



FEDERAL LABOR RELATIONS AUTHORITY

OALJ 17-01

Office of Administrative Law Judges

WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1547

CHARGING PARTY

Case No. DE-CA-15-0427

Michael S. Farley
For the General Counsel

Phillip G. Tidmore
For the Respondent

Harley D. Hembd
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 (FLRA/Authority), part 2423.

On September 17, 2015, the American Federation of Government Employees, Local 1547 (Union/Local 1547) filed an unfair labor practice (ULP) charge against the Department of the Air Force, Luke Air Force Base, Arizona (Respondent). G.C. Ex. 1(a). After an investigation of the charge, the Denver Regional Director issued a Complaint and Notice of Hearing on January 29, 2016, alleging that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute by refusing to provide information requested by the Union regarding the staffing of

an Engineering Equipment Operator Supervisor (Cement Finisher) position. G.C. Ex. 1(b). On February 19, 2016, the Respondent filed its Answer to the Complaint admitting some factual allegations, but denying that it violated the Statute. G.C. Ex. 1(c).

A hearing on the matter was conducted on June 16, 2016, in Phoenix, Arizona. All parties were represented and afforded an opportunity to be heard, introduce evidence, and examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute when it failed and refused to disclose the information requested by the Union. The Union requested information regarding the Respondent's decision to hire an external applicant for a supervisory position so that it could investigate whether the Respondent violated a Memorandum of Agreement (MOU) or discriminated against bargaining unit employees. Although the Union was not entitled to the information to investigate whether the Respondent complied with the MOU because the agreement did not apply to supervisory positions, the Union was entitled to the information to investigate possible discrimination against bargaining unit employees.

In support of the above determinations, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Department of the Air Force is an agency under 5 U.S.C. § 7103(a)(3). G.C. Exs. 1(b), 1(c). At all times material, Bryan Evans occupied the position of Civilian Personnel Officer and George Amaya occupied the position of Labor Relations Officer at Luke Air Force Base, Arizona (Luke AFB). Evans and Amaya acted on behalf of the Respondent at all material times.

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a) (4). G.C. Exs. 1(b), 1(c). AFGE is the exclusive representative of a unit of employees appropriate for collective bargaining at Luke AFB. The Local 1547 is an agent of AFGE for the purpose of representing employees at Luke AFB.

The Memorandum of Understanding

The parties executed a MOU regarding staffing. G.C. Ex. 5. Harley Hembd, the former Union President,¹ and Evans negotiated the MOU. Tr. 30, 49. The parties dispute whether the MOU covers non-bargaining unit positions.

¹ Hembd was the Union President for nine years until January of 2016 when he became a National Representative. Tr. 16.

Hembd testified that the MOU covers non-bargaining unit positions, including supervisory positions. Tr. 32. In support of this, he noted that the introductory paragraph of the MOU states that the purpose of the agreement is to implement the use of resumes for "vacant civilian positions[]", which could include non-bargaining unit positions. Also, Hembd stated that paragraph 32(a) of the MOU provides for promotions to supervisory positions for bargaining unit employees.² He initially testified that employees could only receive promotions to supervisory positions but later acknowledged that employees could also be promoted to other positions within the bargaining unit. Tr. 32, 43, 45:

Evans testified that the MOU does not cover non-bargaining unit positions. Tr. 50. In support, he stated that paragraph 2 of the MOU states that the agreement only covers bargaining unit positions. Tr. 50. Paragraph 2 reads as follows:

By this agreement it is understood that all Luke AFB Appropriated Fund bargaining unit employees includes all bargaining unit employees that are represented by the Union (i.e. Permanent, Temporary, Term, etc.). It is also understood that position openings/vacancies (Vacancy [A]nnouncements) includes all Permanent, Temporary[,] and Term bargaining unit job positions. It is further understood that this is to include any and all employees or positions, funded by any means, for job positions covered by the parties collective bargaining agreement.

G.C. Ex. 5 at 1. Evans denied that he ever agreed to negotiate over the procedures for hiring supervisors or that paragraph 32(a) applied to promotions to supervisory positions. Tr. 50-51.

Hembd acknowledged that supervisory positions are not covered by the collective bargaining agreement between the parties. Tr. 39-40. Nonetheless, he insisted that the parties only added paragraph 2 to reinforce the fact that temporary and term positions, not just permanent positions, were covered by the MOU. Tr. 32-33. He also noted that paragraph 2 does not explicitly exclude supervisory positions. Tr. 35. Furthermore, Hembd stated that the term "it's further understood[]" meant that it was just adding to what was already included in the paragraph. Tr. 36. Finally, Hembd noted that he never intended to give up the Union's right to receive information about supervisory positions when he executed the MOU. Tr. 42-43.

