UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

HEALTH CARE FINANCING ADMINISTRATION Respondent	Case Nos. WA-CA-90046 WA-CA-90378
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned 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 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 25, 1999**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

Dated: September 24, 1999
Washington, DC

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

MEMORANDUM DATE: September 24, 1999

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

SUBJECT: HEALTH CARE FINANCING ADMINISTRATION

Respondent

and Case Nos. WA-CA-90046
WA-CA-90378

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, 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 the 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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 99-40
WASHINGTON, D.C.

HEALTH CARE FINANCING ADMINISTRATION Respondent	Case Nos. WA-CA-90046 WA-CA-90378
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO Charging Party	

Barbara Ann Wilhelm, Esquire
For the Respondent

Tracy E. Levine, Esquire
Thomas F. Bianco, Esquire
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/the Authority) 5 C.F.R. § 2423.1 *et seq.*

This proceeding was initiated by charges filed in each case by the American Federation of Government Employees, Local 1923 (AFGE/AFGE Local 1923), against the Health Care Finance Administration (HCFA/Respondent). The Regional Director of the Washington Region of the FLRA on behalf of the General Counsel (GC), issued a Complaint[1] and Notice of Hearing in each case and the cases were consolidated. The Complaints allege that HCFA violated sections 7116(1) and (5) and 7116(a)(1), (5) and (8) of the Statute by failing and refusing to provide AFGE Local 1923 with the requested information. HCFA filed its answers in both cases, denying the allegations that it violated the Statute.

A hearing was held in Washington, DC, on July 14, 1999, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine

1 The Complaint in Case No. WA-CA-90046 was amended.

witnesses, and to introduce evidence. HCFA and the GC of the FLRA filed timely post-hearing briefs which have been fully considered.

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

Findings of Fact

AFGE Local 1923 is the exclusive collective bargaining representative for an appropriate unit of employees at HCFA.

A. Case No. WA-CA-90046

HCFA issued Recruitment Notice No. RN-98-079C (vacancy announcement 98-079C) in April of 1998 for a bargaining unit position entitled Computer Specialist, GS-334-13. The position in vacancy announcement 98-079C was open to HCFA employees, including bargaining unit employees, as well as applicants from outside the Federal service. Since the position was open to applicants outside the Federal service in addition to HCFA employees, HCFA characterized the announcement as an "outside" or "external" recruitment announcement.

In late September of 1998, a bargaining unit employee who had applied for the position contacted then AFGE Local 1923 Vice President Joseph Flynn regarding the selection process. The employee told Flynn that he did not think that his application had been given fair and proper consideration, and that, based on his longevity with the Activity, he should have been placed on the best qualified (BQ) list.

On October 8, 1998, Flynn submitted a data request under section 7114(b)(4) of the Statute. In order to determine whether to file a grievance on the employee's behalf, Flynn sent an electronic mail message to Glenn Kendall, the Director of Legal and Technical Services for the Activity, requesting the following data with regard to vacancy announcement 98-079C:

(1) An official copy of announcement RN-98-079C;
(2) An official copy of the position description;
(3) An official copy of the related KSA's[2], task examples, and any other rating criteria;
(4) An official copy of the rating and ranking scores
of each applicant, including work sheets;
(5) An official copy of the selection certificate;
(6) An official copy of the applications of all candidates; and
(7) A copy of the rules, regulations, and policies

2 Knowledge, Skills and Abilities.

used in the rating and ranking process and in establishing the selection certificate.

The data was requested purged of personal identifiers.

Flynn explained in his request that he needed this data to determine whether HCFA misapplied and violated established merit promotion principles and procedures in the rating and ranking of applicants. He also explained that AFGE Local 1923 had been contacted by at least one employee who applied under this announcement, and who contended that irregularities occurred in the selection process. Finally, Flynn stated that the employee requested union representation for the purposes of filing a grievance and that the data was necessary for AFGE Local 1923 to meet its representational obligations.

