OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER,
NORTHPORT, NEW YORK

Respondent

and Case No. BY-CA-21467

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO,

LOCAL NO. 1843

Charging Party

Christopher Wood, Esq.

For the Respondent

Ramona Sears

For the Charging Party

Verne R. Smith, Esq.

For the General Counsel

Before: SALVATORE J. ARRIGO

Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the

Authority), by the Regional Director for the Boston Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by failing to furnish the Union with information it requested concerning various employee awards.

A hearing on the Complaint was conducted in New York, New York at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the American Federation of Government Employees, AFL-CIO (herein AFGE) has been the exclusive collective bargaining representative of various of Respondent's employees and AFGE Local No. 1843 has been the agent of AFGE for the purpose of representing those employees at Respondent's Northport, New York facility.

In early July 1992 Respondent conducted a ceremony at which a number of employees received various types of awards from Respondent. Later in July the Union sent Respondent the following correspondence:

> AFGE has been inundated with complaints from employees regarding not receiving monetary performance awards, while other employees did. Please advise/provide the following information in order for AFGE to determine whether . . . a grievance is warranted, specifically:
>
> 1. A listing of employees that received awards identifying;
>
> a. Service
>
> b. Name/Job Title
>
> c. Reason for award
>
> d. Amount of monetary award or other type award received by each.
>
> 2. Specify the criteria used to decide which employees received a monetary vs which employees received another type of award.
>
> Your response within the specified time period is requested.

By letter dated July 28, 1992 Respondent replied to the Union as follows:

1. In response to your request for information, dated July 27, 1992, regarding monetary performance awards, please be advised that the release of this information in an unsanitized format, would be considered an unwarranted invasion of personal privacy, and cannot be accommodated. A recent D.C. Circuit Court of Appeals decision (962 F.2d 10555) specifically upheld the right of an Agency to protect the privacy rights of employees with regard to the release of unsanitized performance appraisals. In addition, since the Master Agreement, Article 13, Section 2 specifically excludes from the negotiated grievance procedure decisions on incentive awards, it is unclear how this information is necessary or relevant. In a good faith attempt to respond to your legitimate concerns and questions from bargaining unit employees, the following information is provided to you:

a. All employees rated Highly Successful or Outstanding were invited to an awards ceremony conducted July 8, 1992. These employees received performance award certificates and an engraved desk size digital clock for their achievements.

b. While no specific local criteria were established to govern the dollar amount of awards given to each employee, the award amounts did conform with agency policy as found in VA Manual MP-5, Part I, Chapter 451. These regulations are attached for your review. In addition, there is no requirement under the Master Agreement to give awards to employees rated Highly Successful. As has been the practice for years, individual services were given the discretion to manage their awards dollar budget within these parameters, while using different criteria as appropriate.

3. If you would like to restate your request along more narrow lines we would be pleased to consider it further.

On August 9, 1992 the Union sent Respondent the following reply:

After further review and consideration of your July 28, 1992 response which answered the concerns

of several employees, there still remains the concern of these awards being given to employees based on their performance under their individual performance plan.

Your statement that [decisions] on awards is (sic) not grievable under the grievance procedure [does not] mean that the application of Article 32 in its entirely [is not grievable].

Accordingly, in order for AFGE to determine whether or not Article 32 has been fully complied with concerning the 1991-1992 rating period as it applies to Section 3.A.,3.C. we request the following information as it pertains specifically to Engineering Service:

1. Name/Section of each award recipient.
2. Type of award received.
3. A copy of the documentation used to justify each recipients award [unsanitized] as to the [recommending] and [approving] official.
4. A copy or statement of the criteria used to determine whether or not give an award to a individual employee. . . .

On August 17 Respondent sent the Union the following communication:

1. In response to your request for information transmitted via E-Mail on August 8, 1992, the following is provided to allow you a more complete understanding of the appraisal/award process as implemented in Engineering Service for the rating period which ended March 31, 1992. We note, however, that your request did not articulate a rationale as to why information specific to non-bargaining unit employees (supervisory and/or NFFE bargaining unit employees) would be required, so this information has not been included in the following.