The Information Request

Prior to September 10, 2015, the Respondent posted a vacancy for an Engineering Equipment Operator (Cement Finisher) a supervisory position. Tr. 18. Bargaining unit

² Paragraph 32(a) states: "The Employer will utilize, to the maximum extent possible, the skill[s] and talents of its bargaining unit employees for promotion opportunities and vacancies before considering candidates from other sources. Absent higher placement priorities mandated by law (example PPP), qualified bargaining unit candidates must be given thorough consideration before the referral of external candidates." G.C. Ex. 5 at 5.

employees were eligible to apply for the position. Tr. 43, 56. At some point, a bargaining unit employee complained to the Union that he was not selected for the position. Tr. 18. Later, Hembd learned that the Respondent selected an external applicant for the position. On September 10, 2015, Hembd submitted an information request seeking information about how the Respondent filled the position. G.C. Ex. 3.

In the information request, Hembd offered two distinct reasons for requesting the information. *Id.* First, he wanted to determine whether the Respondent complied with the MOU. Second, he wanted to investigate whether the Respondent had discriminated against bargaining unit employees. Specifically, he stated that he would use the information to determine: who applied for the position, who was referred to the Respondent, whether the Respondent made its selection based on the job requirements described in the vacancy announcement, why some applicants were not qualified, why the external applicant was selected, and whether the Respondent engaged in any improper conduct to avoid hiring qualified bargaining unit employees. *Id.* Further, Hembd explained that he would use this information to determine whether to file a grievance or a complaint in another forum, such as the Equal Employment Opportunity Commission, and to advise employees of their rights. Finally, he included a list of instructions that included an offer to accept sanitized information. *Id.*

On September 16, 2015, Amaya denied the request by email. G.C. Ex. 4 at 1. He explained that the Union did not need the information because the MOU cited by Hembd did not cover non-bargaining unit positions. A few minutes later, Hembd responded that the MOU “talks about first consideration for both ‘promotion opportunities’ and ‘vacancies.’” *Id.* at 3. Amaya replied by simply stating, “For promotion opportunities and vacancies to bargaining unit positions.” *Id.* at 2. Hembd responded that he could not find the phrase “promotion opportunities and vacancies to bargaining unit positions” in the MOU. *Id.* Amaya replied that he was describing the intent of the MOU, not quoting from it. *Id.* at 1.

Evans testified that in his opinion, the Union was not entitled to the information because the MOU did not cover supervisory positions. Tr. 52. He acknowledged that the information request included other reasons for requesting the information. Tr. 58. Also, he stated that the Union would be entitled to file a grievance alleging that the Respondent discriminated against bargaining unit employees when it selected a non-bargaining unit employee for the position and the Union would be entitled to information regarding such a grievance. Tr. 54, 56-57. Nevertheless, Evans insisted that the Union really only wanted the information to enforce the MOU because it repeatedly referred to the MOU in the information request. Tr. 57-58. Furthermore, he stated that the Respondent was not aware of any complaints alleging discrimination when it received the information request and that Hembd never responded to Amaya’s request for clarification. Tr. 52, 59.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) contends that the Respondent violated the Statute by refusing to provide the information requested by the Union.

The GC asserts that the Union established a particularized need for the information. In support of this, it notes that the Union clearly explained that it would use the information to investigate whether the Respondent discriminated against bargaining unit employees or violated the MOU, when it selected an external applicant for the supervisory position. G.C. Br. at 6. Furthermore, the Union explained that it would use the information to file a grievance or EEO complaint and to advise employees of their rights. *Id.* at 6-7.

The GC contends that the Union "reasonably maintained" that the MOU covered supervisory positions; therefore, the Respondent was required to disclose the information. *Id.* at 10-11. Further, it states that agencies may elect to negotiate over the procedures for selecting applicants for non-bargaining unit positions. Also, it states that unions are not required to prove that their grievances have merit or that the matter is grievable. *Id.* at 11. Instead, such disputes should be resolved by an arbitrator.

As a remedy, the General Counsel seeks an order directing the Respondent to disclose the requested information. *Id.* at 11-12. Also, it wants the Respondent to post a notice, signed by the Commander of the 56th Fighter Wing, on bulletin boards and to email a copy to bargaining unit employees.

