102 FLRR 1-1087

U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution <Forrest City >, AR and AFGE, Local 0922

Federal Labor Relations Authority

DA-CA-80834; 57 FLRA No. 179

June 5, 2002

Related Index Numbers

9.393 General Legal Principles, Evidence, Admissibility, Privileged Evidence
22.21 Unions, Membership, Expulsion or Suspension
44.4114 Subjects of Bargaining, Discipline/Demotion/Discharge, Discipline, Just Cause, Dishonesty
72.775 Employer Unfair Labor Practices, Miscellaneous Unfair Labor Practices, Refusal to Supply Information, Information Necessary and Relevant

Case Summary

THE AUTHORITY AFFIRMED IN PART AND REVERSED IN PART THE ALJ'S DECISION ORDERING THE AGENCY TO PRODUCE DOCUMENTS REQUESTED BY THE UNION.

The Bureau of Prisons suspended an employee for dishonest conduct and being absent without leave one day. The American Federation of Government Employees made an informal request of the agency, seeking all copies of all adverse and disciplinary actions the agency had for all employees at FCI-<**Forrest City** >. The request was for every charge, the pay grade and any action taken against any employee at that location. The agency claimed the union's request was not as "particularized" as required by statute. The union amended its request, stating it needed the information to compare the agency's other suspension cases with its action against the employee. Additionally, the union claimed "it needed the information [specified in the first request] to determine if the agency was consistent in disciplinary actions taken against bargaining unit employees compared with the disciplinary actions taken against supervisors, and that the information would be used to survey the comparisons between exempt and nonexempt employees." The agency rejected the unions' second request. The unions' third request contained more particulars, such as a request for the employee's complete investigative file, all Special Investigatory Supervisors manuals, operations manuals and memoranda explaining how referrals are made to the Office of Internal Affairs and how investigations are conducted. The

union requested any agency information regarding how to resolve issues without discipline, who proposes discipline and for what reasons. Additionally, the union requested copies of all disciplinary actions taken over the past two years. It requested that any personal identifiers (include Social Security numbers, names, etc.) be redacted. However, the union wanted information on race, gender and ethnic origin to be included, along with whether the person receiving the discipline was executive staff, bargaining or non-bargaining member or a department head. The union further explained that the information was needed to decide if it would file a grievance for the employee. It wanted all the requested information to determine if the employee's investigation was carried out as per the agency's guidelines and policies. It also wanted to know whether there may have been exculpatory evidence that was not brought forward and if an investigation was carried out after the employee was told there would be none. The union filed an unfair labor practice complaint alleging that the employer violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute when it did not furnish the union with the requested documents and information. The ALJ agreed with the union, and the agency appealed the decision to the FLRA. The Authority agreed in part with the ALJ's ruling. It stated the agency had a duty to supply the union with the requested information, i.e., Special Investigatory Supervisors manuals, operations manuals and memoranda to the extent that the law allowed. Additionally, the information requested was not privileged. It was maintained by and in the possession of the agency. However, the ALJ's ruling that the agency also violated section 7116(a)(1), (5), and (8) by not giving the union the list of disciplinary and adverse actions was reversed, with member Carol Waller Pope dissenting. The authority ruled the agency must, within 30 days, notify the Dallas Regional Office's regional director of the steps it took to adhere to the order.

Full Text

Decision and Order

I. Statement of the Case

This unfair labor practice case is before the Authority on exceptions to the decision of the Administrative Law Judge (Judge) filed by the Respondent. The General Counsel (GC) filed an opposition to the Respondent's exceptions.

The complaint alleges that the Respondent

violated section 7116(a)(1), (5) and (8) of the [Federal Service Labor-Management Relations Statute (the Statute)] by failing to provide a sanitized listing of disciplinary and adverse actions taken since June 1996; the SIS [Special Investigatory Supervisors] manual. . .and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled; any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline; [and] the complete investigative file on Shannon Hendrickson.

Judge's Decision at 2.

The Judge found that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute by failing to provide the requested documents and to notify the Union of the non-existence of certain requested information, and issued a remedial order.

Upon consideration of the Judge's decision and the entire record, the Authority unanimously adopts the Judge's findings and conclusions that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute by failing to provide, as requested, the SIS manual, Operations Memoranda, Program Statements, and other manuals and documents, and the

requested investigative file. The Judge's finding that the Respondent violated § 7116(a)(1), (5), and (8) by failing to provide the requested list of disciplinary and adverse actions is reversed, with Member Pope dissenting. A remedial order consistent with this decision is issued.

II. Background and Judge's Decision

A. Background

The facts, set forth in detail in the Judge's decision, are summarized here.

Officer Shannon Hendrickson, a unit employee, was suspended for being absent without leave on one day and for dishonest conduct. Subsequent to the suspension, the Union filed an information request with the Respondent (the July 9 request).2 The request sought all "copies of all disciplinary and adverse action files on all employees at FCI-<**Forrest City** >," including "the charges, action taken, and the pay grades of each individual." GC Exhibit No. 2. The Respondent rejected the request because it claimed that "the Union failed to provide enough information to create a particularized need[.]" Judge's Decision at 3.

The Union subsequently amended its request, explaining that "it needed the information [specified in the first request] to determine if Respondent was consistent in disciplinary actions taken against bargaining unit employees compared with the disciplinary actions taken against supervisors, and that the information would be used to survey the comparisons between exempt and nonexempt employees."*Id.* The Union also indicated that the information would be used "to compare the action taken on cases similar in nature."*Id. See also* GC Exhibit No. 4. The Respondent rejected the second request (the July 17 request) on the same grounds that it rejected the July 9 request.

The Union then submitted an amended third request (the July 30 request), specifying particular types of information. Specifically, the Union requested "a listing of disciplinary and adverse actions taken" in the previous two years. Judge's Decision at 3. The Union specified that personal identifiers, such as names and social security numbers, should be sanitized, and the information should be numbered sequentially and coded "to reflect whether the employee is a bargaining unit member, a nonbargaining unit member, a supervisor/department head, or an executive staff member and. . .to indicate[ ] race, ethnic origin, and gender."*Id.* The Union indicated that it was requesting the information "in order to determine whether or not a grievance should be filed in the case of the disciplinary action recently imposed on [officer] Hendrickson." GC Exhibit No. 6.

The Union also requested: (1) "the SIS manual and any and all operations memoranda, program statements, and manuals that indicated how an investigation would be conducted and how referral to the Office of Internal Affairs [(OIA)] is handled";3 (2) "any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline";4 and (3) "the complete investigative file on Hendrickson."5 Judge's Decision at 3-4.

With respect to the list of disciplinary and adverse actions, specifically, the Union stated that it was concerned about disparate treatment based on race, gender, or bargaining unit status. Noting that the Respondent's program statement on standards of conduct indicated that supervisors are held to a higher standard of conduct, the Union explained that it needed such files on supervisors and other management officials to make the necessary comparisons.

The Union explained that it needed the SIS manual and investigatory policy documents to assess whether the investigation of Hendrickson was conducted in accordance with applicable policies and procedures, to determine what evidence is required, and whether it was gathered in this case. The Union also indicated that the information was needed to

evaluate whether Hendrickson was treated differently from other employees and whether any exculpatory evidence was overlooked. As to the disciplinary policy documents requested, the Union explained that it needed to learn "who can formally resolve problems between employees within the work place in order to determine if the supervisors had the authority to resolve the matter without imposing discipline, because an investigation was conducted and discipline imposed after [Hendrickson] was told by three supervisors that the matter was closed."*Id.* at 4-5.

The Union explained that it needed the Hendrickson investigatory file to determine "if there was exculpatory evidence in the file that was not made available to Hendrickson and the Union and. . .if all the evidence was gathered."*Id.* at 5. The Union also stated that it needed to know "all the information available to the Warden, who made the decision on the disciplinary proposal, to determine if the affected employee and the Union had the opportunity to present a complete defense before the decision was made, and whether there were factors considered in the decision of which the employee and the Union were not aware."*Id.*

The Respondent rejected the Union's request for the disciplinary and adverse action records on the ground that the Union had not demonstrated a particularized need for the information. In rejecting the request, the Respondent noted the Union's explanation that it had "reason to believe that supervisor's [sic], executive staff and other non-bargaining unit members are held to a different, and less severe standard of conduct than bargaining unit members." GC Exhibit No. 8 at 2. The Respondent also noted that the Union claimed "a bargaining unit member has complained that there is disparate treatment in disciplinary and adverse actions based on race, gender, and ethnic origin."*Id.* The Respondent indicated, in this regard, that the Union had made the request on behalf of Officer Hendrickson, but had also referenced a bargaining unit member and claims based on race, gender and ethnic origin. *See id.* at 3.

The Respondent rejected the request for the SIS manual, investigatory policy documents, and disciplinary policy documents because it considered it a request for an interpretation of policy and procedure and not a request for data. As to the Hendrickson investigatory file, the Respondent denied the request on the ground that the Union "had access to all the information which was used and considered in suspending Hendrickson" and that, insofar as the request concerned whether all the evidence was gathered, it concerned "an interpretation of policy and procedures and was not a request under the Statute." Judge's Decision at 5.

B. Judge's Decision

The complaint alleged that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute by failing to provide the information in the Union's July 9, July 17, and July 30 requests. *See* Complaint, ¶¶ 10-12, 20 and 21 (mislabeled ¶ 23).

The Judge stated that, under § 7114(b)(4) of the Statute, an agency has the duty to furnish a union, upon request, and to the extent not prohibited by law, data which: (1) is normally maintained by the agency in the regular course of business; (2) is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining. The Judge found that the information sought by the Union was normally maintained by the Respondent in the regular course of business, was reasonably available, and did not constitute guidance, advice, counsel, or training provided for management officials relating to collective bargaining.6 The Judge rejected the Respondent's claims that none of the requested information was necessary within the meaning of § 7114(b)(4), applying the standard set forth in *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661 (1995) (*IRS, Kansas City*). Under that standard, a union must establish a particularized need for the requested information by

articulating, with specificity, why it needs the information, including the uses to which it will put the information, and the connection between those uses and its representational responsibilities under the Statute.

The Judge found that the Union established a particularized need for the requested list of disciplinary and adverse actions. He also rejected the Respondent's claim that, even though sanitized disciplinary and adverse action information was requested, disclosure would violate the Privacy Act because, given the scope of the information requested and the small number of personnel involved, the Union would be able to identify the particular individuals to whom that information pertained. The Judge found that the Respondent did not inform the Union of this countervailing anti-disclosure interest at the time of the request and concluded, therefore, that it could not be considered. Further, the Judge found a separate violation of § 7116(a)(1), (5), and (8) on the ground that the Respondent had failed to inform the Union that the requested list of disciplinary and adverse actions did not exist in the form requested by the Union.

As for the SIS Manual, the Judge noted that the manual is a "limited use document" and that the Union did not request a specific chapter or section because it did not have access to the document. Judge's Decision at 14. The Judge found, however, that from the nature of the request, it was clear that the Union sought information concerning how investigations should be conducted and how cases are referred to the OIA and that, among other things, the Respondent, understood this need. The Judge also rejected the Respondent's claim, based on *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978) (*Robbins*), that disclosure of the SIS manual was not authorized by the Freedom of Information Act (FOIA).

