BEFORE
ANDREW M. STRONGIN
ARBITRATOR

March 5, 2019

In the Matter of the Arbitration between-	:	
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DEPARTMENT OF VETERANS AFFAIRS	:	
	:	
-and-	:	**FMCS Case No. 17-54365**
	:	
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NVAC	:	

APPEARANCES:

For the Agency:

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For the Union:

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This grievance protests the determination and subsequent action of the Agency, continuously since July 10, 2017, in publishing on a public-facing website "Adverse Actions Reports" ("AARs") setting forth certain information relating to disciplinary actions taken against Agency employees for the expressly stated purpose of "hold[ing] our employees accountable and mak[ing] our personnel actions transparent. Posting this information online for all to see, and updating it weekly, will do just that."[1] Identifying itself as "the first federal agency to make such data public," the Agency further indicated that, "For privacy reasons, the adverse action list will not include employee names, but will give information on the position, VA region or administration, and type of adverse or disciplinary action that has been taken." The Union claims in this grievance that compilation and publication of the information contained in this list, actions taken without notice or opportunity to bargain, violates the Statute, 5 U.S.C. § 7116(a), as well as the Privacy Act, 5 U.S.C. § 552a, the Agency's Handbook 6300.5, and the parties' 2011 Master Agreement. The Union seeks a cease and desist order; posting of an appropriate remedial notice; and an award of costs and attorneys' fees under the Privacy Act. As a preliminary matter, the Agency contends that this matter does not sufficiently state a "grievance," as defined by the parties' Agreement, and therefore is not arbitrable.

BACKGROUND

In the wake of a highly publicized "wait time" scandal at the Agency and inception of new Agency administration as of January 20, 2017, David J. Shulkin, the Agency's new Secretary, directed the publication on a public-facing

[1] Initially, the AAR was updated weekly, but that frequency gave way to bi-weekly and then monthly updates.

website of certain disciplinary matters for the express purpose of rehabilitating the Agency's public reputation, literally intended as a measure to rebuild the public's trust in the Agency. The task of publishing this list of disciplinary actions initially fell to the Agency's Office of General Counsel's Office of Accountability Review ("OAR"), which later gave way to a new Office of Accountability & Whistleblower Protection ("OAWP"). According to OAWP Senior Advisor Philip Works, information relating to disciplinary matters routinely is requested by members of Congress, particularly the House and Senate Veterans Affairs Committees, but such requests never did, and still do not, require the Agency to publish such or similar information on any public-facing website. It is undisputed that the decision to publish the information to the general public was Secretary Shulkin's, and that he made that decision to redress a major problem with public credibility, and specifically in an effort to rehabilitate the Agency's public image.

Regarding the source of the information published in the AARs found on the Agency's website, and succinctly stated by the Agency itself, AARs "published after April 1, 2018 use data from official VA HR systems to ensure the accuracy and reliability of the reports. Previous reports were based on information collected manually by HR offices across VA and compiled by OAWP." More specifically as described at hearing:

Initially, in order to respond to Congressional inquiries, OAR created a database specially to compile records of employee discipline ("Adverse Action Tracker"). As the Tracker is described, there had been no existing database to enable the Agency to provide responsive information to Congressional inquiries into employee discipline, so OAR built what is described as an *ad hoc* computerized information sharing site where offices—both national and international—could report on every instance of employee discipline to include information fields for category/occupation, level, grade, offense, date, charge, and decision.

Once the decision was made to publish disciplinary records to the general public beginning on July 10, 2017 (including records retroactive to January 20, 2017), OAR accessed the Tracker, scrubbed it of certain information that it understood made the specific employees' identities "overly obvious," and ultimately published four categories of information: Organization, Position, Action Taken, Effective Date.

