Union believes the grievant was improperly subjected to an administrative action

when he was placed on administrative leave without justification. The fact that the requested

form contained no information that would support a disciplinary action lends itself to the possibility that it would not justify placing the grievant on administrative leave for sixty days either, which is the Union's contention in the grievance and arbitration.

Item 3

All O.I.A. reports and documents related to the above referenced October 3, 2005, incident to include summaries and specific documents relating to Grievant Langheld's alleged involvement.

In support of the request for OIA reports and documents related to the October 3, 2005, assault that prompted the agency to place Langheld on administrative leave to work at home, the Union indicated that it needed the reports to fulfill its representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process. The Union further indicated that the information contained therein resulted in the grievant being interviewed and investigated by the Federal Bureau of Investigation (FBI) and would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 3, the Respondent simply referred to the reasons it provided for refusing to provide the information requested in Item 1, and my determinations with respect to those justifications set forth above apply equally to the Respondent's arguments concerning Item 3. The Union established a particularized need for these reports and documents and the Respondent did not adequately raise a counter veiling anti-disclosure interest at or near the time of the Union's request on the basis of the Privacy Act.

Item 4

All sworn statements, complaints, or allegations made by any person, employee of the agency, or inmate confined within the agency, resulting in Grievant Langheld's interview with F.B.I. authorities on or about May 16, 2006, and subsequent placement under F.B.I. investigation.

In support of its request for sworn statements, complaints, or allegations that resulted in the grievant being interviewed and investigated by the FBI, the Union indicated that it needed the information to fulfill its representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process. The Union further indicated that it needed the information to determine what information or evidence the agency used as a basis for placing the grievant on "home duty" status and that the documents would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request set forth in Item 4, the Respondent again cited the

justification provided in response to Item 1, while also citing its right to determine internal security and again noted that the grievant was not disciplined as a result of the investigation.

I find that the justifications offered by the Respondent in response to Item 4, were without merit for the same reasons provided in my discussion of Items 1 and 2. The Union stated a particularized need for the this information and the Respondent did not adequately raise a countervailing anti-disclosure interest at or near the time of the Union's request on the basis of the Privacy Act, its right to determine internal security under § 7106 (a)(1), or the fact that it did not discipline the grievant.

Item 5

Copies of all F.B.I. reports, statements, interviews, investigations, conclusions or summaries released/forwarded to the Bureau of Prisons during the course of the FBI investigation and at the conclusion of the FBI investigation relating to Grievant Langheld.

In support of its request for FBI reports, statements, interviews, investigations, conclusions or summaries released/forwarded to the Respondent, the Union indicated that it needed the information to fulfill its representational duties, to determine if there were any violations of policy or procedures by the agency, and to expose the reasons for the alleged discriminatory treatment of grievant Langheld in the investigatory process. The Union further indicated that it needed the information to determine what information the agency received from the FBI and used as a basis for placing the grievant under a prolonged investigation and asserted that the documents would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 5, the Respondent rolled all of its prior reasons into one while adding an additional justification related to its lack of control or release authority for FBI investigations.

For the reasons set forth in the discussion of prior items set forth above, I reject the Respondent's justifications related to particularized need, the Privacy Act, internal security, and the absence of a disciplinary action. With respect to the Respondent's argument concerning control and release authority for documents generated by the FBI, I find that the request only sought documents which the FBI had released or forwarded to the Respondent, thus, they were within the custody and control of the Respondent and under *IRS*, the Respondent was obligated to furnish the information within its custody and control when a valid and legally sufficient request was made pursuant to § 7114(b) unless a countervailing anti-disclosure interest was raised at or near the time of the request. Merely asserting conclusions, without explaining how such an interest applied to the information requested is not sufficient. *IRS*, 50 FLRA at 669. Therefore, I find that all of the justifications provided by the Respondent in reply to Item 5 are without merit.

Item 6

Copy of the policy authorizing Grievant Langheld's placement on Home Duty status and all correspondence/documents used in placing Grievant Langheld on Home Duty status on May 17, 2006. Specifically, these documents need to include any written justification/request submitted to the Department of Justice.

In support of its request for the Respondent's policy on administrative leave/home duty and any correspondence including any justification or request used to place the grievant in that status, the Union indicated that it needed the information to fulfill its representational duties, to determine if policy or procedure was violated by the agency. The Union further indicated that it needed the information to determine what justification the agency had for taking the administrative action and asserted that the documents would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 6, the Respondent again indicated that the necessary elements of a particularized need had not been established, that disclosure would violate its right to determine internal security and again noted that the grievant had not been disciplined.

