UNITED STATES CUSTOMS SERVICE SOUTH CENTRAL REGION NEW ORLEANS DISTRICT NEW ORLEANS, LOUISIANA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 168 Charging Party	Case No. DA-CA-30580

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **July 19, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 19, 1995
Washington, DC

MEMORANDUM DATE: June 19, 1995

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: UNITED STATES CUSTOMS SERVICE
SOUTH CENTRAL REGION
NEW ORLEANS DISTRICT
NEW ORLEANS, LOUISIANA

Respondent

and Case No. DA-CA-30580

NATIONAL TREASURY EMPLOYEES
UNION, CHAPTER 168

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

UNITED STATES CUSTOMS SERVICE SOUTH CENTRAL REGION NEW ORLEANS DISTRICT NEW ORLEANS, LOUISIANA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 168 Charging Party	Case No. DA-CA-30580

Harold J. Gilbert, Esquire
Kimberly Jones, Esquire
For the Respondent

Walter Dresslar, Esquire
For the Charging Party

Joseph T. Merli
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.[1], and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent's denial of data showing demotions from January, 1989, to February, 1993, with the race and national origin, age, sex, and marital status of each, together with the general schedule grade and step

[1] For convenience of reference, sections of the Statute hereinafter, are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7114 (b)(4) will be referred to, simply, as, "14(b)(4)".

immediately before the demotion and immediately after the demotion, was contrary to § 14(b)(4) and in violation of §§ 16(a)(1), (5) and (8) of the Statute.

This case was initiated by a charge filed on April 2, 1993 (G.C. Exh. 1(a)), the Complaint and Notice of Hearing issued on September 22, 1994 (G.C. Exh. 1(c)), and set the hearing for October 17, 1994. By Order dated October 18, 1994 (G.C. Exh. 1(f)), the hearing was rescheduled, pursuant to Respondent's Motion (G.C. Exh. 1(d)), to which the other parties did not object, for good cause shown, for December 13, 1994, pursuant to which a hearing was duly held on December 13, 1994, in New Orleans, Louisiana, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, January 13, 1995, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed an excellent brief, received on January 18, 1995, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

Findings

1. The National Treasury Employees Union (NTEU) is the certified exclusive representative of a nationwide consolidated unit of employees of the United States Customs Service, including employees located in the New Orleans District. The National Treasury Employees Union, Chapter 168 (Union), is an agent of NTEU for the purpose of representing bargaining unit employees in Respondent's New Orleans District, New Orleans, Louisiana (G.C. Exhs. 1(c) and 1(e)).

2. Where Respondent has discretion in setting pay of its employees, its policy is to establish a rate of pay which will represent the best possible balance in fairness to employees and still serve the best interest of Respondent. The policy is set forth in CPM 531 as follows:

"1-2. Policy

> "The law and decisions which govern the pay of Federal employees are specific in many cases and permit no exercise of administrative discretion. In other cases, the exercise of administrative discretion is required in the establishment of a pay rate

> within specified minimum and maximum limitations. In any case in which the exercise of administrative dis-cretion is required, the Bureau of Customs endeavors to establish a rate which will represent the best possible balance in fairness to all employees directly or indirectly concerned, and still serve the best interest of the Bureau. While the factors considered in arriving at the rate required under this policy necessarily vary according to the circumstances surrounding the specific case, the result of the application of policy is a pay administra-tion which is consistently fair." (G.C. Exh. 3(a)).

3. In 1988, the Union filed a grievance on behalf of employee Sharon Romosz who claimed that Respondent had told her that she would be given a certain grade and step level if she transferred from the United States Border Patrol (Department of Justice) to Respondent. Upon reporting for work, however, Ms. Romosz was not given the step level of the grade she had been promised. Respondent eventually settled the grievance, but asserted that the higher step level should not have been promised because it contravened a rule called, "objectional use of the highest previous rate," (Tr. 18, 20). On the other hand, Ms. Romosz wanted application of the, "highest previous rate rule" (Tr. 22), pursuant to which an employee, when taking a demotion to move from one job to another, is given the highest rate in his/her prior position, or as close as possible under the

grade for the new job, but not in excess of the old highest rate (Tr. 22).[2]

4. Sometime after 1988, the Union filed a grievance on behalf of certain hispanic employees working in El Paso, Texas, in Respondent's Southwest Region, who had transferred from the Federal Bureau of Prisons and from other government agencies to work for the Respondent. This grievance asserted that non-hispanic employees were being assigned higher rates of pay upon their acceptance for positions with Respondent than similar hispanic employees. This grievance was settled (Tr. 23, 24).