When OAWP replaced OAR, and for purposes of publishing the AARs, OAWP initially used the same Tracker database before replacing it with a new database, "HRSmart," in early 2018. It is undisputed that HRSmart includes Employee Identification Numbers ("EIN"), whereas the Tracker did not, albeit Works testifies that EINs are not used to create the AARs. Regardless, concerns persisted within Agency management that publication of the AARs raised privacy concerns and use of HRSmart required efforts to continue to mitigate against disclosure of information that made it too easy to connect the published records with particularly-identifiable employees. Thus, OAWP continued to undertake efforts to scrub or sanitize the disciplinary records in an effort to mask employee identity. To this day, however, OAWP continues to publish the AARs using the same four categories of information used since the inception. Ultimately, Works testifies that OAWP intends the AAR listings to be as generic and anonymous as can be.

Despite the efforts described by Works to protect personally identifiable information, Union representative William Wetmore, AFGE/NVAC Third Executive Vice President, testifies without dispute that individual employees can be identified from the information published on the Agency's public-facing website, particularly by other employees even if not by the general public. Wetmore testifies that the instant grievance is the Union's response to employee privacy complaints, and specifically that employees complained to the Union that they could identify other employees based on the published information. Further, although it is

undisputed that the publication of the AAR has no direct impact on the way in which employees perform their jobs, Works acknowledges that publication of the AAR nevertheless has given rise to employee privacy complaints and has a negative effect on employee morale, in that publication of private information impacts individual's interest in working or continuing to work for the Agency, insofar as it is easy to end up on what Works describes as the "naughty list."

It is undisputed that the Agency publishes the AARs without seeking or obtaining the consent of the disciplined employees and, further, without the publication of any System of Records Notice, or "SORN," which ordinarily would be required under the Privacy Act for an agency newly to publish lists such as the AAR without obtaining employee consent. It also is undisputed, as noted, that the Agency began publishing the AAR without providing the Union with notice or opportunity to bargain.

The Union grieved on July 11, 2017, and when the parties could not resolve their disagreement, the matter proceeded to arbitration. The parties submitted post-hearing briefs setting forth their respective positions, incorporated herein in their entirety by reference, the principal points of which are discussed below.

DISCUSSION

A. The matter is grievable.

Preliminarily, the Arbitrator is not persuaded that the Union's grievance is deficient. Art. 43, § 2.A, of the Agreement broadly defines a "grievance" as follows:

> **A grievance means any complaint by an employee(s) or the Union concerning any matter relating to employment, any complaint by an employee, the Union, or the Department concerning the interpretation or application of this Agreement and any supplements or any claimed violation, misinterpretation or misapplication of law, rule, or regulation affecting conditions of employment. The Union may file a grievance on its own behalf, or on behalf of some or all of its covered employees.**

Here, the Union alleges that the Agency's publication of the AAR affects employee working conditions and violates the Privacy Act; the Agency's Handbook; and the parties' Agreement insofar as it incorporates the Privacy Act protections under Art. 17 (Employee Rights) and Art. 24 (Official Records). The Union specifically alleges that these violations "allow an individual to discern the identity of a disciplined employee, without their consent, thus violating the privacy rights of bargaining unit employees." The grievance separately alleges that the Agency's unilateral publication of the AARs, without providing the Union notice or opportunity to bargain, constitutes an unfair labor practice and specifically violates the Union's bargaining rights under the Statute.

The question whether the Union ultimately is able to substantiate its grievance must not be conflated with the much different and preliminary question whether a purported grievance sufficiently states a complaint within the meaning of Art. 43, § 2.A. Insofar as the Union's grievance alleges violations of law, rule, and regulation affecting employee working conditions, and that such alleged violations occurred in the context of an unfair labor practice, the Arbitrator finds that it satisfies the contractual definition of a "grievance" established by the parties' Agreement.

Of note, Art. 43, § 2 of the Agreement largely tracks the definition of "grievance" found in the Statute at 5 U.S.C. § 7103(a)(9). The Arbitrator finds that the grievance at issue likewise meets the Statute's definition of grievance.

