OFFICE OF ADMINISTRATIVE LAW JUDGESWASHINGTON, D.C. 20424-0001

INTERNAL REVENUE SERVICE
NORTH ATLANTIC REGION,
BROOKHAVEN SERVICE CENTER
Respondent

and Case No. BY-CA-20901

NATIONAL TREASURY EMPLOYEES UNION and
NTEU CHAPTER 99
Charging Party

Verne R. Smith, Esquire For the General Counsel
Mary Jane Cotter, Esquire For the Respondent
Terry Sullivan, Esquire For the Charging Party
Before: BURTON S. STERNBURG Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on May 5, 1992, by the National Treasury Employees Union and NTEU Chapter 99 (hereinafter collectively called the Union), against Internal Revenue Service, North Atlantic Region, Brookhaven Service Center, a Complaint and Notice of Hearing was issued on September 30, 1992, by the Regional Director for the Boston, Massachusetts Regional Office, Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that Internal Revenue Service, North Atlantic Region, Brookhaven Service Center (hereinafter called Respondent), violated Sections 7116(a)(5) and (8) of the Federal Service Labor-Management Relations Statute (hereinafter called the Statute), by failing and refusing to supply certain requested information to the Union which is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining.

A hearing was held in the captioned matter on November 5, 1992, in New York, N.Y. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Counsel for the General Counsel and Counsel for Respondent submitted post-hearing briefs on December 24, 1992, and Counsel for the Charging Party submitted a post-hearing brief on December 28, 1992, all of which have been duly considered.(1)

Upon the basis of the entire record, including my observation of the witness and her demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact(2)

The National Treasury Employees Union has been the exclusive representative in a nationwide unit of professional and nonprofessional employees appropriate for collective bargaining at Respondent's Service Centers and Regional Offices, including the Brookhaven Service Center, where Chapter 99 has been designated to represent the unit employees.[3]

By letter dated February 28, 1992, Respondent notified Ms. Eileen Higgins, a unit employee at the Brookhaven Service Center, of a proposed removal based on allegations that she, Ms. Higgins, had improperly disclosed taxpayer information in violation of both Internal Revenue Service's Rules of Conduct and the Internal Revenue Code. By letter dated March 3, 1992 addressed to the Labor Relations Section of Brookhaven, Ms. Higgins requested copies of all materials relied upon to support the proposed removal action.

The following day, March 4, 1992, NTEU Chapter 99 wrote a letter to Ms. Carmen Belford, Chief, Recruitment and Labor Relations at Brookhaven, wherein it informed Ms. Belford that the NTEU was representing Ms. Higgins and requested certain information in connection therewith. Namely, the Inspection Report compiled during the investigation of Ms. Higgins and copies of any proposed disciplinary actions against unit and non-unit employees for the same offense. Additionally, by a separate document, NTEU requested an "oral reply" in the matter of Ms. Higgins' proposed removal pursuant to the terms of the NC III contract. By letter dated March 10, 1992, Ms. Belford furnished the requested Inspection Report and informed NTEU Chapter 99 that Brookhaven Service Center had not either proposed or taken any adverse or disciplinary action against any other Brookhaven employee for the same or similar offense that Ms. Higgins was charged with.

Subsequently, NTEU Chapter 99 requested the services of Ms. Elaine Charpentier, an NTEU Assistant Counsel, to help prepare an oral reply to Ms. Higgins' proposed removal. Ms. Charpentier, upon being assigned to the matter, wrote a letter dated April 7, 1992 to Ms. Belford and requested, pursuant to 5 U.S.C. 7114(b)(4), documentation indicating that Ms. Higgins had received and/or was trained in the IRS Rules of Conduct, and copies of all proposal and decision letters issued to all employees (both unit and non-unit) in the North Atlantic Region for disclosure of taxpayer information, in violation of the IRS Rules of Conduct.