5. On November 8, 1990, the Union filed a grievance on behalf of employee Rita Ciulla. Ms. Ciulla claimed that Respondent had told her that she would be given a certain grade and step level if she accepted a promotion to a different position from the one she held at the time. Upon accepting the new position, however, Ciulla was not assigned the grade and step level she had been promised. The Respondent and the Union settled the grievance on January 27, 1993. In accordance with the settlement, Respondent paid Ciulla $1,700 (Res. Exh. 2, Tr. 24, 25).

6. The Union further claimed that, while these were the only complaints formalized through a grievance, there were cases of Customs Inspectors, hired by Respondent from other agencies, who complained that their rates were set too low when they came on board (Tr. 115); however, these employees did not wish to file a grievance (Tr. 115).

7. In the Ciulla grievance, Mr. Walter E. Dresslar, Assistant Counsel, on behalf of the Union, on November 24,

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[2] Voluntary demotions occur, for the most part, when an employee in a job with a limited promotion potential wishes to move to a new job with greater promotion potential, even though he/she must take a lower grade, or an employee wishes to move from one activity or agency to another. For example, an employee is a grade 7, step 6, in a job with a promotion potential of grade 5-7; the employee seeks to move to a different job which has a promotion potential of grade 5-9; but is not qualified for a grade 7 in the new job; however he/she can qualify for a grade 6. Assume that if the employee were given a grade 6, step 9, he/she would be as near as possible to his/her former highest rate without exceeding it; however, I suspect, although it was not explained on the record, that that would be an "objectionable use of the highest previous rate" because it would put an employee, unqualified for a grade 7, one step from the top of grade 6. This might well be a case where the employee would be given, perhaps, a grade 6, step 6.

1992, made an information request, pursuant to § 14(b)(4) of the Statute, which stated, in relevant part, as follows:

> "Please produce the following requested materials . . . :
>
> . . .
>
> "2. the documents effecting Ms. Ciulla's demotion . . . ;
>
> . . .
>
> "9. materials which establish that the agency has 'no discretion in administering' . . . the so-called policy used by the agency . . . ; and
>
> . . .
>
> "11. copies of all materials documenting (a) the voluntary and/or involuntary demotion, (b) the general schedule grade and step prior to the demotion, and (c) the general schedule grade and step immediately after the demotion, of employees in the U.S. Customs Service from August 1989 to the present date.
>
> "12. Materials which documents the race, ethnic background, age, sex, and marital status of the employees discovered in item 10 [sic][3] above.
>
> . . ." (Res. Exh. 1).

8. The Settlement Agreement in the Rita Ciulla grievance, executed on January 25 and 27, 1993, provided, in relevant part, as follows:

> "4. NTEU hereby withdraws with prejudice, and agrees not to file an unfair labor practice charge concerning, the information request in this matter dated November 24, 1992.
>
> . . ." (Res. Exh. 2).

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[3] The request obviously intended item 11, since item 10 relates to correspondence. Moreover, the request stated, immediately after item 12, as follows:

> "NTEU needs the information requested in numbers 11-12 above in order to determine the disparate treatment . . . ."

9. On February 10, 1993, Mr. Dresslar, on behalf of the Union, again requested, pursuant to § 14(b)(4), the following:

> "1. materials which establish whether the agency has any discretion in administering the so-called 'objectional use of the highest previous rate' policy in setting rates of pay for employees;
>
> "2. copies of all materials documenting (a) the voluntary and/or involuntary demotion, (b) the general schedule grade and step prior to the demotion, and (c) the general schedule grade and step immediately after the demotion, of employees in the U.S. Customs Service from January 1989 to the present date.
>
> "3. Materials which documents the race, color, ethnic background, national origin, age, sex, and marital status of the employees discovered in item 10 above.[4] (Emphasis supplied).
>
> . . . ." (G.C. Exh. 2).

10. The Union asserts that its National Agreement contains an Article which prohibits discrimination based on race, color, ethic background, national origin, age, sex, and marital status, i.e. those items set forth in paragraph No. 3 of its request (G.C. Exh. 2); further that the National Agreement contains an EEO Article, which also prohibits discrimination; and if it found, on the basis of its discovery request, evidence of a pattern or practice of disparate treatment, it would file a grievance (G.C. Exh. 2; Tr. 30, 31).

