UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: August 10, 2006

TO: The Federal Labor Relations Authority

FROM: CHARLES R. CENTER
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ELKTON, OHIO

Respondent

and Case No. CH-CA-05-0294

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 607, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring t he above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO Charging Party	Case No. CH-CA-05-0294

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Chief Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 11, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

CHARLES R. CENTER
Chief Administrative Law Judge

Dated: August 10, 2006
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO Charging Party	Case No. CH-CA-05-0294

Sandra J. LeBold, Esquire
Susanne S. Matlin, Esquire
For the General Counsel

Erika S. Turner, Esquire
Darrel Waugh, Esquire
Scot L. Gulick, Esquire
For the Respondent

Before: CHARLES R. CENTER
Chief 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 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 or Authority), 5 C.F.R. Part 2423.

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 607 (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the Chicago Regional Office of the Authority. The complaint alleges that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio (Respondent or BOP) violated section 7116(a)(1), (5) and (8) of the Statute when

it failed to furnish information requested under section 7114(b)(4) of the Statute. (GC Ex. 1(b)) The Respondent timely filed an Answer denying the allegations of the complaint. (GC Ex. 1(d))

A hearing was held in Youngstown, Ohio on March 28, 2006, at which time the parties were afforded a full opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence and make oral argument. The General Counsel and the Respondent filed timely post-hearing briefs that 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

The Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio, is an agency within the meaning of 5 U.S.C. §7103(a)(3). (GC Exs. 1(b) and 1(d))

The American Federation of Government Employees, Local 607 is 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. (GC Exs. 1(b) and 1 (d))

On March 3, 2005[1], Shirley Deeds, a certified physician's assistant at the Federal Correctional Institution in Elkton, Ohio (FCI Elkton) and a member of the bargaining unit represented by the Union was given a written counseling by her supervisor for reporting late for duty on March 2 and March 3. (GC Ex. 2) Documentary and undisputed testimony at the hearing revealed that this was a period of heavy snowfall and wind for the region and that as a result, employees of FCI Elkton were late for work on those two days (GC Ex. 4, Tr. 17, 19) Evidence at the hearing also indicated that Ms. Deeds was the only employee at FCI Elkton who received a written counseling for arriving late on those dates. (Tr. 62)

On March 8, Phillip W. Hulett, a union steward at the facility, submitted to T.R. Sniezek, Warden for the Elkton facility, an information request pursuant to 5 U.S.C. §7114 (b)(4) seeking copies of written counseling administered to any other staff member at FCI Elkton for being late to work in the prior three months and attaching a copy of the

[1] All dates occur in 2005 unless otherwise stated.

counseling document given to Ms. Deeds. The request specifically asked that if no other counseling was documented in writing during the period that the absence of such documentation be disclosed. The request also asked for the name of the executive staff member referred to in Ms. Deed's counseling as the source of the information regarding her tardiness and requested that any and all recorded video images captured by facility security cameras that would show the arrival and departure date and time of staff on March 2 and 3 be provided to the Union.

In making the request, Mr. Hulett stated that the particularized need for the information was:

> The Union must ascertain wether (sic) Ms. Deeds has been selectively singled out by management to receive a more severe corrective action by management than other employees at FCI Elkton who have the same starting time as Ms. Deeds and who arrived at the institution at or after the same time as Ms. Deeds on March 2 and 3, 2005.
>
> The Union will use the data to substantiate a claim of discrimination against Ms. Deeds as well as multiple violations of the parties (sic) collective bargaining agreement. (GC Ex. 3)

The Union also submitted an informal resolution attempt to the Warden on March 8 in which it asserted it was attempting to resolve a potential formal grievance related to the written counseling given to Ms. Deeds. (GC Ex. 4)

Although the Union requested a response to the information request by March 15, no response was provided. Thus, a second request was submitted on March 16. In the second request, the Union repeated the statement of particularized need set forth in the first request. (GC Ex. 5)

After receiving no response to its attempt at informal resolution, the Union filed a formal grievance with Management on March 23 (GC Ex. 6) and a Management representative rejected that formal grievance in a document dated May 11 but not received by the Union until June 15. (GC Ex. 7, Tr. 40) On March 30, the Union filed an unfair labor practice (ULP) charge with the Regional Director for the Chicago Region of the Federal Labor Relations Authority related to Management's failure to respond to the two information requests.