At the hearing, Flynn further explained that he requested the data to determine whether HCFA had given the employee's application fair and appropriate consideration under various rules, regulations, and policies, including numerous provisions of the parties' Master Labor Agreement (MLA). Specifically, Flynn stated that, had he received and considered the requested data, he might have filed a grievance on the employee's behalf under Articles 1, 3, 24 and 26 of the MLA.

Flynn did not receive a response to his October 8, 1998, request. He sent Kendall a follow-up electronic mail message on October 16, 1998, effectively reiterating his request. Flynn did not receive a response.

AFGE Local 1923 never received the data that was requested by Flynn in Case No. WA-CA-90046.[3]

B. Case No. WA-CA-90378

HCFA issued Recruitment Notice No. RN-99-016 (vacancy announcement 99-016) in February of 1999, for a bargaining unit position entitled Health Insurance Specialist, GS-107-13. The position in vacancy announcement 99-016 was open to HCFA employees, as well as to applicants outside the Federal service. It was an "outside" or "external" recruitment announcement.

In March of 1999, a bargaining unit employee who had applied for the position contacted AFGE Local 1923 Vice President Ann Robinson regarding the selection process for the vacancy. The employee told Robinson that she thought that something had gone wrong with the selection process and that she did not think she had received "proper credit" for the material she set forth in her application. The employee

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Flynn testified that the Union still needs this data to pursue an employee's grievance.

also stated that she thought that she should have been selected for the position.

On March 26, 1999, Robinson submitted a written data request under section 7114(b)(4) of the Statute in order to determine whether to file a grievance on this employee's behalf. This request, hand delivered to the office of Glenn Kendall, requested the following data with regard to vacancy announcement 99-016:

(1) An official copy of announcement RN-99-016;
(2) An official copy of the position description;
(3) An official copy of the related KSA's, task examples, and any other rating criteria;
(4) An official copy of the rating and ranking scores of each applicant, including work sheets;
(5) An official copy of the selection certificate;
(6) An official copy of the applications of all candidates; and
(7) A copy of the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate.

The data was requested purged of personal identifiers.

Robinson explained in her request that she needed this data to determine whether HCFA misapplied and violated established merit principles, policies and procedures in the rating and ranking of applicants. She also explained that AFGE Local 1923 had been contacted by an employee who applied under this announcement and believed that irregularities occurred in the selection process. Robinson stated that the employee was requesting Union representation for the purposes of filing a grievance and that the data was necessary for AFGE Local 1923 to meet its representational obligations.

Robinson requested the data because she did not have enough data to file a grievance. She was unable to tell from the documentation the employee provided her, whether the material in the employee's application had been "properly credited." Had Robinson received and considered the requested data, she might have filed a grievance on the employee's behalf under Articles 1, 3, 24 and 26 of the MLA. It was Robinson's understanding that after she received the requested data, she could file a grievance on the employee's behalf.

Robinson did not receive a response to her March 26, 1999, request until a letter dated May 18, 1999,[4] approximately one month after April 13, 1999, the date she filed the Unfair Labor Practice Charge in Case No. WA-CA-90378.

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[4] HCFA refused to provide the requested data.

AFGE Local 1923 never received the data requested by Robinson.[5]

C. **Procedure for Evaluating Applicants**

The examination of applicants under both vacancy announcements, which included the rating and ranking of applicants and establishing a BQ list, was performed by HCFA pursuant to authority delegated to it by the Office of Personnel Management (OPM) in an interagency agreement (IA). The personnel who performed that function worked for, and acted on behalf of HCFA, not for OPM.

The examination of applicants under external or outside vacancy announcements, and the process used to fill the positions, is based on merit selection principles. The IA also requires that all examining activities conform with the requirements "of Federal laws, rules, regulations and of any applicable court orders."

The IA requires HCFA rate applications, notify applicants of assigned ratings, and provide a procedure for applicants to request reconsideration of their ratings. The IA allows that procedure be incorporated into the agency's administrative grievance system, or an alternative dispute resolution system, and be used for agency employed applicants who grieve an assigned rating.