B. The Agency Violated the Privacy Rights of Bargaining Unit Employees

1. The Agency Violated the Privacy Act

Subject to exceptions not claimed by the Agency in this action, the Privacy Act, 5 U.S.C. § 522a(b) provides in relevant part, "No agency shall disclose any record which is contained in a system of records by any means of communication to any person … except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains …."[2]

The Union asserts, and the Agency does not contest, that publication of the AARs on the Agency's public-facing website, where they are available to the general public, is a "disclosure" within the meaning of the Privacy Act. The Arbitrator agrees, based on the plain meaning of the term as used in § 552a(b), and as more specifically defined in the associated federal regulation, 5 C.F.R. § 297.102 ("*Disclosure* means providing personal review of a record, or a copy thereof, to someone other than the data subject or the data subject's authorized representative, parent, or legal guardian.").

The Agency disputes, however, whether the information contained in the AARs constitutes "records" within the meaning of § 552a(a)(4) of the Privacy Act, which provides:

> **the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or**

[2] It is uncontested that publication of the AARs at issue in this case, based on information contained initially in the Tracker and then HRSmart recordkeeping systems, was an unprecedented, new effort, undertaken by the Agency without publication of any notice or "SORN" that it intended to do so as a "routine use" under the Privacy Act, and without consent of the employees about whom the information as published. Neither does any Congressional inquiry require such publication.

> **employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph[.]**

Both parties cite the case of *Tobey v. NLRB*, 40 F.3d 469, 471 (D.C. Cir. 1994), in support of their respective, conflicting positions as to the two-pronged test whether the disputed information both is "about" an individual *and* contains other identifying particulars. Although *Tobey* provides no bright-line test, *Tobey* suggests that the disputed information appropriately is viewed as a Privacy Act "record," because the published information includes items of information "about" not just the issuance of discipline, but about specific instances of discipline issued to particular individuals who, as discussed below, in some instances can be particularly identified by the published information notwithstanding the Agency's effort to scrub or sanitize the data set.

Unlike the facts in *Tobey*, which involved an agency's use of a case tracking and monitoring database to infer substandard employee performance based on the number of cases assigned to a particular individual, the AARs in this case are created for the express purpose of publicizing discreet instances of employee discipline. Here, no inference is required to discern poor employee performance; to the extent any entry is attributable to a particular employee due to the publication of identifying particulars, that entry is a record "about" that specific individual.

In addition to being "about" particular individuals, the details published in the AARs—each individual employees' Organization, Position, Action Taken, and Effective Date—constitute just such "identifying particulars" as are described in *Tobey*. Wetmore specifically, credibly, and without contradiction or dispute testifies that bargaining unit employees expressed concern to him that the information published in the AARs permits identification of particular employees, *i.e.*, the Agency's efforts to scrub or sanitize the published information, however

stringent, is not uniformly sufficient or successful. To highlight Wetmore's point with just one example of numerous possible, any search in the AAR of removal actions of Cemetery Caretakers in the NCA Continental District in April 2017 would produce but a single entry, a point made plain by the AAR published on July 10, 2017. The disappearance from the workplace of that single employee in that particular month, due to the disclosure of the information made available to the general public, including other employees, allows other employees readily to discern the reason for the particular employee's absence from the workplace.

The Agency acknowledges that publication of the AARs implicates privacy issues, and indeed it endeavors to scrub and sanitize the AARs precisely for the purpose of avoiding disclosure of employee's identifying particulars. Efforts to scrub and sanitize records, however laudable, are not a sufficient defense to proof that, despite those efforts, the Agency's publication nevertheless permitted those with no right to know specifically to identify particular disciplined employees. The Union's evidence is that the Agency's efforts are unsatisfactory to the intended purpose, and the Agency's evidence does not disprove it.