For the reasons set forth in the discussion of the Items 1 through 5 above, I find that the Respondent's justifications for not providing the information requested by Item 6 are without merit because the Union provided a particularized need for the information and the Respondent did not adequately raise a countervailing anti-disclosure interest at or near the time of the request on the basis of its right to determine internal security under § 7106 (a)(1), or the fact that it did not discipline the grievant. Given that this request sought nothing more than a copy of the agency's policy and documents related to the grievant being placed on home duty/administrative leave, the Respondent's denial of this basic request provides a further evidence that the Respondent had no intention to make a good faith effort to comply with its obligations under § 7114(b) and the precedent of the *IRS* case.

Item 7

Copy of all O.I.A. reports and documents related to the second investigation of the above referenced incident to include summaries and specific documents relating to Grievant Langheld's alleged involvement.

In support of its request for OIA reports and documents related to a second investigation of the grievant's involvement in the October 2005 incident, the Union indicated that it needed the information to fulfill its representational duties, to determine if policy or procedure was violated by the agency. The Union further indicated that it needed the information to determine whether there was a second investigation and when the grievant ceased to be a subject of the investigation. The Union stated that the documents would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 7, the Respondent again lumped all of its arguments together, indicating that the necessary elements of a particularized need had not been established, that disclosure would violate its right to determine internal security, that disclosure would violate the Privacy Act and again noted that the grievant had not been disciplined and asserted that the information was not routinely released for preparation of third party hearings when no discipline was imposed as a result of the investigation.

Aside from acknowledging that the Union had indicated how it would use the information after making a declaration to the contrary only a few sentences earlier, it was established at the hearing that no second investigation was ever conducted. Thus, no OIA reports or documents related to a second investigation were in existence at the time the Respondent denied the request. (Tr. 29). When information requested by a union from an agency does not exist, the agency is obligated under § 7114(b)(4) of the Statute to inform the union of that fact. *Soc. Sec. Admin. Dallas Region, Dallas, Tex.*, 51 FLRA 1219, 1226 (1996) (SSA); *Veterans Admin., Long Beach, Cal.*, 48 FLRA 970, 975-78 (1993); *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326-27 (1987). Furthermore, failing to inform the Union that the requested information does not exist does not depend upon a determination that the requested information was subject to disclosure, and failure to inform a union of the nonexistence of requested information constitutes a violation of § 7116(a)(1), (5) and (8) of the Statute. *SSA*, 51 FLRA at 1226-27.

Instead of giving the Union a general laundry list of potential reasons for not disclosing information it maintained, the Respondent should have informed the Union that information from a second investigation did not exist, thus, it was not maintained or reasonably available to the Respondent. However, compliance with § 7114(b)(4) and the requirements of *IRS* was not what the Respondent intended. The Respondent intended to deny every item in the request and put little thought into it, choosing instead to offer a smorgasbord of justifications for each item with no concern about whether they actually applied. Because the Respondent did not tell the Union that the information sought by Item 7 did not exist, the Respondent violated § 7116(a)(1), (5) and (8) of the Statute even if legitimate reasons for denying the other seven items in the request had been articulated in their reply.

Item 8

Copies of any other documents, reports, recordings, statements, affidavits, or allegations utilized by the agency in their justification for placing Grievant Langheld under prolonged investigation beginning as early as April 20, 2006 through January 24, 2008.

In support of its request for other documents, reports, recordings, statements, affidavits, or allegations used by the Respondent to justify the placement of the grievant under prolonged investigation, the Union indicated that it needed the information to fulfill its representational duties, to determine if policy or procedure was violated by the agency. The Union further indicated that it needed the information to determine whether there was any additional information or documentation used by the agency, and stated that they would demonstrate a violation of Article 6, Section (b)(2) and (3) of the collective bargaining agreement at a third party hearing.

In rejecting the Union's request for Item 8, the Respondent cited its responses to Items 1, 3, 4, 5 & 7, with no explanation for how the justifications offered for those items applied to the information sought by this request.

For the reasons set forth in the discussion of the other items above, I find that the Respondent's justifications for not providing the information requested by Item 8 are without merit because the Union stated a particularized need for the information and the Respondent did not adequately raise a countervailing anti-disclosure interest at or near the time of the request. The request sought information relied upon by the Respondent to take administrative action against a grievant who had an arbitration hearing pending over that administrative action. The fact that it was an administrative action rather than a disciplinary action for which the Respondent routinely released the type of information that was requested is a distinction without merit under § 7114(b)(4) of the Statute. The grievance and arbitration hearing were within the scope of the collective bargaining agreement and the Respondent had an obligation under § 7114(b)(4) to provide information legitimately requested pursuant to that section even if it did not routinely provide such information when a disciplinary action had not been taken. (Tr. 59).