Ms. Charpentier also requested that the oral reply procedure be held in abeyance until NTEU received and had an opportunity to review the requested material. According to Ms. Charpentier, she requested Region-wide information on unit and non-unit employees because the IRS Rules of Conduct are applicable to all employees and because the collective bargaining agreement requires that discipline be consistent for all employees charged with the same or similar offenses. Further, she requested Region-wide information to ensure that she had a sufficient basis to compare the action taken against Ms. Higgins with that taken against other employees for similar offenses. The Region-wide information was particu-larly necessary since Respondent had already indicated that no similar actions had been taken at Brookhaven. Additionally, Ms. Charpentier testified that she had personal knowledge that the penalties were not being consistently applied since she had represented an employee in the Brooklyn District who had received only a three day suspension for a similar violation of the Rules of Conduct.

On or about April 29, 1992, the Union received from Ms. Belford documentation that Ms. Higgins had been given a copy of the Rules of Conduct. However, in the transmittal letter accompanying the documentation Ms. Belford refused to furnish the requested Region-wide data, and reiterated that no such disciplinary actions had been taken locally at Brookhaven. The Union, shortly thereafter, filed the charge leading to the instant

complaint.

The oral reply on Ms. Higgins' proposed removal was conducted on May 18, 1992. On June 17, 1992, Respondent issued a decision letter which changed the penalty from removal to a five day suspension.

According to Ms. Charpentier and the stipulation of the parties, each IRS office in the North Atlantic Region maintains, for four years, the disciplinary proposals and decision letters requested by the Union for its own employees. In this latter respect, again according to the testimony of Ms. Charpentier and the stipulation of the parties, Ms. Belford maintained a logbook, indexed by employee name, of disciplinary and adverse actions taken at Brookhaven.

Pursuant to the NORD III and NC III collective bargaining contracts, IRS is required to provide copies of proposal and decision letters in disciplinary and adverse action cases to NTEU simultaneously with the issuance of such letters to unit employees. This requirement commenced on July 1, 1989, the effective date of the collective bargaining agreements. In practice, each IRS office in the North Atlantic Region provides the letters to its respective local NTEU chapter. However, according to Ms. Charpentier, she knew at least one instance where the IRS failed to furnish NTEU with a copy of a disciplinary letter.

According to the uncontradicted testimony of Ms. Charpentier, it is the existing practice with respect to information requests to submit such requests to the local labor relations officer, who in this case was Ms. Belford. The Union does not send a separate request to each IRS office.

Discussion and Conclusions

The General Counsel and the Charging Party take the position that the Respondent, by refusing to make the requested data available, failed to comply with Section 7114 (b)(4) of the Statute and thereby violated Sections 7116(a)(1), (5) and (8) of Statute. Thus, it is the General Counsel and Charging Party's position that the requested data is normally maintained in the regular course of business, reasonably available, necessary in order to allow the Union to effectively represent the employee in both the oral reply and any subsequent grievance based on the proposed disciplinary action, and not prohibited from disclosure by law, including the Privacy Act.

Respondent, on the other hand, takes the position that disclosure of the Region-wide disciplinary records, would violate the Privacy Act. Respondent also takes the position the requested documents are not necessary for the performance of the Union's representational responsibilities, and, in any event, the Union had already been furnished the requested information pursuant to the collective bargaining agreements currently in effect between the IRS and NTEU.

With respect to Respondent's defense predicated on absence of necessity, the Authority's decision in Internal Revenue Service and Internal Revenue Service, Salt Lake District, Salt Lake City, Utah, 40 FLRA 303 (hereinafter called IRS, Salt Lake), is dispositive of this defense. While IRS, Salt Lake, involved a different District of the Internal Revenue Service and a demand from a different NTEU local, the information requested was identical to that requested herein and also was for purposes of insuring that the penalty

accorded a unit employee for improperly accessing a computer system was consistent with the discipline accorded other employees in the Southwest Region for similar conduct. In finding that IRS, Salt Lake violated Sections 7116(a)(1), (5) and (8) of the Statute by refusing to make the requested information available, the Administrative Law Judge, whose decision was subsequently affirmed by the Authority, stated in pertinent part as follows:

> Section 7114(b)(4)(B) requires an agency to furnish the exclusive representative of its employees information that is necessary in order to fulfill its representational responsibilities. . . . These representational responsibilities include representing employees who are being, or have been disciplined, and determining whether to take the matters to arbitration, etc. In representing such employees the union is entitled to information necessary to determine whether the employee being represented was treated differently for the same or similar misconduct as other employees and supervisors. Such information includes the discipline records of employees and supervisors who were disciplined for misconduct similar to that engaged in by the employee represented by the union. . . .
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> In the subject case NTEU was representing the grievant with respect to the proposed adverse action penalty based upon her illegal access to IDRS. NORD II (Revised) and later NORD III, was a collective bargaining agreement for a nationwide unit of employees that required . . . that one of the considerations in determining whether an action against an employee is appropriate is 'consistency of the penalty with those imposed upon employees for the same or similar offenses.'
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> The documents requested would have permitted NTEU to make a judgement before the oral reply and before deciding whether to take the matter to arbitration as to whether the grievant's proposed punishment and actual punishment were consistent with the penalties imposed upon other employees who engaged in similar misconduct. Thus I conclude the documents requested by NTEU were 'necessary' for negotiation within the meaning of section 7114(b)(4)(B) of the Statute.

Inasmuch as the facts in the instant case are indistinguishable from those in IRS, Salt Lake, it follows that a similar finding with respect to the necessity of the information sought herein is in order. This is particularly true when the absence of the requested information would make it virtually impossible for Local 99 to

ascertain whether or not the grievant is being subjected to disparate treatment with respect to her misconduct.

Despite the fact that the various Locals of the Union, pursuant to the terms of the collective bargaining agreements, are given copies of all disciplinary actions occurring within their respective jurisdictions, I can not conclude, as contended by Respondent, that Local 99 is foreclosed from seeking the requested information. In this connection it is noted that the Respondent retains copies of the disciplinary actions for four years and the collective bargaining agreements, which require copies of disciplinary actions involving unit personnel to be sent to the respective Locals, have only been in existence for three years. Thus, the Locals would not have received copies of any disciplinary actions occurring in the year preceding the execution of the collective bargaining agreements. Additionally, the Locals would not have received copies of the disciplinary actions involving non-unit personnel.(4) Also, the credited testimony of Ms. Charpentier indicates that Respondent on at least one occasion has failed to forward a copy of a disciplinary action to the Local representing an affected employee. In view of the foregoing, I find that while NTEU Chapter 99 has in the past been sent copies of disciplinary actions it is not foreclosed from receiving from Respondent the requested Region-wide disciplinary information.(5) Moreover, as pointed out by the Charging Party, at a minimum the Union would be entitled to copies of the disciplinary actions taken against non-unit employees and also copies of the disciplinary actions taken during the year preceding the execution of the contract against unit and non-unit employees working within the Region.

Turning now to Respondent's final defense predicated upon the Privacy Act, 5 U.S.C. Section 552a, in agreement with the position of the General Counsel and Charging Party, I find that the Authority has not abandoned its position that the release of disciplinary actions taken against employees is not necessarily barred by the Privacy Act.(6)

In deciding whether or not to order the release of information concerning disciplinary and adverse actions imposed against employees the Authority balances the individual employees' right to privacy against the public interest in having the information disclosed. U.S. Department of Transportation, Federal Aviation Administration, 46 FLRA 1475, 1485.

In agreement with the General Counsel and Charging Party, I find that the public's interest in disclosure of the requested disciplinary actions issued to employees for disclosing taxpayer information outweighs the personal privacy interests of Respondent's employees. As found above, the information was necessary within the meaning of Section 7114(b)(4) for the Union to adequately represent the affected employee in both the oral reply and any subsequent arbitration hearing. In addition, the disclosure of the requested information would also permit the Union to determine whether Respondent was complying with the applicable provisions of the collective bargaining agreements that call for consistency of penalties for the same or similar offenses. Further, while it is recognized that the Respondent's employees would not welcome the disclosure of disciplinary actions taken against them, there is nothing in the record to indicate that there would be widespread dissemination of the information. The Union requested the information to prepare for the oral reply and any subsequent arbitration and there is no evidence that the information would be used for any purpose inconsistent with that request. Cf. U.S. Department of Transportation, Federal Aviation Administration, New England Region, Burlington, Massachusetts, 38 FLRA 1623, 1631, wherein the Authority relied on similar considerations in finding that the Union's need for certain disciplinary information outweighed the employees privacy interests.