Having acted upon the formal grievance and received the ULP, Respondent responded to the Union's information request on May 27. In that response, BOP indicated that it would not provide documents "in an effort to maintain privacy for the staff members" because the collective bargaining agreement required counseling sessions to be private. Respondent also indicated that identifying the executive staff member who instructed the employee's supervisor to issue a counseling form was irrelevant. Finally, the BOP response questioned how the information request related to the Union's representational duties and indicated that because cameras were not used to monitor the arrival and departure of staff there were no tapes of such to provide. (GC Ex. 8) At the hearing, the management representative responsible for responding to the requests indicated that work volume, a lack of staff and office reengineering was the reason a response to the Union's information request was not provided until May 27. (Tr. 60)

POSITIONS OF THE PARTIES

General Counsel

Counsel for the General Counsel asserts that the information requested by the Union met the statutory requirements of section 7114(b)(4) and that the Respondent's failure to furnish this information violated the Statute.

Counsel for the General Counsel contends that the Union stated a particularized need for the three items of information it requested, that the BOP's response was initially untimely, that the belated response was inaccurate and misleading in that it failed to disclose that no other written counseling was issued during the time requested and that the Respondent failed to preserve information requested while its response was pending.

At the hearing, the Respondent revealed, just as the Union had suspected, that no other written counseling for tardiness was issued at the facility during the time covered by the request. Failing to inform the Union at the time of the request or within a reasonable period thereafter, that such documents did not exist misled the Union into believing that other employees at FCI Elkton were given written counseling for being tardy during the period requested. Counsel for the General Counsel contends that the Union had the right to know that Respondent had not issued written counseling to other employees for tardiness during that period and could have used that information in pursuing its grievance or an EEO claim.

Counsel for the General Counsel requests that the Respondent be ordered to respond accurately to the Union's data requests and post a Notice to All Employees.

Respondent

The Respondent asserts that the delay in responding to the Union's data request from March 8 to May 27 was reasonable under the circumstances and that the Union was not prejudiced by the delay. The Respondent also asserts that the Union did not establish a particularized need and that there was a countervailing anti-disclosure interest related to privacy. With respect to the requested video images, the Respondent argues that they are not normally maintained, were not reasonably available and that no particularized need was stated. With respect to the request to name the member of the executive staff who informed Ms. Deeds' supervisor about her tardiness, the Respondent contends in was not necessary because the supervisor issued the written counseling.

ANALYSIS AND CONCLUSION

This case serves as a checklist of things an agency should not do in responding to an information request under §7114(b)(4) of the Statute. From an unreasonable delay in responding, to a belated, inadequate and misleading response, to permitting the destruction of information that was the subject of the request while it was pending, the Respondent exhibited a complete and total disregard for the law governing labor relations in the federal sector that is difficult to understand given its federal law enforcement mission.

After a bargaining unit member was given a written counseling for arriving to work late on consecutive snowy days, the Union steward became concerned that the employee was being unfairly singled out for corrective action for other reasons. The steward held this belief because he knew that weather conditions on the days in question resulted in other employees being late and yet those employees did not receive written counseling[2] and suspected that this employee was being singled out because she had successfully fought a prior termination action while represented by the Union. In an attempt to assess the validity of his belief for the purpose of representing the employee in either a grievance or EEO complaint related to the written counseling, the Union steward submitted a data request to Respondent seeking three types of information:

[2] Included among them was the steward's spouse.

1. Copies of any other written counseling issued to other staff at FCI Elkton in the prior three months for being late;

2. Identification of the executive staff member cited in the written counseling as the source of the information related to the employee's tardiness;

3. Video images from any security camera at the facility situated in a manner that would show staff arrival or departure times on March 2 and 3, 2005.