11. By letter dated March 8, 1993, Respondent supplied the information requested by the Union in paragraph Number 1 of its February 10, 1993, request (G.C. Exh. 3(a); Tr. 15, 19; however, Mr. Dresslar stated that G.C. Exh. 3(a) was not all the data received in response to paragraph Number 1, that he also received, ". . . pages from the Customs personnel manual, and . . . pages from the federal personnel manual, which went into establishing rates of pay." (Tr. 36)); but denied the information requested in paragraph

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[4] The Union indelibly identified this, its February 10, 1993, request, as a renewal of its November 24, 1992, request by the inclusion of the underscored phrase, lifted from the November 24, 1992, request, despite its error of reference in the November 24, 1992, request, and despite its total inapplicability to the February 10, 1993 request.

Numbers 1 and 2 (G.C. Exh. 3; Tr. 15). Respondent asserted, inter alia, that the Union had shown no "necessity" for the information, i.e., that the information was not shown to be "necessary for full and proper discussion . . . ." etc., within the meaning of § 14(b)(4)(B) of the Statute; that the request was overlybroad; that it was not reasonably available and could be produced only through extreme means at an unreasonable expense.

12. The Union had requested, "copies of all materials documenting . . . demotion . . . of employees . . . from January 1989 to the present date." [i.e., February 10, 1993], including the grade and step of each employee immediately before and after demotion, and each employee's age, sex, marital status, race, color, ethnic background, and national origin. Mr. Dresslar conceded that the only difference in the Ciulla request and his request herein was that in Ciulla he had asked for the information from August, 1989, and herein, from January, 1989 (Tr. 40). The only justification advanced by the Union for information covering any period was, ". . . just to give us a sufficient pool of information, to determine whether there was a pattern of [sic] practice of discrimination or disparate impact on the way the policy was administered." (Tr. 28). This was the same justification asserted for information with respect to non-bargaining unit employees (Tr. 26). Mr. Jerry Tauvenner, personnel management specialist in Headquarters, Washington, D.C. (Tr. 52), testified that a computer check had indicated about 900-950 changes to lower grade (demotions) from a one year period, April 19, 1992, through April 19, 1993 (Tr. 69).5

The SF-52 [Request for Personnel Action] is the form which requests personnel action (Tr. 56); SF-50 [Notification of Personnel Action] documents personnel action taken (Tr. 57). The SF-50, and presumably the SF-52, shows: Name; Social Security Number; day, month and year of birth; Sex; Pay Plan; Occupational Code; Grade and step before and after the personnel action; Veterans Preference; and Tenure. Accord-ingly, except race and national origin (Respondent does not retain information on marital status (Tr. 56)), most of the information requested by the Union could be gleaned from these two forms. There may be letters to employees saying that if you accept this voluntary demotion, this will be your grade and step; various documents for involuntary demotions which involve adverse action, etc. (Tr. 47). There is a very significant

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From which he computed a monthly average which he, in turn, projected for the time period of the Union's request to arrive at an estimated 2,000 used on its Summary (Res. Exh. 3).

difference between the two forms, namely that the SF-52 comes from a supervisor or designated field official and would show the personnel action requested. It goes to the person authorized to approve personnel actions and the SF-50 shows the action taken (Tr. 56-57).

There is no government form designating "color" or "ethnic background" beyond the categories shown on OPM Form 1386B (Res. Exh. 4) and on SF-181 (Res. Exh. 5). Each of these forms shows "Race and/or National Origin"; each is voluntary on the part of the employee; information relating to race and national origin is prohibited from being filed in the personnel folder of an employee (Tr. 73-74); after information relating to race and national origin is entered in the computer, the forms, 1386B and SF-181, are destroyed. However the names of employees showing race and national origin information can be provided by computer printout (Tr. 75) -- indeed age and sex could also be shown (Tr. 75).

Employee personnel files are not maintained in alphabetical order, but, rather, are filed by code number (Tr. 62). Therefore, to locate an employee's personnel file it is necessary first to find the employee's code number and then go to the location for that particular file and pull it from storage (Tr. 62-63). Mr. Tauvenner testified that the complete process, i.e., locating the file, pulling the file, charging it out, putting it back, takes seven or eight minutes per file (Tr. 63).