Respondent

The Respondent contends that it did not violate the Statute because the Union failed to establish a particularized need for the information. Respondent asserts that paragraph 2 of the MOU states that the MOU only applies to bargaining unit positions. R. Br. at 10-11. Also, it states that the procedures for filling non-bargaining unit positions are negotiable only at the election of the agency and the Respondent never elected to bargain over these procedures. *Id.* at 11-12.

Further, the Respondent argues that the information request looked "vague" and "ill-defined" because the Union never told the Respondent that someone had complained to the Union and no one had complained to the Respondent. *Id.* at 10. Finally, it states that the Union failed to "really present" a particularized need in response to the Respondent's request for clarification. *Id.* at 12. Therefore, the Respondent was unable to determine why the Union needed the information. Notably, the Respondent did not address the discrimination basis set forth in the Union's information request.

ANALYSIS

Section 7114(b)(4) of the Statute requires an agency to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, information: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

In *IRS, Kansas City*, the Authority set forth the analysis for determining whether information is “necessary” under § 7114(b)(4) of the Statute. *IRS, Wash., D.C. & IRS, Kan. City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 669-71 (1995) (*IRS, Kansas City*). To demonstrate that 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.” *Id.* at 669-70 (footnote omitted). A union’s responsibility for articulating its interests requires more than a conclusory or bare assertion. *Id.* at 670. The request must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. *Id.* It does not have to specifically describe how the agency violated a law, regulation, or policy or how the information would be used to determine whether to file a grievance. *Health Care Fin. Admin.*, 56 FLRA 503, 507 (2000); *Health Care Fin. Admin.*, 56 FLRA 156, 162 (2000) (*HCFA*).

The Union is Not Entitled to the Information to Enforce Compliance of the MOU

The Union is not entitled to the information to verify that the Respondent complied with the MOU because the MOU does not apply to supervisory positions. Paragraph 2 clearly defines the scope of the agreement. It states that the MOU covers “position openings/vacancies . . . for [bargaining unit job positions]” and “job positions covered by the parties[’] collective bargaining agreement.” G.C. Ex. 5. Hembd acknowledged that the collective bargaining agreement only covers bargaining unit positions. Tr. 39-40.

Hembd attempted to minimize the significance of paragraph 2 by arguing that the parties only included this paragraph to reinforce the fact that temporary and term positions, not just permanent positions, are covered by the MOU. Tr. 32-33. However, this explanation ignores the fact that the parties specifically referred to *bargaining unit* positions, not just positions in general. The limited scope of the MOU, unquestionably evident in paragraph 2, cannot be set aside because the parties casually used the general term “vacant civilian positions” in the introductory paragraph. G.C. Ex. 5. Further, Hembd acknowledged that employees could be promoted to other bargaining unit positions; therefore, there is no support for Hembd’s assertion that paragraph 32(a) must cover promotions to supervisory positions. Tr. 32, 43, 45. The General Counsel correctly notes that an agreement concerning the procedures for filling non-bargaining unit positions is enforceable. *AFGE, Local 12*, 60 FLRA 533, 538 (2004). However, in this case, the plain language of the MOU clearly and unambiguously limits the scope of the agreement to bargaining unit positions.

The GC asserts that the dispute over the scope of the MOU does not have any bearing on whether the Union is entitled to the information. G.C. Br. at 10-11. According to the GC the Respondent is required to disclose the information even if it does not believe that the matter is covered by the negotiated grievance procedure. This is accurate. *See, e.g., Dep’t of HHS, Soc. Sec. Admin., Balt., Md.*, 39 FLRA 298, 309 (1991) (*SSA, Balt.*); *Dep’t of the Army, Headquarters, XVIII Airborne Corps & Fort Bragg, Fort Bragg, N.C.*, 34 FLRA 461, 462-63 (1990); *HCFA*, 56 FLRA at 161. However, the Respondent never claimed that the matter was not covered by the negotiated grievance procedure. Instead, it refused to provide the information because the MOU did not apply to supervisory positions.

Finally, the GC's reliance on *Soc. Sec. Admin.*, 64 FLRA 293 (2009) (*SSA*) is misplaced. In that case, the Authority held that the union did not need to show that the information would accomplish its stated purpose. *Id.* at 296. However, the Authority has not held that the union is entitled to information even if the union's stated purpose clearly had no legal basis. On the contrary, the Authority has held that unions are not entitled to information to negotiate matters if there is no duty to bargain. *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 979 (2010); *Gen. Servs. Admin.*, 29 FLRA 197, 200 (1987). In this case, the Union stated that it needed this information to verify that the Respondent complied with the MOU when it filled the supervisor position. The MOU clearly does not cover supervisor positions; therefore, the Union did not establish a particularized need for the information based upon the MOU.