This request was made on March 8, five days after the written counseling was issued. In addition, the steward also submitted a request for informal resolution of a potential formal grievance. When no response to the information request was provided within seven days as requested, a second request was made on March 16, which asked for a response by close of business March 25. When that date passed with no response from BOP, an unfair labor practice charge was filed on March 30. In the meantime, a formal grievance related to the written counseling issued to Ms. Deeds was filed on March 23.

The Request for Other Written Counseling Memorandums

The BOP responded to the Union's request for information on May 27, eighty days after receipt. While Jules Verne may have found the thought of circumventing the globe in that period remarkable, it is less impressive when considering an email message that took five minutes to prepare (Tr. 70).

Under §7114(b)(4) of the Statute, an agency is required to furnish an exclusive representative of its employees, upon request and to the extent not prohibited by law, information that is reasonably available and necessary for the union to carry out its representational functions and responsibilities and such information must be furnished in a timely manner in order to effectuate the purposes and policies of the Statute. *See Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, PA.*, 11 FLRA 639, 641-42 (1983) (*Bureau of Prisons*); *U.S. Dept. of Justice, Office of Justice Programs*, 45 FLRA 1022, 1026 (1992) (*Dept. of Justice*).

While *Bureau of Prisons* stands for the proposition that a delay of two months can be reasonable when much of the information was provided near in time to the request and diligent efforts were being made to find the remainder, such good faith effort is not present in this case. In fact, no action was taken to determine whether other written counseling memos were issued during the covered period until after the unfair labor practice complaint was issued in January of 2006. (Tr. 67) As discussed below, the Respondent actually allowed some of the requested information to be destroyed while the request awaited attention. Although the Respondent contends that its delay was a function of staff reductions, office reorganization and the priority of other work, such excuses do not explain why an action that required about five minutes of effort was handled in such a dilatory manner and the laggard response was not reasonable even if the conditions asserted by the Respondent were present.

Highlighting the abysmal failure of timeliness in the Respondent's reply is the fact that it responded only after denying the grievance, the process for which the information was initially sought. If the Respondent's workload provided time to respond to the grievance, it certainly had time to respond to an information request seeking material related to that grievance. Furthermore, when it did reply, the Respondent failed to reveal that this employee was, in fact, the only one at the facility issued a written counseling for

tardiness during the relevant period and misleadingly implied that others were issued.

In it's declaration of particularized need, the Union indicated that it wanted the information for the purpose of pursuing an action for contract violation or other claim related to unfair and disparate treatment. Evidence that this employee was the only one given a written counseling for conduct also exhibited by others during the period would be most relevant to such a claim. Nonetheless, the Respondent acted upon and denied the grievance without determining if similarly situated employees were treated differently. While the Respondent contends that it was enough to know that the employee's immediate supervisor acted consistently (GC Ex. 7), that determination begs the question when it is asserted that the action taken by the immediate supervisor was at the direction of an executive staff member who may have been the same individual who reported the incident. (GC Ex. 4) At the hearing, the Respondent conceded that no other written counseling documents were issued during the period covered by the request but they did not discover that fact until well after their response when the unfair labor practice complaint was filed.[3] (Tr. 67) That was almost eleven months after the request and eight months after the BOP had responded to the request with a denial based upon privacy and particularized need.

In failing to determine and inform the Union that there was no information to provide with respect to other written counseling memorandums issued during the requested period, I find that the Respondent committed an unfair labor practice. A union is entitled to information that will enable it to realistically assess the strengths or weaknesses of an employee's grievance and to determine the most appropriate course of action to take concerning the matter. *Dept. of Labor, Wash., D.C.*, 39 FLRA 531, 539 (1991), *complaint dismissed on other grounds following court remand, Dept. of Labor, Wash., D.C.*, 51 FLRA 462 (1995).