HCFA and AFGE Local 1923, in their MLA, bargained over some aspects of external recruitments. The IA also requires HCFA to "[r]espond to correspondence/inquires" including, but not limited to, "requests for information covered by the provisions of the Freedom of Information Act and the Privacy Act."

Discussion and Conclusions of Law

A. **The Statute**

Section 7114(b)(4) of the Statute provides that the duty to bargain in good faith includes, among other things, the obligation –

A.D in the case of an agency, to furnish the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data –

A.D.A which is normally maintained by the agency in the regular course of business;

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5 Robinson testified that AFGE Local 1923 needs the data to represent the employee who still wants to learn why she was not selected for the position.

(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[.] . . .

Sections 7116(a)(1), (5) and (8) of the Statute provide:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency –
(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;
* * *
(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * *
(8) to otherwise fail or refuse to comply with any provision of this chapter.

A. AFGE Local 1923 was Entitled to the Requested Information

The record herein and HCFA's admissions in its answers establish that the information requested by AFGE Local 1923 was normally maintained by HCFA, was reasonably available to HCFA, and did not constitute guidance, advice, or counsel provided for management officials relating to collective bargaining.

The only issues which remain in dispute are whether AFGE Local 1923 articulated its need for the requested data with particularity; whether the data is necessary; and whether HCFA established any reasons prohibiting the disclosure of the information.

1. The Information Requested by AFGE Local 1923 is Necessary for the Union to Perform its Representational Duties

The right to data under section 7114(b)(4) of the Statute extends to data needed by a union to perform its full range of representational responsibilities. *Federal Aviation Administration et al.*, 55 FLRA 254, 259 (1999) (FAA). That includes deciding whether to file a grievance, *Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina*, 26 FLRA 407 (1987)(*Fort Bragg*), as well as simply assessing the strengths or weaknesses of an employee's complaint. *U.S. Department of Labor, Washington, DC*, 39 FLRA 531, 539 (1991) *remanded sub nom. DOL v. FLRA*,

No. 91-1174 (D.C. Cir. 1992) *decision on remand dismissed on other grounds*, 51 FLRA 462 (1995)*(DOL*).

AFGE Local 1923 requested data to assist it in assessing whether to file grievances on behalf of two different employees who contacted the Union and complained about the manner in which their applications were considered for two vacant positions in HCFA. The Union could not make even a preliminary assessment of whether the complaining employee was minimally qualified for the vacant position without the Recruitment Notice or the position description. The rating and ranking scores and worksheets of the applicants were necessary for AFGE Local 1923 to determine whether the rating and ranking factors were applied uniformly or disparately, and whether merit principles, policies, and procedures were followed in a fair and equitable manner. The applications of every applicant were necessary for the Union to compare the applicants, and the credit that they received from the selecting official for each KSA. Finally, a copy of the rules, regulations, and policies were needed so that the Union could learn what guidance the selecting official relied on in determining how applicants should be rated and ranked, and what was used to establish the selection certificate.[6] Thus, without the requested data, AFGE Local 1923 could not perform its representational functions.

To the extent that HCFA raises as a defense, that the Union did not need the information because AFGE Local 1923 was not able to file a grievance concerning irregularities which may have occurred during the selection of applicants in an external recruitment announcement, this defense is rejected. I conclude that HCFA is not entitled to deny the Union's data requested under the Statute on that ground. Specifically, the Authority has held that ". . . the resolution of grievability questions cognizable under law is for an arbitrator under [the] parties' negotiated agreements . . . the existence of such a threshold question . . . would not in and of itself relieve the Respondent of its obligation to furnish otherwise necessary information . . . ." *Internal Revenue Service, National*

6 Together, the data requested by the Union is sometimes referred to as the selection package for a vacancy or recruitment announcement. Items 2 and 3 of the Union's data requests are also referred to as a crediting plan. Crediting plans are documents developed by an employer to rate and rank candidates for a specific position. See U.S. *Department of Justice, Bureau of Prisons et al. v. FLRA*, 988 F.2d 1267, 1268 (D.C. Cir. 1993). The Authority has acknowledged that a union needs a crediting plan to assess employees' complaints about the rating and ranking process, including employees who were not placed on the BQ list or, if placed on the list, not selected. *See Fort Bragg*, 26 FLRA at 413-14.