The Union is Entitled to the Information to Investigate Discrimination

In the information request, the Union stated that it also wanted the information to investigate whether the Respondent discriminated against bargaining unit employees during the selection process. G.C. Ex. 3.³ It is undisputed that bargaining unit employees could apply for the supervisory position. Tr. 43, 56. Also, the Authority has held that unions are entitled to information that will allow them to determine whether agencies treated bargaining unit employees fairly when they filled non-bargaining unit positions. *SSA, Balt.*, 39 FLRA at 309; *Def. Mapping Agency, Aerospace Ctr., St. Louis, Mo.*, 21 FLRA 595 (1986). Indeed, Evans acknowledged that the Union could file a grievance alleging that the Respondent discriminated against an employee by not selecting him or her for a supervisory position and that the Union was entitled to information for that grievance. Tr. 54, 56. The Union also explained that it would use this information to file grievances or complaints in other forums and to advise employees of their rights. G.C. Ex. 3. The Authority has repeatedly held that unions are entitled use information for these reasons. *HCF A*, 56 FLRA at 160; *Dep't of Comm., NOAA, Nat'l Weather Serv., Silver Spring, Md.*, 30 FLRA 127, 142 (1987).

Nonetheless, the Respondent contends that it could not determine whether the Union had a legitimate reason for requesting the information because the Respondent was not aware of any complaints about the selection process and the Union did not respond to Amaya's request for clarification. The Union stated that it wanted this information to determine whether to file a grievance or complaint, which, as noted above, is a valid reason for requesting information. The Union is not required to file a complaint first. *U.S. DOJ, BOP, Allenwood Fed. Prison Camp, Montgomery, Penn.*, 988 F.2d 1267 (D.C. Cir. 1993). Finally, Amaya never gave Hembd any indication that he needed additional information to determine whether the Union was entitled to the information. Instead, he denied the information request because the MOU did not apply to non-bargaining unit positions. G.C. Ex. 4. Contrary to the Respondent's characterization, this unequivocal denial was not a request for clarification. *See, e.g., Dep't of the Army, ACE, Portland Dist., Portland, Or.*, 60 FLRA 413, 415-16 (2004); *SSA*, 64 FLRA at 297.

³ Evans claimed that the Union only wanted this information to verify compliance with the MOU because the Union repeatedly referred to the MOU in the information request. Tr. at 57-58. However, the Union also clearly, and repeatedly, stated that it wanted to investigate potential discrimination. G.C. Ex. 5.

CONCLUSION

The Union adequately explained that it needed the information to investigate whether the Respondent discriminated against bargaining unit employees when it filled a supervisory position with an external applicant, as well as the connection to its representational responsibilities (to determine whether to file a grievance or complaint and to advise employees of their rights). Therefore, I find that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute when it denied the Union's request for information regarding its decision to hire the external applicant for the Engineering Equipment Operator Supervisor (Cement Finisher) position.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of the Air Force, Luke Air Force Base, Arizona, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish information requested by the American Federation of Government Employees, Local 1547 (Union) regarding the selection for the Engineering Equipment Operator Supervisor (Cement Finisher) position.

(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:

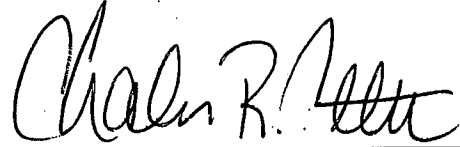
(a) Furnish the Union with the information it requested on September 10, 2015, regarding the selection for the Engineering Equipment Operator Supervisor (Cement Finisher) position.

(b) Post at its 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 Commander, 56th Fighter Wing, Luke Air Force Base, Arizona, and shall be posted and maintained for sixty (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) In addition to physical posting of the paper Notices, Notices shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

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

Issued, Washington, D.C., October 25, 2016

A handwritten signature in cursive script, appearing to read "Charles R. Center". The signature is written in black ink and is positioned above a horizontal line.

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 Department of the Air Force, Luke Air Force Base, Arizona, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish information requested by the American Federation of Government Employees, Local 1547 (Union) regarding the selection for the Engineering Equipment Operator Supervisor (Cement Finisher) position.

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 information it requested on September 10, 2015 regarding the selection for the Engineering Equipment Operator Supervisor (Cement Finisher) position.

(Agency/Respondent)

Dated: _____

By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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, Denver Region, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 446, Denver, CO 80204 and whose telephone number is: (303) 844-5224.