IN THE ARBITRATION BETWEEN
FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTION CTR, FORREST CITY, AGENCY AND
AFGE LOCAL 922, UNION

OPINION AND AWARD

FMCS CASE NO. 09-02744-3

Arbitrator:	William E. Hartsfield
Collective Bargaining Agreement	Master Agreement and Local Supplemental Agreement (collectively CBA) (JX1)
Hearing Site:	Forrest City, Arkansas
Hearing Dates:	August 24, 2011 and May 22, 2014
Record Closed:	September 29, 2014
Date of Award:	October 29, 2014
Representing the Union:	Stephanie J. Bryant Taryn Wilgus Null Mehri & Skalet, PLLC 1250 Connecticut Ave. NW Suite 300 Washington, DC 20036
Also present for the Union:	Jeff Roberts, President, AFGE Local 0922
Representing the Agency:	Michael A. Markiewicz Federal Bureau of Prisons U.S. Dept. of Justice 230 N. First Ave. Ste 201 Phoenix, AZ 85003
Also present for the Agency:	Diane Meadows, Human Resource Mgr.
Witnesses called by the Union:	Jeff Roberts, President, AFGE Local 0922 Jody Cook, Vice Pres., AFGE Local 0922 William Miller, Utility Systems Supervisor Jason Carns, Electronics Technician Susie Roberts, Union Steward (2009)
Witnesses called by the Agency:	Carol Brown, Facility Manager (2007-10) Rickey Galloway, Human Resource Mgr. Karen Street, Computer Service Mgr.
Decision:	The Grievance is upheld.

OPINION AND AWARD

ISSUES

The parties did not agree upon the issues and authorized the Arbitrator to frame the issues. (Aug. Tr. 6[1] and Tr. 6). The parties suggested various issues including:

At the first hearing, the Union framed the issues as:

> Whether the Bureau of Prisons in this case violated 5 USC 552, otherwise known as the Privacy Act, in exposing employees' records to inmates and anybody else who wanted to come in contact with them, within the meaning of 552-A, such that the Union members who were affected should be entitled to damages under 552-A, including, but not limited to, attorney's fees?

(Aug. Tr. 5).

At the second hearing, the Union framed the issues as:

> Did the Bureau of Prisons FCC-Forrest City repeatedly violate the Privacy Act by failing to secure FCC-Forrest City employees' personal information in February and March 2009?
> If so, what is the remedy?

(Tr. 14).

At the first hearing, the Agency framed the issues as:

> Does the Arbitrator have jurisdiction of a Privacy Act claim?
> Did the Agency violate the Privacy Act?
> If so, what is the appropriate remedy?

(Aug. Tr. 6).

At the second hearing, the Agency framed issues as:

> Does the Arbitrator have jurisdiction on a Privacy Act claim?
> Did Management violate the Master Agreement when certain file cabinets in the Facilities Department were left unsecured in 2009?
> Did the Union delay proceeding with its grievance such that it did not comply

[1] References to the August 24 hearing transcript are denoted "Aug. Tr." References to the May 22 hearing transcript are denoted "Tr."

with CBA Article 31 §a, to proceed expeditiously?
If so, what is an appropriate remedy?

(Tr. 15 and 127).

In its posthearing brief, the Agency framed the issues as:

> Does the Statute allow the union to file a grievance alleging a violation of the Privacy Act and requesting remedies under the Act?
> Did the union fail to timely prosecute this case?
> Did FCC Forrest City violate the Privacy Act by failing to secure FCC Forrest City employees' personal information in February and March 2009?
> If so, What is an appropriate remedy?

(Agency Brief p. 1).

During the second hearing, the Agency and the Union stipulated to a revision of the Union's statement of the issues by omitting the word "repeatedly" (Tr. 129). The Agency presented that revised issue as:

> Did the Bureau of Prisons, FCC-Forrest City violate the Privacy Act by failing to secure FCC-Forrest City employees' personal information in February and March 2009?
> If so, what is the remedy?

(Tr. 129).

Shortly after the stipulation, the parties disputed its scope and meaning. The Union noted it was not stipulating that its Grievance was barred by the Agency's argument that any Privacy Act claim belongs only in federal court. (Tr. 130-31). Essentially, the Union continued to pursue its Grievance based on the CBA asserting that a Privacy Act violation violated the CBA. (Union's Reply Br. p. 6). The Agency urged the stipulated issue limits the dispute to a Privacy Act violation and not a CBA violation. (Agency Br. p. 8).

While the parties may have agreed on the words used in the stipulated issue, they disagreed concerning its scope and meaning requiring an interpretation of the stipulated issue.

Moreover, the parties agreed the Arbitrator may frame issues over which they disagreed. (Aug. Tr. 6 and Tr. 6). Further, the issue of a violation of the CBA is necessary to the resolution of the presented issues and necessarily arises when addressing jurisdiction, laches, the request for an adverse inference and any remedy.

When the parties do not agree on the scope of the issues, it is commonly recognized that the arbitrator has the authority to address that dispute. *See Waverly Mineral Products Co. v.*

United Steelworkers, 633 F. 2d 682, 685-86 (5th Cir. 1980) ("it was for the arbitrator to decide just what the issue was that was submitted to it and argued by the parties"); *McKinney Mfg. Co.*, 19 Lab. Arb. (BNA) 291, 292 (Reid, Arb.) (1952) (arbitrator had implied authority to restate the issue contained in the submission); See Elkouri & Elkouri, *How Arbitration Works* at pp. 7-6 through 7-8 (Kenneth May, Editor-in-Chief, 7th ed., 2012). For example, the topic may be implicit within the grievance and the stipulated issues. Indeed, deference is granted to an arbitrator's interpretation of a stipulated issue. *U.S. Dep't of Transp. Fed. Aviation Admin. and Nat'l Air Traffic Controllers Ass'n AFL-CIO*, 64 FLRA 612, 613 (Mar. 29, 2010). Further, the hearing afforded both parties a reasonable opportunity to develop the issues as framed below and the parties amply developed them.

Although previously addressed in the Jurisdiction Ruling, the Agency has now submitted different arguments challenging the Arbitrator's jurisdiction. While that prior ruling stands and may be viewed as res judicata, collateral estoppel or "law of the grievance," the Award addresses those arguments from an abundance of caution.

In addition to the dispute over the meaning of the stipulated issue, the parties disputed whether the Arbitrator could draw an adverse inference. The Union urged the Arbitrator to draw an adverse inference due to the Agency's failure to provide documents relating to its investigation of the disclosure of Union members' private information. As detailed below, the Agency argued that an adverse inference is not appropriate.

Accordingly, the Arbitrator framed the issues as follows:

Does the Arbitrator have jurisdiction over the Grievance?

Did the Union delay proceeding with its Grievance such that it did not comply with CBA Article 31 Section a, to proceed expeditiously?

May the Arbitrator draw an adverse inference based on the Agency's actions?

Did FCC Forrest City violate the CBA by failing to secure FCC Forrest City employees' personal information in February and March 2009?

If yes, what is the remedy?

PROCEDURE

The parties selected the Arbitrator through the procedures of the Federal Mediation and Conciliation Service. Pursuant to the parties' agreement, a hearing convened on August 24, 2011. Following that hearing, the parties submitted the issue of jurisdiction and briefs on that issue.

After the Jurisdiction Ruling finding that the Arbitrator had jurisdiction of the Grievance,

a second day of hearing occurred on May 22, 2014 to address the merits. Both parties made opening statements. The parties submitted and the Arbitrator admitted Joint Exhibits 1-5, Union Exhibits 1-14 and Agency Exhibits 1-4. All witnesses were sworn. A Certified Shorthand Reporter attended both hearing days and provided transcripts. Both parties submitted posthearing briefs and posthearing replies.

Both parties had a full opportunity to examine and cross-examine witnesses under oath, to offer exhibits, to raise objections and to make known their respective positions and arguments.