The conclusion that publication of the AARs constitutes a disclosure of Privacy Act "records" is fully consistent with the Agency's own understanding of the problem as reflected also in an earlier Advisory Opinion authored by the Agency's own General Counsel (March 14, 2000). There, the Agency's General Counsel considered the question whether the Agency could "publish the names of management officials disciplined for violating the EEO laws." In the context of the Privacy Act, 5 U.S.C. § 552a, the General Counsel specifically held that the Agency was prevented from publishing such information because:

> **[I]t is clear that announcements of disciplinary action taken against discriminating employees must be done in anonymous form, e.g., so that a third party cannot identify the individual who is the record subject from the information**

> **released. In many situations the omission of personal identifying information – such as an offender's name, telephone number, facility and/or service, and title – is not adequate to provide necessary privacy protection. When a small group of individuals (for example, the employees in a VA medical center) can easily identify an employee from the details contained in the information being released, such limitation would not adequately protect privacy interests. A determination of what constitutes identifying information requires both an objective analysis and an analysis "from the vantage point of those familiar with the mentioned individuals." *Cappabianca v. Commissioner, United States Customs Service*, 847 F. Supp. 1558, 1565 (M.D. Fla. 1994). (Although this is a FOIA case rather than a Privacy Act case, the rule is equally applicable.)**

Thus, the Agency General Counsel held that, "Under the Privacy Act, the Department may not, on its own initiative and without prior written consent, disclose information about disciplinary actions against identified management officials." The General Counsel continued, "Information about disciplinary actions cannot contain details which would allow employees, including employees at the involved facility, to identify the disciplined employee."

On this record, the Arbitrator finds that the entries in the AARs are both "about" particular employees, and contain particular identifying information that allow the subjects of those postings to be unmasked by other employees. The Arbitrator credits the Union's evidence that despite the Agency's effort to scrub information derived directly from records relating to particularly-identifiable employees, the employees remain identifiable by others due to the inclusion in the AARs of the Organization, Position, specific Action Taken, and Effective Date of the action. The Union's evidence reasonably establishes, and the Arbitrator credits it, that particular employees can be identified by the information provided, despite Agency efforts to scrub it.

Following *Tobey's* reasoning, the Arbitrator likewise finds the records to be contained within a "system of records," *i.e.*, the Tracker and then HRSmart.

Under the Privacy Act, 5 U.S.C. § 552a(a)(5), "system of records" is defined as follows:

> **the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual[.]**

As Works testifies, the Agency always for purposes of this case has culled disciplinary records attributable to particular employees from one or another recordkeeping system in order to capture specific instances of employee discipline. HRSmart, just as the Tracker before, is used to collect personally identifiable information about particular employee discipline and then compile it into publication form by scrubbing it of certain personally identifying information.

Unlike the situation in *Tobey*, where the recordkeeping system was "about" cases, not people, the records and the systems in which they are stored by the Agency in this case are about specific issuances of discipline to specific employees. As Works acknowledges, all of the information contained in the AARs is drawn from recordkeeping systems from which information is retrieved that contains identifying particulars assigned to the individual disciplined employee. That the Agency scrubs the published record of certain information that most readily permits an employee to be identified later, does not answer the problem that the remaining information that the Agency does publish still permits individual employees to be identified. Thus, the Arbitrator finds the records at issue to be drawn from a "system of records" as defined in 5 U.S.C. § 552a(a)(5).[3]

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[3] If and to the extent it were to be argued that the AARs, after scrubbing, themselves should be viewed as a "system of records" independent of HRSmart, the Arbitrator would reach the same conclusion. The facts of the case, as found by the Arbitrator, demonstrate that the AARs, as published, groups records under the Agency's control from which information can be retrieved by identifying particulars assigned to individual employees in at least some cases.

Notwithstanding the foregoing, the Arbitrator does not gainsay the Agency's efforts to sanitize or scrub the published information, and does not gainsay the Agency's assertion that the prevalence of discipline within some positions at certain organizations likely provides some measure of anonymity. The Agency's efforts to scrub and sanitize the records, however, just underscores the reality that the Agency is publishing information that it knows *must* be scrubbed due to Privacy Act concerns, specifically because the information otherwise could not be published. Works' testimony cannot reasonably be construed otherwise, and the General Counsel's advisory opinion makes it plain.

In summary, the Agency neither sought nor obtained any employee's consent to publish the AARs, and the Agency does not argue for the application of any of the 12 enumerated exceptions to the consent requirement as set forth in § 552a(b)(1) – (12). Based on the foregoing, the Arbitrator finds that the Agency's publication of the AARs violates the Privacy Act, and specifically its § 552a(b), by disclosing records contained in a system of records by publishing those records on a public-facing website without consent or other justification.