Before April 19, 1992, Customs used an Air Force system, known as "PERMITS", for its personnel and payroll records system (Tr. 58). No information was transferred from PERMITS when, beginning April 19, 1992, Customs switched to a Department of Agriculture personnel and payroll records system, known as "CIPPS" [Customs Integrated Personnel Payroll System] (Tr. 58-59). Consequently, for any information before April 19, 1992, a query would have to be made to PERMITS and for any information after April 19, 1992, to CIPPS. Mr. Tauvenner stated that the turnaround time for an Air Force query [PERMITS] is two to three weeks (Tr. 76, 77). Customs' contractor can go directly to CIPPS and could do a data query for data from April 19, 1992, in about four to six hours. (Tr. 76).

Thus, the record shows that to obtain the information requested the following steps would be required: a) a query to PERMITS for the names of all employees who received a change to lower grade action (demotion) for the appropriate period before April 19, 1992; a query to CIPPS for the names of all employees who received a change to lower grade action (demotion) after April 19, 1992. b) with the two lists of names of employees, make a query to ascertain the file code

number for each employee.[6] c) with the list of names, determine the race and national origin of each employee (inasmuch as age and sex are shown on both the SF-52 and SF-50, it would be wholly duplicative to request this information by computer printout as the Union, and General Counsel, insist upon copies of such materials). At this point, the name of the employee is joined with race and national origin and the name of the employee, as well as other identifying information, will be contained on the SF-52s and SF-50s, discussed in d), infra. Each employee must be assigned an identifying number and care must be taken to insure proper identification of the employee on SF-52s and SF-50s, as well as on any other data, and, then, the names must be removed from all forms and other data from the personnel files and from the computer printout of race and national origin. d) with the file code numbers, obtain the personnel files of each employee and copy the SF-52 and the SF-50 for each employee with respect to the demotion in question. As each form contains both information not requested and/or information identifying the employee, the following must be removed: name; Social Security Number; day and month of birth; tenure; veterans preference; and educational level. e) Each personnel file must be reviewed for any data, such as correspondence, adverse action procedures, etc., documenting the voluntary or involuntary demotion. Each document would have to be sanitized carefully to eliminate any personal identification.

General Counsel at the hearing injected the use of the SF-171 (application for federal employment) (Tr. 81-83, 84) and his concession in his Brief, ". . . the Union would not need SF-171s if given the previously described computer printouts . . . ." (General Counsel's Brief, p. 8) is a wholly gratuitous "offer". The SF-171 contains no requested information not also shown on the SF-52s and SF-50s; contains none of the requested information "documenting" the demotion; and would be entirely counterproductive.

Respondent's Exhibit 3, entitled "Summary" lists in detail its estimate of the time and expense of providing the information requested by the Union, which in man hours it estimates would entail 1,557 hours; an estimated cost of $19,687.17; and an estimated minimum time to provide the information of six months. Mr. Tauvenner testified at great length concerning the production of the information requested. General Counsel disputes Respondent's estimates of both time and cost, sniped and carped but did little to

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Presumably, most of this information would be on CIPPS; however, if an employee had ceased work before April 19, 1992, it is possible a query would have to be made to PERMITS.

dispel Respondent's contention that the information requested is not readily available and its production would be quite expensive, even if Respondent's cost estimates were reduced to eliminate puffing. Moreover, in his Brief, General Counsel makes assertions that are wholly unsupported by the record -- indeed, appear to be contrary to the record. For example: a) General Counsel asserts, "Contrary to R Ex 3, no such database report needed to be 'retrieved' or 'correlated'." (General Counsel's Brief, p. 11). General Counsel is wrong on all assertions. The database report is the manner, and only manner, of obtaining the race and national origin of each employee (Tr. 74-75). As noted above, when the computer printout of employees, showing the race and national origin, is obtained, each employee must be given a number before the name is removed and, most assuredly, this must be carefully correlated with the SF-52s and SF-50s to issue proper identification. b) General Counsel asserts, ". . . Respondent's duty is to provide the Union with SF-50s . . . It is up to the Union to separate them, if the Union chooses, into two groups . . . voluntary and involuntary. Respondent need only provide the Union with the SF-50s." (General Counsel's Brief, p. 11). First, the Union's request for information plainly encompasses "<u>all</u> materials documenting" the demotions which, necessarily, would include the SF-52s as well as the SF-50s. Moreover, the SF-52, because it is the personnel action requested, could be critical to an informed analysis. Second, because it is apparent that different considerations attach to an involuntary demotion, it is important that the Union know whether a demotion was voluntary or involuntary and whether it involved adverse action, which is the reason for related correspondence, etc., as noted above. c) General Counsel's comments on the time to sanitize (General Counsel's Brief, pp. 11-12). General Counsel clearly is wrong that each SF-50 requires only ". . . drawing a black marker through a 2 inch line in block 1 and . . . in block 2 . . . ." (General Counsel's Brief, p. 12). This simply is not all that must be eliminated. Thus, the day and month of birth, tenure, veterans preference and educational level must be eliminated as well as name and social security number. In addition, the number identifying the employee on the computer printout for race and national origin must be entered on the SF-50. Moreover, this process must be repeated for the SF-52. d) General Counsel asserts, ". . . the figures of time and money quoted on R Ex 3 are amounts which are already spent by Respondent." (General Counsel's Brief, p. 12). The record is to the contrary. Mr. Tauvenner testified for example, that he took a one year period and ascertained the number of "demotions" and he took that number, ". . . divided by 12 . . . and then projected that on the time period from '89 . . . through February of '93. It worked out that it was just about 2,000