Office, 21 FLRA 646, 649 n.3 (1986). *See also Department of Health and Human Services, Social Security Administration, Baltimore, Maryland*, 39 FLRA 298 (1991)(agency required to furnish data concerning the filing of non-unit positions when the data is necessary to fulfill its representational responsibilities); *Defense Mapping Agency, Aerospace Center, St. Louis, Missouri*, 21 FLRA 595, 605-06 (1986).

The MLA could reasonably be construed to provide that AFGE Local 1923 could file a grievance over violations or the misapplication of laws, rules, and regulations applying to bargaining unit employees. The MLA expressly grants AFGE Local 1923 such a right. Specifically, Article 24 of the MLA contains the MLA's broad-scope grievance procedures, which permits the Union to file a grievance concerning, among numerous matters, "any matter relating to the employment of the employee . . . concerning . . . any claimed violation, misinterpretation or misapplication of any law, rule or regulation affecting conditions of employment." MLA Article 24, Section 2.C.2. Article 1 of the MLA provides that, in the administration of all matters covered by the MLA, "officials and employees will be governed by existing or future laws and existing Government-wide rules and regulations as defined in 5 U.S.C. § 71, Executive Order 12871 and by subsequently enacted Government-wide rules and regulations implementing 5 U.S.C. § 2302." MLA Article 1, Section 1. The Appendix to Article 3 of the MLA, Merit System Principles, provides that Federal Personnel Management be implemented consistent with multiple merit system principles, including, but not limited to, the principle that "[a]ll employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management . . . ." MLA Appendix I to Article 3, Section B.

In light of the foregoing, I conclude that AFGE Local 1923 needed the requested data in both cases to perform its representational duties.

2. AFGE Local 1923 Articulated its Need for the Requested Data to HCFA with Particularity

In *Internal Revenue Service, Washington DC and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri,* 50 FLRA 661 (1995), the Authority set forth the following framework for determining whether data is requested with sufficient particularity under section 7114 (b)(4) of the Statute:

> [A] union requesting information under [section 7114 (b)(4)] must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute.

> The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, a union must establish that requested information is 'required in order for the union adequately to represent its members.' (footnote and citations omitted).
>
> The union is responsible for articulating and explaining its interests in disclosure of the information. Satisfying this burden requires more than a conclusory or bare assertion. Among other things, a request for information must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. . . .

Id. at 669-70.

The facts of this case establish that AFGE Local 1923 met the particularized need standard. Flynn's electronic mail message dated October 8, 1998, and Robinson's letter dated March 26, 1999, stated that the Union needed the requested data to determine whether HCFA had misapplied and/or violated established merit principles, policies and procedures in the rating and ranking of applicants under the vacancy announcements. The requests also stated that AFGE Local 1923 had been contacted by employees who had applied under the announcements and who contend that irregularities occurred in the selection process. The requests stated further that the employees were requesting Union representation for the purposes of filing a grievance and that the requested data was necessary for the Union to meet its representational obligations.

In addition to explaining the Union's need, the requests show that AFGE Local 1923 unambiguously connected its intended use for the data - to determine whether HCFA misapplied or violated merit principles, policies and procedures - with its representational responsibilities under the Statute, representation of employees in a grievance. *See, e.g., Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota v. FLRA,* 144 F.3d 90 (D.C. Cir. 1998)(union articulated a particularized need for the requested data by connecting its request for disciplinary records with its intended use for the data - comparison with the potential grievant's record); *Department of the Air Force*, *Scott Air Force Base, Illinois v. FLRA,* 104 F.3d 1396 (D.C. Cir. 1997) (union articulated a particularized need for the requested data by connecting its request for a letter dealing with the discipline of a supervisor to its use for the data - a potential grievance on workplace safety). *See FAA*, (union articulated a particularized need for the requested data by connecting its request for seniority policy data to its use for the data - to administer a contractual

provision); *See also, Health Care Financing Administration*, Case No. WA-CA-80383, OALJ 99-21, slip op. at 7-8 (March 18, 1999)(union articulated a particularized need for the requested data by connecting its request for data regarding an external recruitment announcement to its use for the data - to determine whether or not to file a grievance on an employee's behalf).