Based upon the foregoing analysis, and absent any contention, whatsoever, that the requested information is not normally maintained by Respondent and reasonably available or that it constitutes guidance advice, counsel or training for management, I find that the Union was entitled, pursuant to Section 7114(b)(4) of the Statute to the requested disciplinary information. I further find that Respondent by failing to accede to the Union's request and make the disciplinary information available violated Sections 7116(a)(1), (5) and (8) of the Statute.

Accordingly, it is recommended that the Federal Labor Relations Authority issue the following order[(7)] designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of the Treasury, Internal Revenue Service, North Atlantic Region, Brookhaven Service Center, New York, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish, upon request by the National Treasury Employees Union, the employees' exclusive representative, information which is necessary for the exclusive representative to effectively prepare for an oral reply and any subsequent grievance.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statue.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at its facilities in the North Atlantic Region, where employees in the bargaining unit 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 District Director for the North Atlantic Region, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Boston Regional Office, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, MA 02110, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, June 8, 1993

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BURTON S. STERNBURG

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish, upon request by the National Treasury Employees Union, the employees' exclusive representative, information which is necessary for the exclusive representative to effectively prepare for an oral reply and any subsequent grievance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

_____

(Activity)

Date: _____ By : _____

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any of questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Boston Regional Office, 99 Summer Street, Suite 1500, Boston, MA 02110, and whose telephone number is: (617) 424-5730.

Dated: June 8, 1993

Washington, DC

1. In absence of any objection, Respondent's Motion to Correct Hearing Transcript, should be, and hereby is, granted.

2. Aside from the formal papers, the record consists of a number of joint exhibits, a stipulation and the uncontradicted testimony of one witness, Ms. Elaine Charpentier, an attorney employed by the National Treasury Employees Union.

3. The Brookhaven Service Center is located in Respondent's North Atlantic Region. The Union and Respondent are parties to two separate collective bargaining agreements applicable to the Service Centers and Regions, respectively. NC III covers the Service Centers and NORD III covers the Regions. Both contracts provide that when discipline or adverse actions are to be taken, Respondent shall consider a number of factors, including "consistency of the penalty with those imposed upon other employees for the same or similar offenses".

4. In Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 28 FLRA 202, Internal Revenue Service, Western Region, San Francisco, California, 9 FLRA 480, and IRS Salt Lake, supra, the Authority made it clear that data concerning discipline imposed on non-unit employees and region-wide employees was "necessary" in order for the Union to evaluate and process a grievance on behalf of an employee who was being subjected to a possible disciplinary action for violating

established rules.

5. Cf. U.S. Department of Transportation, Federal Aviation Administration, National Aviation Support Facility, Atlantic

City Airport, New Jersey, 43 FLRA 191, 197, wherein the Authority concluded that even if the union had received a copy of the requested information from another source, that fact would not relieve the agency of its obligation under Section 7114(b)(4) of the Statute to furnish the requested information.

6. Respondent, in its post-hearing brief, concedes that the Authority has not abandoned it's position that the Privacy Act does not constitute an absolute bar against the disclosure of disciplinary information. However, citing the Second Circuit's opinion in FLRA v. Veterans Affairs, 958 F.2d 503, Respondent argues that the Authority's interpretation of

Privacy Act is in error.

7. With respect to remedy, it is the position of Respondent that since the grievance concerning Ms. Higgins has been resolved there is no longer any need for the requested data. The General Counsel, on the other hand,

acknowledging that

the Union may have received some of the requested information pursuant to the provisions of the collective bargaining contracts, urges that Respondent be ordered to "furnish the

the information, upon request of the Union and to the extent that the Union does not already have the information."

While I agree that an order citing Respondent's refusal to comply with Section 7114(b)(4) should issue, I do not agree that, under the circumstances present herein, i.e., the matter of Ms. Higgins' suspension having been converted to a five day suspension, Respondent should now be ordered to make the requested information available. Inasmuch as it appears that the Union has no intention of proceeding further with Ms. Higgins' grievance, there is no current need for the requested information. This is particularly true when one considers the sensitive nature of the requested information. Cf. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Detroit District, Detroit, Michigan, 43 FLRA 1378.