Further, the Judge rejected the Respondent's claim that the Union's request for investigatory policy documents constituted a request for an interpretation and not a request for data. The Judge noted that the Union President testified he did not request these documents by name because he did not have access to them and did not know what they were. The Judge found that the Union's request was detailed enough for the Respondent to know what was included. With respect to the Respondent's assertion that the requested information was contained in a compilation of Bureau of Prisons Documents (BOPDOCS), to which the Union had access, the Judge found that the Respondent had never informed the Union of that fact and concluded that the Respondent's failure was "equivalent to a failure to properly respond" to the Union's request. *Id.* at 18.

The Judge concluded that the Union established a particularized need for the requested disciplinary policy documents and that the Respondent failed to establish that disclosure of the information was precluded by law. In reaching this result, the Judge found that the Union's request was detailed enough for the Respondent to know what the Union wanted. The Judge noted that although the Respondent asserted that some of the information requested was available on BOPDOCS, the Respondent never communicated that to the Union at the time of the request, did not seek clarification of the Union's request, as the Union had asked, and did not advise the Union that all of the information requested was not available on BOPDOCS.

As for the Hendrickson investigatory file, the Judge found that the Union needed the information to determine whether to file a grievance. The Judge rejected the Respondent's arguments that Hendrickson had not given permission for the Union to obtain a copy of the file and that since there was no public interest to be served by disclosing the unsanitized file, disclosure was barred by the Privacy Act. The Judge found that, by giving the Union permission to see the file, Hendrickson had waived any privacy interests he might have and concluded that, in these circumstances, "the [U]nion's access to the relevant records would not be a clearly unwarranted invasion of personal privacy." Judge's Decision at 23. The Judge also found that the Respondent did not present any evidence as to other employees whose privacy interests would be affected by the Union's access to the file.

In sum, based on his findings and conclusions as to each aspect of the Union's information request, the Judge concluded that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute by failing to provide the Union with the requested information. The Judge issued a recommended order.

III. Exceptions Concerning Whether the Requested Information is Necessary within the Meaning of § 7114(b)(4).

A. Positions of the Parties

1. Respondent's Exceptions

The Respondent contends, generally, that the Judge "erroneously concluded that the Union's [July 30] information request satisfied the Statute's requirements." Exceptions at 6-7.7 In particular, as to the request for the SIS manual, the investigatory policy documents, and the disciplinary policy documents, the Respondent argues that "the Union identified no alleged irregularities in the investigation of Hendrickson's misconduct, and had no reason to believe that any had occurred."*Id.* at 14. Noting that the SIS manual and investigatory policy documents contain only guidelines for conducting investigations, and are not mandatory, the Respondent argues that there is "no connection" between the manual and documents and procedures that must be followed in conducting investigations. *Id.* In addition, the Respondent maintains that the investigatory policy documents and disciplinary policy documents covered by the Union's request were already available to the Union on BOPDOCS and that the Union specified its interest in limited official use documents only at the hearing.

With respect to the Hendrickson investigatory file, the Respondent notes that the file played no role in the Warden's decision to discipline Hendrickson and that the Union already had access to the disciplinary file on which the decision was based. The Respondent contends that the Union did not establish that it had "reason to believe that any exculpatory evidence existed in Hendrickson's case."*Id.* at 21. The Respondent maintains that the Judge erred in finding that the Union established a particularized need for the investigative file to determine whether there was such evidence or evidence of other factors in the decision of which the Union was not aware.8

Finally, as to the requested list of disiciplinary actions, the Respondent contends that the Union failed to state a particularized need for the information. According to the Respondent, the Union tied its request to Hendrickson's discipline, but did not "narrow[ ] its request to the same or similar misconduct."*Id.* at 7. The Respondent asserts that the Union "failed to state a particularized need for a listing, coded or otherwise, of *all* disciplinary actions taken since June 1996."*Id.* at 8 (emphasis in original). The Respondent claims that the Judge erred, in finding a particularized need, by relying on the Union's "general and conclusory" statements regarding a need for the information to determine whether the Respondent was engaged in disparate disciplinary treatment based on race, gender, ethnic origin, or bargaining unit status, particularly management status. *Id.*

2. General Counsel's Opposition

The General Counsel asserts, generally, that the Respondent's exceptions pertaining to the Judge's finding of particularized need constitute only disagreement with the Judge's application of the law to the facts.

The General Counsel also notes that the Respondent had an "obligation to articulate its countervailing anti-disclosure interests at or near the time of its response to the request for information." Opposition at 5. The General Counsel claims that the Respondent did not assert the Privacy Act as a countervailing anti-disclosure interest at the time the Union's request for a list of disciplinary actions was made.

As to the exceptions pertaining to the SIS manual and other related memoranda, the General Counsel argues that the Judge correctly found that the Union might not have available all the documents it requested because limited official use documents are not on BOPDOCS and that there is a time lag delaying inclusion of documents in BOPDOCS. The General Counsel claims that the Respondent did not, in its response to the Union's request, state that the request did not establish particularized need, and did not assert any countervailing anti-disclosure interests.

B. Analysis and Conclusions

1. Applicable Framework

As noted by the Judge, under § 7114(b)(4) of the Statute, an agency must furnish information to a union, upon request and "to the extent not prohibited by law," if that information is: (1) "normally maintained by the agency"; (2) "reasonably available"; (3) "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining"; and (4) not "guidance, advice, counsel or training."

To demonstrate that information is "necessary" a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute."*IRS, Kansas City*, 50 FLRA at 669 (footnote omitted). In addition, the union's responsibility for articulating its interests in the requested information requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the disclosure of the information is required under the Statute. *Id.* at 670. The agency is responsible for establishing any countervailing anti-disclosure interests and, like the union, must do so in more than a conclusory way. *Id. See also Health Care Financing Admin.*, 56 FLRA 156, 159 (2000) (*HCFA*). Such interests must be raised at or near the time of the union's request. *See IRS, Austin Dist. Off., Austin, Texas*, 51 FLRA 1166, 1180 n.14 (1996) (*Austin Dist. Off.*) (finding of violation based on response at time of request, not some later time).

2. Application of the framework to the information requested in this case

a. SIS Manual, Investigatory Policy Documents, and Disciplinary Policy Documents

We find that the Agency has not established that the Judge incorrectly determined that the Union had established a particularized need for the requested SIS Manual, investigatory policy documents, and disciplinary policy documents.

The Union's request clearly informed the Respondent that it needed the requested information for several reasons, specifically, to determine: (1) whether the investigation of Hendrickson was conducted in accordance with applicable Agency policy; (2) who had the authority to resolve issues of employee conduct without imposing discipline; (3) whether Hendrickson was treated differently than other employees; and (4) whether to file a grievance concerning the discipline of Hendrickson. The request clearly notified the Respondent that the Union intended to examine whether the investigation of Hendrickson was consistent with Agency policies concerning investigations of employee conduct and that it needed information as to those policies in order to make that examination. The Union had a similar intent with respect to the Agency's policies regarding the imposition of discipline. The results of its examination would enable it to decide whether to file a grievance concerning the Hendrickson discipline. In short, the Union's explanation established a connection between the particular information that it was requesting, the uses to which that information would be put, and the representational purposes for which it was requested.

As to the Respondent's contention that the Union had identified no

irregularities in the Hendrickson investigation, a union is not required in its request to describe the exact nature of the respondent's alleged misapplication or violation of policy, procedure, law or regulation. *See HCFA*, 56 FLRA at 162. With respect to the contention that the Union has not shown how the requested information would enable it to demonstrate disparate treatment, the Authority has stated previously that whether requested information would accomplish a union's purpose is not determinative of whether it is necessary within the meaning of the Statute. *See IRS, Kansas City*, 50 FLRA at 673. Further, as to the Respondent's argument that the information requested by the Union was already available to it on BOPDOCS, the Respondent did not raise that issue in responding to the request and is untimely in raising it for the first time at the hearing. *See Federal Aviation Admin.*, 55 FLRA 254, 260 (1999) (*FAA*) (agency must articulate non-disclosure interests in response to information request and not for the first time at the unfair labor practice hearing). In any event, the Judge found that the request extended to information in limited official use documents not in BOPDOCS and that the Union would not have had any knowledge of those documents. *See IRS, Kansas City*, 50 FLRA at 670 n.13.

We find that the Respondent has not demonstrated that the Judge erred in finding that the Union established a particularized need for the requested SIS Manual, investigatory policy documents, and disciplinary policy documents. Consequently, we deny the Respondent's exception in this regard.

b. Hendrickson Investigatory File

We also find that the Agency failed to establish that the Judge erred in finding that the Union established a particularized need for the Hendrickson investigatory file. First, the Respondent contends that the decision to discipline Hendrickson was based on the disciplinary file and not the investigatory file. Second, the Respondent contends that the Union did not establish that it had any reason to believe that there was exculpatory evidence in the investigatory file. The Respondent's contentions miss the point.

As to the first contention, the Union made clear that it intended, at least in part, to examine whether the investigation leading up to the disciplinary action was consistent with the Respondent's policy and whether that file contained exculpatory evidence. The second contention assumes that the Union should have had some knowledge of the contents of the file. However, since it had no previous access to that information, the Union would not have had any knowledge of those documents. Neither of these contentions demonstrates that the Judge erred in finding that the Union's request established a particularized need for the requested file.

We find that the Respondent has not demonstrated that the Judge erred in finding that the Union established a particularized need for the requested Hendrickson investigatory file. Consequently, we deny the Respondent's exception in this regard.

C. List of Disciplinary and Adverse Actions 9

Finally, we find that the Judge erred in concluding that the Union established a particularized need for the requested list of disciplinary and adverse actions. In this regard, we note that the Authority has consistently recognized that a union establishes a particularized need under § 7114(b)(4) for requested information where the request provides "sufficient specification of both the uses to which the information would be put and [the] connection between the uses and the union's representational responsibilities under the Statute."*United States Dep't of Justice, INS, Northern Region, Twin Cities, Minn.*, 52 FLRA 1323, 1331 (1997) (*INS, Twin Cities*), aff'd, *United States Dep't of Justice, INS, No. Region, Twin Cities, Minn. v. FLRA*, 144 F.3d 90 (D.C. Cir. 1998). *See also Austin Dist. Off.*, 51 FLRA at 1178; *United States Dep't of Transportation, FAA, New England Region, Bradley Air Traffic Control Tower, Windsor Locks*, Conn., 51 FLRA 1054, 1067-68 (1996); *IRS, Kansas City*, 50 FLRA at 672. However, where the information sought is broader than the circumstances

covered by the request, and the union has not been able to establish a connection between the broader scope of the information requested and the particular matter referenced in the request, the Authority has found that the union has not established a particularized need for that information. *See, e.g., United States Customs Service, South Central Region, New Orleans Dist., New Orleans, La.*, 53 FLRA 789, 799 (1997); *United States Dep't of the Treasury, IRS, Washington, D.C.*, 51 FLRA 1391, 1395-96 (1996); *United States Dep't of Labor, Washington, D.C.*, 51 FLRA 462, 476 (1995) (*Dept. of Labor*).

In this case, we find that the Union failed to establish a particularized need for the list of disciplinary and adverse actions, despite the Respondent's repeated requests for clarification of the Union's need for the type and breadth of information sought.