2. Names of employees receiving awards in Engineering Service by Section:

OFFICE OF THE CHIEF:

(10 named employees)

M&R SECTION:

(24 named Employees)

3. Types and number of awards received by Engineering Service BUE's:

Group Special Act: 6

Individual Special Act: 0

Performance Award (Monetary): 24

Performance Award (Honorary): 34 *

Quality Step Increase: 4

4. Criteria utilized for justifying each award:

Engineering Service received an allocation of $9,174 for awards. The Service allocated these funds within the parameters established by VA regulation (see attached copy of MP-5, Part I, Chapter 451). These criteria cover performance awards and also, a special act award with tangible and intangible benefits. Ratings for employees assigned to the "Project Team", whose details expired in February were extended to provide 90 days under performance standards. No member of the project team received an individual performance award for his regular assignment; all members of the project team received Group Special Act Awards for their work on various projects. All Service employees receiving Highly Successful or Outstanding ratings received a monetary award of some sort (Monetary Performance Award, Group Special Act, or Quality Step Increase) in recognition of their efforts.

5. I hope this information is helpful. Should you require further clarification, we will comply within parameters established by the Privacy Act and Release of Information Act for release of said information.

On August 21, 1992 the Union notified Respondent that, since it did not provide the information the Union requested, it would proceed to file an unfair labor practice charge on the matter which it did on September 8, 1992.

Agency regulations provide the following with regard to employee awards:

(a) Special Act Awards may be given as a cash payment or honor to an individual or a group and are in recognition of actions of unusual merit or accomplishment in a particular program. They are not directly related to an employee's performance appraisal or proficiency rating. According to the applicable regulation:

1. Special Achievement Awards for special contributions (cash, honor or both) may be granted at any time during the appraisal period to an individual or a group of employees for a single contribution. The act or achievement must be in the public interest, related to official employment and deserving of special recognition. It may be an act of heroism or a special project of a "one-time" nature, a series of acts unusual to a particular job, or some other significant contribution such as outstanding achievement in the area of affirmative action. There is no limit on the number of Special Contribution awards which may be granted to an employee in any given period, either as an individual or as a member of a group, except that budgetary consideration may limit the number/amounts of monetary awards.

2. VA Form 5-4659 is used to nominate employees for special contribution awards. Justifications will consist of a narrative to explain thoroughly the contribution and why it is considered to be of sufficient merit to warrant an award. The justi-fication must include the tangible and/or intangible benefits resulting from the special contribution. If the benefits are tangible (actual dollars can be calculated), then the justification must specify those dollar savings. If the benefits are intangible, both the value of the contribution to the organization and its extent of application must be clearly explained as part of the narrative description of the contribution. (Tangible Benefits Table appears in Appendix B of this CM.) If the Special Contribution Award is based on a group contribution, the information

requested on VA Form 5-4659 will be submitted for each individual in the group.

3. Nominations are submitted to the Incentive Awards Officer (05C) for the technical review and determination of the availability of funding. The Director, or designee, approves these discretionary awards contingent upon funding and other management considerations.

4. Awards will be presented at the worksite by the Approving Official, whenever possible. It will be the Approving Official's responsibility to arrange for photographs, if these are desired. To provide the greatest motivational impact, awards should be recommended, approved and presented promptly following the contribution. A cash award is payable from the appropriation current at the time the award is approved. . . .

(b) The Performance Award, more specifically termed a "special achievement award for superior performance," can be given as cash, honor or both. It is granted to an individual for the superior performance of duties over an extended period of time and is based upon the employee's annual performance appraisal of record. The regulation governing the Performance Award states:

. . . .

2. An employee must ordinarily have a highly successful or outstanding rating to be considered for a superior performance award. An award may be given an employee with a fully successful rating when a majority of all elements have been rated exceptional or when at least one critical element has been rated exceptional.

3. Recommendations for superior performance awards will be considered at the end of the performance rating period and will usually be initiated by the immediate supervisor, but may be submitted by any supervisor or management official through appro-priate supervisory channels with sufficient knowledge of the employee's work performance. Recommendations will be submitted utilizing VA Form 5-4659, "Recommendation for Recognition of High Level Performance." A copy of the employee's performance appraisal will be attached to VA Form 5-4659. CM 05-43 contains additional information.

. . . .

5. Processing will be done through supervisory channels. Service Chief will review the recommendations for accuracy, adequacy of documentation and indicated concurrence. Comments and recommendations are added and the complete file is forwarded to the Incentive Awards Officer (05C).