actions . . . ." (Tr. 62; 68-69); that, "A query of this type would typically take four to six hours" (Tr. 60); etc. At no point did Mr. Tauvenner state, so far as I am aware and General Counsel has not indicated any record reference to the contrary, that Respondent has collected any of the information requested beyond a list of the names of employees involved in a "demotion" for the period April, 1992, through April, 1993. General Counsel's further assertion that, "contractors and employees . . . would be paid regardless of this particular request" (General Counsel's Brief, p. 12), is without merit. An agency's cost of complying with an information request is both a proper and a necessary consideration. Department of Justice v. FLRA, 991 F.2d 285, 292 (5th Cir. 1993).

Conclusions

1. Request not barred by settlement in prior case

The Union's information request in the Ciulla grievance case was identical to the information request herein except for a difference in the period for which the information was requested, a difference which was wholly inconsequential, and the parties, in settling the Ciulla grievances agreed, inter alia, that,

> "4. NTEU hereby withdraws with prejudice, and agrees not to file an unfair labor practice charge concerning, the information request in this matter dated November 24, 1992.
>
> . . .
>
> "7. This Agreement constitutes the complete understanding of the parties in settling the above-styled matter.
>
> . . . (Res. Exh. 2).

Respondent may well have believed that the Settlement laid to rest any further request for the information; however, Mr. Dresslar, who signed the Agreement for the Union, testified without contradiction that, ". . . we did not agree and our discussions never entered into the area of waiving our right to request this information in future cases" (Tr. 42) and Ms. Krielow, who signed the Agreement for Respondent, did not testify. In any event, I agree with General Counsel that nothing in the Settlement Agreement indicates any intention on the part of the Union to waive its statutory right to request the same information in future cases. Department of the Air Force, Scott Air Force Base, Illinois, 42 FLRA 266, 271 (1991). The Settlement

Agreement did no more than withdraw with prejudice the information request dated November 24, 1992.

2. Necessity within the meaning of § 14(b)(4)(B)

Respondent asserts, in part, that,

> ". . . Mr. Dresslar stated that even though the only known problems with voluntary demotion where [sic] in one matter in the South Central Region and two matters in the South West Region . . . , he needed the documentation from the entire U.S. Customs Service . . . to have a sufficient pool of information. Clearly, if there are no other known problems there is absolutely no reason why information from other regions is necessary.
>
> "Secondly, . . . because NTEU failed to clarify its request and failed to adequately explain why the documents were necessary, the agency was therefore unable to determine whether in fact the documents were necessary . . . ." (Respondent's Memorandum, p. 3).

At the outset, in addition to the Ciulla case (South Central Region) and the Sharon Romosz case (Southwest Region), Mr. Dresslar testified that, ". . . in . . . the Southwest Region, out at El Paso, we had a whole series of situations . . . where people were coming from another agency . . . and they were complaining that their rate of pay was too low relative to other people, and that case was based on their status as Mexican American or Hispanic. So we filed a grievance, a mass grievance . . . ." (Tr. 20-21). Mr. Dresslar further testified, "we just settled that grievance" (Tr. 24), and the record further reflects that Rita Ciulla was the third grievant (Tr. 24).

Mr. Dresslar's request, in effect, was for each demoted employee's grade and step before and after demotion, together with race, age and sex.