In this case, BOP responded to that part of the information request related to other written counseling memos by indicating that it would not provide them because "As outlined in the Master Agreement, counseling sessions between managers and their subordinates are private. In as

[3] While I make no finding concerning the sufficiency of such a fact as evidence of unfair or disparate treatment, obfuscation and false denial of facts detrimental to your legal position creates the impression that one had something to hide.

much, **the documents will not be released** to the Union in an effort to maintain privacy for the staff members." *Emphasis added.* In so responding, the Respondent presented the clear impression that other written counseling memos did in fact exist but that they would not be provided for reasons of privacy.

Only after the complaint was filed did the Respondent actually make an effort to determine if other written counseling memos were issued during the relevant period. The obligation to furnish information attaches at the time the request is made, not when the charge is filed or the complaint issued. *Dept. of Justice* at 1026. After the complaint, the Respondent spent five minutes composing an email survey and waited two weeks for responses, which revealed that no other written counseling memos were issued during the period in question. Thus, contrary to the Respondent's initial response, there were no privacy interests to protect and the assertion of a countervailing anti-disclosure interest upon that basis was improper. Whether the assertion of a privacy interest was based upon a general principal related to the protection of privacy or a deliberate deception to avoid disclosing a damaging fact in the face of a disparate treatment claim is uncertain. However, it is clear that the failure to tell the Union that no such information existed near in time to the request was an unfair labor practice. The obligation to furnish information also encompasses the obligation to inform the union when there is no information to release. *Veterans Admin., Long Beach, CA.*, 48 FLRA 970, 975-978 (1993); *Social Security Admin., Baltimore, MD. and Social Security Admin. Area II, Boston Region, Boston, MA.*, 39 FLRA 650 (1991) (*SSA, Baltimore and Boston*). Furthermore, failing to inform the Union that the requested information does not exist does not depend upon a determination that the requested information was disclosable. *Social Security Admin., Dallas Region, Dallas, TX.*, 51 FLRA 1219, 1226-1227 (1996) (SSA, Dallas). There is no need to review the merit of any countervailing privacy interest the Respondent may have had in other written counseling memos that actually existed and the fact that it proffered such an interest without knowing if such documents existed was inconsistent with the obligation to bargain in good faith and amounted to little more than taking eighty days to say no as the Respondent was not concerned with determining the facts

before giving an answer.[4] *Internal Revenue Service, Wash., D.C., and Internal Revenue Service, Kansas City Service Center, Kansas City, MO.*, 50 FLRA 661, 670 (1995) (*IRS, Kansas City*).

Because the Respondent's reply to the Union's data request related to other written counseling memos was unreasonably late, either negligently or deliberately deceptive, and failed to disclose the absence of information requested when there was no legitimate reason for doing so, I find that the Respondent committed an unfair labor practice.

The Request to Identify the Witness

The memorandum of record documenting the written counseling issued by the Respondent included the statement "It came to my attention by the executive staff that you reported to the Institution late on Wednesday, March 2, 2005 and today, Thursday, March 3, 2005." (GC Ex. 2)

In an attempt to investigate the matter for the purpose of representing the employee in a possible grievance or EEO action, the Union steward submitted an information request on March 8, asking the Respondent to identify by name, the executive staff member cited in the memorandum. (GC Ex. 3). As outlined above, the Respondent did not reply until May 27, and when it did so, it refused to provide the information requested because it was "irrelevant" since an oral or written counseling was not an act of discipline. (GC Ex. 8).

The standards for whether requested information must be provided pursuant to 5 USC §7114(b)(4) is particularized need and necessity, not relevance. *IRS, Kansas City*, 50 FLRA 661. In that case, the Authority adopted an analytical framework for determining necessity that require unions requesting information to show a particularized need for the information and agencies to show countervailing anti-disclosure interests. Weighing the needs and interests articulated by the parties regarding the request determines whether the requested information is necessary.

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[4] The adverse impact of such bad faith bargaining was demonstrated by the fact that at some point, the Respondent and the Union wasted government work hours engaging in a dialog about the sufficiency of sanitized/redacted documents that did not exist. Eliminating such meaningless exercise would allow the Respondent more time to respond to legitimate pending matters.