Specifically, the record reveals that the Union initially requested "copies of all disciplinary and adverse action files on all employees at FCI-<**Forrest City** >," including "the charges, action taken, and the pay grades of each individual." GC Exhibit No. 2. The Union did not explain why it needed information for *all* employees and for *all* types of disciplinary and adverse actions. Similarly, the Union did not identify the uses to which that information would be put. The Respondent timely responded to the Union's request, stating that the Union had failed to provide sufficient information to create a particularized need. In particular, the Respondent noted that the Union failed to indicate why it needed the information, how the information would be used, and how the use of the information would relate to the Union's representational responsibilities under the Statute.

In its second request for the information, the Union stated that the information would be used to determine if the Respondent was "consistent in disciplinary actions taken against bargaining unit employees, compared with the disciplinary actions taken against supervisors." GC Exhibit No. 4. The Union added that the information "will be used to survey the comparisons between exempt, and non-exempt employees. . .[and] will also be used to compare the action taken on cases similar in nature."*Id.* The Respondent timely responded to this second request and, in its response, stated that the Union had failed to provide a sufficient basis to establish a particularized need for the requested information.

Nowhere in the Union's first or second requests is there any reference to the Hendrickson suspension or an indication that the information was needed for the possible representation of a bargaining unit employee. Likewise, nowhere in the two requests is there any indication as to any other representational purpose for which the requested information would be used. A mere assertion that the Union intended to make comparisons between disciplinary actions taken against employees and those taken against supervisors does not, standing alone, meet the statutory requirement to articulate, with specificity, why the Union needed the information, including the uses to which the information would be put and the connection between those uses and the Union's responsibilities in adequately representing its members. *See IRS, Kansas City*, 50 FLRA at 669-70. As the Authority stated in *IRS, Kansas City*, a request need not be so specific as to require a union to reveal its strategies or compromise the identity of potential grievants who desire anonymity. *Id.* at 670 n.13. However, a union must still identify, with sufficient specificity, the representational purposes to which the requested information will be put. Here, there was no such specificity provided in the Union's first and second requests.

Not until the third information request did the Union reference the Hendrickson suspension and the possible filing of a grievance on Hendrickson's behalf. However, the Union's July 30 request, although now confined to a particular time period, continued to request all disciplinary and adverse action records within that stated time period in order to compare discipline in similar cases against unit employees, rather than solely in connection with the discipline in the Hendrickson case. In addition to the previous requests, it sought to have the information as to disciplinary actions coded as to race, gender, and national origin.10 Further, referencing the complaint of an unnamed unit employee, it

claimed to need the information to compare disciplinary actions based on race, gender, and national origin. In replying to the July 30 request, the Respondent noted that, in that request, the Union indicated it was "making [the] request on behalf of Mr. Hendrickson," but that it also "now refer[s] to a bargaining unit member and further without specificity on race, gender, and ethnic origin." GC Exhibit 8 at 2, Respondent's reply to the July 30 request. In this manner, the Respondent indicated to the Union that it had failed to specify whether and how all the information sought was needed for a grievance concerning Hendrickson or to indicate whether it was needed for some other employee. This reply was

sufficient to apprise the Union that additional specificity to support the request was needed. However, the Union did not provide any further explanation to the Respondent.

It is clear that the Union's requests concerned general issues related to disparate treatment of unit employees, and were not related solely to the Hendrickson suspension. Nothing in the record indicates that the Union attempted to clarify its request to apply only to information concerning offenses similar to that involving Hendrickson. Thus, while some of the information requested may be the type of information that would be needed to compare the Respondent's discipline of Hendrickson to the discipline of, e.g., similarly situated non-unit employees, or other employees based on race, gender, or national origin, not all of the requested information would be necessary for that purpose. The Union did not further explain the manner in which the remainder of the information would have any connection to demonstrating disparate treatment of Hendrickson with respect to similarly situated employees.

Thus, in the instant case, as in *Dep't of Labor,* the Union has established "a need for *some* disciplinary. . .records to compare with the [similar discipline] given [the employee it is representing]," but it does not "explain why [it] needs the information it has requested[.]" *Id.* at 476. The Authority concluded in *Dep't of Labor* that the union had not established a particularized need for the scope of the information requested. Consistent with *Dep't of Labor,* and for the same reasons, the Union in this case has not established a particularized need for the list of disciplinary and adverse actions which it requested.11

We conclude that the Judge erred in finding that the Union established a particularized need for the requested list of disciplinary and adverse actions and reverse the Judge's finding of a violation of the Statute on that ground.12

IV. Exceptions Concerning Whether Disclosure of the SIS Manual is Prohibited by Law within the Meaning of § 7114(b)(4)

A. Positions of the Parties

1. Respondent's Exceptions

The Respondent contends that disclosure of the SIS Manual would "impermissibly interfere" with its right to determine its internal security practices under § 7106(a)(1) of the Statute. Exceptions at 15.

The Respondent also contends that the Judge erred in failing to address its argument that disclosure of the SIS Manual is prohibited by "the Housekeeping Act, 5 U.S.C. § 301," and Department of Justice regulations, 28 C.F.R. Part 16 (Part 16). According to the Respondent, Part 16 has been held to permit it to withhold information concerning matters pertaining to its security and the security of its investigations, citing *United States ex rel. Touhy v. Ragen,* 340 U.S. 462 (1951). Exceptions at 18.

2. General Counsel's Opposition

The General Counsel states that the Respondent did not assert in its response to the Union's request that disclosure of the SIS Manual is prohibited by law. The General Counsel also notes that the Respondent

has an obligation to articulate its countervailing anti-disclosure interests at or near the time of its response to the Union's request for information.

B. Analysis and Conclusions

Section 7106 does not prohibit the disclosure of information. *See NLRB Union, Local 6 v. FLRA*, 842 F.2d 483, 486 (D.C. Cir. 1988) (*NLRBU v. FLRA*) ("Nothing in § 7106 contains any language concerning the disclosure or prohibition of disclosure of anything."). Consequently, the Respondent's reliance on § 7106 is without merit. *See NTEU*, 55 FLRA 1174, 1186 n.15 (1999) (Member Wasserman dissenting on other grounds) ("The court held in *NLRBU v. FLRA* that, in resolving an asserted statutory entitlement to information, the 'prohibited by law' exception to disclosure under § 7114(b)(4) of the Statute encompasses only disclosure laws, not 7106.").

The Respondent's reliance on 5 U.S.C. § 301 and Part 16 is also unavailing.13 5 U.S.C. § 301 merely authorizes heads of agencies to prescribe regulations, among other things, governing the use of the agencies' records and papers. The provision also specifically states that it does not "authorize withholding information from the public or limiting the availability of records to the public." In short, 5 U.S.C. 301 does not prohibit the disclosure of information.

Part 16 contains Respondent's regulations governing the processing of requests for information under the FOIA. In the first place, this case does not involve a request under FOIA and, thus, it appears that Part 16 is not applicable to the request. Secondly, the Respondent does not indicate the section of Part 16 that it claims prohibits disclosure of the requested information. In this regard, examination of Part 16 in light of the Respondent's expressed concerns suggests that the only arguably relevant portion could be 28 C.F.R. § 16.26. That subsection pertains to the considerations that should guide agency officials in deciding whether to disclose requested information and includes guidance concerning investigatory records compiled for law enforcement purposes. 28 C.F.R. § 16.26(b)(5). However, by its own terms, the provision applies to records compiled for law enforcement purposes, not for internal disciplinary proceedings. Thirdly, it does not prohibit the disclosure even of the records to which it applies.

Consequently, the Respondent has failed to demonstrate that disclosure of the requested SIS Manual is prohibited by law. We conclude, therefore, that the Judge properly found that disclosure of that information was not prohibited by law. Consequently, we deny the Respondent's exception. In light of this conclusion, it is not necessary for us to address the General Counsel's contention regarding the Respondent's obligation to articulate countervailing interests.

V. Exceptions Concerning Whether the Judge Erred in Finding that the Respondent Violated the Statute by Failing to Inform the Union that the Requested List of Disciplinary and Adverse Actions did not Exist in the Form Requested

A. Positions of the Parties

1. Respondent's Exceptions

The Respondent contends that the Judge erred in finding that: (1) it had an affirmative obligation to notify the Union that it did not have certain information in the form requested by the Union; and (2) it violated the Statute by failing to notify the Union of that fact. The Respondent also claims that the General Counsel did not allege in the complaint that the Respondent violated the Statute by failing to notify the Union that the requested information did not exist, and did not amend the complaint to include such an alleged violation. The Respondent cites *United States EEOC*, 51 FLRA 248, 251 (1995).

2. General Counsel's Opposition

The General Counsel contends that the violation for failure to notify as to nonexistent information "is not a separate allegation under the Statute, but, rather, is incorporated within the § 7116(a)(1), (5), and (8) allegation in the Complaint." Opposition at 13. In particular, the General Counsel notes that a reply to a request for information is necessary for full and proper discussion of subjects within the scope of bargaining and that the nonexistence of requested information does not relieve a respondent of the obligation to reply. Rather, according to the General Counsel, although the Authority has indicated that parties should consider alternative forms or means of disclosure, the Respondent failed to consider an alternative means by which to meet the Union's information needs.

B. Analysis and Conclusions

The Authority has consistently held that, when information requested by a union from an agency does not exist, the agency is obligated under § 7114 (b)(4) of the Statute to inform the union of that fact. *See, e.g., Social Security Admin., Dallas Region, Dallas, Tex.*, 51 FLRA 1219, 1226 (1996); *United States Naval Supply Center, San Diego, Cal.*, 26 FLRA 324, 326-27 (1987). Failure to inform a union of the nonexistence of requested information constitutes a violation of § 7116(a)(1), (5), and (8) of the Statute. *Id.*

However, this is not a case in which information as to unit status, race, gender, and national origin of employees involved in disciplinary and adverse actions sought by the Union did not exist. Indeed, the Respondent maintained the information, only not in the precise form sought by the Union. Furthermore, the Respondent in this case responded to the Union's request and has never defended its refusal to provide the requested information on the ground that it did not exist in "list" form. Finally, the General Counsel acknowledges that any failure to notify the Union that the requested information did not exist in that form was not a separate allegation in this case. Consequently, this was not a separate issue before the Judge, and we modify the order in this case to strike any reference to it.

VI. Exceptions Concerning Whether the Judge Erred in His Recommended Remedial Order and Notice

A. Positions of the Parties

1. Respondent's Exceptions

The Respondent claims that the issue of its failure to notify the Union that a list of disciplinary and adverse actions categorized by unit status, race, gender, and national origin did not exist was not properly litigated. In this regard, the Respondent contends that the Judge improperly ordered the Respondent to cease and desist from failing to so notify the Union and ordered the Respondent to notify the Union when requested information does not exist. The Respondent asserts that the Judge also improperly ordered it to provide the Union with the SIS Manual, investigatory policy documents, and disciplinary policy documents already in the Union's possession and to respond in a timely manner to the Union's information requests. The Respondent argues that the order and notice to employees should be modified to remove those requirements.