The parties agreed that if the Arbitrator found any CBA violation, then he may provide a general description of an appropriate remedy allowing the parties to negotiate the implementation of the remedy and he may retain jurisdiction for 90 days if the parties are not able to resolve the remedy. (Tr. 232).

All counsel are to be commended for their zealous, thoughtful and courteous advocacy at the hearing, as well as the quality of the arguments and materials submitted.

STIPULATIONS

The parties stipulated Bruce Dye, Wade Pipkin, Christopher Biggs, Michael Chapman, Brooks Taylor, William Vance, Donald Burton, Brian Frames, Brent South, and Billy Phillips would testify that they:

> (1) are individuals in the Facilities Department who attended a mandatory meeting in March 2009 with the warden;
> (3) that these individuals who are in the Facilities Department took preventative measures on their own time to protect their credit after this meeting, and
> (3) that after these incidents employees had their credit cards canceled, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined.

(Tr. 125-26).

JURISDICTION

The parties agreed that the Arbitrator had jurisdiction to decide whether or not he had jurisdiction of the Grievance and if he determined he had jurisdiction of the Grievance then he had jurisdiction to decide the remaining issues, i.e., all other conditions of the CBA have been met and the Arbitrator had authority to fashion an appropriate remedy for the disputes in the proceeding and that the Arbitrator had the jurisdiction to issue a final and binding award. (Aug. Tr. 6-8).

RELIEF SOUGHT BY THE UNION

For each Privacy Act violation, each affected employee is entitled to at least $1,000 in damages. For example, if an employee's information was disclosed in Incidents 1, 2, and 3, he would be entitled to damages of at least $3,000.

KEY PROVISIONS OF CBA[2]

Master Agreement, Preamble, D

. . .[the Agency and the Union]
. . .
(D) recognize that the employees are the most valuable resource of the Agency, and are encouraged, and shall be recently unassisted, to develop their potential as Bureau of Prison employees to the fullest extent practicable.

Master Agreement, Article 1, Section a.,

The Union is recognized as the sole and exclusive representative for all bargaining unit employees as defined in 5 United States Code (USC), Chapter 71.
. . .

Master Agreement, Article 3, Section a.,

Both parties mutually agree that this Agreement takes precedence over any Bureau policy, procedure, and/or regulation which is not derived from higher government-wide laws, rules, and regulations.
. . .

Master Agreement, Article 3, Section b.,

In the administration of all matters covered by this Agreement, Agency officials, Union officials, and employees are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect.
. . .

Master Agreement, Article 6, Section b. 2.,

The parties agree that there will be no restraint, harassment, intimidation, reprisal or any

[2] For convenience, the Master Agreement between the Federal Bureau of Prisons and the Council of Prison Locals, American Federation of Government Employees and the Local Supplemental Agreement between the Federal Correctional Institution, Forrest City, Arkansas and American Federal of Government Employees Local 0922 (JX1) are collectively referenced as the CBA. References to Master Agreement indicate the location of the quoted language.

coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:
. . .
2. To be treated fairly and equitably in all aspects of personnel management;
. . .

Master Agreement, Article 7, Section j.,

In accordance with 5 USC, 552a (Privacy Act):

1. the local President will be notified of any proposals or decisions regarding disciplinary or adverse action against bargaining unit staff, and such notification will include the charge(s) and the proposed/decided upon corrective action; and

2. In cases where a disciplinary action or adverse action has been proposed, but no grievance has been filed, the Union will be notified of the terms of the settlement between the Employer and the employee. This notice will include reference to the date the proposal was issued, but will not include individual identifiers, except as outlined in Section j (1). This will not affect the Union's entitlement to data pursuant to the statute.

. . .

Master Agreement, Article 23, Section e.,

If a report on the Upward Mobility Program is required by a higher authority or is otherwise generated by the Employer, the President of the Council of Prison Locals will be provided a copy within fifteen (15) calendar days of the submission of the report. This information will be provided in compliance with the provisions of the Privacy Act.
. . .

Master Agreement, Article 27,

Section a. There are essentially two (2) distinct areas of concern regarding the safety and health of employees in the Federal Bureau of Prisons:

1. The first, which affects the safety and well-being of employees, and involves the inherent hazards of a correctional environment; and

2. The second, which affects the safety and health of employees, and involves the inherent hazards associated with the normal industrial operations found throughout the Federal Bureau of Prisons.

With respect to the first, the Employer agrees to lower those inherent hazards to the lowest

possible level, without relinquishing its rights under 5USC 7106. The Union recognizes that by the very nature of the duties associated with supervising and controlling inmates, the hazards can never be completely eliminated.

With respect to the second, the Employer agrees to furnish to employees places and conditions of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm, in accordance with all applicable federal laws, standards, codes, regulations, and executive orders.
. . .

Section e. Unsafe and unhealthful conditions reported to the Employer by the Union or employees will be promptly investigated. Any findings from said investigations relating to safety and health conditions will be provided to the Union, in writing, upon request. No employee will be subject to restraint, interference, coercion, discrimination, or reprisal for making a report and/or complaint to any outside health/safety organization and/or the Agency.
. . .

Master Agreement, Article 31,

Section a. The purpose of this article is to provide employees with a fair and expeditious procedure covering all grievances properly grievable under 5 USC 7121.

Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution.
. . .

Master Agreement, Article 32,
. . .
Section h. . . .The arbitrator shall have no power to add to, subtract from, disregard, alter, or modify any of the terms of: 1. this Agreement; or 2. published Federal Bureau of Prisons policies and regulations.
. . .

KEY PROVISIONS OF STANDARDS OF EMPLOYEE CONDUCT (JX5)
. . .
8. GENERAL POLICY. Employees of the Bureau are governed by the regulations published in 5 CFR Part 2635. While this Program Statement expounds on those regulations to clarify their application in the Bureau, it does not and cannot specify every incident which would violate the Standards of Conduct. In general, the Bureau expects its employees to conduct themselves in such a manner that their activities both on and off duty will not discredit

themselves or the agency.
. . .

15. CONFIDENTIALITY. Employees of the Bureau have access to official information ranging from personal data concerning staff and inmates to information involving security. Because of the varying degrees of sensitivity of such information, it may be disclosed or released only as required in the performance of an employee's duties or upon specific authorization from someone with the authority to release official information.
. . .

c. Employees may not use, or release for use, official information for private purposes unless that information is available to the general public.

d. Employees may not remove information from files or make copies of records or documents, except in accordance with established procedures or upon proper authorization.

e. Employees may not make statements or release official information which could breach the security of the institution or unduly endanger any person.
. . .

16. GOVERNMENT PROPERTY. Government property is to be used for authorized purposes only.
. . .
c. Personal Use. Personal use of Government property may take place before or after official working hours or during non-paid meal breaks, provided such use does not adversely affect the performance of official duties by the employee or the Bureau, with the following exception:
. . .

Attachment A Standard Schedule of Disciplinary Offenses and Penalties

1. This table is intended to be used as a guide in determining appropriate discipline to impose according to the type of offense committed. The offenses listed are not inclusive of all offenses.
. . .
NATURE OF OFFENSE
. . .
14. *Endangering the safety of* or causing injury to staff, inmates or others *through carelessness* or failure to follow instructions. (emphasis added)
. . .
42. *Unauthorized dissemination of official information.* (emphasis added)
. . .
43. *Use of official information for private purposes.* (emphasis added)

. . .
44. *Unauthorized removal of records or documents.* (emphasis added)
. . .

KEY PROVISIONS OF THE PRIVACY ACT OF 1974

5 U.S.C. § 552a (g)(1),
Whenever any agency . . . (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

5 U.S.C. § 552a (g)(4),
In any suit brought under the provisions of subsection (g)(1)0 or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of - - (A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court.

BURDEN OF PROOF

The parties agreed the Union had the burden of proof on the merits.