Under the framework adopted in *IRS, Kansas City*, a union has the initial responsibility of establishing a particularized need for information requested. To establish a particularized need, the union must articulate with specificity why it needs the information requested, including the uses to which it will put the information and the connection between those uses and the union's responsibilities as exclusive representative. *IRS, Kansas City*, 50 FLRA at 669. Generally, the question of whether the union has met its responsibility will be judged by whether it adequately articulated its need at or near the time of its request, rather than at the hearing in any litigation over the request. *U.S. Dept. of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, MN.*, 51 FLRA 1467, 1473 (1996) *pet. denied* 144 F3rd 90 (1998) (*INS, Twin Cities*).

Once a union makes a request and articulates its need, the agency must respond. In responding, an agency cannot simply say "no." Rather, the agency must, in denying a request for information, identify and articulate its countervailing anti-disclosure interests. *IRS, Kansas City*, 50 FLRA at 670. As appropriate under the circumstances of each case, the agency must either furnish the information, ask for clarification of the request, identify its countervailing or other anti-disclosure interests, or inform the union that the information requested does not exist or is not maintained by the agency. *Federal Aviation Admin.*, 55 FLRA 254, 260 (1999) (*FAA*); *INS, Twin Cities*, 51 FLRA at 1472-73; *SSA, Dallas*, 51 FLRA at 1219; *SSA Baltimore and Boston*, 39 FLRA at 656.

Moreover, an agency must fulfill these responsibilities in a timely manner. For example, it must articulate its anti-disclosure interests to the union at or near the time it denies the union's information request and it cannot wait months after the request to raise anti-disclosure interests or do so for the first time during litigation of any dispute over the information request. *FAA*, 55 FLRA at 260. Once an agency requests clarification or raises legitimate anti-disclosure interests, it is incumbent on the union to respond in a timely and constructive manner. *U.S. Dept. of the Treasury, Internal Revenue Service, Wash., D.C.* and *U.S. Dept. of the Treasury, Internal Revenue Service, Oklahoma City District, Oklahoma City, OK.*, 51 FLRA 1391, 1396 (1996).

As interpreted by the Authority, section 7114(b)(4) requires parties to engage in an exchange or dialogue with respect to the information request for the purpose of communicating respective interests and attempting to work

out an accommodation of those interests and agreement on disclosure of information. Often, one party's satisfaction of its responsibilities will depend on the degree to which it has responded to the interests and concerns raised by the other party, rather than simply saying "no" or resorting to litigation.

If the parties do not reach agreement and the dispute proceeds to litigation,

> an unfair labor practice will be found if a union has established a particularized need, as defined herein, for the requested information and either: (1) the agency has not established a counter-vailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need.

50 FLRA at 671.

I find that the Union's request that the Respondent identify the member of the executive staff mentioned in the memorandum of counseling for the purpose of pursuing a contract violation or discrimination action was sufficient to constitute a particularized need and that disclosure of the name is necessary.

Initially I note that while the Respondent questioned how the request for all written counseling sessions related to the Union's representational duties in its response, it raised no such inquiry or challenge to the request for the identity of the witness. Nonetheless, I construe the Respondent's relevance argument as a challenge to the particularized need offered by the Union. Thus, disclosure is necessary because I find the particularized need stated by the Union to be sufficient and the Respondent has not articulated a legitimate countervailing anti-disclosure interest against which the interest of the Union's particularized need can be weighed.

A union may request information under the Statute by articulating a particularized need for the information in terms of fulfilling its representational duties and overseeing the administration of the collective bargaining agreement. *INS, Twin Cities,* 51 FLRA 1467 (1996) *pet. denied* 144 F3rd 90 (1998). In this case, the Union clearly indicated that it wanted the name of the person on the executive staff who reported the employee's tardiness for the purpose of substantiating a claim of discrimination and violation of the collective bargaining agreement. There is

no dispute that the Union was authorized to represent the employee in a grievance and the Union steward filed a grievance on behalf of the employee shortly thereafter, after receiving no response to either of his information requests.