Specifically, the Respondent contends that it should not be required to disclose the whole SIS Manual, since only one chapter pertains to the subject of that request. The Respondent also contends that it should not be required to provide any of investigatory policy documents or disciplinary policy documents requested by the Union that "already are in the Union's possession" through BOPDOCS. Exceptions at 24. Finally, the Respondent contends that the requirement regarding timely response should be removed because there was no issue before the Judge concerning the timeliness of the Respondent's responses to the Union's requests for information. The Respondent notes that certain parts of the Judge's order were not requested as remedies by the General Counsel.

2. General Counsel's Opposition

According to the General Counsel, the Judge "correctly ordered relief based on his conclusion that [the] Respondent violated § 7116(a)(1),(5), and (8) of the Statute." Opposition at 14. The General Counsel contends also that the Respondent did not cite any precedent supporting its claim that the Judge was limited to remedies requested by the General Counsel.

B. Analysis and Conclusions

Because we have reversed the Judge's conclusion that the Respondent violated the Statute by failing to notify the Union of the non-existence of requested information, the remedial order and notice will be modified by removing any requirements pertaining to that violation.

We view the Judge's order concerning timely response to the Union's information requests as simply a restatement of the Respondent's obligation under the Statute. *See, e.g., Dep't of Health and Human Services, Social Security Admin., New York Region, New York, N.Y.*, 52 FLRA 1133, 1150 (1997). Accordingly, we deny the Respondent's exception in this regard.

As to the Respondent's claim that the order should be modified to require disclosure of only a portion of the SIS Manual and to eliminate a requirement for the disclosure of any necessary information on BOPDOCS, the Judge's recommended order is sufficiently specific to put the Respondent on notice as to what is required, and any disputes as to particular information covered by the order in this regard should be resolved in compliance proceedings. *See Dep't of the Air Force, Scott AFB, Ill.*, 51 FLRA 675, 694 (1995), *aff'd, Dep't of the Air Force, Scott AFB, Ill. v. FLRA*, 104 F.3d 1396 (D.C. Cir. 1997) (disputes as to scope of order resolved in compliance proceedings).

We conclude that the Judge's recommended order in this case should be modified by removing from the order any reference to requirements pertaining to the failure to notify the Union as to the non-existence of requested information. We deny the Respondent's exceptions as to the requirements of the Judge's recommended order pertaining to the timeliness of the Respondent's response and to the SIS Manual and operations memoranda and program statements contained on BOPDOCS.

VII. Order

Pursuant to § 2423.43 of our Regulations and § 7118 of the Federal Service Labor-Management Relations Statute, the United States Department of Justice, Bureau of Prisons, Federal Correctional Institution, <**Forrest City** >, Arkansas shall:

1. Cease and desist from:

(a) Failing and refusing to furnish, as requested by the American Federation of Government Employees, Local 0922: (1) the SIS manual and any and all investigatory policy documents; (2) any and all disciplinary documents; and (3) the complete investigatory file on Shannon Hendrickson.

(b) Failing to furnish information requested by the American Federation of Government Employees, Local 0922, under the Statute in a timely manner.

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

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

(a) Upon request, furnish to the American Federation of Government Employees, Local 0922, the exclusive representative of certain of its employees: (1) the SIS manual and any and all investigatory policy documents; (2) any and all disciplinary documents; and (3) the complete investigatory file on Shannon Hendrickson.

(b) Respond in a timely manner to requests for information made by the American Federation of Government Employees, Local 0922, under the Statute.

(c) Post at its facilities in <**Forrest City** >, Arkansas, where the bargaining unit employees represented by the American Federation of Government Employees, Local 922, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, and shall be posted and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Appendix

1. 5 U.S.C. § 301 provides as follows:

§ 301. Departmental regulations

The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting availability of records to the public.

2. 28 C.F.R. Part 16 provides in relevant part as follows:

§ 16.1 General provisions.

(a) This subpart contains the rules that the Department of Justice follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

. . .

§ 16.26 Considerations in determining whether production or disclosure should be made pursuant to a demand.

(a) In deciding whether to make disclosures pursuant to a demand, Department officials and attorneys should consider:

(1) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose, and

(2) Whether disclosure is appropriate under the relevant substantive law concerning privilege.

(b) Among the demands in response to which disclosure will not be made by any Department official are those demands with respect to which any of the following factors exist:

. . .

(5) Disclosure would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired.

1 The separate opinion of Member Pope, dissenting in part, is set forth at the end of this decision.

2 This request references previous requests for information which are not

in the record.

3 The Special Investigators Supervisory Manual, referred to herein as the SIS Manual, is a policy document that contains guidance on the conduct of investigations, including investigations into potential disciplinary actions. The phrase "operations memoranda, program statements, and manuals" in this context refers to other management documents containing policy or guidance on the conduct of investigations. Those documents will be referenced herein as "investigatory policy documents."

4 The phrase "operations memoranda, program statements, manuals and documents" in this context relates to documents containing policy or guidance with respect to the imposition of disciplinary actions on employees and will be referenced herein as "disciplinary policy documents."

5 The phrase "complete investigative file on Hendrickson" relates to all the information that was collected in the investigation into Hendrickson's alleged AWOL infraction, including reports of interviews with witnesses, that formed the basis for the summary information in the disciplinary file used by the warden in deciding Hendrickson's discipline. It will be referenced herein as the "Hendrickson investigatory file."

6 The Respondent does not except to the Judge's findings that the information is normally maintained and reasonably available and they will not be addressed further in this decision.

7 The Respondent contends that the Judge erroneously stated that it did not dispute that the Union's request met the requirements of § 7114(b)(4). Exceptions at 6 n.3. Even if the Judge's statement is in error, that fact is irrelevant to whether he correctly found that the requirements are met.

8 The Respondent also argues, Exceptions at 14 n.8, that the SIS manual constitutes advice, guidance, and counsel within the meaning of § 7114(b)(4)(C) and, as such, is not disclosable. We agree with the General Counsel that, because § 7114(b)(4)(C) was not raised before the Judge, it is not properly before us. *See* § 2429.5 of the Authority's Regulations.

9 Member Pope dissents as to the majority's conclusion in this section and would find, for reasons set forth in her dissenting opinion, that the Union established a particularized need for the requested list of disciplinary and adverse actions.

10 In this regard, the Union noted that coding the information would allow it to make "a more specific request if necessary." GC Exhibit 8 at 2, July 30 Request at 2. The Union's statement suggests that it recognized that it was requesting more information than it might ultimately need.

11 The fact that the Union established a particularized need for most of the information it requested clearly shows that the Union was aware of the steps that it was required to take to satisfy a showing of need under § 7114(b)(4), and that these steps did not impose an insurmountable burden on the Union.

12 Given the conclusion set forth above, that the Union has not established a particularized need for the requested list of disciplinary and adverse actions, the majority opinion will not consider the Respondent's claim that disclosure of that information is prohibited by law.

13 The relevant text of each of these provisions is set forth in the Appendix to this decision.

Member Pope, dissenting in part:

I agree with the majority's decision in all respects but one. On that one point, I would find that the Union Party established particularized need for the requested list of disciplinary and adverse actions.

A union satisfies its burden to demonstrate particularized need "by

articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information, and the connection between those uses and the union's representational responsibilities under the Statute."*IRS, Wash., D.C.*, 50 FLRA 661, 669 (1995) (*IRS*). In response, a respondent has the burden to establish any anti-disclosure interests in more than a conclusory way. *Id.* at 670.

In this case, the Union submitted at least three separate information requests.1 In all three requests, the Union asked for the list of disciplinary and adverse actions; in the third request the Union also asked for the SIS Manual, the investigatory policy documents, the disciplinary policy documents, and the Hendrickson investigatory file.2 While the first two requests are relevant to understanding the evolution of the dispute, it is clear that the issue here is whether, as the Judge stated, the union articulated particularized need in its third request.3 Judge's Decision at 10.

In that third request, the Union offered three separate reasons for requesting the disciplinary and adverse action files. First, the Union stated that the information was needed to determine "whether or not a grievance should be filed in the case of the disciplinary action recently imposed on Mr. S. Hendrickson." GC. Ex. 6 at 1. Second, the Union stated that, based on information it had already supplied to the Respondent, it had "reason to believe that supervisors, executive staff, and other non-bargaining unit members are held to a different, and less severe, standard of conduct than bargaining unit members."*Id.* at 2. Third, the Union stated that a bargaining unit employee had "complained that there is disparate treatment in disciplinary and adverse actions based on race, gender, and ethnic origin."*Id.* The Union added:

The requested information will enable the Union to fulfill its representational responsibilities to represent employees under the Statute and administer the contract by allowing the Union to compare the discipline imposed on bargaining unit members as compared to non-bargaining unit members, supervisors/department heads, and executive staff members and to compare the discipline imposed on various races, ethnic origins, and genders, to determine if a grievance under the contract or other action is warranted.

Id. The Union also added that the temporal limits on the request (disciplinary and adverse action files taken since July 1996) were based on the time that the current code of conduct for employees had been in place. *Id.* at 3.

I believe that any reasonable application of the particularized need standard---which "requires parties to articulate and exchange their respective interests in disclosing information"---results in a conclusion that, in the third request, the Union established such need. *IRS,* 50 FLRA at 670. In that request, the Union not only referenced a particular grievant by name, but also referenced its need to investigate specific complaints regarding discrimination based on unit status as well as race, gender, and ethnicity. I am unaware of any precedent requiring the Union to state more. I note that, as the majority acknowledges, "a request need not be so specific as, for example, to request a union to reveal its strategies or compromise the identity of potential grievants who wish anonymity."*IRS,* 50 FLRA at 670 n.13.

In concluding that the Union did not establish particularized need, the majority does a disservice to both the factual record and Authority precedent.

As for the record, the majority states that, in its response to the Union's third request, the Respondent "indicated to the Union that it had failed to specify whether and how all the information sought was needed for a grievance concerning Hendrickson or to indicate whether it was needed for some other employee." Majority Opinion at 17. This is incorrect. The Respondent's response to the third request contains no such indication.4 In a similar vein, the majority states that the Respondent's response to the third request was sufficient to apprise the Union what additional

information was needed and implies that the Union failed to respond to repeated requests from the Respondent for additional information. However, the fact is that the Respondent *never provided the Union the slightest indication of what further information it needed.* Indeed, the Respondent rejected the third request for exactly the same reasons, in exactly the same words, it had rejected the previous two requests. Despite the fact that the Union had offered significant new and different reasons for the requested list of disciplinary and adverse actions in the third request,5 the Respondent did nothing more than repeat, as if by rote, its previous reasons for denying the first and second requests. *See* GC Ex. 3 at 1-2 (Response to first request); GC Ex. 5 at 1-2 (Response to second request); GC Ex. 8 at 3 (Response to third request).

As to Authority precedent, none of the cases relied on by the majority involve facts remotely like those in this case. In both *United States Customs Serv., S. Cent. Region, New Orleans Dist., New Orleans, La.*, 53 FLRA 789, 799 (1997), and *United States Dep't of the Treasury, IRS, Wash., D.C.*, 51 FLRA 1391, 1395-96 (1996), the respondents made specific requests that the unions narrow their requests. Here, by contrast, the Respondent made no such request and, other than its "cut and paste" insistence that the Union had not established a need for the requested files, made no attempt to explain why, in its view, the requested information was not necessary. In the other case relied on by the majority, *United States Dep't of Labor, Wash., D.C.*, 51 FLRA 462, 476 (1995), the union did not explain why it needed records for the period of time requested. As noted above, the Union here explained that "[t]he time frame is limited to the time that the current code of conduct for employees has been in place." GC Ex. 6 at 3. Simply put, there is no Authority precedent supporting the majority's outcome in this case.