6. The entire case is then forwarded to the Director, or designee, for final decision, except for employees in centralized positions and for awards above $3,000. These exceptions must be forwarded through the Director to Central Office for approval.

7. If disapproved, reasons will be entered in the file, which will be returned through the Incentive Awards Officer [05C)] to the appropriate Service Chief. Such awards are not an entitlement; they are granted at management's discretion and are based on established criteria. There must be funding available to support them.

(c) Quality Step Awards are given only in conjunction with the employee's annual rating of record. These awards begin with a recommendation from the Agency's Professional Standards Board. Such recommendations are considered at the end of the annual performance rating period and are usually prepared by the employee's immediate supervisor to which is attached a copy of the employee's performance appraisal. This award is granted only to employees who receive "outstanding" annual ratings of record. The applicable regulation further provides:

. . . .

3. Recommendations for Quality Step Increases will be considered at the end of the annual performance rating period. Recommendations will be submitted on VA Form 5-4659, "Recommendation for Recognition of High Level Performance," usually prepared by the immediate supervisor. Attached to the recommenda-tion will be a copy of the employee's performance appraisal. The documentation must be sufficient to support the recommendation for the Quality Step Increase or Special Advancement for Performance. Note that to be eligible for a Quality Step Increase (QSI), an employee must be rated OUTSTANDING. Also, the Approving Official must

concur in both the outstanding rating and the recommendation for Quality Step Increase. Finally, the Approving Official must certify he/she expects the employee's performance to continue at the same high level of effectiveness and that the employee will remain with the VA in the same on equivalent position for 60 days. [See CM 05-43 for any additional requirements].

4. Recommendations for Special Advancement for Performance are accomplished by sending copies of the rating upon which recommendations are based and VA Forms 5-4659 and 5-4652 to the appropriate Professional Standards Board after concurrence by the 2nd line rater. CM 05-43 contains additional information.

5. The entire case file is forwarded to the Incentive Awards Officer for review of technical accuracy and then to the Director, or designees, for final decision, except for positions requiring Central Office approval. These are forwarded through the Director to Central Office for action.

6. If disapproved, reasons will be entered in the file which will be returned through the Incentive Awards Officer (05C) to the appropriate Service Chief.

Additional Findings, Discussion and Conclusions

Section 7114(b)(4) of the Statute requires:

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data-

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . .

The General Counsel alleges Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to furnish the Union, in an unsanitized form, with the information it requested pertaining to the distribution of awards of bargaining unit employees in Respondent's Engineering Service. Respondent denies violating the Statute contending release of the requested information to the Union would constitute a "clearly unwarranted invasion of employees' privacy" which is prohibited by the Privacy Act.(1)

The Privacy Act, 5 U.S.C. § 552(a), generally prohibits disclosure of personal information about Federal employees without their consent unless the disclosure is required by the Freedom of Information Act (FOIA), 5 U.S.C. 552. The FOIA requires disclosure of information by the Federal government unless disclosure falls within an enumerated exception. Exception (b)(6) provides that an individual's privacy rights must be balanced against the public's interest to have infor-mation concerning the person disclosed in situations when disclosure "would constitute a clearly unwarranted invasion of personal privacy." It is clear from the thrust of Respondent's brief that Exception (b)(6) is the exception to the FOIA that Respondent urges is applicable herein.

Recently, in U.S. Department of Transportation, Federal Aviation Administration, New York Tracon, Westbury, New York, 50 FLRA 338 (1995) (FAA-I), the Authority, for the first time, addressed the holdings of the Supreme Court in United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (Reporters Committee), and United States Department of Defense v. FLRA, 510 U.S. --, 114 S. Ct. 1006 (1994) (Department of Defense), regarding the interplay between a union's right to information under the Statute and the proscriptions imposed by the Privacy Act. Thus, the Authority held in FAA-I at 343-344:

> With respect to the public interest to be weighed, the Authority is guided by Reporters Committee and Department of Defense. In Department of Defense, the Supreme Court rejected the Authority's previous approach, which defined the public interest in terms of collective bargaining as embodied in the Statute. The Court held that the only relevant public interest to be considered in the FOIA Exemption 6 balancing analysis is the extent to which disclosure of the information would shed light on the agency's performance of its statutory duties or otherwise inform citizens as to "'what their government is up to.'" Department of Defense, 114 S. Ct. at 1013-14 (quoting Reporters Committee, 489 U.S. at 773). In addition, the Court stated that "all FOIA requestors have an equal, and equally qualified, right to information[.]" 114 S. Ct. at 1014. See also Reporters Committee, 489 U.S. at 771 ("the identity of the requesting party has no bearing on the merits of his or her FOIA request").
>
> Although the case before the Court in Department of Defense involved only the disclosure of bargaining unit employees' home addresses, we find no basis for determining the relevance of an asserted public

interest any differently in cases involving other information, including performance appraisals. We note that courts reviewing claims under Exemption 6 of the FOIA consistently have analyzed the public interest utilizing the same definition regardless of differences in the type of information sought. Compare [FLRA v. United States Department of Commerce, 962 F.2d 1055, 1060 (D.C. Cir. 1992) (Commerce)] (names and duty stations of unit employees who received certain performance evaluations) with [National Association of Retired Federal Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989)] (names and addresses of Federal annuitants). Accordingly, in balancing the interests under Exemption 6, we will in this and future cases define the public interest in disclosure of information in terms of the extent to which disclosure of the information would shed light on the agency's performance of its statutory duties or otherwise inform citizens as to what their Government "is up to." Reporters Committee, 489 U.S. at 773.

We adopt this definition of public interest because we conclude that Department of Defense requires this result for all cases involving the FOIA, including those that have their genesis in a request pursuant to section 7114(b)(4) of the Statute. . . . (Footnote omitted).

In FAA-I the Authority also set forth the respective burdens the parties bear in proceeding in a case such as herein. Thus, in FAA-I at 345-346 the Authority stated:

. . . in cases where an agency defends a refusal to furnish requested information on the basis that disclosure is prohibited by the Privacy Act because it would result in a clearly unwarranted invasion of personal privacy within the meaning of FOIA Exemption 6, the agency bears the burden of demonstrating: (1) that the information requested is contained in a "system of records" under the Privacy Act; (2) that disclosure of the information would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. If the agency makes the requisite showings, the burden shifts to the General Counsel to: (1) identify a public interest that is cognizable under the FOIA, and (2) demonstrate how disclosure of the requested information will serve that public interest. Although the parties bear the burdens set forth above, we will, where appropriate, consider matters

that are otherwise apparent.

Once the respective interests have been articulated, we will, as we have in the past, balance the privacy interests against the public interest. . . In striking this balance, we must be mindful that the "clearly unwarranted" language in Exemption 6 weights the scales in favor of disclosure. . . . (Footnote omitted).

The specific issue the Authority addressed in FAA-I was an agency's obligation to furnish its employees' collective bargaining representative with unsanitized employee performance appraisals which it requested. When considering the strong privacy interests employees have in their performance appraisals, the Authority stated at 346-347:

In assessing the privacy interests identified by the Respondent, we are guided by the substantial body of law that has been developed, both by the Federal courts and by the Authority. . . . Consistent with this precedent, it is clear that bargaining unit employees have significant privacy interests in information that reveals supervisory assessments of their work performance. As the Supreme Court has observed, "Congress' primary purpose in enacting Exemption 6 was to protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." United States Department of State v. Washington Post Co., 456 U.S. 595, 599 (1982). That privacy interest may be heightened with respect to derogatory information in an appraisal, Gilbey, but it also extends to disclosure of favorable information that might embarrass an individual or incite jealousy in his or her co-workers. See, for example, Commerce, 962 F.2d at 1059; Ripskis, 746 F.2d at 3.

Specifically, unsanitized performance appraisals reveal details of supervisory assessment of individual work performance and, as such, are likely to contain information that is highly sensitive to employees, which employees may wish to keep confidential. See Stern v. Federal Bureau of Investigation, 737 F.2d 84, 91 (D.C. Cir. 1984) (addressing employee privacy interest in "diverse bits and pieces of information, both positive and negative, that the government, acting as an employer, has

obtained and kept in the employee's personnel file"). We note that unsanitized performance appraisals rarely have been subject to disclosure by courts because of the strong privacy interests of the affected employees. CompareCommerce, 962 F.2d at 1060; Ripskis, 746 F.2d at 3-4; Gilbey; and Church of Scientology, 816 F. Supp. at 1156 with Columbia Packing and Celmins. Indeed, we are unaware of any judicial precedent issued subsequent to Reporters Committee in which disclosure of unsanitized employee performance appraisals was mandated under Exemption 6.