> ". . . to determine whether the Customs Service has engaged in disparate treatment of its employees . . . upon demotion. NTEU needs this information . . . to determine whether . . . the agency has violated the National Agreement's provisions prohibiting discrimination based on race, color, ethnic background, national origin, age, sex . . . [w]e also need this information . . to determine if the agency has violated any law, rule, or regulation associated

with setting rates of basic pay upon demotion. . . ." (G. C. Exh. 2) (Emphasis supplied).

The request for information made it abundantly clear why the information was necessary. Indeed, Respondent, while down-playing the extent of prior known problems, demonstrated its full awareness of prior claims that it had engaged in disparate treatment when demotions involved women and/or Hispanics. Once a Union becomes aware of seeming disparate treatment based on sex and/or national origin, it has an obligation as the exclusive representative to investigate and to take appropriate action to bring such invidious action to a halt. This is neither the place nor the time to embark upon a philosophical consideration of the present-day status of the common law crimes of champerty or maintenance[7] and the relationship of either to a bargaining agent, beyond emphasizing that here the Union is enforcing its right as exclusive representative to prevent invidious discrimination, if it is found to exist, on the basis of sex or national origin.

Only by examining each demotion, knowing the grade and step before the demotion and the grade and step after the demotion, with the sex and national original shown for each employee, can the Union make an informed judgment as to whether employees with like grades and steps have been treated differently upon demotion on the basis of sex and/or national origin. Because it seems unavoidable that different considerations attach to involuntary demotions, and in particular those based on adverse action proceedings, the Union must be informed when the particular demotion was involuntary.

Respondent's assertion that, "If there were no objections . . . regarding involuntary demotion then the information . . . as it related to involuntary demotions [w]ould not be necessary . . . " (Respondent's memorandum, p. 3) is based on a false assumption. The Union's need was based on whether Respondent treated employees differently upon demotion, voluntary or involuntary, on the basis of sex and/or national origin. Nevertheless, as noted above, because different considerations attach, voluntary and involuntary demotions can not be compared.

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[7] Champerty and maintenance each addressed the improper solicitation of litigation. Champerty involved compensation for services rendered or some profit growing out of the litigation. Maintenance did not take into account any compensation -- the interfering party is in no way benefitted by the success of the party aided but intermeddles officiously.

In essence, Respondent equates "necessary" to pending known cases, e.g., ". . . the only case he knew about at that time was the Rita Ciulla arbitration, which had been settled." (Respondent's Memorandum, p. 3). This may be a very proper reason to request clarification where the need for information is not apparent from the request; but here, Mr. Dresslar's request stated, inter alia, "NTEU needs this information . . . to determine whether . . . the agency has violated the National Agreement's provisions prohibiting discrimination based on race . . . sex . . ." upon demotion. Ciulla had involved an allegation of discrimination because of sex and/or national origin and, even though settled, alerted the Union to the reasonable possibility that other employees may have been treated in a disparate manner upon demotion on the basis of sex and/or national origin and thus the information as to other demotions was necessary, as Mr. Dresslar stated, ". . . to determine whether . . . the agency has violated the National Agreement's provision prohibiting discrimination . . . ."

Respondent has not addressed the need for information as to age, notwithstanding that nothing in the record shows, or even suggests, that age was, or had been, a consideration in any demotion. Inasmuch as Respondent made no effort to show that "age" was not necessary, I shall not further consider its separate necessity and will, simply, consider it as part of "sex, national origin and age." Accordingly, I conclude that some of the information requested was "necessary" within the meaning of § 14(b)(4)(B) of the Statute.

3. Union's request was overbroad

No justification, or need, for "color, ethnic background . . . and marital status" was shown, except that such words may have been used in the parties' National Agreement. Since there are no records showing color or ethnic background beyond "race and national origin" and no records showing marital status, these requests are moot.

As noted previously, the only justification advanced by the Union for information covering any period was, ". . just to give us a sufficient pool of information, to determine whether there was a pattern of [sic] practice of discrimination or disparate impact on the way the policy was administered." (Tr. 28). This was also the only justification asserted for information with respect to non-bargaining unit employees (Tr. 26). Mr. Tauvenner testified that he determined that there were about 900 to 950 changes to lower grade (demotions) for a one year period, April 19, 1992, through April 19, 1993 (Tr. 69). With an estimated 900

changes to lower grade per year, the requested information for a one year period will, certainly, afford a sufficient information pool to determine whether there was a pattern or practice of discrimination upon demotion on the basis of sex, age or national origin. Moreover, since Respondent switched to CIPPS April 19, 1992, the period of the Union's information request will be changed to a one year period from April 19, 1992, through April 19, 1993, in order to avoid the necessity for a separate PERMITS information request and, plainly, the modified period will provide a sufficient information pool.