The HCFA's contention that the AFGE Local 1923 failed to articulate its particularized need for the data lacks merit. The HCFA knew, both from the plain language of the requests, as previously stated, and from the MLA, that AFGE Local 1923 needed the requested data to perform its representational duties.

Article 26 of the MLA involves outside or external recruitment. Article 26, Section 9, provides, in pertinent part, that "[w]hen a decision is made for outside recruitment for a bargaining unit position, a summary vacancy announcement identifying title, series, and grade of the outside recruitment will be timely announced to employees via e-mail and made available on HCFANet. . . ." MLA Article 26, Section 9.A.1.b. Therefore, based on the clear and unambiguous language of the requests and the parties' MLA, HCFA was provided with a statement of AFGE Local 1923's need for the requested data, stated with particularity, which connected the Union's intended use for the data with its representational obligations and, thereby, satisfied the Authority's particularized need requirements.

In light of the foregoing, I conclude that in both cases, AFGE Local 1923 advised HCFA with sufficient particularity of the need for the requested information.

3. HCFA Failed to Respond to the Requests for the Information

HCFA did not timely respond to the Union's data requests regarding vacancy announcements 98-079C and 99-016 before AFGE Local 1923 filed the subject unfair labor practice charges.[7] In this regard, HCFA did not respond to the Union's request in Case No. WA-CA-90378 until some seven weeks after the data request and one month after the unfair labor practice charge was filed. Hardly a timely or meaningful response.

The Authority has interpreted section 7114(b)(4) of the Statute as requiring an agency to respond to a data request even if the response is to tell an exclusive representative that the agency does not maintain the data which the exclusive representative seeks. *See Department of Health and Human Services, Social Security Administration, New York Region, New_York, New*

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Counsel for HCFA characterized HCFA's behavior as a "failure or neglect" to give the Union a written response.

York, 52 FLRA 1133, 1149-50 (1997)(*SSA, New York Region*). *See also U.S. Naval Supply Center, San Diego, California*, 26 FLRA 324, 326-27 (1987). The Authority has also stated that a timely reply to a union's data request under section 7114 (b)(4) of the Statute is necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. *See SSA, New York Region*, 52 FLRA at 1150; *U.S. Department of Justice, Office of Justice Programs*, 45 FLRA 1022, 1026-27 (1992). *See also Social Security Administration, Baltimore, Maryland and Social Security Administration, Area II, Boston Region, Boston, Massachusetts*, 39 FLRA 650, 656 (1991).

Thus, HCFA's failure to timely respond to AFGE Local 1923's data requests in both cases violated sections 7116(a)(1), (5) and (8) of the Statute. Even if, as the HCFA contends, the Union was aware of the HCFA's position on the disclosure of the data from a previous ULP case. A union can not be required to infer an agency's position from an event that occurred under different circumstances, approximately one year before the date that the requests in these cases were submitted.

4. HCFA has not Raised any Defense that Justifies its Refusal to Provide the Union the Requested Data

For the first time at the hearing, the HCFA raised three defenses to the disclosure of the requested data under the Statute. HCFA's failure to timely respond to the data requests not only constituted violations of the Statute, it also forecloses HCFA from raising countervailing interests to disclosure of the data for the first time at the hearing. The Authority has held that a union is required to articulate its disclosure interests at or near the time of the request -- not for the first time at the ULP hearing. *See Department of the Air Force, Washington, DC and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 52 FLRA 1000, 1006 (1997). Similarly, an agency's "expression of countervailing interests for the first time at the unfair labor practice hearing does not absolve the [agency] of its obligations under the Statute." *FAA*, 55 FLRA at 260. Accordingly, HCFA's defenses, that were not communicated to AFGE Local 1923, can not be raised for the first time in this proceeding.