The Respondent does not argue that the name of the individual was not known, that a record was not maintained, nor that it was not reasonably available. The Respondent contends that disclosure of the name was not required because the Union did not need a name, as it was not relevant. The Respondent contends that because the counseling was not disciplinary and her tardiness undisputed, who reported it to her supervisor does not matter.5

However, the factual accuracy of the information concerning the employee's tardiness was not the holy grail of the information requested. The information being sought about who instigated the matter was not to determine if their report was accurate, but to ascertain if the matter was being pressed by someone with motive or bias to discriminate. After all, the employee knew she had signed in late. The action under contemplation by the Union was a grievance or other action based upon discrimination because the employee was treated differently from others similarly situated. In that regard, knowing who raised the matter with her supervisor could reveal if it was someone with a motive or bias to discriminate. It is also notable that the Respondent's untimely reply actually indicated that it was ". . . irrelevant that an executive staff member **may have instructed** Mr. Sidhom to issue the counseling form." *Emphasis added*. If such intervention by someone higher in the chain of command was the reason this employee was the only one to receive a written counseling, the only thing that becomes irrelevant is that it was issued by her first-line supervisor. If it was done at the direction of another, that renders the supervisor's consistency meaningless.

Given the Union's clearly stated purpose for wanting the name of the executive staff member involved in this written counseling process, I find that under these facts, the Respondent committed an unfair labor practice by refusing to disclose the information because it was "irrelevant".

The Request for Video Images

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The record demonstrates that the employee signed in after her duty start time on both days. (GC. Ex. 8)

The Union's March 8 and March 16 requests for information also sought:

> any/all recorded video images (with date and time) from any camera situated to view the arrival and/or departure of staff to the institution on March 2 and 3, 2005, and which may have recorded staff arriving and/or departing the "key line" area of the front lobby of the administration building which is located in front of the control center on March 2 and 3, 2005.

In its reply, the Respondent declared:

> Cameras are not used to monitor when staff arrive and leave the institution. Additionally, there are no tapes to provide, as you requested.

Section 7114 of the Statute provides, in pertinent part:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –
>
> . . .
>
> (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[.]

Thus, the statutory requirement is to furnish data normally maintained that is reasonably available unless it meets 5 USC §7114(b)(4)(C). Simply put, there is no requirement that the Union intend to use the information for the same purpose in the same manner as the agency. If that were a limitation Congress intended it would have been part of the Statute.

In this case, testimony at the hearing made it clear that the Respondent maintains such information for up to two weeks after the information is captured digitally on computer. (Tr. 68-69) However, despite receiving the information request with two weeks of the dates in question, the Respondent made no effort to preserve the digital images captured by its cameras and computers. Thus, when it responded to the request on May 27, the images were unavailable because they were no longer stored on the computer.

Suffice it to say, that for reasons similar to those discussed above, the Union provided an adequate particularized need for its request. The Union disclosed that it was contemplating actions in the form of grievance for contract violation and/or EEO complaint in response to discrimination experienced by an employee it represented. In that scenario, the ability to identify other tardy transgressors who were not given a written counseling memo would establish not only the existence of disparate treatment, but also provide a baseline for determining whether any reasons offered as justification for the disparate treatment were legitimate or pretext. By knowing who the other transgressors were, the Union could have made additional data requests to ascertain if disciplinary history or other factors might explain why they were treated differently.

There is no doubt that recorded video constitutes data and is subject to an information request. *Army and Air Force Exchange Service, Dallas, TX.*, 24 FLRA 292 (1986). Furthermore, the destruction of information that is the subject of an information request renders the obligation to provide information meaningless and vitiates the Authority's ability to fully remedy a failure to produce and sabotages effective vindication of rights under the Statute. *SSA Dallas*, 51 FLRA at 1225-26. Like its failure to comply with the Statute, such destruction of evidence by a component within the Department of Justice is difficult to understand and demonstrates a devotion to justice that is less than ideal.

Thus, I find that the Respondent committed an unfair labor practice when it refused to provide the Union with video images from the dates and locations set forth in the information request and permitted the destruction of said information while the dispute over the information request was pending.

