

**67 FLRA No. 129**

SOCIAL SECURITY ADMINISTRATION  
(Agency)

and

AMERICAN FEDERATION  
OF GOVERNMENT EMPLOYEES  
LOCAL 1923  
(Union)

0-AR-4948

\_\_\_\_\_

DECISION

July 30, 2014

\_\_\_\_\_

Before the Authority: Carol Waller Pope, Chairman, and  
Ernest DuBester and Patrick Pizzella, Members  
(Member DuBester dissenting in part)

**I. Statement of the Case**

Arbitrator Terry D. Loeschen found that the Union established a particularized need for one category of information that the Union had requested from the Agency, but that the Union's request for another category of information was overbroad. With respect to the latter category, the Arbitrator found that the Union was entitled to some of the requested information, and he issued a remedy that allowed the Union to submit a narrower request to the Agency. The substantive issue before us is whether the Arbitrator's finding of particularized need is contrary to § 7114 of the Federal Service Labor-Management Relations Statute (the Statute).<sup>1</sup>

With regard to the first category of information, the Agency does not explain how the Arbitrator's conclusion is inconsistent with the standards for finding particularized need. Therefore, we find that the Agency has not established that the award is deficient with regard to that category.

With regard to the second category of information, unchallenged Authority precedent supports a conclusion that the Arbitrator should not have issued a remedy entitling the Union to a narrower category of information than it actually requested. Accordingly, we set aside that remedy.

<sup>1</sup> 5 U.S.C. § 7114.

**II. Background and Arbitrator's Award**

The Union asked the Agency to provide it with information related to a grievance concerning overtime pay (the merits grievance) and submitted four separate requests (Requests 1-4), only two of which, Requests 1 and 3, are relevant here. In Request 1, the Union sought Agency overtime policies that pertained to the "aggrieved [Union]."<sup>2</sup> The Union asserted in its request that it needed the information to "defend the [merits] grievance."<sup>3</sup> The Agency denied the request for two reasons. First, the Agency argued that the requested information was not reasonably available or normally maintained, because the Agency did not have overtime policies that specifically pertained to the Union. Second, the Agency asserted that the Union failed to establish a particularized need for the information. In this regard, the Agency asserted both that the Union did not explain how it would use the requested information and that it was "not enough" for the Union to state that it would use the information to defend the merits grievance.<sup>4</sup>

In Request 3, the Union sought "Saturday and Sunday sign in and out sheets [and Mainframe Time and Attendance (MTAS)] electronic records [(attendance records)] for all [Union] employees for the past year."<sup>5</sup> The Union asserted in its request that it needed the information to prove damages in the merits grievance. The Agency denied the request for two reasons. First, the Agency argued that the requested information was not reasonably available or normally maintained, because the Agency did not have records that specifically pertained to "[Union] employees."<sup>6</sup> Second, the Agency contended that the Union failed to establish a particularized need for the information because the information would not help the Union prove damages.

The Union filed a grievance (separate from the merits grievance) alleging that the Agency's denials violated § 7114 of the Statute. The grievance was unresolved and submitted to arbitration.

In an award (the original award), the Arbitrator framed the following issues: (1) did the Agency violate the parties' agreement, "under the statutory criteria in 5 U.S.C.[ §] 7114," when it denied the Union's information request; and (2) "[i]f so, what is the proper remedy?"<sup>7</sup>

With regard to Request 1, the Arbitrator found that the policies requested by the Union did not exist, and

<sup>2</sup> Original Award at 10 (emphasis omitted).

<sup>3</sup> *Id.* at 11.

<sup>4</sup> *Id.* at 10.

<sup>5</sup> *Id.* at 12 (emphasis omitted).

<sup>6</sup> *Id.* at 13.