However, even if HCFA's defenses are considered, they must be rejected. HCFA argues that the Privacy Act bars the disclosure of the data; that the data requested does not concern a subject within the scope of collective bargaining; and that the IA prohibited the HCFA from furnishing the data. Each of these defenses, to the extent that they were asserted at all, are rejected.

D. **Privacy Act**

In *U.S. Department of Transportation, Federal Aviation Administration, New York TRACON, Westbury, New York*, 50 FLRA 338, 345 (1995)(*TRACON*), the Authority established a framework of what an agency must demonstrate when asserting that the Privacy Act, 5 U.S.C. § 552, bars disclosure of data requested under section 7114(b)(4) of the Statute:

> (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.

Id. at 345. *See DOL*, 51 FLRA at 469, *citing TRACON,* 50 FLRA at 345.

The HCFA has not met its burden under the *TRACON* framework. AFGE Local 1923 specifically requested the data purged of personal identifiers in order to avoid any Privacy Act implications and to ease HCFA's burden in disclosing the documents.[8] Further, the documents requested in items (1), (2), (3), and (7) of both requests include no items that raise privacy concerns. Thus, the Privacy Act did not prohibit HCFA from providing AFGE Local 1923 with the data it requested. *See, e.g., TRACON*, 50 FLRA at 342 n.5.

E. **External Recruitment**

HCFA contends that the data requested does not concern a subject within the scope of collective bargaining because: (1) the external recruitment procedure is not covered by the parties' MLA; (2) the external recruitment process is operated under delegated authority from OPM and the Union has no collective bargaining relationship with OPM; and (3) selections under the external recruitment procedure are considered appointments, and therefore, are excluded from the negotiated grievance procedure under section 7121(c)(4) of the Statute.

Whether the external recruitment process used by the HCFA, or parts thereof, was itself open to negotiation is not determinative. It must be noted, as discussed above, that certain provisions of the MLA did pertain to the external recruitment process. *See, e.g.*, MLA Appendix I to Article 3, Article 26, Sections 6.A., 9.A.1.b. Similarly, the fact that the parties did not, and could not, negotiate over the crediting plan (*Department of the Interior, Washington, DC and Bureau of Reclamation, Lower Colorado Dams Project, Boulder City, Nevada*, 26 FLRA 832 (1987)), does not justify HCFA's failure to furnish such a plan if

[8] The documents themselves as provided by HCFA at the hearing in response to a subpoena confirm that the requested data is not prohibited from disclosure by the Privacy Act.

the Union needs it to determine whether to file a grievance alleging an inconsistent application of that plan. *See Fort Bragg,* 26 FLRA at 413-14.

OPM has delegated examining authority to HCFA. HCFA acknowledged that it acts for itself, not OPM, when considering applicants under this delegated authority, and that a grievance filed over the administration of the selection procedures would be against the HCFA, not OPM. Furthermore, the IA itself does not preclude the disclosure of the requested data. IA at I.E.2.b., p.3 ("the HCFA shall . . . [r]espond to correspondence/inquiries . . ."); Section 9.3 ("[i]nformation in this section is advisory only. Each agency is ultimately responsible for decision about the release of examining information.").