The Authority then examined in FAA-I the "public interest" involved and stated, in part at 347-348:

> With respect to the public interest asserted by the General Counsel, we similarly are guided by precedent recognizing that the public is served if the Respondent carries out its personnel functions fairly, equitably, and in accordance with laws, rules and regulations, Commerce, 962 F.2d at 1060; Ripskis, 746 F.2d at 3; Core v. United States Postal Service, 730 F.2d 946, 948 (4th Cir. 1984) (Core), and otherwise fulfills its statutory and regulatory obligations. The Respondent is engaged in air traffic control activities, which clearly affect aviation safety for the general public. Disclosure of unsanitized performance appraisals would shed light on the ability of employees to perform their air traffic control duties and on the manner in which those duties are performed, which furthers the public interest in knowing how "public servants" are carrying out their Government functions. NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978) (a basic purpose of the FOIA is to ensure an informed citizenry needed to "hold the governors accountable to the governed"). (Footnote omitted).

The Authority went on to say in FAA-I, however, that, contrary to some earlier decisions when defining the public interest under FOIA Exception b, it would not be appropriate to consider the benefits disclosure to a union would yield, such as the early resolution of grievances, the proper administration of a collective bargaining agreement, generally, or any other interest that was specific to the union and not a concern of the general public at large. The identity of the requestor and a commitment not to disclose would similarly be irrelevant. Thereupon the Authority in FAA-I balanced the articulated privacy interests against the public interests and concluded that disclosure of the unsanitized employee performance appraisals the union requested was prohibited by law and the complaint was dismissed.

In the case herein, the Union basically wished to obtain the unsanitized materials which Respondent used in its decision to grant particular individuals an employee award. In the request made by the Union on August 9, 1982, its last request, the Union sought: the name, employment section, and type of award of each award recipient; the unsanitized documentation, including recommendations and comments from approving officials, used to "justify" or support each award; and the "criteria" used to determine whether or not to give an award to an individual employee. Respondent's reply of August 17 named the employees who received awards but did not identify what specific award or the amount of the award each employee received, did not give the "justification" supporting each individual award, nor did Respondent's reply supply the "criteria" used for each individual award except to give general criteria applied in the award process. In any event, Ramona Sears, a Union steward called as a witness by counsel for the General Counsel, and the only witness to testify at the trial, testified that although the Union did not request performance appraisals from Respondent, the Union was seeking to obtain the "criteria" for each of these awards, explaining that the Union wished to obtain information that would reveal ". . . how the engineering services went about . . . approving these people for highly satisfactory and outstanding. How they were rated." The record reveals that Performance Awards and Quality Step Increases are based upon an individual's performance appraisal. Accordingly, employee performance appraisals were obviously used to "justify" these awards and I find were indeed what the Union was requesting of Respondent.

In U.S. Department of Transportation, Federal Aviation Administration, Jacksonville Air Traffic Control Tower, Jacksonville, Florida, 50 FLRA No. 388 (1995) (FAA-II), the Authority also considered an employer's refusal to provide the collective bargaining representative with copies of employees' performance appraisals, unsanitized except for social security numbers. In that case the Authority applied the principle's it enunciated in FAA-I and dismissed the complaint, finding disclosure would constitute a clearly unwarranted invasion of personal privacy and therefore prohibited by the Privacy Act. The Authority stated, at 393:

> We find, in agreement with the Respondent, and for reasons discussed more fully in FAA, that employees have substantial privacy interests in shielding their individual performance evaluation information from public view. The Union's request encompasses all unit employees' performance appraisals, whether favorable to the employee or not. In this regard, privacy interests may be heightened with respect to derogatory information in an appraisal. See Gilbey v. Department of the Interior, 1990 WL 174889 (D.D.C. 1990). However, such interests exist even as to favorable information. See FLRA v. United States Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, 962 F.2d 1055, 1059 (D.C. Cir. 1992); Ripskis, 746 F.2d at 3.