2. The Agency Violated Articles 17 and 24 of the Agreement

The Union persuasively argues that the Agency's violation of the Privacy Act, as detailed above, likewise constitutes a violation of the parties' Agreement, and specifically Arts. 17 and 24.

Article 17, § 1, provides in pertinent part that, "Employees will … be afforded proper regard for and protection of their privacy … rights." Violation of an employee's rights under the Privacy Act, in the Arbitrator's opinion, suffices to establish a violation of the employee's privacy rights within the meaning of Art. 17, § 1. By publishing the AARs that allow certain individual disciplined employees to

be identified in violation of their right to privacy under both the Privacy Act and, as discussed immediately below, Art. 24 of the Agreement, the Agency violated Art. 17,§ 1 of the Agreement.

Likewise, Art. 24, § 1, provides in pertinent part:

> **No personnel record may be collected, maintained, or retained except in accordance with law, government-wide regulations, Department regulations, and this Agreement or its Supplements. All personnel records are confidential and shall be known or viewed by officials only with a legitimate need to know for the performance of their duties; they must be retained in a secure location….**

Records of employee discipline constitute "personnel" records that must be kept "confidential" subject to limited disclosure. Publication of those records on a public-facing website, made available to the general public purely for public-relations purposes, plainly is not an allowable disclosure under Art. 24. Likewise, retention of those records on a public-facing website, accessible by the general public, certainly runs afoul of the contractual requirement that such records be retained in a "secure location," where the term is meant to refer to the protection of such records against improper disclosure.

3. The Agency Violated Handbook 6300.5

It is undisputed that the Agency is permitted to maintain the system of records from which the information compiled into the AARs is culled. The record supports the conclusion that such system of records generally is maintained consistent with the "SORN" published in the Federal Register, but the Union argues persuasively that the Agency has not published any new "SORN" to justify any new, routine use of its recordkeeping system for the purpose of publishing the AARs. As the Union argues, the Agency's Handbook 6300.5 requires, at subsection 3(b),

publication of a new SORN in the event of any "major" change in the use of records within a system. The Handbook defines "major" change as including "(c) A change that alters the purpose for which the information is used," and "(f) The addition of a routine use pursuant to 5 U.S.C. 552a(b)(3)."

As the record makes clear, the use of the Agency's recordkeeping systems for the publication of AARs beginning in July 2017 was new and indeed unprecedented at the Agency and any other federal agency. While disciplinary records certainly were maintained in systems of records, never previously did the Agency maintain such records for the purpose of publishing them to the public for the purpose of countering unfavorable press coverage. Further, the fact that the Agency discloses such information by updating the AARs on a monthly basis, and previously on a weekly and then bi-weekly basis, confirms that the Agency intends the new "use," *i.e.*, the publication in the form of AARs, to be "routine" as defined at 5 U.S.C. § 552a(b)(3).[4] If the Agency is to extend its systems of records to a new purpose, as the Union correctly asserts in light of the Privacy Act's provisions, it must publish a new SORN to indicate that new intended use.

C. The Agency Committed an Unfair Labor Practice

Independent of the foregoing, the Agency's unilateral publication of the AARs without providing the Union with notice or opportunity to bargain constitutes an unfair labor practice in violation of § 7116(a)(1) and (5) of the Statute. As the Union argues, the Agency has a statutory duty to bargain with the Union over

[4] To the extent the Agency might take the position that the AARs themselves are considered to be the "system of records" at issue, the Agency still would be found in violation of the Handbook, in that the AARs themselves would be a "new system" that must be proposed and reported in the Federal Register under Handbook § 3(a).

changes in the terms and conditions of employment that are more than *de minimis*, which duty is predicated on the provision of notice. It is undisputed that the Agency published the AARs without notice to the Union or opportunity to bargain, but the Agency argues that the publication does not constitute *any* change in working conditions, not even a *de minimis* change.[5]