<sup>7</sup> *Id.* at 7.

that the Agency's denial based on the non-existence of those policies did not violate the parties' agreement. In this connection, the Arbitrator noted that the Agency based its denial on a "legalistic" interpretation of the Union's request, but he stated that the Agency was entitled to interpret the Union's request "strict[ly]."<sup>8</sup> In addition, the Arbitrator stated that the Union "could have used greater specificity in the request" by asking for policies and other documents for "bargaining[-]unit employees in specified components of the Agency."<sup>9</sup> At the same time, the Arbitrator found that the Agency violated the parties' agreement by basing its denial on a claim that the Union had not established a particularized need for the requested information. In this regard, the Arbitrator stated that the Union's request indicated that the Union was seeking documents to use as evidence in the merits grievance, and that such documents would be "directly relevant" to proving the Union's claims.<sup>10</sup>

With regard to Request 3, the Arbitrator found that the attendance records requested by the Union did not exist, and that the Agency's denial based on the non-existence of those records did not violate the parties' agreement. The Arbitrator noted that the Agency again based its denial on a "legalistic" interpretation of the Union's request, but he found that the Agency was entitled to interpret the Union's request strictly.<sup>11</sup> At the same time, the Arbitrator determined that the Agency violated the parties' agreement by basing its denial on a claim that the Union had failed to establish a particularized need for the information. In this regard, the Arbitrator found that the Agency's claim – that the information would not help the Union prove damages – was conclusory.

The Arbitrator determined that the Agency did not commit an unfair labor practice (ULP) by denying the requests. As a remedy for the Agency's contractual violations, the Arbitrator stated that the Union was entitled to refile Requests 1 and 3 with "greater specificity as to the information sought and the particularized need for that information."<sup>12</sup> The Arbitrator retained jurisdiction "with respect to issues presented by the parties regarding the implementation of the terms of [the original award]" and with regard to a Union request for attorney fees.<sup>13</sup>

Subsequently, the Union submitted refiled requests (Refiled Requests 1 and 3). In Refiled Request 1, the Union requested

any and all [Agency o]vertime policies or directives requiring [Agency] employees [to] work a minimum amount of overtime before being entitled to payment of time and a half. For examples of the overtime polic[ies] the [U]nion is requesting please see attachment #1 sent by the [A]gency to the [U]nion[, a]ttachment #2 sent to the [U]nion by [an Agency] employee[, and a]ttachment #3 sent by [an Agency] supervisor to [Agency] employees. The Union is requesting the information for all [Agency] employees in all [Agency] offices.<sup>14</sup>

The Union asserted in its request that it needed this information because there were requirements or directives that Agency employees "must work a minimum amount of time before being paid time and a half."<sup>15</sup> In this regard, the Union claimed that it needed the requested information to prove that the Agency's overtime policies are "inconsistent for different components and offices," and to show that the "directive[s were not] bargained for as required by the [collective-bargaining agreement]."<sup>16</sup>

The Agency denied in part, and granted in part, Refiled Request 1. Specifically, the Agency stated that it would not provide information for all Agency employees in all Agency offices, because the Union did not represent the employees in most of those offices. In addition, the Agency asserted that overtime policies pertaining to employees not represented by the Union were not "relevant" to the merits grievance.<sup>17</sup> The Agency stated that it would provide information that pertained to employees represented by the Union.

In Refiled Request 3, the Union requested "Saturday and Sunday [attendance records] for all employees" included on a list of affected employees, "for the past seven years."<sup>18</sup> The Union asserted in its request that it needed this information to "prove" that employees who "worked less [than] the minimum requirement . . . are now entitled to time and a half" for that work.<sup>19</sup> Further, the Union claimed that under the Back Pay Act,<sup>20</sup> affected employees could collect backpay "for [six] years from the filing of a grievance," and that

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 11-12.

<sup>11</sup> *Id.* at 13.

<sup>12</sup> *Id.* at 16.

<sup>13</sup> *Id.*

<sup>14</sup> Exceptions, Ex. 7 at 2.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Exceptions, Ex. 8 at 1.

<sup>18</sup> Exceptions, Ex. 7 at 2.