Finally, with respect to the word "appointment" as used in section 7121(c)(4) of the Statute, the Authority has consistently held that when a current Federal employee applies for another Federal job, as was the case here, the Federal employee's selection to that position is not considered an appointment under section 7121(c)(4) of the Statute. Instead, an "appointment" under that section is an applicant's initial entry into the Federal service. *See, e.g., National Federation of Employees, Local 2010 and U.S. Department of Agriculture, Forest Service, Rogue River National Forest*, 55 FLRA 533, 534 (1999)("appointment" in section 7121(c)(4) refers "to the action which takes place at the time an individual is initially hired into the Federal service."), *citing, United States Information Agency and American Federation of Government Employees, Local 1812*, 32 FLRA 739, 748 (1988); *Suzal v. Director, United States Information Agency*, 32 F.3d 574, 580 (D.C. Cir. 1994) ("appointment" in section 7121(c)(4) "refer[s] only to *initial* appointments
. . ."); *U.S. Department of Defense Dependents Schools, Kaiserslautern, Germany and Overseas Education Association*, 51 FLRA 210, 212 (1995), *citing, National Council of Field Labor Locals of the American Federation of Government Employees, AFL-CIO and U.S. Department of Labor*, 4 FLRA 376, 381 (1980)(the term appointment relates to the initial entry of an applicant into Federal service).

The employees that came to AFGE Local 1923 for assistance were employees of HCFA and were not seeking initial entry into Federal service. Therefore, section 7121 (c)(4) does not preclude AFGE Local 1923 from filing grievances on their behalf because such grievances would not concern an initial appointment into the Federal service. *See American Federation of Government Employees, Local 1843 and U.S. Department of Veterans Affairs Medical Center, Northport, New York*, 51 FLRA 444, 447 (1995).

Accordingly, I conclude that HCFA has not produced any reason that would justify not providing AFGE Local 1923 with the data it requested. Thus, I further conclude that AFGE

Local 1923 was entitled to the requested data pursuant to section 7114(b)(4) of the Statute and HCFA violated sections 7116(a)(1),(5) and (8) of the Statute by failing to respond to AFGE Local 1923's requests for data and by failing and refusing to provide the Union with such data.

Remedy

The GC of the FLRA requested at the hearing and in its brief that HCFA be ordered to refrain from raising the defense of untimeliness in any grievance in connection with the disputed vacancy announcements, as long as the grievance is timely filed from the date the Union receives the requested information. HCFA objects to any such remedy, but admits it does have the authority to agree to a waiver of any timeliness defense in a grievance.

In light of the circumstances of this case, I conclude that the remedy requested by the GC of the FLRA is appropriate. To conclude otherwise would permit HCFA to benefit from its own misconduct.

Having found that HCFA violated sections 7116(a)(1), (5) and (8) of the Statute, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and Section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Health Care Financing Administration, shall:

1. Cease and desist from:

(a) Failing and refusing to reply to requests for data from the American Federation of Government Employees, Local 1923 (Local 1923), the exclusive representative of its employees, which reply is necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

(b) Failing and refusing to furnish Local 1923 with data it requested on October 8, 1998, in connection with Vacancy Announcement RN-98-079C, consisting of copies of: (1) the announcement in RN-98-079C; (2) the position description; (3) the related KSA's, task examples, and any other rating criteria; (4) the rating and ranking scores of each applicant, including work sheets; (5) the selection certificate; (6) the applications of all candidates; and (7) the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate, all purged of all personal identifiers.

(c) Failing and refusing to furnish the American Federation of Government Employees, Local 1923, with data it requested on March 26, 1999, in connection with Vacancy Announcement RN-99-016, consisting of copies of: (1) the announcement in RN-99-016; (2) the position description; (3) the related KSA's, task examples, and any other rating criteria; (4) the sanitized rating and ranking scores of each applicant, including work sheets; (5) the sanitized selection certificate; (6) the sanitized applications of all candidates; and (7) the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate, all purged of any personal identifiers.

(d) In any like or related manner 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) Furnish the American Federation of Government Employees, Local 1923, the data it requested on October 8, 1998, in connection with Vacancy Announcement RN-98-079C, consisting of copies of: (1) the announcement in RN-98-079C; (2) the position description; (3) the related KSA's, task examples, and any other rating criteria; (4) the sanitized rating and ranking scores of each applicant, including work sheets; (5) the sanitized selection certificate; (6) the sanitized applications of all candidates; and (7) the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate.