BACKGROUND

The Federal Correctional Center, Forrest City, Arkansas (FCC Forrest City) houses approximately 4,000 inmates and consists of three facilities, FCI-Medium, FCI-Low and a satellite Camp. The CBA protects the Union members employed in the Agency's Facilities Department. As described in a memorandum by Jason Cox, an Engineering Technician, about three weeks prior to February 19, 2009, the Agency moved locked file cabinets to an area used to store large equipment colloquially called the "Bone Yard." (UX1 and AX4). At least eight unsecured file cabinets were discovered in the Bone Yard accessible to inmates and staff. (AX4).

The moved cabinets contained job applications and payroll records, including social security numbers, from employees of the federal contractors who built the FCI-Medium facility. (Tr. 27 and AX4). In 2009, the Agency employed in the Facilities Department several individuals who worked for those contractors–Jason Carns, Don Burton, William Vance, and Chris Biggs. (Tr. 31).

On February 19, 2009, Mr. Cox learned that not only had the sensitive files not been destroyed, but the file cabinets were found forced open in the Bone Yard ("First Incident").

Approximately 286 inmates and 585 staff had access to the Bone Yard. (AX4). At times, the inmates were without supervision.

On February 27, 2009, Mr. Cox discovered unsecured file cabinets containing Union members' personal information, including social security numbers, home telephone numbers and credit card numbers, in an open area in the Facilities Department (Incident 2). (UX2). Inmates perform clerical work in the Facilities Department, e.g., they file non-sensitive documents, including using the copy machine also located in an open area.

After Incident 2, the Agency moved the unsecured file cabinets into a manager's office (Ms. Brown's) an office with a lockable door adjacent to the Facilities Department's open area. In March 2009, Jason Carns, an Electronics Technician, went to Ms. Brown's office to get her signature. He discovered she had called in sick, but her office door was unlocked. Mr. Carns saw the file cabinets from Incident 2 in her office and one of the file cabinets appeared to be unlocked with one of the drawers open (Incident 3).

SUMMARY OF UNION'S POSITION

To demonstrate a prima facie case of a Privacy Act violation, a party must show that (1) the disclosed information was a record contained within a system of records, (2) the Agency improperly disclosed the information, (3) the disclosure was willful or intentional, (4) the disclosure had an adverse effect, and (5) actual damages resulted from the disclosure.

Adverse Inference. The Union is entitled to an adverse inference that the investigatory documents the Agency withheld favored the Union's case. *See*, *Dep't of Health & Human Servs., Soc. Sec. Admin.*, 86 LA 1205, 1211 (1986). The Union's Information Request sought pertinent investigatory documents. The only reason the Agency could have to withhold the requested documents is its belief they were adverse to its position. Accordingly, Arbitrator may draw an adverse inference that the investigatory documents demonstrate the Agency violated the Privacy Act.

System of Records. The unlocked file cabinets in Incident 1, located in the Bone Yard, contained applications with contractors' names, social security numbers, dependents' names, and banking information. As the Agency maintained the information which contained both names and identifying numbers, it meets the Privacy Act's definition of a "record." 5 U.S.C. § 552a(a)(4). As the Agency controlled the documents and could retrieve information by name or other identifier, they constituted a "system of records." *Id.*(a)(5).

Incidents 2 and 3 involved the same file cabinets located in the Facilities Department. These cabinets contained documents maintained by the Agency that included employees' full legal names, social security numbers, and phone numbers. (UX12 and UX13). Again, these documents qualify as "records" under the Privacy Act. 5 U.S.C. § 552a(a)(4). As the Agency controlled the documents and could retrieve information by name or other identifier, they

constituted a "system of records." *Id.(a)*(5).

Improper Disclosure. The Union may prove the second element, a disclosure, with circumstantial evidence. *Beaven v. U.S. Dep't of Justice*, 622 F.3d 540, 556 (6th Cir. 2010). That court inferred disclosure when a supervisor left a folder containing employees' personally identifiable information in an area accessible to inmates. *Id.* at 544-45.

Inmates work in the Bone Yard unsupervised with no security cameras. Per Facilities Manager Carol Brown's request, the Agency moved file cabinets containing personally identifiable information, including names and social security numbers, of contractors who built the medium security facility at Forrest City to the Bone Yard. The Agency later hired several of these contractors and some were working as Facilities Department employees in 2009–including Jason Carns, Don Burton, William Vance, and Chris Biggs.

After cabinets were moved to the Bone Yard, a lock shop employee discovered them forced open. (Tr. 28).

In an open area in the Facilities Department inmates perform clerical work, often without supervision. (Tr.34-35, 264 and 226-27). The Agency left unlocked filing cabinets containing employees' names, phone numbers, addresses, and social security numbers in this area for an unknown amount of time. (Tr. 34-35).

Incident 3 involved the same unsecured file cabinets from Incident 2. The Agency moved the cabinets to Manager Brown's office after they were discovered unlocked in the open area. On March 4, 2009, Facilities Department employee Jason Carns discovered Ms. Brown's unlocked office although she had called in sick and was not at work that day. Ms. Brown's office was adjacent to the open area of the Facilities Department where inmates worked and thus accessible to inmates through an unlocked door. Ms. Brown was disciplined and received a one-day suspension for leaving her office door unlocked.

After these three incidents, employees had their credit cards canceled, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined. This happened to employees who had never before experienced any credit problems. The number of employees who experienced credit problems after the incidents compelling the conclusion a disclosure occurred.

In addition to the testimony from Jeff Roberts, Jody Cook, and William Miller cited above, the parties stipulated that Bruce Dye, Wade Pipkin, Christopher Biggs, Michael Chapman, Brooks Taylor, William Vance, Donald Burton, Brian Frames, Brent South, and Billy Phillips would testify that they had "credit cards canceled, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined." (Tr. 125-26). This was not all of the affected employees in the Facilities Department, but merely a representative sample. (Tr. 126). This number of credit problems for people who had

never before experienced them is evidence their records were disclosed.

After Incidents 1 and 2, the Warden called two meetings with all Facilities Department staff to inform them there had been a potential breach of personal information. (Tr. 47-48). He instructed employees to contact their lenders to find out if there had been any problems with their credit. (Tr. 48). The Agency would not have required all affected employees to meet with the Warden personally if it did not believe there was a disclosure.

Intentional or Willful. As to the third element, an agency's actions are intentional or willful if they are "somewhat greater than gross negligence, or committed without grounds for believing them to be lawful, or in flagrant disregard of others' rights under the Act." *Maydak v. United States*, 630 F.3d 166, 180 (D.C. Cir. 2010).

As discussed in *Beaven*, 622 F.3d at 552, an agency's entire course of actions may be considered intentional or willful within the meaning of the Privacy Act even if the agency's final act that led to disclosure was inadvertent.

The Agency left sensitive information of Facilities Department employees in unsecured file cabinets in areas accessible to inmates on three separate occasions; this is "so patently egregious and unlawful that anyone undertaking the conduct should have known it unlawful," "committed without grounds for believing them to be lawful," and "in flagrant disregard of others' rights under the Act." *Maydak*, 630 F.3d at 180; *Beaven*, 622 F.3d at 551. These actions alone show the Agency's actions in all three incidents were intentional or willful.

The Agency disciplined the Facilities Manager for violating policy by leaving her office door unlocked, and thus allowing Incident 3 to occur. (Tr. 176). The Agency thus admitted that its manager violated policy. It is undisputed that it is a violation of policy and against the law to leave a door unlocked in a prison, especially a door to an office that contains employees' sensitive information. (Tr. 63). Ms. Brown's action in leaving her door unlocked was thus "committed without grounds for believing them to be lawful," and demonstrate that the Agency's actions in Incident 3 were intentional or willful. *Maydak*, 630 F.3d at 180.