In FAA-II, as in FAA-I, the Authority went on to review the public interest served by releasing unsanitized performance appraisals to the requestor, i.e., permitting review of the ways in which the Respondent administers its performance appraisal system and monitoring the quality of the work products generated in fulfilling its statutory mission. FAA-II at 6-7. However, the Authority found it had not been established that disclosure of the names and other identifiers related to the specific appraisal "enhances" the public interest

articulated by the General Counsel.(2) After acknowl- edging the "limited public interest" derived from possibly facilitating the investigation of government efforts to enforce certain laws though a review of the requested information, the Authority concluded in FAA-II at 7-8 that, "on balance," the public interest served by disclosure of the requested information was outweighed by the substantial invasion of employees' privacy that would result from disclosure.

As stated by the Authority, and applicable herein, "the public is served if Respondent carries out its personnel functions fairly, equitably, and in accordance with laws, rules and regulations." FAA-I at 347. In the case herein data requested would shed light on Government operations and open for inspection the manner in which Respondent administers its employee awards programs which would ultimately "permit review of the ways in which the Respondent administers its performance appraisal system and monitors the quality of the work products generated in fulfilling its statutory mission." FAA-II at 6. The public interest is thus served by disclosure.

Clearly, with regard to Performance Awards and Quality Step Awards, the underlying determinative vehicle for an employee being selected to receive such an award is the individual employee's performance appraisal and performance rating. It is also clear that the information sought by the Union centered on individual employee's performance appraisals and supervisory comments regarding the employee's performance necessary to "justify" the award, and ascertaining the specific "criteria" used to determine whether the individual would receive an award. However, in order to be producible, the public interest must be served by providing this information to the requestor. But the appraisals were not the end of the Agency's actions which are to receive public scrutiny. The appraisals in the case of those receiving awards are the foundation for Respondent's ultimately granting monetary awards involved herein. Surely the public interest served is stronger when an agency is called upon to reveal how its funds are spent and to assure the public that such funds are spent in an honest and prudent manner. It would seem obvious and not require any specific urging by a party that the public has a significant interest in ascertaining whether special financial awards bestowed by an agency on a Government employee are distributed in a fair and impartial manner without individual favoritism or hostility.

On the other hand, applying the principles set forth by the Authority in FAA-I and FAA-II, I find the employees involved have a substantial privacy interest in Performance Awards and Quality Step Awards, to the extent such awards are dependent upon employee's underlying performance evaluations and details concerning their performance ratings and supervisory comments with respect thereto. I also find that a substantial privacy interest similarly attaches to the fact that a specific employee received a Performance Award or Quality Step Award. I have further considered the "adverse consequences" the Authority recognizes as being inherent from disclosure, i.e., inducing unhealthy comparisons among employees thereby breeding discord in the workplace and the possibility that disclosure might cause supervisors to withhold in the future positive or negative comments about an employee in the appraisal or recommendation, if such comments should become public. See FAA-I at 349-350 and FAA-II at 6. Prior disclosure of some of this information as herein, does not support disclosure of additional information. Id. Indeed, it could be argued that the public interest in the information has already been adequately served by the information already disclosed to the Union by Respondent in its correspondence of July 28 and August 17, above. See FAA-II at 7 and see Ripskis, 46 F.2d at 3-4.

Since the data sought by the Union with regard to the Performance Awards or Quality Step Awards is essentially the employee appraisals and ratings, with supporting supervisory and managerial recommendations and comments on each individual employee's performance as it relates to the specific award, I conclude that

the substantial invasion of employees' privacy recognized by the Authority and the courts outweigh the public interest served by disclosure of the data sought by the requestor. Accordingly, having balanced the competing interest involved, I conclude that disclosure of the requested data, to the extent not already disclosed, would constitute a clearly unwarranted invasion of personal privacy within the meaning of Exemption 6 of the FOIA and is therefore prohibited by the Privacy Act. In these circumstances Respondent was not obligated to further provide the Union with the additional data it requested under section 7114(b)(4) of the Statute and its failure to do so did not violate the Statute.