<sup>19</sup> *Id.*

<sup>20</sup> 5 U.S.C. § 5596.

because the grievance was filed in 2012, “tolling allow[ed] . . . damages for seven years.”<sup>21</sup>

The Agency denied Refiled Request 3 for two reasons. First, the Agency asserted that the Union had not established a particularized need for the requested information. In this regard, the Agency stated that while the Union claimed it needed the requested information necessary to calculate damages, the Agency did not “know that [the Union] need[ed] to possess [attendance records] for over 700 employees . . . going back . . . [seven] years, when there is a possibility that [the Union] will not prevail [in the merits grievance].”<sup>22</sup> Second, the Agency claimed that documents covered by the request were not reasonably available, because of the “sheer amount of work” it would take to produce records covering 700 employees over seven years.<sup>23</sup>

Following the Agency’s denials of Refiled Requests 1 and 3, the parties then asked the Arbitrator to issue a supplemental award to resolve the dispute. The Arbitrator noted that the Agency “continued to object to language contained in the [refiled] information requests and the [Union’s] statements of need.”<sup>24</sup> The Arbitrator found that the parties were “unable to implement the original award,” and he determined that he would issue a supplemental award (the supplemental award) to resolve the dispute.<sup>25</sup>

In the supplemental award, the Arbitrator noted that Refiled Request 1 “expanded” on Request 1 by pertaining to “*all [Agency] employees in all [Agency] offices.*”<sup>26</sup> Similarly, the Arbitrator noted that Refiled Request 3 “modified” Request 3 by requesting attendance records that applied to a list of employees and covered the “*past seven years.*”<sup>27</sup>

The Arbitrator stated that the Agency denied the refiled requests “based, in part, on its position that the Union does not represent all [Agency] employees and . . . had not met particularized need.”<sup>28</sup> The Arbitrator found that the Agency’s denial based on a “lack of representation is valid” but that the Agency’s denial based on a “lack of need is not.”<sup>29</sup> With regard to Refiled Request 1, the Arbitrator noted that although the Union had sought information with regard to “all [Agency] employees,” it was “obvious” that “supervisors

are not included within the bargaining unit.”<sup>30</sup> With regard to Refiled Request 3, the Arbitrator stated that the Agency’s “challenge to the Union’s particularized need is superficial” and unsupported.<sup>31</sup>

The Arbitrator determined, based on the “total compilation of evidence involved in both the first and [refiled] information requests,” that the Union “established a particularized need for the information.”<sup>32</sup> The Arbitrator stated that the “one exception is a need for seven years of [attendance records] when compared to the original one[-]year request” – in other words, the information requested in Refiled Request 3.<sup>33</sup> The Arbitrator added that if the Union received a favorable decision in the merits grievance, then it would be able to request more than a year’s worth of information.

As a remedy, the Arbitrator stated that the Union was entitled to file two new, Arbitrator-authored information requests (New Requests 1 and 3). As relevant here, New Request 1 asks for Agency policies and other documents indicating that bargaining-unit employees are required to work a minimum amount of overtime hours before being entitled to overtime pay. New Request 3 asks for one year of “Saturday and Sunday [attendance records] for all bargaining[-]unit employees.”<sup>34</sup> The new requests have blank spaces in which the Union may specify the Agency components covered by the requests. The Arbitrator stated that the Agency could not object to the new requests based on “Union need.”<sup>35</sup>

After the Arbitrator issued the supplemental award, the Agency filed exceptions.

### III. Preliminary Matter: The exceptions to the original award are untimely.

The Authority issued an order directing the Agency to show cause why its exceptions should not be dismissed as untimely filed.<sup>36</sup> In this regard, the Authority stated that exceptions to the original award were due on January 7, 2013,<sup>37</sup> but that the Agency did not file its exceptions until May 31, 2013.<sup>38</sup>

The Agency does not dispute that if the original award were a final award, then exceptions to the original

<sup>21</sup> Exceptions, Ex. 7 at 2.

<sup>22</sup> Exceptions, Ex. 8 at 1.

<sup>23</sup> *Id.*

<sup>24</sup> Supplemental Award at 2.

<sup>25</sup> *Id.* at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 5.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 6.

<sup>35</sup> *Id.*

<sup>36</sup> Order to Show Cause at 1.

<sup>37</sup> *Id.* at 4.