The Warden instructed employees to "contact their lenders, their mortgage holders, anybody they have a line of credit with, and check with them and let them know this had happened and see if there was anything funny going on with the credit." (Tr. 48). The Agency refused, however, to pay for a credit monitoring service for the employees. (Tr. 53-54). There is precedent for the Bureau paying for this service; when there were Privacy Act breaches at Federal Correctional Institution, Miami and U.S. Penitentiary, Leavenworth, these Bureau institutions provided credit monitoring services for the affected employees. (Tr. 54). The Agency's refusal to do so at FCC Forrest City exacerbates the willfulness of its actions, and demonstrates further why the entire course of the Agency's conduct was willful or intentional.

Adverse Effect and Damages. The fourth element of an "adverse effect" only requires that a plaintiff satisfies the injury-in-fact and causation requirements of Article III standing. *Doe v. Chao*, 540 U.S. 614, 624-25 (2004).

Included in actual damages as the fifth element are the costs of an employee's prophylactic measures taken to prevent harm from the disclosure as well as compensation for any time spent dealing with disclosure. *Beaven*, 622 F.3d at 557-59. The damages for lost time may be calculated at the employee's regular hourly rate. *Id.* at 558.

In addition to compensation for the actual damages, a plaintiff who prevails is also entitled to his attorneys' fees and costs. 5 U.S.C. § 552a(g)(4)(B).

At the hearing, the parties stipulated: individuals in the Facilities Department attended a mandatory meeting with the Warden in March 2009; the individuals in the Facilities Department took preventive measures on their own time to protect their credit after this meeting; and after the three Incidents, employees had their credit cards canceled, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined. (Tr. 125). Accordingly, the parties stipulated to the fourth and fifth elements of a prima facie claim: that the disclosure resulted in an adverse effect, and resulted in actual damages.

SUMMARY OF AGENCY'S POSITION

The Agency maintains:

the CBA states that Union officials and employees are governed by existing laws which includes the Privacy Act which in turn places jurisdiction of this matter exclusively with the federal district courts;

the Privacy Act does not apply as a condition of employment and was not issued for the purpose of affecting working conditions or conditions of employment and thus a grievance based on the Privacy Act is outside of the scope of 5 U.S.C. §7103;

5 USC §7103(a)(14)(C) states that matters which are specifically provided for by Federal statute are not included as policies, practices, and matters affecting working conditions and thus the Privacy Act is beyond the scope of permitted grievances;

as the Union filed a grievance on March 30, 2009 and the Arbitrator held a hearing in August 2011 and the second hearing occurred in May 2014, the grievance is barred for the Union's unreasonable delay and the resulting prejudice to the Agency;

a portion of the grievance is not arbitrable as it pertains to private contract employees and the Master Agreement only covers bargaining unit employees employed with the Bureau of

Prisons (see Master Agreement, Article 1);

the language of the Privacy Act must be used in determining whether a violation occurred;

the Union failed to show the documents were contained in a system of records retrievable by identifiable information;

the Union failed to show a disclosure occurred, specifically a disclosure does not occur because a file is left in an unsecured file cabinet;

the Union failed to show the Agency acted in a manner which was intentional or willful;

the Union failed to show any employee suffered an adverse effect or actual damages; and

the Union is not entitled to any presumption of adverse effect or damages.

ANALYSIS

Full and careful consideration was given to the entire record, including the CBA, the materials received, all testimony, the credibility of the witnesses, and all arguments. References to CBA provisions, cases, the transcript, exhibits or other materials are not exhaustive or exclusive. Rather, references are representative samples.

JURISDICTION.
Does the Arbitrator have jurisdiction over the Grievance?

Joint Exhibit 2 is the Grievance. It recites the Agency violated the following CBA provisions:

Master Agreement Article Preamble (D);
Master Agreement Article 6 - Section b (2);
Master Agreement Article 27;
Program Statement 3420.09 Attachment A 13, 9, 14 and 32.

It is axiomatic that jurisdiction exists to determine whether the Agency violated the CBA. *AT&T Technologies, Inc. v. Communications Workers*, 475 U. S. 643, 650 (1986).

Moreover, the CBA's broad grievance provision includes a Privacy Act violation as grievable and arbitrable. *American Fed'n Gov't Employees, Local 987 and U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 57 FLRA 551, 556 (Sept. 28, 2001).

The Grievance asserts the Privacy Act of 1974, 5 USC §552a (Privacy Act) is part of the CBA and includes it as a basis for the Grievance. However, the Grievance references other CBA provisions, and, thus, the Grievance is not based solely on the Privacy Act.

Stipulated Issue. The Agency asserts that since the stipulated issue only refers to a Privacy Act violation then only the language of the Privacy Act may be used to determine whether a violation occurred. As discussed above, the parties disagreed over the stipulation's meaning, requiring the Arbitrator to interpret the stipulation.

As noted, the Union based the Grievance on alleged CBA violations. Indeed, the Grievance recites the Agency violated "the following provisions of the contract: The Privacy Act of 1974-5 USC 552a, Master Agreement Art. Preamble (D) . . ."

The Privacy Act aids in interpreting the CBA, particularly in light of the parties' agreement that the CBA's broad reference to existing laws in Article 3, Section b. of the CBA encompasses the Privacy Act and in light of the CBA's references to the Privacy Act, e.g., Article 7, Section j. and Article 23, Section e.

To interpret the CBA, including the provisions relied upon in the Grievance, it is necessary to interpret the entire CBA which includes the meaning of Privacy Act references. Thus, jurisdiction exists to interpret the CBA provisions relied upon by the Union and to determine whether the CBA's reference to the Privacy Act allow a remedy under the CBA in addition to a remedy available in a United States District Court. *See Alexander v. Gardner-Denver Co*., 415 U. S. 36 (1974).

Exclusive Court Jurisdiction. The Agency urges that a violation of the Privacy Act can only be decided by a United States District Court.[3] However, that position proves too much. For example, the Grievance cites specific provisions of the CBA. To interpret those provisions it is appropriate to consider the CBA as a whole, which includes Privacy Act references.

As the Supreme Court explained, a labor arbitrator is "not confined to the express provisions of the contract," but may also look to other sources – including the "industrial common law" – for help in construing the CBA. *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). The Court further stated that an arbitrator may "look for guidance from many sources," and the "arbitrator [may look] to 'the law' for help in determining the sense of the agreement." *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

Thus, to interpret the CBA it is necessary to consider it as a whole and to consider the Privacy Act. Elkouri & Elkouri, *How Arbitration Works* at pp. 10-18 through 10-19 and 10-23 through 10-25 (Kenneth May, Editor-in-Chief, 7th ed., 2012).

Placing jurisdiction of the Privacy Act with the United States District Court does not oust an arbitrator from interpreting the CBA. *See Alexander v. Gardner-Denver Co*. , 415 U. S. 36

[3] As discussed elsewhere, several well-reasoned decisions reject this argument.

(1974); *U.S. Dep't of Veterans Affairs, Medical Ctr., Charleston, S. C. and National Ass'n of Gov't Employees, Local R5-136*, 58 FLRA 706, 709 (July 17, 2003)("nothing in [§ 552a(g)(1)(D)] precludes jurisdiction over Privacy Act claims in other, appropriate fora. [citation omitted]. That is, nothing in [§ 552a(g)(1)(D)] establishes *exclusive* jurisdiction in the district courts.")

Working Conditions. The Agency maintains Congress did not enact the Privacy Act for the purpose of affecting employees' working conditions. The Agency writes the "Privacy Act was enacted to protect individual citizen rights in furtherance of Constitutional Rights," and cites *U.S. Customs Service v. F.L.R.A.*, 43 F.3d 682 (D.C. Cir 1994) for the proposition that a grievance claiming a violation of a law may be brought under §7103 (a) (9) (C)(ii) only if the law was fashioned for the purpose of regulating the working conditions of employees.

The Agency overlooks the United States Supreme Court's announcement that those "Constitutional Rights" include an employee's right to privacy in personnel records in the hands of an employer in the context of a CBA which announcement referenced the Privacy Act as governing the recordkeeping activities of public employers. *Detroit Edison Co. v. N.L.R.B.,* 440 U.S. 301, 319 fn 16 (1979) ("A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the recordkeeping activities of public employers and agencies. See, e. g., Privacy Act of 1974, 5 U.S.C. § 552a (written consent required before information in individual records may be disclosed, unless the request falls within an explicit statutory exception)"). The Agency also overlooks the statement in Section 2 of the Privacy Act that "the opportunities for an individual to secure employment. . . are endangered by the misuse of certain information systems" which indicates that the Privacy Act was concerned with employment.