First, the Arbitrator finds that the publication of the AARs constitutes a change in "conditions of employment" as that term is defined at § 7103(a)(14) of the Statute and in the recent decision of the FLRA in *United States DHS, CBP (El Paso) and AFGE, NBPC, Local 1929*, 70 FLRA No. 102, 70 FLRA 501 (2018). Until the advent of the Agency's publication of the AARs, bargaining unit employees worked pursuant to the collectively bargained guarantee, not to mention federal protection in the guise of the Privacy Act, that any instances of discipline would be kept confidential, subject only to limited disclosure. With the Agency's unilateral decision to publish records of employee discipline on a public-facing website—which as discussed above enabled other employees, if not the general public, specifically to correlate the published records to specific individuals, violating the disciplined employee's privacy rights under the Privacy Act and Agreement—employees newly were required to work under the threat of public disclosure of confidential personnel information, where the disclosure was not intended to improve their performance, but rather was intended to mollify public criticism of the Agency.

In the Arbitrator's opinion, as in the opinion of Agency witness Works, working under the cloud of such disclosure "absolutely" might impact an individual's desire to work for, or to continue to work for, the Agency, and

[5] The Agency does not dispute that it denied the Union notice and opportunity to bargain; it argues, instead, that no bargaining obligation exists because the disputed action did not affect working conditions. The Arbitrator joins the parties where he finds them on those issues.

Wetmore's testimony establishes that it had precisely that effect on employees who complained to him personally about the Agency's new publication policy. That is, in the parlance of the FLRA, the threat of the disclosure impacted "'the day-to-day circumstances under which an employee perform[ed] his or her job.'" 70 FLRA 501, 503 (*quoting Fort Stewart Sch. v. FLRA*, 495 U.S. 641, 645-46 (1990)). Thus, in conclusion, the Arbitrator finds that the policy pursuant to which the Agency publishes the AARs is one that changes "conditions of employment," in that it "affects working conditions."

Under relevant caselaw, the question whether a disputed action that affects working conditions constitutes more than a *de minimis* change is a fact-driven inquiry. Given that the action at issue in this case was unprecedented across the federal service at the time it was taken, and so far as this record shows remains so, neither party can identify any relevant, controlling precedent. Each looks to other, arguably analogous situations. The facts of record include the Agency witness's acknowledgment that publication of the AARs can impact an individual's willingness to become or remain employed by the Agency, as well as the Union witness's testimony that it does precisely that. Moreover, the record shows that the publication itself violates the Privacy Act, the Agency Handbook 6300.5, and Articles 17 and 24 of the Agreement, which specifically recognize an employee's right to privacy and the limited purposes for which confidential personnel records are subject to disclosure. Given these factors, the Arbitrator finds that the Agency's publication of the AARs is more than a *de minimis* change in working conditions; indeed, it is a change that violates specifically negotiated contractual rights.

Employee privacy rights, insofar as they are protected by federal law, by the Agency's Handbook, and by specially negotiated provisions of the parties' Agreement, obviously are a weighty matter. The Agency's unilateral determination to alter the parties' Agreement, to subject to publication records they agreed would

be kept confidential except for limited disclosures not relevant here, plainly alters working conditions that carry the hallmark of substantive, negotiated rights. If the Agency wishes to change the terms by which such records may be disclosed to the general public, that is a matter that must be made subject to bargaining pursuant to proper notice, admittedly not provided here.

Finally, if and to the extent the Agency adheres to the view that its publication of the AARs is a protected reserved management right under 5 U.S.C. § 7106(a), the Arbitrator finds otherwise. There is no discernible reserved management right to publish disciplinary records for the purpose of countering unfavorable press. Moreover, even were the Arbitrator to find a reserved management right embedded within this case, which he does not, nothing in § 7106(a) precludes the parties from negotiating under § 7106(b) "procedures" or "arrangements" respecting the publication of the AARs, in which case the Agency still would be required to provide the notice and opportunity to bargain that it deprived the Union in this case.

