DEFENSE MAPPING AGENCY, HYDROGRAPHIC/TOPOGRAPHIC CENTER, LOUISVILLE OFFICE, LOUISVILLE, KENTUCKY Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1482 Charging Party	Case No. AT-CA-20190

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 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JANUARY 3, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: November 30, 1994

Washington, DC

MEMORANDUM DATE: November 30, 1994

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: DEFENSE MAPPING AGENCY,
HYDROGRAPHIC/TOPOGRAPHIC CENTER,
LOUISVILLE OFFICE,
LOUISVILLE, KENTUCKY

Respondent

and Case No. AT-CA-20190

NATIONAL FEDERATION OF FEDERAL
EMPLOYEES, LOCAL 1482

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEFENSE MAPPING AGENCY, HYDROGRAPHIC/TOPOGRAPHIC CENTER, LOUISVILLE OFFICE, LOUISVILLE, KENTUCKY Respondent	
and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1482 Charging Party	Case No. AT-CA-20190

Barbara J. Bahr
Counsel for the Respondent

Robert L. Madison
Representative for the Charging Party

Sherrod G. Patterson
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1), (5), and (8), when it failed and/or refused to furnish the Charging Party (NFFE or Union) certain information pursuant to section 7114(b)(4) of the Statute.[1] The complaint alleges that Respondent refused to furnish the Union information related to the suspension

[1] Respondent and the Union settled disputes relating to other allegations immediately before the hearing and, at the request of Counsel for the General Counsel, these were severed from the complaint. (Tr. 8-9).

of Robert L. Madison's security clearance, maintained in Defense Mapping Agency offices in Washington, D.C. and St. Louis, Missouri, and the names of nonunit employees the Respondent tested during its Drug Testing Program.

Respondent's answer admitted the allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Louisville, Kentucky. The Respondent, Union, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The parties filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

I. Information Requested Regarding Security Clearance

A. Findings of Fact

Robert Madison has been employed by Respondent since approximately 1979 as a Cartographer. Since September 1988 he has also been President of NFFE, Local 1482. Before June 1991 he possessed a security clearance at the level of Secret, Top Secret, and Access to Sensitive Compartmented Information
which allowed him to work for Respondent on such classified material.

In June 1991 Madison's security clearance was suspended by Defense Mapping Agency headquarters in Washington, D.C. on the basis of allegations of spouse abuse and child abuse. He was transferred to another unit to work only on unclassified material.[2]

Madison did not believe that the stated reasons were the real reasons for the suspension of his clearance. He believed that the real reason was retaliation for his Union activity based on several disciplinary actions he had received within the previous year and a statement made to him by the former Head of Personnel Security.

In order to determine whether it was appropriate to file an unfair labor practice charge against Respondent

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[2] Madison's security clearance at the level of Secret and Top Secret was restored in June 1993.

based on the retaliation/disparate treatment theory[3], Mr. Madison, in his capacity as President, NFFE, Local 1482, requested Respondent to provide the following information generated in the Louisville office:

> Related to a security clearance suspension of Robert Madison all intra management memos, notes, letters, etc. This is needed to see if the actions were taken in retaliation of union activities. This includes, but is not limited to, items within the Louisville Office, to DMA offices in Washington & St. Louis.

In making the request for this information, Mr. Madison was attempting to learn whether management and supervisory personnel in Louisville had put information into his security file concerning unrelated disciplinary actions on other matters not related to the reasons stated in his suspension letter.

Respondent, by Pamela Ransom, checked Mr. Madison's personnel security file maintained in the Louisville Office. She did not check Mr. Madison's file located at the Washington, D.C. personnel security office. It would be very unlikely that such information would be in his official file in Washington, D.C. because any such intra management documents from Louisville officials would have first been sent through Ms. Ransom. Ms. Ransom concluded that there were no documents meeting Mr. Madison's description. By letter dated August 16, 1991, Respondent replied as follows:

> There are no intra management memos, notes, or letters at the Louisville Office related to your clearance suspension. All requests for additional information related to security clearances should be forwarded through HRSAQ, St. Louis, to HRC in Washington.