Indeed, well-reasoned decisions reject the Agency's position. *U.S. Dep't of Veterans Affairs, Medical Ctr., Charleston, S. C. and National Ass'n of Gov't Employees, Local R5-136*, 58 FLRA 706, 709 (July 17, 2003); *American Fed'n Gov't Employees, Local 987 and U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 57 FLRA 551, 555 (Sept. 28, 2001) ("The Privacy Act's effect on employees' working conditions is evident from the large variety of situations in which the Privacy Act has been involved in federal sector labor-management cases.").

Condition of Employment. The Agency asserts that the Privacy Act is not a "condition of employment" based on 5 USC 7103(a)(14) (C). The Agency's position overlooks the fact the Union based the Grievance on CBA provisions, not just the Privacy Act.

Moreover, well-reasoned decisions conclude an arbitrator has jurisdiction of a grievance alleging a Privacy Act violation. *U.S. Dep't of Veterans Affairs, Medical Ctr., Charleston, S. C. and National Ass'n of Gov't Employees, Local R5-136*, 58 FLRA 706, 709 (July 17, 2003)("the rights and obligations created by the Privacy Act affect the conditions of employment of

federal employees" and "nothing in [§ 552a(g)(1)(D)] precludes jurisdiction over Privacy Act claims in other, appropriate fora. [citation omitted]. That is, nothing in [§ 552a(g)(1)(D)] establishes *exclusive* jurisdiction in the district courts."); *American Fed'n Gov't Employees, Local 987 and U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 57 FLRA 551, 556 (Sept. 28, 2001) ("we conclude that the Privacy Act is a law 'affecting conditions of employment' within the meaning of [5 USC] § 7103(a)(9)(C)(ii) of the Statute. As such, claimed violations of the Privacy Act come within the definition of 'grievance' set forth at [5 USC] § 7103(a)(9)(C)(ii), and are grievable and arbitrable under a broad-scope grievance procedure."); *U.S. Dep't of Justice, Federal Bureau of Prisons, Federal Correctional Complex and Council of Prisons Locals, AFGE Local 3955*, (Parent, Guy M. Arb.) (Jan. 3, 2007).

Indeed, when an arbitrator held alleged violations of the Privacy Act were not grievable, the Federal Labor Relations Authority concluded the award was deficient. *American Fed'n of Gov't Employees, Local 1045 and U. S. Dep't of Veterans Affairs Medical Ctr., Biloxi, Miss.*, 64 FLRA 520, 521-22 (Feb. 25, 2010) ("As for the Arbitrator's finding that alleged violations of the Privacy Act are not grievable, the Authority has specifically held to the contrary.")

DELAY.

Did the Union delay proceeding with its Grievance such that it did not comply with CBA Article 31 Section a, to proceed expeditiously?

The Agency urged the Union waived the Grievance by not pursuing it expeditiously or within a reasonable time, i.e., the Union filed the Grievance in March 2009 and the second hearing day occurred in May 2014. The Agency also argued the delay prejudiced it.

The Arbitrator may take arbitral notice of the communications concerning scheduling this matter. *See*, *The Common Law of the Workplace*, *The Views of Arbitrators* §1.61, p. 38 (2nd ed. 2005).

Based on this record, jurisdiction exists to consider the Grievance. In fact, the parties agreed in the August 24 hearing that other than the jurisdictional issue concerning the Privacy Act, all other conditions of the CBA had been met, e.g., Article 31 Grievance Procedure, Section a. (Aug. Tr. 7-8). Moreover, the CBA provision relating to arbitrations does not contain a deadline for holding a hearing.

Further, a portion of the delay is attributable to the ill health of the first arbitrator selected by the parties. When that arbitrator bowed out, the Agency filled in the original agreed hearing date with another case. Then the busy calendar of the Agency's Representative caused delays in selecting a new hearing date.

Moreover, the failure of a witness to appear, even though subpoenaed by the Union, prevented the completion of the hearing in August.

Then the parties agreed to separate the jurisdictional issue from the remaining issues. As a result they submitted briefs on that issue and subsequently the Arbitrator issued a Jurisdictional Ruling. Not until after that ruling did the parties begin to discuss another hearing date.

The unavailability of a witness, the Warden, for the next hearing date selected by the parties required resetting the hearing. The busy calendar of the Agency's Representative and the Union's Representative along with difficulties in confirming the availability of witnesses further delayed selection of a hearing date until May 2014.

Further, an Agency witness indicated the parties held several discussions concerning settlement (Tr 196-97) which may have also contributed to delays.

With respect to the Agency's claim of prejudice, the record does not indicate there were any witnesses it desired to call but who were unavailable due to the passage of time. Moreover, its witnesses did not mention any difficulty recalling facts material to the dispute.

Finally, any delays attributed solely to the Union may be rectified as part of any remedy. Elkouri & Elkouri, *How Arbitration Works* at pp. 18-39 through 18-40 (Kenneth May, Editor-in-Chief, 7th ed., 2012).

Accordingly, the Agency's argument that the Union did not comply with CBA Article 31, section a, is rejected. Based on the record, including the credibility of the witnesses, the Union established that it did not fail to comply with CBA Article 31, section a.

ADVERSE INFERENCE.
May the Arbitrator draw an adverse inference based on the Agency's actions?

The Union urges the Arbitrator to make an adverse inference based on the Agency's failure to provide certain documents. The Union submitted an Information Request for "[a]ny and all documents that refer or relate to any investigation the Agency conducted into the disclosures described in the Grievance." (UX6).

The Agency acknowledges it investigated the possibility of disclosure of employee information. (Agency Br. p. 6). In fact, it warned members of the bargaining unit[4] that their private personal information, e.g., social security numbers, may have been disclosed. (AX1). Further, one Agency witness testified the Agency investigated Incident 3 (Tr. 139-40) and another Agency witness testified she referred Incidents 1 and 2 for investigation. (Tr. 200-202) and Union Exhibit 7, the Agency's response to the Informational Request, identifies

[4] At times, members of the bargaining unit covered by the CBA and employed by the Agency are referred to as Union members.

information disclosed. Further, the Agency introduced as Agency Exhibit 4 a referral report for Incident 1. Accordingly, the documents requested by the Union existed for Incidents 1, 2 and 3. Of the requested documents, the Agency only provided documents related to the Incident Report Form for Incident 1. (AX3 and AX4).

The Agency maintained that arbitration is an informal process that does not provide for discovery, that the Union was not entitled to request documents after the hearing started in August 2011 and that the Agency responded to the request.

In that response, the Agency did not object to the request as untimely. (UX7). Rather, it relied upon the Union's asserted failure to meet the standards established by 5 USC §7114(b)(4). The Agency incorrectly concluded that the Union's Information Request did not meet those standards. (UX6 and UX7). Namely, the Union stated specifically why it needed the requested information, how it would use the requested information and how the articulated uses of the information related to the Union's representational responsibilities under the statute. (UX6). Moreover, the Agency's response did not address the Agency's obligations under the CBA.

Specifically, the CBA required the Agency to provide the Incident Report Form for Incidents 1, 2 and 3, and the resulting investigation reports to the Union.

For example, the CBA requires the Agency to promptly investigate any unsafe conditions reported to it by the Union or employees and to provide any findings from these investigations relating to safety to the Union, in writing, upon request. (CBA, Art. 27, Section e). The disclosure of the Union members' private personal information is an unsafe condition within the meaning of the CBA. Indeed, Agency Exhibit 4 reflects Incident 1 was classified as high risk. (AX4).