<sup>38</sup> *Id.* at 3.

award would have been due on January 7, 2013.<sup>39</sup> However, the Agency argues that the original award was not final, because the Arbitrator: (1) “did not completely resolve all issues submitted to arbitration,”<sup>40</sup> in that he “rul[ed] against both the Agency and the Union”;<sup>41</sup> (2) “did not order a specific remedy, pending further action by the parties”;<sup>42</sup> (3) “postponed the determination of the [issues] for the [supplemental award]”;<sup>43</sup> and (4) “did not . . . resolve the question of whether the Agency . . . violated . . . § 7114” of the Statute.<sup>44</sup> Further, the Agency argues that if the original award were “final, then [the Arbitrator] would not have [allowed] the [U]nion to [refile] the information request with greater specificity.”<sup>45</sup> In addition, the Agency contends that it filed timely exceptions in relation to the supplemental award.<sup>46</sup>

An award is final for the purpose of filing exceptions when it completely resolves all of the issues submitted to arbitration.<sup>47</sup> The mistaken belief that a final award is not yet final will not excuse a party’s failure to file timely exceptions.<sup>48</sup> While an arbitration award that postpones the determination of an issue submitted is not a final award subject to review, an arbitrator’s retention of jurisdiction to assist with the implementation of any awarded remedies,<sup>49</sup> or to resolve questions regarding attorney fees,<sup>50</sup> does not prevent the award from being final.

The Arbitrator stated that there were two issues to resolve in the original award: (1) did the Agency violate the parties’ agreement, “under the statutory criteria in 5 U.S.C.[ §] 7114,” when it denied the Union’s information request; and (2) “[i]f so, what is the proper remedy?”<sup>51</sup> By finding that the Agency violated the parties’ agreement and awarding a remedy, the Arbitrator, in the original award, completely resolved all of the issues submitted to arbitration. And although the Arbitrator retained jurisdiction, he did so only with regard to implementation of the remedy and a Union request pertaining to attorney fees. These factors support

a conclusion that the original award was final, and the Agency’s claims do not support a contrary conclusion.

To support its claim that the original award is not final, the Agency cites *U.S. Department of the Treasury, IRS, National Distribution Center, Bloomington, Illinois (IRS Bloomington)*<sup>52</sup> and *U.S. Patent & Trademark Office (PTO)*.<sup>53</sup> Both decisions are distinguishable from this case. In *IRS Bloomington*, the Authority found that an award was not final because the issue of remedy was before the arbitrator and the arbitrator did not grant a remedy.<sup>54</sup> But here, in the original award, the Arbitrator resolved all of the issues before him, including remedy. In *PTO*, the Authority found that an arbitrator’s interim award in which the arbitrator “expressly declined to issue a final decision until the parties submitted additional evidence and had another opportunity to solve their differences,” was not a final award.<sup>55</sup> But here, in the original award, the Arbitrator did not request additional evidence, and did not delay issuing a final award before giving the parties another opportunity to resolve their differences. Accordingly, the Agency’s reliance on *IRS Bloomington* and *PTO* is misplaced.

Based on the foregoing, we find that the original award is a final award for the purpose of filing exceptions. As the Agency does not dispute that exceptions to the original award, if final, were due January 7, 2013, and as the Agency did not file exceptions until May 31, 2013, we dismiss the Agency’s exceptions to the original award as untimely filed.<sup>56</sup> As such, we do not consider challenges the Agency raises to the original award, specifically, that: (1) the Arbitrator erred in finding that the Union had established a particularized need for information that the Agency did not normally maintain;<sup>57</sup> (2) the Union did not explain the connection between the information sought in Request 1 and the Union’s representational responsibilities;<sup>58</sup> (3) the Arbitrator did not apply Authority precedent when analyzing whether the Union established a particularized need in Requests 1 and 3;<sup>59</sup> and (4) the Union failed to establish a particularized need for the information sought in Request 1, because Request 1 was “overbroad” and “conclusory.”<sup>60</sup>

<sup>39</sup> Exceptions at 1-2; Resp. at 1, 4.

<sup>40</sup> Resp. at 1.

<sup>41</sup> *Id.* at 2 n.2.

<sup>42</sup> *Id.* at 2 n.3.

<sup>43</sup> *Id.* at 2 n.2.

<sup>44</sup> *Id.* at 2.

<sup>45</sup> *Id.*

<sup>46</sup> Exceptions at 1-2; Resp. at 1, 4.