D. Remedy

In remedy of the several violations discussed above, and as specifically contemplated by the Privacy Act, 5 U.S.C. § 552a(g), the Arbitrator directs the Agency to remove the AARs from its website and cease and desist publishing the AARs in that or like manner until such time as it achieves compliance with the Privacy Act, Agreement, Handbook, and Statute consistent with the foregoing discussion. Nothing in this Award, it should be noted, should be read as precluding the Agency from publishing statistics relating to discipline that are not personally identifiable, so long as the Agency does so consistent with its contractual and statutory obligations.

Further, the Arbitrator grants the Union's request for costs of the arbitration together with reasonable attorney fees, consistent with 5 U.S.C. § 552a(g)(4). In this regard, the Arbitrator specifically finds the Agency's violation of the Privacy Act was willful or intentional, in that the publication was pursuant to a specific intention to publicize to the general public records of employee discipline for public relations purposes not authorized by either federal law or the Agreement; which information the Agency attempted to scrub precisely because it knew publication could lead to identification of specific individuals; which the Agency continued to publish even after the Union indicated that publication allowed specific identification of particular employees; and which the Agency's own General Counsel's advisory opinion, as quoted above, indicated in strikingly similar circumstances was not permissible under the Privacy Act. The decision to disclose to the general public the information in its published form, notwithstanding efforts to scrub or sanitize other information that even more readily permitted identification of particular disciplined employees, flagrantly disregarded the Agency's own General Counsel's advisory opinion and the rights of those employees whose particular work circumstances allowed them particularly to be identified. *AFGE Local 1102 and U.S. DOJ, BOP (Seattle)*, 65 FLRA No. 36, 65 FLRA 148, 150 (2010).

As for evidence that the disclosures adversely affected bargaining unit members, Wetmore testifies credibly and without dispute to the ease with which bargaining unit employees were able to identify certain disciplined employees, with a consequent negative effect on employee working conditions. Works also acknowledged that the disclosures could have a negative effect on employee recruitment and retention. Certainly, the public airing of confidential information has a negative effect on the disciplined employee, who has a contractual right to

confidentiality in the maintenance of his or her disciplinary records, and by agreement of the parties is not to be subject to public shaming.

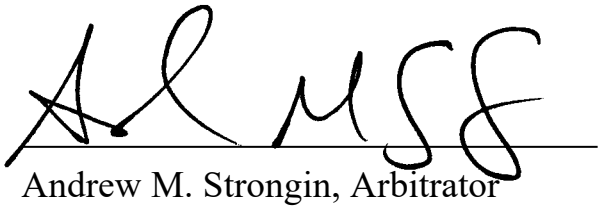
In this last regard, the Agency's purpose is to rehabilitate its public image without specifically identifying particular employees, without any intention to disclose the identity of any particular employee. That the disclosures at issue are accidental and contrary to the Agency's intended purpose in no way detracts from the fact that the disclosures themselves were willful and intentional, taken with the known risk that publication of such information could lead to privacy violations as recognized by the Agency's witness and its own General Counsel's advisory opinion.

The Union shall have thirty (30) calendar days from the date of this Award to make application for reimbursement of its costs and reasonable attorney fees, with appropriate supporting detail. Upon receipt of any such request, the Agency shall have a thirty (30) calendar day period either to file a reply or to request the Arbitrator's assistance in resolving any resulting dispute. Absent timely request by the Agency for arbitral assistance, the amount sought by the Union shall be payable in full, as claimed. The Arbitrator retains jurisdiction to resolve any questions that may arise over application or interpretation of the remedial provisions of this Award, including specifically to resolve any dispute over the amount of costs and attorney fees to be payable to the Union.

Further, in remedy of the unfair labor practice, the Agency is directed to cease and desist publishing the AARs in this or like manner pending satisfaction of the Union's bargaining rights. The Agency further is directed to issue an electronic notice posting of the unfair labor practice to all bargaining unit employees, to be signed by the Secretary as the officer who directed the wrongful publication of the protected information at issue.

DECISION

The grievance is sustained. The remedy is as stated in Sec. D, above.



Andrew M. Strongin, Arbitrator

Takoma Park, Maryland