Further, the CBA provides: "Section b. The parties strongly endorse the concept that grievances should be resolved informally and will always attempt informal resolution at the lowest appropriate level before filing a formal grievance. A reasonable and concerted effort must be made by both parties toward informal resolution." Based on this record, that provision also required the Agency to provide the requested documents.

As part of the fact finding process, an adverse inference may be drawn by an arbitrator. *Cf.* *U.S. Dep't of Justice Federal Bureau of Prisons U.S. Penitentiary (Administrative Maximum) Florence, Colo. and Am. Fed' of Gov't Employees Local 130*, 60 FLRA 752, 757 (Mar. 22, 2005) ("The Authority has held that a judge may draw an adverse inference from the failure of a party voluntarily to produce documents or other objects in its possession as evidence."); *IRS, Philadelphia Serv. Ctr. and Nat'l Treas. Employees Union*, 54 FLRA 674 (July 31, 1998) ("An adverse inference may be drawn if a party fails 'voluntarily to produce documents or other objects in his or her possession as evidence.' McCormick [on Evidence], 184 [(4th ed. 1992)].").

Accordingly, based on the failure of the Agency to provide the Incident Report Forms for Incidents 2 and 3 and the investigation documents for Incidents 1, 2, and 3, an adverse inference may be made as a finding of fact. *Am. Fed'n of Gov't Employees, Local 3506 and Social Security Admin., Office of Disability Adjudication and Review, San Antonio, Tex.*, 65 FLRA 121, 124 (Sept. 29, 2010) ("the adverse inference that the Arbitrator drew from the Agency's failure to produce the promotion package is a finding of fact.")

CBA VIOLATION.
Did FCC Forrest City violate the CBA by failing to secure FCC Forrest City employees' personal information in February and March 2009?

The Agency acknowledges the Privacy Act is part of the CBA and references Master Agreement, Article 3, Section b. (Agency Br. p. 2).

The CBA required the Agency to protect the privacy of Union members it employed with respect to the records created and maintained by the Agency which contained private personal-identifiable-information about them such as social security numbers, home telephone numbers, home addresses and evaluations.

To illustrate, Article 3, section b. recites that "[i]n the administration of all matters covered by this Agreement, Agency officials . . . are governed by existing and/or future laws, rules, and government-wide regulations in existence at the time this Agreement goes into effect."

As acknowledged by the Agency, the Privacy Act is one of those laws. (Agency Br. p. 2)

Further, the CBA recites that information about Union members employed by the Agency will be provided in compliance with the Privacy Act (CBA Art. 7, Section j. and Art. 23, Section e.) establishing that they have privacy rights under the CBA, and those CBA privacy rights include Privacy Act protection.

Additionally, the Agency agreed "to lower those inherent hazards [of a correctional environment which affect the safety and well-being of employees] to the lowest possible level, without relinquishing its rights under 5USC 7106." (CBA Art. 27)–a goal furthered by the Agency's Standards of Employee Conduct. (JX5).

In turn, those standards contemplate that Agency officials will protect the confidentiality and thus the safety of Agency employees with respect to the records created and maintained by the Agency which contain private information about employees such as social security numbers, home telephone numbers, home addresses and evaluations. (JX5, p. 11, 15. CONFIDENTIALITY, Sections c.; Attachment A, Standard Schedule of Disciplinary Offenses and Penalties, p. 6, Item 14. Endangering the safety of or causing injury to staff, inmates or others through carelessness or failure to follow instructions).

Accordingly, even absent the Privacy Act, the CBA obligates the Agency to lower the hazard of the dissemination of the private information of Union members employed by the Agency to the lowest possible level. Indeed, an Agency witness testified she was charged with making sure that "we maintain sensitive documentation in secure locations." (Tr. 157), that the Agency had a policy protecting employees' personal information (Tr. 161) and that as a manager she was responsible for the security of the personal information of the Union members employed in the Facilities Department. (Tr. 162).

Assuming, without deciding, that the CBA requires the Union to establish a violation of the Privacy Act in order to establish a violation of the CBA's requirement to protect Union members' privacy, the Union met that standard as detailed below.[5]

The documents contained in the filing cabinets in Incidents 1, 2 and 3 were Agency records of Union members employed by the Agency, in a system of records retrievable by identifiable information; unauthorized individuals retrieved the information, i.e., the Agency improperly disclosed the documents; the Agency acted intentionally or willfully; the disclosure adversely affected those Union members; and those Union members incurred actual damages.

The Agency urges that the records in Incident 1 relate to individuals employed by a contractor, not the Agency. Accordingly, those individuals are not protected by the CBA. However, the Union established the Agency employed some of those individuals who then became Union members. To the extent the Agency obtained records of employees of a contractor and retained those records when those individuals became Union members employed by the Agency, then the CBA obligated the Agency to maintain in confidence the private information of those Union members in those retained records.

Incident 1[6]

Records. Based on the record, including the credibility of the witnesses, the Union established that the unlocked file cabinets in Incident 1: (1) contained applications with contractors' names, social security numbers, dependents' names, and banking information and (2) contained such data for some contractors who became Union members employed by the Agency. (Tr. 27 and 31; AX1 and AX4[7]). As the Agency maintained the information

[5] Under CBA's language the Union only needs to establish the Agency violated its constitutional, other statutory, common law or contractual obligations to protect the privacy of Union members. As the parties focused on the elements of a Privacy Act violation and as the Union met that standard , which exceeds the other standards, this Award assumes, without deciding, that only a Privacy Act analysis applies.

[6] The definitions and standards applied to Incident 1are applied to Incidents 2 and 3. References to definitions and standards are not always repeated in the discussion of Incidents 2 and 3.

[7] As noted by an Agency witness, Agency Exhibit 4 only lists records found in the file cabinets forced open in the Bone Yard, not the records they contained when moved to the Bone Yard. (Tr. 215).

which contained both names and identifying numbers, it meets the Privacy Act's definition of a "record." 5 U.S.C. § 552a(a)(4).

Additionally, an adverse inference based on the Agency's failure to provide its investigation report of Incident 1, while not necessary to the above finding of fact and standing alone, leads to a finding of fact that the unlocked file cabinets in Incident 1 contained records of private data relating to some Union members employed by the Agency, such as social security numbers.

System of Records. Based on the record, including the credibility of the witnesses, the Union established the Agency controlled these documents and that individuals retrieved information from those documents by name or other identifier, and thus the documents involved in Incident 1 constituted a "system of records." *Maydak*, 630 F.3d at 178; 5 U.S.C. §552(a)(5).

To illustrate, the Agency originally stored the documents in the Facilities Department, thus controlling the documents. Further, the Agency continued to control the documents when it moved them to the Bone Yard. The Agency discovered the locked cabinets placed in the Bone Yard were forced opened. Shortly afterward, many Union members began to experience numerous problems with canceled credit cards, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined. Such events following the Incidents so closely coupled with the forced opening of the cabinets in the Bone Yard (which contained social security numbers and other private data of Union members) lead to a finding of fact that unauthorized individuals retrieved documents by name or other identifier from the unlocked cabinets in the Bone Yard relating to Agency-employed Union members. (Tr. 27, 31 and 125-26, 202; AX1 and AX4).

Additionally, an adverse inference based on the Agency's failure to provide its investigation report of Incident 1, while not necessary to the above finding of fact and standing alone, leads to the finding of fact that unauthorized individuals retrieved documents by name or other identifier from the cabinets forced open in the Bone Yard relating to Agency-employed Union members.

Intentional or Willful. Liability is imposed "only when the agency acts in violation of the [Privacy] Act in a willful or intentional manner, either by committing the act without grounds for believing it to be lawful, or by flagrantly disregarding others' rights under the Act. *Maydak v. United States*, 630 F.3d 166, 180 (D.C. Cir. 2010)*; U.S. Dep't of Veterans Affairs, Medical Ctr., Charleston, S. C. and National Ass'n of Gov't Employees, Local R5-136*, 58 FLRA 706, 710 (July 17, 2003).