<sup>47</sup> *U.S. Dep’t of the Treasury, IRS, Nat’l Distrib. Ctr., Bloomington, Ill.*, 64 FLRA 586, 589 (2010).

<sup>48</sup> *U.S. Dep’t of Commerce, Patent & Trademark Office*, 24 FLRA 835, 835-36 (1986).

<sup>49</sup> *U.S. DHS, ICE*, 66 FLRA 880, 883 (2012).

<sup>50</sup> *U.S. DHS, U.S. CBP*, 66 FLRA 838, 842 (2012) (Member DuBester dissenting in part).

<sup>51</sup> Original Award at 7.

<sup>52</sup> 64 FLRA 586 (2010).

<sup>53</sup> 32 FLRA 572 (1988).

<sup>54</sup> 64 FLRA at 590.

<sup>55</sup> 32 FLRA at 577.

<sup>56</sup> *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Miami, Fla.*, 66 FLRA 1046, 1048 (2012).

<sup>57</sup> Exceptions at 7, 10.

<sup>58</sup> *Id.* at 9.

<sup>59</sup> *Id.* at 9, 12, & 12 n.6.

<sup>60</sup> *Id.* at 12 & n.6.

However, in its exceptions, the Agency also argues that the supplemental award is contrary to § 7114 of the Statute,<sup>61</sup> and the Agency's exceptions were timely filed in relation to the supplemental award. Accordingly, we address the Agency's exceptions to the supplemental award below.

#### IV. Analysis and Conclusions

The Agency argues that the supplemental award is contrary to § 7114 of the Statute. When an exception involves an award's consistency with law, the Authority reviews any question of law de novo.<sup>62</sup> In conducting de novo review, the Authority assesses whether the arbitrator's legal *conclusion* – not his or her underlying *reasoning* – is consistent with the relevant legal standard.<sup>63</sup>

With regard to Refiled Request 1, the Agency cites the test for establishing a particularized need under *IRS, Washington, D.C. & IRS, Kansas City Service Center, Kansas City, Missouri (IRS)*,<sup>64</sup> and argues that the Arbitrator's "particularized[-]need analysis about why the Union needed [Agency] overtime policies is deficient."<sup>65</sup> The Agency also argues, without specifically referencing a particular request, that the Arbitrator "ruled that the Union met particularized need without using the required elements used to analyze the propriety of a particularized need."<sup>66</sup>

Section 2425.6(e)(1) of the Authority's Regulations provides that an exception "may be subject to dismissal or denial if . . . [t]he excepting party fails to raise and support a ground" listed in § 2425.6(a)-(c).<sup>67</sup> Accordingly, when a party fails to provide any argument to support its exception, the Authority will deny the exception.<sup>68</sup> Similarly, the Authority has stated that an excepting party's "mere citation to legal authority, without explanation or analysis, . . . does not demonstrate that an arbitrator's award is contrary to law."<sup>69</sup>

The Agency provides no support for its arguments regarding Refiled Request 1. That is, the

Agency provides no explanation for finding that the Arbitrator's legal conclusion – that the Union established a particularized need with regard to that request – is contrary to § 7114 of the Statute. In this regard, the Agency cites the Authority's decision in *IRS*, but does not explain why the Arbitrator's conclusion with regard to Refiled Request 1 is contrary to *IRS*.<sup>70</sup> Because the Agency has not provided any explanation as to why the Arbitrator's conclusion regarding Refiled Request 1 is contrary to § 7114, we deny this exception under § 2425.6(e).

With regard to Refiled Request 3, the Agency asserts that the Arbitrator "erred in re-crafting the Union's renewed information request and then ordering the Agency to provide the requested information, instead of dismissing the case as requested by the Agency."<sup>71</sup> According to the Agency, after finding that the Union failed to establish particularized need for the seven years of records that it had requested, the "correct course of action [was] to dismiss the case" – not to "amend" the information request and allow the Union to recover one year of records.<sup>72</sup>

When resolving a grievance that alleges a ULP, such as a violation of § 7114 of the Statute, an arbitrator functions as a substitute for an Authority administrative law judge (judge) and must apply the same standards and burdens that are applied by a judge.<sup>73</sup> Under Authority precedent, a union's burden of establishing particularized need includes the burden of establishing the necessity of "the scope of the request," including the time period covered by the request.<sup>74</sup> Therefore, a union requesting data that covers a specific period of time must explain why it needs data for that entire period.<sup>75</sup> Where a union

<sup>70</sup> Exceptions at 9.