(b) Furnish the American Federation of Government Employees, Local 1923, the data it requested on March 26, 1999, in connection with Vacancy Announcement RN-99-016, consisting of copies of: (1) the announcement in RN-99-016; (2) the position description; (3) the related KSA's, task examples, and any other rating criteria; (4) the sanitized rating and ranking scores of each applicant, including work sheets; (5) the sanitized selection certificate; (6) the sanitized applications of all candidates; and (7) the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate.

(c) Refrain from alleging as a defense, in any subsequent grievance and/or arbitration filed in connection with Vacancy Announcements RN-99-079C and RN-99-016, that the grievance is untimely, as long as the grievance is timely filed from the date the American Federation of Government Employees, Local 1923, receives the requested information.

(d) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 1923 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 Chairman of the Health Care Financing Administration, 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.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington 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, September 24, 1999.

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SAMUEL A. CHAITOVITZ
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 Health Care Financing Administration has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to reply to requests for data from the American Federation of Government Employees, Local 1923, the exclusive representative of our employees, which reply is necessary for a full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 1923, data it requested on October 8, 1998, in connection with Vacancy Announcement
RN-98-079C, consisting of copies of: (1) the announcement in RN-98-079C; (2) the position description; (3) the related KSA's, task examples, and any other rating criteria; (4) the sanitized rating and ranking scores of each applicant, including work sheets; (5) the sanitized selection certificate; (6) the sanitized applications of all candidates; and (7) the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate.

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 1923, data it requested on March 26, 1999, in connection with Vacancy Announcement RN-99-016, consisting of copies of: (1) the announcement in RN-99-016; (2) the position description; (3) the related KSA's, task examples, and any other rating criteria; (4) the sanitized rating and ranking scores of each applicant, including work sheets; (5) the sanitized selection certificate; (6) the sanitized applications of all candidates; and (7) the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate.

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

WE WILL furnish the American Federation of Government Employees, Local 1923, all the data it requested on October 8, 1998, in connection with Vacancy Announcement RN-98-079C, consisting of copies of: (1) the announcement in RN-98-079C; (2) the position description; (3) the related KSA's, task examples, and any other rating criteria; (4) the sanitized rating and ranking scores of each applicant, including work sheets; (5) the sanitized selection certificate; (6) the sanitized applications of all candidates; and (7) the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate.

WE WILL furnish the American Federation of Government Employees, Local 1923, all the data it requested on March 26, 1999, in connection with Vacancy Announcement RN-99-016, consisting of copies of: (1) the announcement in RN-99-016; (2) the position description; (3) the related KSA's, task examples, and any other rating criteria; (4) the sanitized rating and ranking scores of each applicant, including work sheets; (5) the sanitized selection certificate; (6) the sanitized applications of all candidates; and (7) the rules, regulations, and policies used in the rating and ranking process and in establishing the selection certificate.

WE WILL refrain from alleging as a defense, in any subsequent grievance and/or arbitration filed in connection with Vacancy Announcements RN-99-079C and RN-99-016, that the grievance is untimely, as long as the grievance is timely filed from the date the American Federation of Government Employees, Local 1923, receives the requested information.

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(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, Washington, DC Regional Office, Federal Labor Relations Authority, whose address is: 800 “K” Street, NW., Suite 910, Washington, DC 20001, and whose telephone number is: (202)482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case Nos. WA-CA-90046 & WA-CA-90378, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT	**CERTIFIED NOS**:
Tracy Levine, Esquire Thomas Bianco, Esquire Federal Labor Relations Authority 800 K Street, NW, Suite 910 Washington, DC 20001	P168-059-667
Barbara Ann Wilhelm, Esquire Health Care Financing Administration Central Bldg., MS-C2-13-27 7500 Security Boulevard Baltimore, MD 21244	P168-059-668
Joseph Flynn, Vice President AFGE, Local 1923 c/o Social Security Administration 6401 Security Blvd, 1-J-21 Baltimore, MD 21235	P168-059-669

REGULAR MAIL:

Bobby Harnage, President
AFGE, AFL-CIO
80 "F" Street, N.W.
Washington, DC 20001

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: SEPTEMBER 24, 1999
WASHINGTON, DC