However, balancing the public interest with employees' privacy rights when considering Special Achievement Awards, awards designated as Group Special Act Awards by Respondent, I reach a different result. While the public interest involved as expressed above relative to the granting of Performance Awards and Quality Step Awards remains the same when considering Special Achievement Awards, the employee privacy rights involved are considerably less. Thus the Agency's regulations provide that such awards are not directly related to the employee's performance appraisal or proficiency rating as are Performance and Quality Step Awards. Apparently little or no part of an employee's performance appraisal or rating plays any part in selecting an individual separately or to partake with others in the receipt of a Special Achievement Award. What must be included to justify receipt of such an award, according to Respondent's regulations, is an explanation of the contribution, its merit, and a specific description of the tangible or intangible benefits of the action or activity of the individual or group of employees. Special recognition as used in the regulations obviously encompasses publication of the award. The regulations specifically encourage publicizing the awards by presenting the award at the worksite whenever possible and photographing the presentation. In these circumstances, "stigmatizing" or derogatory elements are most likely not present. Some of the considerations which support privacy interests of those receiving these awards may still be present, e.g., an assessment of an employee's or group of employees' work will undoubtedly be present in the narrative supporting the justification for the award and the favorable information supporting the award might embarrass an individual or incite jealousy in a co-worker. However, I find such considerations to be minor compared to those present when dealing with unsanitized performance appraisals.

Having balanced the identifiable public interests with the identifiable employees' privacy interests involved,[3] I conclude, noting particularly that Exception 6 of the FOIA weighs the scales in favor of disclosure (see FAA-I at 345-346), that disclosure of the information requested concerning the six Group Special Acts awards received by Respondent's employees would not constitute an unwarranted invasion of personal privacy within the meaning of Exemption 6 of the FOIA and is not precluded by the Privacy Act. Therefore, I conclude Respondent was obligated to provide the Union with all the data it requested under section 7114(b)(4) of the Statute relative to the six Group Special Act Awards and Respondent's failure to do so violated section 7116(a)(1) and (5) of the Statute.[4] Accordingly I recommend the Authority issue the following:

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 Veterans Affairs Medical Center, Northport,

New York, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish Local No. 1843, American Federation of Government Employees, AFL-CIO, (the Union) the agent of the exclusive representative of certain of its employees, unsanitized copies of data requested by the Union on August 9, 1992 concerning the Group Special Act Awards given to bargaining unit employees.

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

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

(a) Furnish the Union unsanitized copies of data it requested on August 9, 1992 concerning the Group Special Act Awards given to bargaining unit employees.

(b) Post at its facilities in the Northport, New York Medical Center 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 Medical Center Director 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.

(c) 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, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued: Washington, DC, July 28, 1995

SALVATORE J. ARRIGO

Administrative Law Judge

BY-21467

NOTICE OF ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish Local No. 1843, American Federation of Government Employees, AFL-CIO, the agent of the exclusive representative of certain of our employees, unsanitized copies of data it requested on August 9, 1992 concerning the Group Special Act Awards given to bargaining unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL furnish Local No. 1843, American Federation of Government Employees, AFL-CIO, the agent of the exclusive representative of certain of our employees, unsanitized copies of data it requested on August 9, 1992 concerning the Group Special Act Awards given to bargaining unit employees.

_____

(Activity)

Date: _____ By: _____

(Signature) (Title)

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 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 Region, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110-1200 and whose telephone number is: (617) 424-5730.

1. In its Answer to the Complaint Respondent admitted the data sought by the Union was normally maintained, reasonably available and did not constitute guidance, advice, counsel, etc. within the meaning of section 7114(b)(4) of the Statute. Although Respondent denied the allegation in the Complaint that the information sought was necessary for full and proper discussion, etc., it did not raise or support such a contention in its brief.

2. I find it difficult to understand how a party could review the administration of a performance appraisal system and monitor work products generated without knowing the specific identity of the individual appraisal so that the agency's processes could be validated.

3. Although the authority has set forth the parties' respective burdens when proceeding in a case such as herein, including the burden of establishing the nature and extent of the public and private interests involved, some interests are generic to particular types of information requests and, in my view, may be presumed to exist.

4. It appears Respondent has abandoned its denial that the data sought is "necessary" within the meaning of section 7114(b)(4) of the Statute. In any event, based upon the record herein including the reasons set forth by the Union when making its request, I would conclude that the information sought was "necessary" within the meaning of section 7114(b)(4) of the Statute.