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.* at 13.

<sup>73</sup> *E.g., USDA, Farm Serv. Agency, Kan. City, Mo.*, 65 FLRA 483, 486 (2011) (citing *NTEU*, 61 FLRA 729, 732 (2006); *NTEU, Chapter 168*, 55 FLRA 237, 241 (1990)) (stating that when a grievance alleges a ULP, the arbitrator functions, and must apply the same standards, as a judge); *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 977-78 (2010) (Member DuBester dissenting in part) (resolving a grievance alleging a violation of, among other things, § 7114(b)(4) of the Statute); *IRS Wash.*, 64 FLRA at 431 (citation omitted) (stating that when an arbitrator functions as a substitute for a judge, the arbitrator must apply the same standards and burdens that the judge must under § 7118 of the Statute); *Library of Cong.*, 63 FLRA 515, 518 (2009) (resolving an alleged violation of § 7114(b)(4) of the Statute).

<sup>74</sup> *SSA*, 64 FLRA 293, 295 (2009) (quoting *U.S. DOJ, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472 (1996), *recons. denied*, 52 FLRA 1323 (1997), *pet. for review denied*, 144 F.3d 90 (D.C. Cir. 1998)) (internal quotation mark omitted).

<sup>75</sup> *U.S. DOL, Wash. D.C.*, 51 FLRA 462, 476-77 (1995) (*DOL*).

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *NTEU, Chapter 24*, 50 FLRA 330, 332 (1995) (citing *U.S. Customs Serv. v. FLRA*, 43 F.3d 682, 686-87 (D.C. Cir. 1994)).

<sup>63</sup> *U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 64 FLRA 426, 433 (2010) (*IRS Wash.*).

<sup>64</sup> 50 FLRA 661 (1995).

<sup>65</sup> Exceptions at 8.

<sup>66</sup> *Id.* at 13.

<sup>67</sup> 5 C.F.R. § 2425.6(e)(1).

<sup>68</sup> *E.g., NTEU, Chapter 215*, 67 FLRA 183, 184 (2014) (Member Pizzella concurring).

<sup>69</sup> *U.S. DHS, U.S. CBP*, 66 FLRA 904, 908 (2012) (quoting *AFGE, Local 3354*, 64 FLRA 330, 334 (2009)) (internal quotation marks omitted).

requests data for a specific period of time, and the Authority finds no particularized need for that period, the Authority does not separately assess whether the union established a need for *some* of the information within that period.<sup>76</sup> Rather, the Authority finds that no remedy is warranted.<sup>77</sup> Neither party challenges this precedent.

Here, the Arbitrator found that the Union failed to establish a particularized need for the seven years of attendance records that it requested in Refiled Request 3.<sup>78</sup> However, rather than finding no violation and awarding no remedy, the Arbitrator found that the Union was entitled to a remedy: an Arbitrator-formulated information request to which the Agency could not object on the basis of the Union's lack of need.<sup>79</sup> Awarding a remedy after finding no particularized need for the period of time covered by the Union's request is contrary to the unchallenged Authority precedent described above. Accordingly, we find that the Arbitrator's remedy regarding Refiled Request 3 is contrary to law, and we set it aside.

## V. Decision

We deny the exception regarding Refiled Request 1, and we set aside the remedy with respect to Refiled Request 3.

---

<sup>76</sup> See *NLRB*, 60 FLRA 576, 580-81 (2005) (Chairman Cabaniss concurring and then-Member Pope dissenting in part as to finding of no particularized need); *U.S. Dep't of the Air Force, Randolph Air Force Base, San Antonio, Tex.*, 60 FLRA 261, 264 (2004) (stating that where a union fails to establish a connection between the scope of its information request and the particular matter referenced in that request, particularized need for the request is not established); *DOL*, 51 FLRA at 476-77.