By finding that the Respondent did not violate the Statute in denying the request at issue here, the majority permits the Respondent---and encourages agencies in other cases---to stonewall a union's request for information. This does not "'facilitate[ ] and encourage[ ] the amicable settlement[ ] of disputes. . .' and, thereby, effectuate[ ] the purposes and policies of the Statute."*IRS*, 50 FLRA at 670. It also does not enhance "both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute."*Id.* Instead, the majority "impose[s] an insurmountable burden on a party requesting information."6*Id.* at 671.

Based on the foregoing, I would find that the Respondent violated the Statute by failing to provide the Union with the requested list of disciplinary and adverse actions.7

1 The request referenced by the Judge as the first request states that it is, in fact, "the second request." GC. Exh. 2. Nevertheless, as there are no exceptions on this point, I refer to the requests in the same way as the Judge.

2 As there is agreement that the Union established particularized need for the SIS Manual, the investigatory policy documents, the disciplinary policy documents, and the Hendrickson investigatory file, I address here only the requested list of disciplinary and adverse actions.

3 As such, I do not understand the majority's reliance on the first two requests.

4 While the Respondent noted that the Union had requested information on behalf of Hendrickson as well as another unit employee, the Respondent made no claim that the Union failed to specify which information would be used for which claim. The Respondent merely noted that the Union had not identified the race, gender, or ethnic origin of the other employee. GC. Ex. 8 at 3.

5 The majority's statement, Majority Opinion note 10, that the Union's statement in its third request that the requested information would permit a more specific request if necessary suggests Union recognition that its request was overbroad is both speculative and irrelevant. Not even the

Respondent offers this construction of the request.

6 The majority's response to this misses the point. The Union's success in establishing particularized need for other information establishes only that the majority is evaluating the requests inconsistently. The record establishes that the Union provided far more information, with far more specificity, regarding its need for the requested list of disciplinary and adverse actions than it did for the other requested information.

7 I would reject the Respondent's argument that disclosure of this information is prohibited by the Privacy Act. While the Judge erred in stating that sanitization of the requested information would necessarily avoid Privacy Act concerns, *see AFGE, Local 1858*, 56 FLRA 1115, 1117-18 (2001), the record does not establish that any individual's identity would be discernable from the sanitized information requested.

Decision

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (hereinafter FLRA/Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed by the Charging Party, the American Federation of Government Employees, Local 0922 (hereinafter Union/Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Dallas Regional Office. The complaint alleges that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forest City, Arkansas (Respondent), violated section 7116(a)(1), (5) and (8) of the Statute by failing to provide a sanitized listing of disciplinary and adverse actions taken since June 1996; the SIS manual and a sanitized listing of disciplinary and adverse actions taken since June 1996; the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled; any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline; the complete investigative file on Shannon Hendrickson.

A hearing was held in Memphis, Tennessee, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. All parties filed timely post-hearing briefs which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

At all times material herein, the Respondent was an agency under 5 U.S.C. § 7103(a)(3). At all times material herein, the Union was a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent.1

Sometime around May 21, 1998,2 Officer Shannon Hendrickson, a bargaining unit employee, requested annual leave from a lieutenant. The lieutenant referred Hendrickson to Hendrickson's shift lieutenant, to see if she could get the day off. The following day Hendrickson talked to another lieutenant, who that evening called a lieutenant on the telephone, who was going to be the shift lieutenant on the day that Hendrickson wanted to take annual leave. That lieutenant told Hendrickson that there was no problem, but Hendrickson would have to talk to the acting captain.

Hendrickson contacted Lieutenant Jones, the acting captain who granted her leave request. However, due to an apparent miscommunication, Hendrickson should not have been granted leave. Around July 1, Hendrickson was placed under an investigation and subsequently received a one-day suspension.

As a result of that suspension, the Union made a written request for information dated July 9. The Union claimed that it needed the information within five working days to ensure that it would have ample time to review the information prior to the time limit to file a grievance would expire. Respondent replied in its response dated July 15, denying the Union's request. Respondent contended that the Union failed to provide enough information to create a particularized need because it failed to provide the following with specificity: (1) why the Union needed the information; (2) how the Union would use the information; and (3) how the use of the information related to the union's representational responsibilities under the Statute.

Thereafter, on July 17, the Union amended its data request, asking for the same information. In its amended requested, the Union said it needed the information to determine if Respondent was consistent in disciplinary actions taken against bargaining unit employees compared with the disciplinary actions taken against supervisors, and that the information would be used to survey the comparisons between exempt and nonexempt employees. Additionally, the Union indicated that the information would also be used to compare the action taken on cases similar in nature. Respondent replied to the second request on July 22, again denying the Union's request for the same reason it denied the July 9, request.

Sometime around July 30, the Union made a third amended data request. This time the Union requested for four items: (1) a listing of disciplinary and adverse actions taken since June 1996. The Union explained that all personal identifiers such as names and social security numbers should be sanitized and the listing should be coded to reflect whether the employee is a bargaining unit member, a nonbargaining unit member, a supervisor/department head, or an executive staff member and should also be coded to indicated race, ethnic origin, and gender. The Union also asked that the listing be numbered sequentially; (2) the SIS manual and any and all operations memoranda, program statements, and manuals that indicated how an investigation would be conducted and how referral to the Office of Internal Affairs is handled; (3) any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline; and (4) the complete investigative file on Hendrickson. Around July 30, the Union made a written request to prolong the grievance deadline for Hendrickson.

The Union explained that it needed the list of disciplinary and adverse actions in order to determine whether or not a grievance should be filed in the case of the disciplinary action imposed on Hendrickson. The Union also explained that it needed the information to determine if Respondent had imposed disparate discipline, based on race, sex, or ethnic origin, and/or based on bargaining unit membership as opposed to employees who are not in the bargaining unit, in particular employees who hold supervisory or higher positions. The Union asserted that the program statement on standards of conduct and responsibility indicates that employees are held to the same standard of conduct, but that supervisors are held to a higher standard of conduct due to their increased level of responsibility and the need to set an example to other employees. The Union explained that listing the specific infraction and coding the documents in the way requested would allow the Union to make the necessary comparisons.

The Union explained that it needed the SIS manual and other memoranda, program statements and manuals in order to determine whether or not a grievance should be filed in the case of the disciplinary action imposed on Hendrickson. Further, the Union maintained that it

needed the information to determine whether the investigation of Hendrickson was conducted properly and in accordance with Bureau of Prison policies and procedures, what evidence is required to be gathered, and whether all evidence was gathered in the case. The Union also stated that it needed the SIS manual and other memoranda, program statements and manuals to determine whether Hendrickson was treated differently than other employees and to determine if there was exculpatory evidence that was overlooked. Similarly, the Union said that it needed the information in memoranda, program statements and manuals to determine whether or not a grievance should be filed in the case of the disciplinary action imposed on Hendrickson. The Union also said that it needed the information to determine who can formally resolve problems between employees within the work place in order to determine if the supervisors had the authority to resolve the matter without imposing discipline, because an investigation was conducted and discipline imposed after the employee involved was told by three supervisors that the matter was closed.

The Union stated that it needed the investigative file of Hendrickson in order to determine whether or not a grievance should be filed in the case of the disciplinary action imposed on Hendrickson. Furthermore, the Union explained that it needed the information to determine if there was exculpatory evidence in the file that was not made available to Hendrickson and the Union and to determine if all the evidence was gathered. In addition, the Union stated that it needed to be apprized of all the information available to the Warden, who made the decision on the disciplinary proposal, to determine if the affected employee and the Union had the opportunity to present a complete defense before the decision was made, and whether there were factors considered in the decision of which the employee and the Union were not aware.

Around August 7, Respondent made its final reply to the data requests, once again denying the Union's requests. Respondent repeated the response it gave to the Union's two previous requests, that the Union had failed to state a particularized need for disciplinary and adverse actions. With regard to the SIS manual and memoranda, program statements and manuals requested in items 2 and 3, Respondent stated that the requests were denied because the requests were for an interpretation of policy and procedures and were not requests for data under the Statute. As to the investigative file of Hendrickson, Respondent denied the request, stating that the Union had access to all the information which was used and considered in suspending Hendrickson and that the request for determining if all the evidence was gathered was an interpretation of policy and procedures and was not a request under the Statute.

Analysis and Conclusions

Section 7114(b)(4) of the Statute provides that an agency has the duty to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. Counsel for the General Counsel maintains that the Union's data request meets all of the above requirements and the data in its entirety should have been provided to the Union. Respondent does not contest that the requirements are met and the record evidence set out below supports the General Counsel's conclusion that the requirements are met.

Respondent argues that if the Union had any question regarding the propriety of the investigation it could have filed a grievance or gone to arbitration. That is precisely why the Union made its requests for information, to determine whether or not a grievance should be filed. Respondent's argument apparently would require the Union to file a grievance or ask for arbitration before any requests for information under section 7114(b)(4) of the Statute are granted. Counsel for the General

Counsel asserts that such an interpretation of section 7114(b)(4) is not only contrary to the Statute but to existing Authority precedent as well. I agree.

A. Whether the Information was Normally Maintained by Respondent in the Regular Course of Business

The Authority has found that requested information is "normally maintained" by an agency, within the meaning of section 7114(b)(4) of the Statute, if the agency possesses and maintains the information. *Department of Health and Human Services, Social Security Administration, Baltimore, Maryland,* 37 FLRA 1277 (1990). Additionally, the Authority had determined that even where specific information sought does not exist an agency is not relieved of its obligation to reply a union's request under section 7114(b)(4) of the Statute, even if its response is that the information sought does not exist. *U.S. Naval Supply Center, San Diego, California,* 26 FLRA 324 (1987); *Veterans Administration, Washington DC and Veterans Administration, Regional Office, Buffalo, New York,* 28 FLRA 260 (1987); *Department of Health and Human Services, Social Security Administration, New York Region,* 52 FLRA 1133, 1149-50 (1997).

Whether Respondent normally maintained a sanitized listing of disciplinary and adverse actions taken since June 1996 as requested by the Union in its July 30, request for information was answered by Warden George Snyder, who was the Warden at Respondent's facility at the time the data request herein was made. Warden Snyder testified that at the time the data request was made, Respondent did not have a listing of disciplinary files, but that it had only the disciplinary files themselves. Warden Snyder also said that Respondent did not inform the Union that it did not have a listing of disciplinary files already prepared or that it only had the files themselves. In this case, Respondent simply denied the request, relying on the Union's believed failure to state a "particularized need" for the information. As already noted, where information does not exist, it is not sufficient for an agency to respond to the request without stating that the information sought does not exist. *Social Security Administration, Baltimore, Maryland and Social Security Administration, Area II, Boston Region, Boston, Massachusetts,* 39 FLRA 650 (1991).