CONCLUSION

I find that the Union provided a particularized need for each of the eight items it sought in the information request dated July 3, 2008, and the Respondent did not adequately raise a countervailing anti-disclosure interest at or near the time of the request that would justify its refusal to provide any of the information requested. Thus, the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by not providing the information requested in Items 1, 2, 3, 4, 5, 6 & 8, and by not informing the Union that the information requested in Item 7 did not exist.

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois, shall:

1. Cease and desist from:

(a) Failing or refusing to furnish the American Federation of Government Employees, Local 2343, AFL-CIO (Union) with: (1) Special Investigative Supervisor (SIS) reports that mention Elmer (Gene) Langheld in relation to the October 3, 2005, staff assault incident at the U.S. Penitentiary, Marion, Illinois; (2) any Federal Bureau of Prisons form BP-S716.012 that mentions Elmer (Gene) Langheld in relation to the October 3, 2005, incident; (3) any Federal Bureau of Prisons Office of Internal Affairs (OIA) reports and documents relating to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (4) all sworn statements, complaints or allegations made by any person resulting in Elmer (Gene) Langheld's interview with FBI authorities on May 16, 2006; (5) copy of any FBI documents forwarded to the Federal Bureau of Prisons related to the October 3, 2005,

incident that mention Elmer (Gene) Langheld; (6) a copy of the policy authorizing Elmer (Gene) Langheld's placement on home duty status during 2006 and any documents used in justifying the placement of Elmer (Gene) Langheld on home duty status; (7) copies of any other documents or recordings used by the Respondent in justifying the placement of Elmer (Gene) Langheld on home duty status during 2006.

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

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

(a) Furnish the Union with copies of: (1) Special Investigative Supervisor (SIS) reports that mention Elmer (Gene) Langheld in relation to the October 3, 2005, staff assault incident at the U.S. Penitentiary, Marion, Illinois; (2) any Federal Bureau of Prisons form BP-S716.012 that mentions Elmer (Gene) Langheld in relation to the October 3, 2005, incident; (3) any Federal Bureau of Prisons Office of Internal Affairs (OIA) reports and documents relating to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (4) all sworn statements, complaints or allegations made by any person resulting in Elmer (Gene) Langheld's interview with FBI authorities on May 16, 2006; (5) copy of any FBI documents forwarded to the Federal Bureau of Prisons related to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (6) a copy of the policy authorizing Elmer (Gene) Langheld's placement on home duty status during 2006 and any documents used in justifying the placement of Elmer (Gene) Langheld on home duty status; (7) copies of any other documents or recordings used by the Respondent in justifying the placement of Elmer (Gene) Langheld on home duty status during 2006.

(b) Post at all facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, U.S. Penitentiary, Marion, Illinois, and shall be posted and maintained for 60 consecutive days, 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 section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Chicago Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued Washington, D.C., September 28, 2011.

CHARLES R. CENTER
Chief 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 Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish as requested, the American Federation of Government Employees, Local 2343, AFL-CIO (Union), with the documents requested on July 3, 2008, relating to the decision to place Elmer (Gene) Langheld on home duty status during the Summer of 2006.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

WE WILL, furnish the Union with: (1) Special Investigative Supervisor (SIS) reports that mention Elmer (Gene) Langheld in relation to the October 3, 2005, staff assault incident at the U.S. Penitentiary, Marion, Illinois; (2) any Federal Bureau of Prisons form BP-S716.012 that mentions Elmer (Gene) Langheld in relation to the October 3, 2005, incident; (3) any Federal Bureau of Prisons Office of Internal Affairs (OIA) reports and documents relating to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (4) all sworn statements, complaints or allegations made by any person resulting in Elmer (Gene) Langheld's interview with FBI authorities on May 16, 2006; (5) copy of any FBI documents forwarded to the Federal Bureau of Prisons related to the October 3, 2005, incident that mention Elmer (Gene) Langheld; (6) a copy of the policy authorizing Elmer (Gene) Langheld's placement on home duty status during 2006 and any documents used in justifying the placement of Elmer (Gene) Langheld on home duty status; (7) copies of any other documents or recordings used by the Respondent in justifying the placement of Elmer (Gene) Langheld on home duty status during 2006.

(Agency/Activity)

Dated: _____

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, Chicago Regional Office, Federal Labor Relations Authority, and whose address is: 55 W. Monroe Street, Suite 1150, Chicago, IL 60603, and whose telephone number is: 312-886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by CHARLES R. CENTER, Chief Administrative Law Judge, in Case No. CH-CA-08-0601, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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REGULAR MAIL:

President
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Washington, DC 20001

Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: September 28, 2011
Washington, DC