<sup>77</sup> See *NLRB*, 60 FLRA at 581 (setting aside arbitrator's order to post a notice); *U.S. Customs Serv., S. Cent. Region, New Orleans Dist., New Orleans, La.*, 53 FLRA 789, 799 (1997) (dismissing ULP complaint because Union did not establish particularized need for entire scope of its request even though judge found it had established particularized need for part of the requested time period); *DOL*, 51 FLRA at 477 (dismissing ULP complaint without issuing remedy).

<sup>78</sup> Supplemental Award at 5.

<sup>79</sup> *Id.* at 6.

**Member DuBester, dissenting in part:**

I agree with the majority's decision to dismiss the Agency's exceptions to the original award and to deny the Agency's exception concerning Refiled Request 1.

I disagree, however, with the majority's decision to set aside the Arbitrator's remedy.<sup>1</sup> The pertinent issue, which the majority does not address, is whether the Arbitrator's remedy is a proper exercise of arbitral remedial discretion for the violations the Arbitrator found regarding the Agency's response to the Union's information requests.

The cases my colleagues rely on in notes 74-77 do not address remedial discretion at all – much less arbitral remedial discretion.<sup>2</sup> Instead, the cases discuss the Authority's particularized-need rulings in a ULP context.

But in contrast to what is arguably the scope of the Authority's remedial discretion in ULP cases involving § 7114(b)(4) of the Statute, an arbitrator's remedial discretion may take account of policy and institutional interests, including how a remedy, if awarded or implemented, might affect the parties' collective bargaining relationship.<sup>3</sup>

The Arbitrator's remedy in this case does this. Even if one limits the basis for the remedy in this case to the Arbitrator's finding regarding Refiled Request 1, which the majority upholds, that finding provides a sufficient basis for the Arbitrator's remedy. Setting forth his considerations regarding the

remedy, the Arbitrator focused on the controversy's impact on the parties' collective bargaining relationship:

This controversy has been raging between the parties for well more than a year. . . . The underlying overtime grievance has remained pending due to the continuing production dispute. It is time for the parties to reach closure on this dispute and be able to proceed to hearing on the overtime issues pending before the previous [a]rbitrator.<sup>4</sup>

Noting that he “has generally favored the production of evidence needed by a party in connection with processing a grievance to its conclusion,”<sup>5</sup> the Arbitrator found that “[t]here should be sufficient disclosure of information to provide for a full and fair hearing.”<sup>6</sup> The Arbitrator continued: “[N]either statute, common law, nor arbitration custom and practice intends that an arbitration hearing is a matter of ‘trial by ambush.’ The purpose of full and fair disclosure of information is to avoid that potential.”<sup>7</sup>

Consistent with these views, the Arbitrator then ordered the Agency to give the Union certain information – including a year's worth of attendance data.<sup>8</sup>

Because the Arbitrator's remedy is a proper exercise of arbitral remedial discretion in this case, I would deny the Agency's exception to the Arbitrator's remedy.

<sup>1</sup> Majority at 10.

<sup>2</sup> *Id.* at 9-10.

<sup>3</sup> See, e.g., *Def. Sec. Assistance Dev. Ctr.*, 60 FLRA 292, 294 (2003) (“the explicit policy on arbitration remedies recognized by the Authority has always been one of according broad discretion to arbitrators in the fashioning of appropriate remedies”); *VA*, 24 FLRA 447, 450 (1986) (“both the Authority and [the] [f]ederal courts have consistently emphasized the broad discretion to be accorded arbitrators in the fashioning of appropriate remedies.”); see generally National Academy of Arbitrators, *The Common Law of the Workplace: The Views of Arbitrators* 327-329 (Theodore J. St. Antoine, ed., 1999) (one authority of the arbitrator to formulate a specific remedy “deals with policy concerns, that is, what will be the likely impact of a specific remedy on the collective[-]bargaining relationship . . . .” “If, as claimed by the Supreme Court, arbitrators are usually chosen because of the parties' confidence in their knowledge of the ‘common law of the shop,’ it is expected that they will draft remedies that may not explicitly be cited within the four corners of the [parties'] agreement.”) (citing *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

<sup>4</sup> Supplemental Award at 5.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 6-7.