Although the Union's request did not specify sanitized data with name and social security number removed, Mr. Dresslar testified that the Union was willing to take the documents with the employee's name and social security number removed (Tr. 107-108). Moreover, there was nothing shown on the record that the personal identity of any employee was necessary for any purpose whatever, certainly not to determine whether there was a pattern or practice of discrimination upon demotion on the basis of sex, age, or national origin. Because the personal identification of all employees will have been removed from the data to be supplied, no Privacy Act considerations attach because there will be no unwarranted invasion of personal privacy. Cf. U.S. Department of Transportation, Federal Aviation Administration, New York Tracon, Westbury, New York, 50 FLRA 338 (1995).

In challenging Respondent's estimate of the cost of producing the requested information (Res. Exh. 3), General Counsel strongly implied that certain information was not needed, such as the SF-52s ("Respondent need only provide the Union with the SF-50s" (General Counsel's Brief, p. 11)); or that it is unnecessary to separate demotions into voluntary and involuntary categories (General Counsel's Brief, p. 11); or that other data would be required, by ignoring the Union's request for "copies of all materials"; however, General Counsel makes it clear that he was not, on behalf of the Union, indicating any intention to restrict or limit in any manner the Union's request. Thus, General Counsel concludes by requesting that Respondent, ". . . provide the Union with the requested information" (General Counsel's Brief, p. 23) and, of course, in his notice, he repeated the content of the Union's February 10, 1993, request.

For reasons set forth above, both the SF-52 and the SF-50 are necessary to show the requested personnel action and the actual personnel action; both, clearly, are encompassed by the Union's request. Also for reasons set forth above, it is necessary to separate demotions into

voluntary and involuntary categories because different considerations attach to demotions involving adverse actions.

The Union's request covered related documents such as correspondence and adverse action procedures. While neither party addresses this material, and the record does not give very much enlightment, from the nature of the data it would appear important for a full and informed analysis by the Union. Because this material was part of the Union's request and Respondent has not specifically raised any objection, I conclude that it is "necessary" if carefully sanitized, together with: sanitized copies of each SF-52 and each SF-50, with each employee being identified only by a number; and a computer printout showing the race and national origin, with the employee being identified only by a number, which must be coordinated with the other data to insure that the proper number attaches to all information.

4. Was material "reasonably available"?

The Union's request for information for a period of over four years at a very high cost, estimated by Respondent as more than $19,000.00 (Res. Exh. 3), demonstrated, Respondent asserts, ". . . that the documents requested in this matter are not reasonably available and would be available only through extreme and excessive means." (Respondent's Memorandum, p. 4).

For reasons fully set forth above, the Union's request was overbroad. For the stated reason it sought the information, i.e., to give a sufficient pool of information to determine whether there was a pattern or practice of discrimination on change to lower grade based upon age, sex or race and national origin, no need was shown for information over more than a four year period and, I conclude, that data from a one year period, for an estimated 900-950 changes to lower grade, will provide a sufficient information pool. Further, by beginning the period on April 19, 1992, access to only one computer record system (CIPPS) will be required. The steps Respondent outlined to obtain the information were not refuted. Indeed, General Counsel's injection of a form Respondent had not made reference to was wholly counter- productive as the Form 171 (Application for Federal Employment) would produce no information not shown on SF-52s and SF-50s and none of the essential information available only on SF-52 and SF-50.