Based on the record, including the credibility of the witnesses, the Union established the Agency acted intentionally or willfully with respect to the disclosure of records of Agency-employed Union members in Incident 1. To illustrate, placing the file cabinets–which

contained private data of Union members, such as social security numbers–in an area accessible by 286 inmates without supervision and by 585 staff members flagrantly disregards the rights of those individuals under the CBA and the Privacy Act. (AX1 and AX4). *Beaven v. U.S. Dep't of Justice*, 2007 WL 1032301 * 17 (E.D. Ky. Mar. 30, 2007) *aff'd in part, rev' in part, and remanded* 622 F.3d 540, 552-53 (6th Cir. 2010) ("Jones's course of conduct that resulted in his leaving the unmarked folder in an inmate-accessible area did not just 'inadvertently contravene one of the Act's strictures' and could properly be viewed as 'the intentional or willful failure of the agency to abide by the Act.'").

Adverse effects. Adverse effects only require a party to satisfy the injury-in-fact and causation requirements of Article III standing. *Doe v. Chao*, 540 U.S. 614, 624-25 (2004). Adverse effects such as mental distress, emotional trauma, or embarrassment are sufficient to confer standing under the Privacy Act. *U.S. Dep't of Veterans Affairs, Medical Ctr., Charleston, S. C. and National Ass'n of Gov't Employees, Local R5-136*, 58 FLRA 706, 710-11 (July 17, 2003).

Based on the record, including the credibility of the witnesses, the Union established Union members employed by the Agency suffered adverse effects such as mental distress as a result of Incident 1. (Tr. 69, 88, 95). As another illustration of adverse effects, the parties stipulated that after the Incidents Union members had credit cards canceled, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined. (Tr. 125-26).

Actual Damages. Actual damages include the costs of prophylactic measures taken to prevent harm from the disclosure as well as compensation for any time spent dealing with disclosure. *Beaven*, 622 F.3d at 557-59.

Based on the record, including the credibility of the witnesses, the Union established that Union members employed by the Agency suffered actual damages as a result of Incident 1. (Tr. 64-69, 86-87, 93-95). As an example, Union members took preventive measures on their own time after being alerted to Incident 1. (Tr. 49-51, 81-84, and 91-93 and AX1). Based on the parties' stipulation, other Union members employed by the Agency (Bruce Dye, Wade Pipkin, Christopher Biggs, Michael Chapman, Brooks Taylor, William Vance, Donald Burton, Brian Frames, Brent South, and Billy Phillips) took preventive measures on their own time to protect their credit. (Tr. 125-26).

Incident 2

Records. Based on the record, including the credibility of the witnesses, the Union established that the unlocked file cabinets in Incident 2, located in the Facilities Department's open area contained documents with the names of Union members employed by the Agency, their social security numbers, and credit card information. (UX7, UX12 and AX1). As the Agency maintained the information which contained both names and identifying numbers, it meets the Privacy Act's definition of a "record." 5 U.S.C.

§552a(a)(4).

Additionally, an adverse inference based on the Agency's failure to provide its Incident Report Form and investigation report for Incident 2, while not necessary to the above finding and standing alone, leads to a finding of fact that the unlocked file cabinets in Incident 2 contained private data on records relating to some Agency-employed Union members, such as social security numbers.

System of Records. Based on the record, including the credibility of the witnesses, the Union established that the Agency controlled the records and that individuals retrieved information from those documents by name or other identifier, and thus they constituted a "system of records."

To illustrate, the Agency stored the records in the Facilities Department, thus controlling them. The records in the unlocked cabinet included 27 Time and Attendance Records for fiscal year 2006 and 12 staff performance evaluations (UX7) which could be retrieved by name or other identifier. A Union member discovers the unlocked cabinets in the open area of the Facilities Department. In short order, many Union members employed by the Agency in that department began to experience numerous problems with canceled credit cards, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined. Such events following the Incidents so closely coupled with the access to the unlocked cabinets by staff and by inmates with limited supervision[8], both with access to a nearby copier, lead to a finding of fact that unauthorized individuals retrieved information from those records by name or other identifier. (Tr. 35-36, 37-40, 44, 77, 118-19, 155, 159-60, 162, 165, UX7, UX12, UX14 and AX1).

Indeed, one witness testified that upon the discovery of the unlocked cabinets he retrieved by name a social security number of another Union member employed by the Agency in order to convey the seriousness of finding the unlocked cabinets. (Tr. 36-37 and 77).

Additionally, an adverse inference based on the Agency's failure to provide its Incident Report Form and investigation report for Incident 2, while not necessary to the above finding of fact and standing alone, leads to a finding of fact that unauthorized individuals retrieved documents by name or other identifier from the unlocked cabinets in the Facilities department relating to Union members employed by the Agency.

Intentional or Willful. Based on the record, including the credibility of the witnesses, the Union established that the Agency acted intentionally or willfully with respect to Incident 2. To illustrate, unlocked file cabinets–which contained confidential data of Union members,

[8] "[B]y policy, when you have an inmate on your detail you have to make sure you lay eyes on them every two hours." (Tr. 164). Further, these inmates filed documents.

such as social security numbers–in an area accessible to staff and to inmates with limited supervision, both with ready access to a copier, flagrantly disregards the rights of those individuals under the CBA and the Privacy Act. (AX4).

Adverse effects. Based on the record, including the credibility of the witnesses, the Union established Agency employees who are Union members suffered adverse effects such as mental distress as a result of Incident 2. (Tr. 69, 88, 95). As another illustration, the parties stipulated that after the Incidents employees had credit cards canceled, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined. (Tr. 125-26).

Actual Damages. Based on the record, including the credibility of the witnesses, the Union established that Union members employed by the Agency suffered actual damages as a result of Incident 2. (Tr. 64-69, 86-87, 93-95). As an example, Union members took preventive measures on their own time after being alerted to Incident 2. (Tr. 49-51, 81-84, and 91-93). Based on the parties' stipulation, other Union members employed by the Agency (Bruce Dye, Wade Pipkin, Christopher Biggs, Michael Chapman, Brooks Taylor, William Vance, Donald Burton, Brian Frames, Brent South, and Billy Phillips) took preventive measures on their own time to protect their credit. (Tr. 125-26).

Incident 3

Records. Based on the record, including the credibility of the witnesses, the Union established that the unlocked file cabinets in Incident 3, located in the unlocked office in the Facilities Department contained records with the names of Union members employed by the Agency, their social security numbers, and credit card information.[9] (UX7, UX12 and AX1). As the Agency maintained the information which contained both names and identifying numbers, it meets the Privacy Act's definition of a "record.".

Additionally, an adverse inference based on the Agency's failure to provide its Incident Report Form and investigation report for Incident 3, while not necessary to the above finding of fact and standing alone, leads to a finding of fact that the unlocked file cabinets in the unlocked office in Incident 3 contained records with private data relating to some Union members employed by the Agency, such as social security numbers.

System of Records. Based on the record, including the credibility of the witnesses, the Union established that the Agency controlled the records and that individuals retrieved information from those documents by name or other identifier, and thus they constituted a "system of records."

To illustrate, the Agency stored the records in the Facilities Department, thus controlling

[9] These unlocked file cabinets are the same unlocked file cabinets involved in Incident 2.

them. The records in the unlocked cabinet included 27 Time and Attendance Records for fiscal year 2006 and 12 staff performance evaluations (UX7) which could be retrieved by name or other identifier. After the discovery of the unlocked cabinets in the unlocked office of the Facilities Department, many Union members employed by the Agency in that department experienced numerous problems with canceled credit cards, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined. Such events following the Incidents so closely, coupled with access to the unlocked cabinets by staff and inmates with limited supervision, both with access to a nearby copier, lead to a finding of fact that unauthorized individuals retrieved information from those records by name or other identifier. (Tr. 35-36, 37-40, 44, 77, 118-19, 155, 159-60, 162, 165, UX7, UX12, UX14 and AX1).