Respondent's security file on Mr. Madison in the Louisville office was a "working file." It contained a copy of a "conversation record," prepared by a security specialist, documenting a telephone conversation the security specialist had with Ms. Ransom. The "conversation record" set forth that Ms. Ransom had advised the security specialist of a telephone conversation she had with Mr. Madison's wife in which Mrs. Madison, among other things, requested assistance under the employee assistance

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[3] Mr. Madison acknowledged that, other than a possible unfair labor practice proceeding, the suspension "can't be grieved or appealed or anything." (Tr. 33).

program. Ms. Ransom acknowledged that the document related to the suspension of Mr. Madison's security clearance.

The "working file" on Mr. Madison also contained copies of DD Forms 398, which the employee himself completes, change of address forms, and clearance certificates.

Everything in Respondent's "working file" is also contained in the employee's official security file maintained in the Washington, D.C. headquarters. In addition, the Washington file contains copies of investigative reports from the Defense Investigative Service. The St. Louis office did not maintain a security file on Madison at the time.

Ms. Ransom testified that she referred Mr. Madison to the Washington office despite the fact that Mr. Madison, in his capacity as the Union President, did not have a bargaining relationship with either the Washington or the St. Louis offices. She testified that she did so because she could not request a copy of an employee's personnel security file from the Washington office because she did not have a need to know. If an employee requests his security file from Washington, it is sent to Ms. Ransom to be delivered, sealed, to the employee. The Washington office can also advise an employee how to secure information generated by other agencies.

Ms. Ransom testified that sometime after this correspondence, Mr. Madison advised her that he was aware of the conversation record and had seen it. Ms. Ransom assumed that Mr. Madison must have followed through with Respondent's advice and made a request of the Washington office.

Mr. Madison did not deny that he had seen the conversation record or that he had made a request of the Washington office or of the Defense Investigative Service for his file. He denied, however, that he had received the information described in the above request.

B. Discussion and Conclusions

Under section 7114(a) of the Statute, a labor organization which has been accorded exclusive recognition is entitled to "act for, and negotiate collective bargaining agreements" covering all employees in the unit. Section 7114(b)(4) of the Statute provides that an agency shall, upon request, furnish the exclusive representative, to the extent not prohibited by law, data which is normally maintained in the regular course of business; which is reasonably available and necessary for full and proper

discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

The complaint alleges that Respondent violated the Statute by failing to furnish the Union information related to the suspension of Robert L. Madison's security clearance maintained in Defense Mapping Agency offices in Washington, D.C. and St. Louis, Missouri. The General Counsel claims that Respondent was under a duty under the Statute to provide this information from the Washington office (it did not exist in St. Louis) instead of directing Madison to obtain it himself.

Respondent claims that the requested information was not normally maintained in Mr. Madison's security file located in Washington, D.C. and was not necessary for the Union to perform its representational duties.

The record reflects that Mr. Madison sought information generated in the Louisville office related to the suspension of his security clearance, including items prepared within the Louisville Office and sent to agency offices in Washington. Mr. Madison did not claim that any official located in the Washington, D.C. headquarters had written the type of document he sought.

Given Ms. Ransom's testimony that the standard procedure required that any document generated in Louisville concerning personnel security come through her office prior to going to the Washington, D.C. office, and the fact that the logical place for any such document to first reside was Ms. Ransom's office, I agree with Respondent that no unfair labor practice can be founded upon Respondent's failure to check Mr. Madison's personnel security file in the Washington, D.C. office and provide such information maintained there. Such information was "normally maintained" and "reasonably available" in Respondent's

Louisville office.[4] Respondent referred Mr. Madison to the Washington, D.C. office in an effort to assist him to obtain even more complete information than he had requested (his security file).

In view of this disposition, it is not necessary to reach the other issues posed by the parties.[5]

A preponderance of the evidence does not establish that Respondent committed an unfair labor practice in violation of section 7116(a)(1), (5), and (8), as alleged, by failing and refusing to furnish the Union information related to the suspension of Robert L. Madison's security clearance, maintained in Defense Mapping Agency offices in Washington, D.C. and St. Louis, Missouri.