Assuming that Respondent had no duty to turn over the redacted disciplinary files from June 1996 to June 1998, an obligation still remained to reply to the request and inform the Union that it did not maintain such a listing. Furthermore, where as here, an agency maintains the information in some form, it is clear that it must reply to the request for data by at least telling the union that it maintains the requested information in a different form. Moreover, "creation" of new documents is within the statutory duty to furnish information which an agency normally maintains as long as the information is maintained in some form and need not be sought from outside sources. Thus, an agency has a duty to extract information or provide the whole record from the existing records physically maintained by it. *U.S. Department of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California,* 37 FLRA 987 (1990).

Accordingly, it is found that the information requested, a sanitized listing of disciplinary and adverse actions taken since June 1996, was normally maintained by Respondent in the regular course of business.

Warden Snyder's testimony also confirms that the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled was normally maintained by Respondent in the regular course of business. In this regard, Warden Snyder testified that the SIS manual is normally kept by the SIS Officer and by the Warden. In addition he stated that other operations memoranda, program statements and manuals which were not classified, were on BOPdocs (BOPDOCS).

Accordingly, it is found that the SIS manual and any and all operations

memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled requested by the Union on July 30, was normally maintained by Respondent in the regular course of business.

The Union also asked for any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline. Again, warden Snyder testified that any other operations memoranda, program statements and manuals which were not classified, were on BOPDOCS. Thus, it is concluded that any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline as requested by the Union on July 30, was normally maintained by Respondent in the regular course of business.

With respect to Union's request for the complete investigative file on Hendrickson. Warden Snyder admitted that Respondent possesses and maintains the investigative file of Hendrickson.

Consequently, it is found that the complete investigative file on Hendrickson was normally maintained by Respondent in the regular course of business.

B. Whether the Information was Reasonably Available. 3

Availability under section 7114(b)(4) has been defined as that which is accessible or attainable. *Department of Health and Human Services, Social Security Administration*, 36 FLRA 943 (1990); *U.S. Department of Justice Washington, DC and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 46 FLRA 1526 (1993).

Warden Snyder agreed that a sanitized listing of disciplinary and adverse actions taken since June 1996 or the disciplinary files were accessible and attainable by Respondent. Accordingly, it is found that the data requested was reasonably available.

Warden Snyder's testimony also reveals that the SIS manual is accessible and attainable by Respondent. Warden Snyder testified that any other operations memoranda, program statements and manuals which are not classified, were on BOPDOCS, and were available to the Union.

Thus, it is found that the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled was reasonably available.

As previously noted, the testimony reveals that any other operations memoranda, program statements and manuals which were not classified, were on BOPDOCS, and were available to the Union. Therefore, it is found that any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline as requested by the Union on July 30, was reasonably available.

The evidence reveals that the complete investigative file on Hendrickson was accessible and attainable by Respondent. (Tr. at 107-09).

Accordingly, it is found that the complete investigative file on Hendrickson was reasonably available.

C. Whether the Information Constituted Guidance, Advice Counsel or Training Provided for Management Officials or Supervisors, Relating to Collective Bargaining

Section 7114(b)(4)(C) exempts from disclosure to the exclusive representative information which constitutes guidance, advice, counsel, or training for management officials relating specifically to the collective bargaining process, such as: (1) courses of action agency management should take in negotiations with the union; (2) how a provision of the collective bargaining agreement should be interpreted and applied; (3) how a grievance or unfair labor practice charge should be handled; and (4) other labor-management interactions which have an impact on the union's status as the exclusive representative. *National Labor Relations Board*, 38 FLRA 506 (1990) *aff'd sub nom. NLRB v. FLRA*, 952 F.2d 523 (D.C. Cir. 1992). The evidence in this case indicates that a sanitized listing of disciplinary and adverse actions taken since June 1996 as requested by the Union does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

Accordingly, it is found that a sanitized listing of disciplinary and adverse actions taken since June 1996 does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

Warden Snyder testified that the information requested by the Union in the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the office of Internal Affairs is handled does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

Accordingly, it is found that the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

The instant record amply demonstrates that and it is found that the Union's request for any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline as requested by the Union does not include information that constitutes guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining. (Tr. at 106-07).

Based on the record as a whole, it is concluded and found that the complete investigative file on Hendrickson does not involve any information which constitutes guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

D. Whether the Union Articulated a "Particularized Need" for the Information in its July 30 Data Request

1. The sanitized listing of disciplinary and adverse actions taken since June 1996

Internal Revenue Service, Washington, DC and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA 661 (1995) (*IRS Kansas City*) formulated the criteria for determining whether information is necessary and how requested information will be disclosed under section 7114(b)(4) of the Statute. In *IRS Kansas City* the Authority specified that a union must establish a particularized need requested information by articulating, with specificity, why it needs the information, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute. The requirement that a union establish such need can not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, it must be established that the information is required for the union to adequately represent unit

employees. An agency denying a request for information under the Statute has a comparable responsibility as it must assert and establish any countervailing anti-disclosure interests. Its responsibility can not be satisfied through broad or general claims.

The Union herein explained that it needed the information to determine whether or not a grievance should be filed over the disciplinary action imposed on Hendrickson. In addition, the Union stated that the information was needed to determine if Respondent had imposed disparate discipline, based on race, sex, or ethnic origin, and/or based on bargaining unit membership as opposed to employees who are not in the bargaining unit, in particular employees who hold supervisory or higher positions. The Union claimed that the program statement on standards of conduct and responsibility indicated that employees are held to the same standard of conduct, but that supervisors are held to a higher standard of conduct due to their increased level of responsibility and the need to set an example to other employees. The Union mentioned that listing the specific infraction and coding the documents as it requested would allow it to make the necessary comparisons. In my opinion, the Union's request described specifically why it needed the requested information, including the uses to which it would put the information and established a connection between those uses and its representational responsibilities under the Statute.

It is well settled that disclosure of disciplinary actions of employees, sanitized to remove names and personal identifiers, does not violate the Privacy Act. *U.S. Equal Employment Opportunity Commission, Washington, DC,* 20 FLRA 357 (1985) (*EEOC*). The Union herein, requested that the listing of disciplinary files from June 1996 to June 1998 excluding all personal identifiers such as names and social security numbers. While the testimony elicited by Respondent from Union President Brian Lowry confirms that due to the small size of the facility sanitized information might allow the Union to identify individuals from the remaining unsanitized information provided and through rumor. Respondent did not tell the Union that this was a countervailing anti-disclosure interest at the time the request was made, however.

Respondent maintains that *Alirez v. NLRB,* 676 F.2d 423 (10th Cir. 1982) supports its argument that even with the specified redaction, disclosure as requested by the Union would guarantee disclosure of the identities of all employees disciplined in the two year history of FCI <**Forrest City** > along with personal, private information regarding such disciplinary actions, which is barred by the Privacy Act of 1974. The information request in the *Alirez* case was made under the Freedom of Information Act which is a releasing statute, in favor of disclosure. *Department of the Air Force v. Rose,* 425 U.S. 352, 360-61 (1976). Furthermore, Respondent offered no evidence other than Lowery's testimony to support any argument that the Privacy Act would bar disclosure here.

Section 7114(b)(4) requires an agency to furnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law,* data. In this matter the Union's request was made under section 7114(b)(4) of the Statute, and was not a FOIA request; therefore, *Alirez* is inapplicable. Furthermore, it has long been established that the FOIA does not prohibit release of any data. It merely permits agencies to withhold from release data falling within its exceptions. *U.S. Customs Service, Region IV, Miami, Florida,* 48 FLRA 1239, 1242 (1993). Assuming *Alirez* is applicable, Respondent's assumption that "rumors" that give the Union a means of guessing who the individual employees were is no more than conjecture, particularly since Respondent did not proffer evidence such as the number of disciplinary files at issue. Accordingly, it is concluded that Respondent's argument lacks merit.

It has been held that disclosure of sanitized disciplinary information would not violate the Privacy Act. *Internal Revenue Service, Austin District Office, Austin, Texas,* 51 FLRA 1166, 1169 (1996) (*IRS Austin*). The Authority in *IRS Austin,* found that even assuming employee privacy interests might be at stake even with regard to sanitized documents, when balanced against the public interest in disclosure, such disclosure would

not constitute a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6. Also the Authority has found that disclosure of disciplinary actions and performance appraisals of employees sanitized to remove names and personal identifiers does not violate the Privacy Act. *EEOC*, 20 FLRA at 357. In *U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 37 FLRA 1310 (1990), the Authority held that when a Union requests data in a sanitized format it is unnecessary to reach Privacy Act issues. That is the situation in this case. Moreover, the Union request in this cases did not require the release of employee names or identifiers, therefore appears to rule out privacy issues and concerns. *U.S. Department of Defense, Maxwell Air Force Base, Maxwell Air Force Base, Georgia*, 36 FLRA 110 (1990). See also, *IRS Austin*, 51 FLRA at 1166.

An agency asserting that the Privacy Act bars disclosure must establish: (1) that the requested information is contained in a "system of records," within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. *U.S. Department of Transportation, Federal Aviation Administration, New York TRACON, Westbury, New York*, 50 FLRA 338, 345 (1995)(FAA). There is no record evidence of the nature and significance of any employee's privacy interests here.

Respondent also relies on *U.S. Department of Labor, Washington, DC*, 51 FLRA 462 (1995) (*DOL*), to back its argument that the requested coded listing of the disciplinary and adverse action files were not relevant and necessary to the union's representational duties. In *DOL*, the union requested *unsanitized* copies of all disciplinary suspension records of unit and non-unit employees covering a 5-year period in order to prepare for arbitration hearings. Although the Authority found that the General Counsel had correctly asserted that the public interest would be served by release of disciplinary suspension records, which would shed light on Government operations and, therefore, would serve a public interest cognizable under Exemption 6 of the FOIA, the Authority found that there was no assertion or other basis on which to conclude that this public interest would be better served by the disclosure of disciplinary records in an unsanitized form that reveals the identity of employees who were the subject of discipline. Here, the Union did not request unsanitized disciplinary files. Rather, it requested a listing of the disciplinary and adverse actions taken for a 2-year period, with all personal identifiers such as names and social security numbers redacted. (G.C. Exh. 6). Thus, the Union stated with specificity why it needed the requested information, including the uses to which it would put the information and the connection between those uses and its representational responsibilities under the Statute. It thus appears that the Union's information request met the particularized need requirement as set out in *IRS Kansas City* and Respondent has failed to establish a law which prohibits the disclosure of the information.

2. The SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the OIA is handled

The Authority set forth guidelines in *IRS Kansas City*, for determining whether information is necessary and how requested information will be disclosed under section 7114(b)(4) of the Statute. The Authority held that a union requesting information under that section must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which it will put the information and the connection between those uses and its representational responsibilities under the Statute. The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, a union must establish that requested information is required in order for the union to adequately represent its employees. An agency denying a request for information under the Statute must assert and establish any countervailing anti-disclosure interests. Like a union, an agency may not satisfy its burden by making conclusory assertions. It is my view, as set out below that the Union's request for information here met the

particularized need requirement as set forth in *IRS Kansas City* and that the Respondent did not establish a law which prohibits the disclosure of the requested information.