Additionally, an adverse inference based on the Agency's failure to provide its Incident Report Form and investigation report for Incident 3,while not necessary to the above finding of fact and standing alone, leads to finding of fact that unauthorized individuals retrieved records by name or other identifier from the unlocked cabinets in the unlocked office in the Facilities Department relating to Union members employed by the Agency.

Intentional or Willful. Based on the record, including the credibility of the witnesses, the Union established that the Agency acted intentionally or willfully with respect to Incident 3. To illustrate, an unlocked office which held unlocked file cabinets–which contained confidential data of Union members employed by the Agency, such as social security numbers–in an area accessible to staff and to inmates with limited supervision who filed documents, both with ready access to a copier, flagrantly disregards the rights of those individuals under the CBA and in turn under the Privacy Act. (AX4). Indeed, the Agency disciplined a manager based on the incident. (Tr. 140).

Adverse effects. Based on the record, including the credibility of the witnesses, the Union established Union members employed by the Agency suffered adverse effects such as mental distress as a result of Incident 3. (Tr. 69, 88, 95). As another illustration of adverse effects, the parties stipulated that after the Incidents Union members had credit cards canceled, credit cards opened in their names that they did not open, fraudulent charges, overdraft fees, and credit cards declined. (Tr. 125-26).

Actual Damages. Based on the record, including the credibility of the witnesses, the Union established that Union members employed by the Agency suffered actual damages as a result of Incident 3. (Tr. 64-69, 86-87, 93-95). As an example, Union members employed by the Agency took preventive measures on their own time after being alerted to Incident 3. (Tr. 49-51, 81-84, and 91-93). As another example, based on the parties' stipulation other Union members (Bruce Dye, Wade Pipkin, Christopher Biggs, Michael Chapman, Brooks Taylor, William Vance, Donald Burton, Brian Frames, Brent South, and Billy Phillips) took preventive measures on their own time to protect their credit. (Tr. 125-26).

REMEDY.

Incident 1 may have involved as many as 89 Union members. (Tr. 55). Incidents 2 and 3 involved at least 12 Union members. (UX7). Agency Exhibit 1 indicates Incidents 1, 2 and 3 involved at least 38 Union members employed by the Agency.

Individuals with records involved in Incident 1 who did not become Union members employed by the Agency are not entitled to a remedy.

Exchange of Information. The Agency is to provide to the Union all of the Agency's Incident Report Forms and Investigation reports relating to Incidents 1, 2 and 3 not provided at the hearing and any other documents and information needed to identify Union members employed by the Agency and whose data was involved in the Incidents. The Union is to provide to the Agency any documents and information it has which may be needed to identify Union members employed by the Agency and whose data was involved in the Incidents and to obtain documents and information from Union members needed to identify Union members employed by the Agency and whose data was involved in the Incidents. *U.S. Dep't of Homeland Security U.S. Customs and Border Protection and Am. Fed'n of Gov't Employees Local 1917*, 62 FLRA 59, 62 (Mar. 29, 2007)("arbitrators enjoy a broad discretion to fashion remedies" and particularly when parties empower the arbitrator to determine the remedy).

Actual Damages. With respect to monetary damages, an arbitrator may award money damages for a violation of the Privacy Act. *American Fed'n of Gov't Employees, Local 987 and U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 57 FLRA 551, 553 and 557 (Sept. 28, 2001) ("it is well accepted that statutory language permitting a court to award money damages against the federal government does not deprive arbitrators of authority to also award such damages." and "we find that the damages provision [5 USC §552a(g)] is applicable to arbitration proceedings. Thus, we find that the Arbitrator erred in finding that he did not have authority to assess money damages under 5 U.S.C. § 552a(g).").

The actual damages related to Incidents 1, 2 and 3 lasted for some time. (Tr. 69). The Union members employed by the Agency affected by Incidents 1, 2 and 3 are entitled to recover reasonable out-of-pocket expenses, such as any overdraft fees and fraudulent charges following and related to the Incidents and to recover their applicable hourly rate for reasonable time spent outside of normal working hours for a reasonable duration following the Incidents applying reasonable preventive measures.

Union members employed by the Agency permitted to access the website referenced in Agency Exhibit 1 to process a copy of their credit report during normal working hours may not recover their applicable hourly rate for time spent outside of normal working hours spent accessing the website referenced in Agency Exhibit 1 for that purpose. (AX1).

With respect to that portion of the delay in the hearing attributable to the Union, to the extent that a different, later event revealed a Union member's private data, e.g., social security number, then for that Union member actual damages end upon that different, later event. Elkouri & Elkouri, *How Arbitration Works* at pp. 18-39 through 18-40 (Kenneth May, Editor-in-Chief, 7th ed., 2012).

If the parties are unable to resolve the issues of Union members employed by the Agency affected by the Incidents or the issue of the amount of actual damages, they may submit evidence and briefs upon that issue.

Statutory Damages. The Union seeks as much as $3,000 per Union member as statutory damages under 5 USC §552a(g)(4) if a record of a Union member is involved in each of Incidents 1, 2 and 3. However, it does not cite any authority for this position.

It may not be necessary to decide this issue as there may not be a Union member involved in all three Incidents or if there is, that Union member may have actual damages in excess of $3,000. As the Arbitrator retained jurisdiction with the parties' agreement to resolve the issues relating to remedies (Tr. 232), the Arbitrator respectfully requests the parties to attempt to resolve issue of the remedy of the greater of actual damages or statutory damages. If they are not able to resolve the issue of whether multiples of $1,000 are recoverable under the Privacy Act, then they may submit evidence and briefs on that issue.

Attorneys' Fees. For a Union to be eligible for an award of attorneys fees, it must be the "prevailing party." When a grievant receives a mitigated penalty, it has received significant relief and is a prevailing party. *Am. Fed'n of Gov't Employees, Local 987 and U.S. Dep't of the Air Force, Air Force Materiel Command, Robins Air Force Base, Ga.*, 64 FLRA 884, 886-87 (June 16, 2010). The Union is a prevailing party here.

In the interest of justice, an award of reasonable and necessary attorneys' fees to the Union may be warranted. *Naval Air Development Center, Navy and AFGE, Local 1928*, 21 FLRA 131 (1986); 5 U.S.C. §7701(g). Additionally, the Union may be entitled to recover reasonable and necessary attorneys' fees under 5 U.S.C. §552a(g)(4)(B).

Such reasonable and necessary attorneys' fees exclude any overlapping work performed by the two law firms which represented the Union.

As the parties did not brief the issue of reasonable and necessary attorneys' fees, the Arbitrator respectfully requests the parties to attempt to resolve the remedy of reasonable and necessary attorneys' fees. If they are not able to resolve this issue, then they may submit evidence and briefs on that issue.

AWARD

Based on the evidence, including the credibility of the witnesses, the Grievance is upheld.

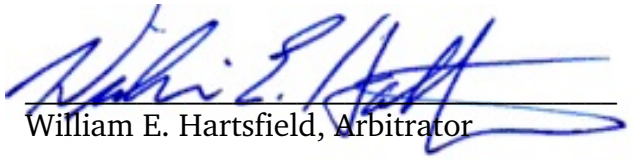
The Union is awarded the remedies generally described above.

The Arbitrator's fees and costs shall be borne as provided in the CBA.

The Arbitrator retains jurisdiction of this matter to address any unresolved remedy and any unresolved interpretation of this Award or its application. A party must make a written request to resolve any remedy, interpretation or application to the Arbitrator with notice to the other party via the same means of transmission by the end of 90 days following the date of the Award. Once a written request is made, the parties may agree upon or the Arbitrator may establish a time period for additional evidence or briefs and a ruling even if that period is outside the original 90 days. If no written request is received by the end of 90 days following the date of the Award, the Arbitrator's jurisdiction will end.

This Award is in full resolution of all matters submitted to this Arbitrator. All relief not expressly granted herein is denied.

October 29, 2014
Date



William E. Hartsfield, Arbitrator