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority (Authority) and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio, shall:

1. Cease and desist from:

(a) Failing and refusing to respond in a timely manner to requests for data made by the Union pursuant to the Statute.

(b) Failing to inform the American Federation of Government Employees, Local 607 (Union), the exclusive representative of certain of its employees, that all memoranda of written counseling for tardiness for the employees of the Federal Correctional Institution, Elkton, Ohio (FCI Elkton) for the three months prior to March 8, 2005, do not exist.

(c) Failing to provide the name of the executive staff member who advised the supervisor that the employee was tardy on March 2 and 3, 2005 as requested by the Union pursuant to the Statute.

(d) Failing and refusing to furnish the recorded video images from entrances/exits at the FCI Elkton from March 2 and 3, 2005 as requested by the Union pursuant to the Statute.

(e) Failing to preserve the recorded video images from the entrances/exits of the FCI Elkton from March 2 and 3, 2005 as requested by the Union pursuant to the Statute until a final determination was made concerning whether those images must be provided.

(f) Interfering with, restraining or coercing its 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) Respond to the Union's information request pursuant to the Statute for all memoranda of written counseling for tardiness received by employees of FCI Elkton for the three months prior to March 8, 2005 by formally informing the Union in writing that such documents do not exist and did not exist at the time of the Union's request.

(b) Provide the Union with the name of the executive staff member who advised the supervisor that the employee was tardy on March 2 and 3, 2005 as requested by the Union pursuant to the Statute.

(c) Post at the FCI Elkton facility, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Warden, FCI Elkton, 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 ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, August 10, 2006

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to respond in a timely manner to requests for data made pursuant to the Statute by the American Federation of Government Employees, Local 607 (Union).

WE WILL NOT fail or refuse to inform the Union, the exclusive representative of certain of our employees, that all memoranda of written counseling it requested on March 8 and 16, 2005, pursuant to the Statute do not exist.

WE WILL NOT refuse to provide the name of the executive staff member who informed the supervisor that an employee was tardy on March 2 and 3, 2005, requested on March 8 and 16, 2005 by the Union pursuant to the Statute.

WE WILL NOT fail or refuse to preserve data such as the recorded video images from the entrances/exits at the FCI Elkton as requested on March 8 and 16, 2005 by the Union pursuant to the Statute until such time as a final determination is made concerning whether that data must be provided.

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.

WE WILL respond in a timely manner to requests for data made pursuant to the Statute by the Union.

WE WILL respond to the Union’s March 8 and 16, 2005 data requests for all memoranda of written counseling by informing the Union in writing that such data does not exist.

WE WILL provide the name of the executive staff member who informed the supervisor that an employee was tardy on

March 2 and 3, 2005, requested on March 8 and 16, 2005 by the Union pursuant to the Statute.

WE WILL preserve data requested by the Union pursuant to the Statute until such time as a final determination is made concerning whether that data must be provided to the Union.

_____
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U.S. Department of Justice
Federal Bureau of Prisons
Federal Correctional
Institution
Elkton, Ohio

Dated: _____
By: _____
(Signature) (Warden)

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 its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, IL 60603-9729, and whose telephone number is: 312-886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by CHARLES R. CENTER, Chief Administrative Law Judge, in Case No. CH-CA-05-0294, were sent to the following parties:

_____

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Sandra J. LeBold, Esquire **7004 2510 0004 2351 1788**
Susanne S. Matlin, Esquire
Federal Labor Relations Authority
55 West Monroe, Suite 1150
Chicago, IL 60603-9729

Erika S. Turner, Esquire **7004 2510 0004 2351 1795**
U.S. Department of Justice
Federal Bureau of Prisons, LLB
320 First Street, NW, Room 818
Washington, DC 20534

Darrel Waugh, Esquire **7004 2510 0004 2351 1801**
Scot L. Gulick, Esquire
U.S. Department of Justice
Federal Bureau of Prisons, LLB
Tower II, Room 802
4th & State Avenue
Kansas City, KS 66101

REGULAR MAIL:

President
AFGE
80 F Street, NW
Washington, DC 20001

DATED: August 10, 2006
Washington, DC