In this case, the Union explained that it needed the information to determine whether or not a grievance should be filed in the case of the disciplinary action imposed on Hendrickson. Also the Union declared that it needed the information to determine whether the investigation was conducted properly and in accordance with Bureau of Prison policies and procedures, what evidence is required to be gathered, and whether all evidence was gathered in the case. (G.C. Exh. 6). In addition, it was the Union's position that the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the office of Internal Affairs is handled, were needed to determine whether Hendrickson was treated differently than other employees and to determine if there was exculpatory evidence that was overlooked. (Tr. at 58-60; G.C. Exh. 6).

In its request for the SIS manual, the Union asked for a copy but, did not name a specific chapter or section because the SIS manual is a limited use document which the Union does not have access to. (Tr. at 58; 80; G.C. Exh. 6). The purpose of the request for the SIS manual is clear from the wording of the request, which asked for any other documentation that indicates how an investigation should be conducted and how referral to the Office of Internal Affairs is handled. Thus, the Union explained that it needed the information to determine whether the investigation was conducted properly and in accordance with Bureau of Prison policies and procedures, what evidence is required to be gathered, and whether all evidence was gathered in Hendrickson's case. (G.C. Exh. 6). Although Respondent contends that this would require an interpretation on its part, its witnesses Warden Snyder and Correctional Services Administrator David Dodrill confirm that Respondent understood what was requesting as demonstrated by their references to the one chapter in the SIS manual dealing with staff misconduct and employee investigations.4 (Tr. at 96; 145; 156). In weighing the degree of specificity required of a union in data requests one must allow for the reality that, in many cases a union certainly will be unaware of the contents of documents it is requesting. *IRS Kansas City*, 50 FLRA at 670 n.13. Applying a particularized need test to a situation where the exclusive representative has not seen and asking it to describe documents it has not seen makes its task impossible. *See also, American Federation of Government Employees, Local 2343 v. FLRA*, 144 F.3d 85 (D.C. Cir 1998) (*AFGE Local 2343*). In this case, the Union described why the information was needed, what purpose the information would serve and even though the Union did not give a specific chapter in the SIS manual, not having seen the document, it could hardly have been expected to do so. Thus, the Union had no way of knowing what sections of the SIS manual involved employee investigations. (Tr. at 77-78; 156; 160-61).

IRS Kansas City, 50 FLRA at 671, makes it clear that the Authority expects the parties to consider, in determining whether and/or how disclosure is required, alternative forms or means of disclosure that may satisfy both a union's information needs and an agency's interests in information. Furthermore, in the instant data request, the Union asked that Respondent contact Lowry if further clarification of the request was required or if Respondent wanted to meet to discuss the request, or a format or means of furnishing the information to the Union, or the issues giving rise to the request. (G.C. Exh. 6). There is no evidence that Respondent contacted the Union or considered giving it the requested information in an alternate form. (Tr. at 76). The standard in data request cases appears to be to facilitate and encourage the amicable settlements of disputes and thereby effectuate the purposes and policies of the Statute. In my view, a failure of an agency to communicate its real concerns with an information request constitutes a failure to properly respond to the request. (Tr. at 32-33).

Respondent further asserts that the disclosure of the SIS manual is prevented by law, specifically the Law Enforcement Privilege (otherwise known as the investigatory privilege) "to prevent disclosure of law

enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigations.)."*NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223, 237-43, (1978) (*Robbins Tire & Rubber*). This argument is rejected since the Authority has not previously recognized the Law Enforcement Privilege and no case Respondent cites is on point with the case at issue here. In *Robbins Tire & Rubber,* after the NLRB filed an unfair labor practice complaint against the respondent employer, the respondent requested, pursuant to FOIA, that the NLRB make available prior to the hearing copies of all potential witnesses' statements collected during the NLRB's investigation. The NLRB denied the request on the ground that the statements were exempt from disclosure under, inter alia, Exemption 7(A) of FOIA, which provides that disclosure is not required of investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings. Section 7114(b)(4) requires an agency to furnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law,* data. FOIA is not a prohibitive statute and therefore does not apply. This case involves the Union requesting documentation from Respondent under section 7114(b)(4) of the Statute, not a FOIA request; therefore, *Robbins Tire & Rubber* is inapplicable. Additionally, Exemption 7(A) of FOIA applies to investigatory records compiled for law enforcement purposes. The SIS manual is not an investigatory record compiled for law enforcement purposes. It is a policy manual, which gives guidance, in part, to staff or employee investigations. This case is not on point with *Robbins Tire & Rubber.* Here, we have no FOIA request, but rather a data request under section 7114(b)(4) and here, there is no actual, contemplated enforcement proceeding that would be interfered with. Additionally, the Supreme Court held that the records at issue, witness statements, would only be exempt from FOIA disclosure until the completion of the NLRB's hearing.

Again, an agency asserting that the Privacy Act bars disclosure is required to demonstrate: (1) that the requested information is contained in a "system of records," within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. *FAA,* 50 FLRA at 345. Respondent has failed to put into evidence the nature and significance of any employee's privacy interests with regard to the SIS manual.

Respondent also claims that the security of the SIS office itself and the computer system that it utilizes would be at risk. Additionally, the SIS manual discusses how Respondent gathers information and the techniques used, including some of the security features and monitoring devices Respondent uses which aren't necessarily known. (Tr. at 151-53). However, Lowry testified to other local union presidents having access to the SIS manual, including Pam Clampett at DCI Bastrop, Texas, who can review the manual and take notes, and Phil Hewlitt, at Elkton, Ohio, who was given a copy of the manual by management. (Tr. at 36-37).

Respondent cites *Touhy v. Ragen,* 340 U.S. 462 (1951) (*Touhy*) in support of its contention that Department of Justice rules and regulations prohibit disclosure of the SIS manual. However, *Touhy* is about Department of Justice Order No. 3229, which concerns how subordinates of the Department of Justice are to respond to *subpoena duces tecum.* This has nothing to do with unions requesting information under the Statute and is inapplicable to the case before us.

Although Respondent also cites *Haas v. Henkel,* 216 U.S. 462 (1910), which concerns an appeal from a circuit court to review a judgment refusing relief by habeas corpus and certiorari to a defendant held in custody to await an order of removal to another city for the trial of indictments pending against him there. This case has no application to the issues in the instant matter.

Finally, Respondent cites *Tuite v. Henry,* 181 F.R.D. 175 (D.D.C. 1998) which holds that the Federal law enforcement privilege is a qualified

privilege designed to prevent disclosure of information that would be contrary to the public interest in the effective functioning of law enforcement. This is a qualified privilege that is applied to instances where a party is subpoenaing documents. This qualified privilege does not apply to Unions seeking data under section 7114(b)(4) of the Statute.

Regarding any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled, Respondent replied in its response that the request for memoranda and statements was for an interpretation of policy and procedures and was not a request for data under the Statute. Lowry admittedly did not request any document by name, other than the SIS manual. Lowry testified that he did so because he did not know what these documents were called because he does not have access to the manual that may list the memoranda or program statements, numbers, references, or whatever they are. The description of what the Union wanted was detailed enough, however, for Respondent to know what the Union wanted. Indeed, in Respondent has continued to assert throughout these proceedings that it has provided all potentially responsive documents to the Union via BOPDOCS. No one from Respondent ever told that to the Union, however. I agree with the General Counsel, that had Respondent advised the Union of its position that there was nothing outside of BOPDOCS that would answer this request a hearing in this case would not have been necessary. Respondent's failure to communicate its real concerns to the Union is again, in my view, equivalent to a failure to properly respond to the request herein.

Respondent maintains that the routine and continuous providing of BOPDOCS is consistent with effective and efficient government and that it should not be required to provide voluminous hard copies of policies and procedures in response to repetitive requests. Thus, Respondent asserts that it has already made complete electronic responses to all of the information requests at issue herein. There are several reasons that BOPDOCS might not meet the Union's data requests in this particular matter. Here the Union never claimed that it did not receive BOPDOCS or did not know how to use BOPDOCS. Indeed, Lowry testified that he knew how to use BOPDOCS and that he did not need training on it. The Union's concern was to make sure it had all the information applicable to disciplinary actions, even that information which is in limited official use documents and not available to it through BOPDOCS. Furthermore, Respondent admitted that limited official use documents are not on BOPDOCS, that there are only a small number of these limited official use documents and that they are not made available to the Union, which is why the Union was requesting this information. Finally, there is a question regarding BOPDOCS and whether they are current since there is apparently some lag time between when a policy goes into effect and when it is made available on BOPDOCS. This lag time certainly raises a question as to whether the BOPDOCS in the Union's possession contained all the information it was requesting.

James P. Foley, a retired FOB employee testified about the national level agreement saying that Respondent gave access to BOPDOCS with the *quid pro quo* that the Union wouldn't have to ask for information anymore. (Tr. at 122-38). It is not contested that it had access to BOPDOCS or that public documents were on BOPDOCS; but, rather, that BOPDOCS does not contain limited access documents sought by the Union in this case. In any event, it cannot be concluded. Foley's testimony that any provision of the national agreement showed that the Union waived its right to request information under section 7114(b)(4) of the Statute by gaining access to BOPDOCS. (Tr. at 138). Warden Dodrill also testified that this is not memorialized in any other document. (Tr. at 139). Thus, Respondent claims that the *quid pro quo* was a verbal agreement. (Tr. at 139). Respondent states that this verbal agreement was in relation to policies and not information. (Tr. at 140-41). Furthermore, it appears from the record that the agreement applied only to information that is available to the public and not any limited access documents. (Tr. at 14142). Contrary to Foley's testimony, Philip Glover, the Union's President of Council of Prison Locals, American Federation of Government Employees, testified that although there was an agreement to distribute BOPDOCS to the

Union, there was no agreement that as a result of that distribution that the Union waived its right to request information under section 7114(b)(4) of the Statute. (Tr. at 193-94). Glover was unaware of any *quid pro quo* agreement and stated that the parties continue to negotiate over the distribution of BOPDOCS. (Tr. at 194-95).

Thus, the Union stated with specificity why it needed the requested information, including the uses to which it would put the information and the connection between those uses and its representational responsibilities under the Statute. Therefore, it appears that the Union's information request met the particularized need requirement as set out in IRS Kansas City and Respondent has failed to establish a law which prohibits the disclosure of the information.

3. Any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline

As already noted *IRS Kansas City* establishes the guidelines for determining whether information is necessary and how requested information will be disclosed under section 7114(b)(4) of the Statute.

In this case, the Union explained that it needed the information to determine whether or not a grievance should be filed in the case of the disciplinary action imposed on Hendrickson. The Union further stated that it needed the information to determine who can formally resolve problems between employees within the work place in order to determine if the supervisors had the authority to resolve the matter without imposing discipline, because an investigation was conducted and discipline imposed after the employee involved was told by three supervisors that the matter was closed. (Tr. at 74; G.C. Exh. 6). Respondent also alludes to the fact that this matter was not brought up in the oral response conducted by Warden Snyder, before he made his decision regarding the proposed suspension. (Tr. at 74). There is nothing in the Statute that requires a Union to have brought up every possible argument at the time of the oral response. Again, the Union made the request for information to determine if this was a proper argument to make in a grievance. The Union needed the information first, in order to make that determination, however.