Consequently, as Mr. Tauvenner testified, in order to obtain the information, Respondent would first have to make a computer inquiry to obtain the names of all employees who have been changed to a lower grade in the period, April 19,

1992, through April 19, 1993; second, obtain the file code number for each of these employees; third, go to each of the personnel files of these employees and extract the SF-52 and SF-50 from each file as well as any documents relating to the demotion, i.e. correspondence, adverse action proceedings, etc.; copy and sanitize each document and assign a number to identify the employee; fourth, return each personnel file; fifth, submit a computer inquiry for the race and national origin of each of these employees; assign each employee a number and remove the name of each employee; carefully coordinate the numbering to ensure that the numbers here and on all other data furnished are consistent; sixth, separate voluntary demotions from involuntary demotions. What the cost of producing the information would be is not known; but, since it will be for ¼ the period of the Union's request, a reasonable guess would be about ¼ of Respondent's original estimate, or about $5,000.00. While a substantial cost, it would not be extreme or excessive, U.S. Department of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California, 37 FLRA 987, 993-994 (1990); Department of Health and Human Services, Social Security Administration, 36 FLRA 943, 950 (1990), and such data is necessary for the Union to make an informed judgment as to whether Respondent has, or has not, administered its policy upon demotion without discrimination based on age, sex, or race and national origin.

Having found that Respondent violated §§ 16(a)(1), (5) and (8) by failing and refusing to furnish data requested under § 14(b)(4), it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the United States Customs Service, South Central Region, New Orleans District, New Orleans, Louisiana, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Treasury Employees Union, Chapter 168 (hereinafter, "NTEU Chapter 168") the exclusive representative of certain of its employees, with information requested by NTEU Chapter 168 which is necessary and relevant to the performance of its representational duties.

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

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

(a) Upon request, furnish NTEU Chapter 168 with sanitized copies of all materials documenting the voluntary and/or involuntary demotion, the general schedule grade and step immediately prior to the demotion and the general schedule grade and step immediately after the demotion, of employees in the United States Customs Service from April 19, 1992, through April 19, 1993, together with a sanitized computer printout showing the race and national origin of each. Specifically, the data to be supplied, if requested, shall consist of: a) copies of the SF-52 and the SF-50 of each employee demoted, with the name, social security number, day and month of birth, tenure, educational level and veterans preference deleted. A number shall be assigned to identify all data pertaining to the same employee; b) other data such as correspondence, adverse action proceedings, etc., pertain-ing to the demotion, each document being sanitized and assigned only the identifying number; c) computer printout showing the race and national origin of each employee in a) above, with names, and any other personal identification, deleted; identify by number only, coordinated with a) and b) above. d) separate voluntary demotions from involuntary demotions.

(b) Post at its facilities in the New Orleans District, New Orleans, Louisiana, 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 Regional Commissioner of Customs, South Central Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30 of the Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the Dallas Region, Federal Labor Relations Authority, 525 Griffin Street, LB 107, Dallas, Texas 75202-1906, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 19, 1995
Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish the National Treasury Employees Union, Chapter 168 (hereinafter, "NTEU Chapter 168"), the exclusive representative of certain of our employees, with information requested by NTEU Chapter 168 which is necessary to the performance of its representational duties.

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

WE WILL, upon request of NTEU Chapter 168, furnish it with sanitized copies of all materials documenting the voluntary and/or involuntary demotion, the general schedule grade and step immediately prior to the demotion and the general schedule grade and step immediately after the demotion, of employees in the United States Customs Service from April 19, 1992, through April 19, 1993, together with a sanitized computer printout showing the race and national origin of each. Specifically, the data to be supplied, if requested, shall consist of: a) copies of the SF-52 and the SF-50 of each employee demoted, with the name, social security number, day and month of birth, tenure, educational level and veterans preference deleted. A number shall be assigned to identify all data pertaining to the same employee; b) other data such as correspondence, adverse action proceedings, etc., pertaining to the demotion, each document being sanitized and assigned only the identifying number; c) computer printout showing the race and national origin of each employee demoted, with names, and any other personal identification, deleted, identify by number only, coordinated with a) and b) above; d) voluntary demotions to be separated from involuntary demotions.

(Activity)

Date: By:

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Region, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DA-CA-30580, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Harold J. Gilbert, Esquire
Kimberly Jones, Esquire
U.S. Customs Service
423 Canal Street, Room 216
New Orleans, LA 70130

Walter Dresslar, Esquire
National Treasury Employees Union
1120 Capital of Texas Highway, South
Building III, Suite 210
Austin, TX 78746-6460

Joseph T. Merli, Esquire
Federal Labor Relations Authority
525 Griffin Street, Suite 926, LB 107
Dallas, TX 75202-1906

REGULAR MAIL:

Labor Relations Officer
Office of Personnel Management
Southwest Region
1100 Commerce Street
Dallas, TX 75242

National President
National Treasury Employees Union
901 E Street, NW, Suite 600
Washington, DC 20004

Dated: June 19, 1995
Washington, DC