Regarding the operations memoranda, program statements, manuals, and documents relating to discipline, Respondent replied that the request for memoranda and statements was for an interpretation of policy and procedures and was not a request for data under the Statute. (G.C. Exh. 8). Lowry admitted that he did not request any document by name, other than the SIS manual. (Tr. at 63-67). Lowry stated he did this because he did not know what these documents were called because he does not have access to the manual that may list the memoranda or program statements, numbers, references, or whatever they are. (Tr. at 79-80). However, the description of what the Union wanted was detailed enough for Respondent to know what the Union wanted. Indeed, Respondent repeatedly asserted that it has provided all potentially responsive documents to the Union via BOPDOCS. (Tr. at 20-21; 57-58; 94-95; 112-13). No one from Respondent informed the Union of this at the time of the request. (Tr. at 76). The Union stated in its third and final request that Lowry should be contacted if Respondent required further clarification of the request or if it wanted to meet to discuss the request, or a format or means of furnishing this information to the Union, or the issues giving rise to the request. (G.C. Exh. 6). Respondent ignored this apparent attempt to discuss what the Union's needs really were and failed to communicate its real concerns with the request to the Union and, thereby failed to properly respond to the request.

The Union never alleged that it did not receive BOPDOCS or did not know how to use BOPDOCS; in fact, Lowry admitted that he knows how to use BOPDOCS and does not need training on it. (Tr. at 65). Rather, the Union wanted to make sure it had all the information applicable to disciplinary actions, even that information which is in limited official use documents and not available to the Union via BOPDOCS. (Tr. at 65; 77-78).

Respondent admitted that limited official use documents are not on BOPDOCS, that there are only a small number of these limited official use documents and that they are not made available to the Union, which is why the Union was requesting this information. (Tr. at 105; 113). Additionally, there is an issue regarding BOPDOCS as to it being up-to-date, due to the fact that there is some lag time between a policy goes into effect and when it is made available on BOPDOCS. (Tr. at 78).

Thus, the Union stated with specificity why it needed the requested information, including the uses to which it would put the information and the connection between those uses and its representational responsibilities under the Statute. Consequently, it appears that the Union's information request did meet the particularized need requirement as set out in *IRS Kansas City* and Respondent has failed to establish a law which prohibits the disclosure of the information.

4. The complete investigative file on Shannon Hendrickson

In this case, the Union explained that it needed the information in order to determine whether or not a grievance should be filed in the case of the disciplinary action imposed on Hendrickson. The Union further stated that it needed the information to determine if there was exculpatory evidence in the file that was not made available to Hendrickson and the Union and to determine if all the evidence was gathered. The Union also stated that it needed to be apprized of all the information available to the Warden, who made the decision on the disciplinary proposal, to determine if the affected employee and the Union had the opportunity to present a complete defense before the decision was made, and whether there were factors considered in the decision that the employee and the Union were not aware of. Hendrickson e-mailed Katie Bozeman on June 15, giving Lowry permission to see any files regarding this investigation and that if she had any questions, she was to call Hendrickson. Respondent relies on semantics in an attempt to avoid providing the Union information under the Statute when it maintains that it did not have to give the Union a copy of Hendrickson's investigative file since Hendrickson had only given the Union permission to see any files. However, Respondent did not inform the Union that it would not give the Union a copy of the investigative file because Hendrickson had only given permission for the Union to see it. Respondent instead informed the Union that it could not have a copy of the investigative file because it was not used in their decision to issue a one-day suspension to Hendrickson. Respondent ignores the Union's other stated reasons that it wanted to review the investigative file to make sure there wasn't any exculpatory evidence and to determine if all the evidence was gathered. The Union requested that Respondent review the file and determine if all the evidence was gathered and make sure there was no exculpatory evidence; it was clearly asking for the file in order to make those determinations for itself. The Union was, therefore, not asking for an interpretation of policy and procedures as Respondent asserted in its response.

This case differs from *AFGE Local 2343,* as relied on by Respondent. *AFGE Local 2343* reiterates the standard for particularized need noted above in *IRS Kansas City,* and holds that the Union failed to meet particularized need because of its conclusory claim that it needed the information to prepare for arbitration of its previously filed grievance. Here, the Union went beyond making a conclusory statement that it needed the investigative file for a possible grievance. The Union stated with specificity why it needed the information, including the uses to which it would put the information and the connection between those uses and its representational responsibilities under the Statute.

It is the Respondent's position that the Union had no valid Privacy Act waiver to support its request for a copy of the complete unsanitized SIS Investigation. In Hendrickson's case, that there is no public interest to be served by redacting disclosure, therefore disclosure is barred by the Privacy Act. An agency asserting that the Privacy Act bars disclosure is required to demonstrate: (1) that the information requested is contained in a "system of records," within the meaning of the Privacy Act; (2) that disclosure would implicate employee privacy interests; and (3) the nature

and significance of those privacy interests. *FAA*, 50 FLRA at 345. Respondent cites *DOL*, wherein the Authority found that the agency had established employees, privacy interests with respect to disciplinary information which can be embarrassing and stigmatizing to the employees. Here, Hendrickson gave the Union permission to see any of his files, thereby waiving any privacy interests he may have. In this respect, the Authority has held that the Privacy Act does not preclude release of information concerning an employee when the information is sought by a union as the employee's representative. *Federal Employees Metal Trades Council and U.S. Department of the Navy, Mare Island Naval Shipyard, Vallejo, California*, 38 FLRA 1410 (1991). In such circumstances, the union's access to the relevant records would not be a clearly unwarranted invasion of personal privacy. *U.S. Department of Justice, Office of Justice Programs*, 45 FLRA 1022 (1992). Respondent did not submit any evidence as to any other employees' privacy interests that were of concern to them here. Moreover, Warden Snyder doubted there was any sensitive security information contained in Hendrickson's investigative file.

Respondent relies on *Laborers' International Union of North America v. U.S. Department of Justice*, 772 F.2d 919, 920-22 (D.C. Cir. 1984) (*LIUNA*) in support of its contention that its non-disclosure interests outweigh the Union's interests in the complete investigative file. In *LIUNA*, the union brought an action seeking to compel disclosure under FOIA of a Department of Justice's report on organized crime and labor unions. The court held that the report was an investigative record compiled for law enforcement purposes and that disclosure of the report, which contained names of numerous individuals and documented alleged illegal activities of several of the individuals, would constitute a significant invasion of privacy. Here, Respondent has produced no evidence that the investigative file of Hendrickson involves anybody other than Hendrickson and the five lieutenants, whose affidavits appeared in Hendrickson's disciplinary file, or that there would be a significant invasion of anyone's privacy by releasing this document.

Lastly, Respondent cites *Marathon LeTourneau Co., Marine Division v. NLRB*, 414 F.Supp. 1074, 1080 (S.D. Miss. 1976), which involves a private company seeking documents from the NLRB under a FOIA request. Again, this case discusses an exemption under FOIA and never discusses the Privacy Act. FOIA is a releasing statute, in favor of disclosure. Section 7114(b)(4) requires an agency to furnish to the exclusive representative involved, or its authorized representative, upon request and, *to the extent not prohibited by law*, data. FOIA is not a prohibitive statute and therefore does not apply. In this matter the Union was requesting documentation from Respondent under section 7114(b)(4) of the Statute, and not making a FOIA request. It is my view, that the Union's information request met the particularized need requirement as set out in *IRS Kansas City* and Respondent has failed to establish a law which prohibits disclosure.

Based on all of the foregoing, it is found and concluded that Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to provide a sanitized listing of disciplinary and adverse actions taken since June 1996; the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the office of Internal Affairs is handled; any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline; the complete investigative file on Hendrickson which the Union requested for representational purposes.

Order

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of Justice, Federal Correctional Institution, <**Forrest City** >, Arkansas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish a sanitized listing of disciplinary and adverse actions taken between June 1996 and July 1998; the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the office of Internal Affairs is handled; any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline; the complete investigative file on Shannon Hendrickson as requested by the American Federation of Government Employees, Local 0922.

(b) Failing to furnish information requested by the American Federation of Government Employees, Local 0922, under the Statute in a timely manner.

(c) Failing to notify the American Federation of Government Employees, Local 0922, that certain information requested under the Statute did not exist.

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

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

(a) Furnish to the American Federation of Government Employees, Local 0922, the exclusive representative of certain of its employees, a sanitized listing of disciplinary and adverse actions taken between June 1996 and July 1998; the SIS manual and any and all operations memoranda, program statements, and manuals that indicate how an investigation should be conducted and how referral to the Office of Internal Affairs is handled; any and all operations memoranda, program statements, manuals, and documents that indicate who proposes discipline, how the decision to impose discipline is made, who determines what the proposal for discipline is, and who can resolve such matters without imposing discipline; the complete investigative file on Shannon Hendrickson.

(b) Respond in a timely manner to requests for information made by the American Federation of Government Employees, Local 0922, under the Statute.

(c) Notify the American Federation of Government Employees, Local 0922, when certain information requested under the Statute does not exist.

(d) Post at its facilities in <**Forrest City** , Arkansas, where bargaining unit employees represented by the American Federation of Government Employees, Local 0922, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, and shall be posted and maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

1 Respondent's uncontested motion to correct transcript is granted.

2 Unless otherwise noted all dates hereafter are 1998.

3 Respondent contends that the General Counsel did not move to amend the complaint to give notice of the non-existence of an annotated disciplinary listing. That claim is rejected. Whether or not the information

existed is a legal conclusion to be drawn from the fully litigated facts.

4 My *in camera* review of the SIS manual confirms the above testimony. In my view, and consistent with the other findings in this case, Respondent had an obligation to at least inform the Union of limited use of the SIS manual and to supply it with the Chapter or Chapters dealing with staff misconduct and employee investigations.

Cases Cited

100 FLRR 1-1022
100 FLRR 1-1061
104 F.3d 1396
144 F.3d 90
340 U.S. 462
437 U.S. 214
50 FLRA 661
50 FLRA 669
50 FLRA 670
50 FLRA 672
50 FLRA 673
50 FLRA No. 86
51 FLRA 1054
51 FLRA 1166
51 FLRA 1178
51 FLRA 1219
51 FLRA 1391
51 FLRA 248
51 FLRA 462
51 FLRA 675
51 FLRA No. 113
51 FLRA No. 26
51 FLRA No. 41
51 FLRA No. 59
51 FLRA No. 87
51 FLRA No. 95
51 FLRA No. 97
52 FLRA 1133
52 FLRA 1323
52 FLRA No. 113
52 FLRA No. 121
53 FLRA 789
53 FLRA No. 67
55 FLRA 1174
55 FLRA 254
55 FLRA No. 191
55 FLRA No. 44
56 FLRA 156
56 FLRA 162
56 FLRA No. 19
842 F.2d 483
87-1203 (D.C. Cir.)
87-1204 (D.C. Cir.)
88 FLRR 1-8024
95 FLRR 1-1072
95 FLRR 1-1102
95 FLRR 1-1117
95 FLRR 1-1135
96 FLRR 1-1026
96 FLRR 1-1034
96 FLRR 1-1036
96 FLRR 1-1052
97 FLRR 1-1032
97 FLRR 1-1040
97 FLRR 1-1131
97 FLRR 1-8002
98 FLRR 1-8008
99 FLRR 1-1028
No. 96-1060 (D.C. Cir.)
No. 97-1388 (D.C. Cir.)

Prev ous | Next | Back to Messages

Save Message Text | Full Headers

Check Mail | Compose

Search Mail | Search the Web