II. Information Requested Relating to Drug Testing

A. Findings of Fact

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[4] Contrary to Respondent's position, I conclude that the "conversation record," described above, fell within Mr. Madison's request for "all intra management memos, notes, letters, etc." related to his security clearance suspension including "items within the Louisville Office, to DMA offices in Washington & St. Louis." The complaint does not allege that Respondent failed to furnish such information maintained in the Louisville office. This is probably because Respondent denied that any such information existed and referred the Union to the St. Louis and Washington, D.C. offices, the violation addressed by the complaint. The General Counsel did not move to amend the complaint at the hearing. Accordingly, any allegation relating to "items within the Louisville office" is not before the Authority. See Library of Congress, 15 FLRA 589, 591 (1984).

[5] If it were deemed necessary to decide the issue, I would conclude, in agreement with Respondent's position, that the information is not "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." It appears that the information sought by the Union concerning the reason Mr. Madison's security clearance was suspended could not be used by the Union in any proceeding challenging the Respondent's reason for the suspension, the need for the information expressed by Mr. Madison. See Department of the Navy v. Eagan, 484 U.S. 518, 108 S.Ct. 818 (1988).

On July 24, 1991, the Union, by Local 1482 President Madison, requested the Respondent to furnish "the name of the non-unit employee tested in April 1991."

The Union wanted this information because it believed that Respondent was testing disproportionate numbers of bargaining unit, as opposed to nonbargaining unit, employees. Approximately every two months Respondent randomly selects about 15 to 20 employees for drug testing. There are six bargaining unit employees for each supervisor or management official at Respondent. Thirteen bargaining unit employees and one nonbargaining unit employee were tested in this first test.

On August 16, 1991, Respondent refused to provide the name of the nonbargaining unit employee it had tested. Respondent stated:

> In accordance with the 1989 Negotiated Agreement, Drug Testing Article, only names of bargaining unit employees are to be furnished to the Union. We have complied with the contract.

The referenced section of the Drug Testing Article of the collective bargaining agreement between the Union and Respondent provides, in relevant part, as follows:

> The employer will provide the Union a list of the names of all [Louisville Office] LUO bargaining unit employees randomly tested under the DMA Drug Free Workplace Plan within 28 days after the test date. . . . The number of non-unit employees who were randomly tested will also be shown on the list.
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> NOTE: Directed by FSIP, Case No. 90 FSIP 4.

As noted, the language that was incorporated into the agreement was imposed upon the parties by the Federal Service Impasses Panel (FSIP) as part of the collective bargaining process.

The Union's initial proposal in the negotiations specified that management would provide the Union with the names of both nonbargaining unit and bargaining unit employees who were selected for random drug testing. The Union wanted all the names so that it could ensure that the procedure was being done randomly. During the course of negotiations, the Union dropped its request for the names of nonbargaining unit employees and accepted Respondent's proposal. The Union accepted Respondent's proposal because

the Union traded the demand to receive the names of nonbargaining unit employees selected for random drug testing for something else. Mr. Madison could not recall what concession the Union received when it dropped the proposal for nonbargaining unit names.

As the proposals were submitted to the Panel, the Union's proposal called for Respondent to provide "a list of the names of all Louisville Office (LOU) bargaining unit employees randomly tested" under the drug testing program and the "number of nonunit employees who were randomly tested and their position titles." The Union argued that disclosure of the position titles of nonbargaining unit employees tested would provide the Union with additional assurance that the Employer's data regarding the number of nonunit employees tested are accurate. The Respondent's position provided that the Respondent would furnish the Union with "a list of the names of all LOU bargaining unit employees randomly tested," and the "number of nonunit employees who were randomly tested." Thus, the only difference by the time the issue had reached the FSIP for decision was whether or not the position titles of the nonbargaining unit employees would be provided to the Union.

The FSIP imposed the above noted provision, stating as follows:

> [I]t appears that the parties' proposals differ only as to whether the Employer should be required to provide the Union, in addition to the number of nonunit employees randomly tested, their position titles. In the circumstances of this case, we are persuaded that the additional information sought by the Union is unnecessary, and that an accounting of the number of nonunit employees tested should be sufficient to meet its needs in monitoring the randomness of the program. Thus, we shall order the parties to adopt the Employer's proposal to resolve the issue. Should legitimate questions arise, however, concerning the accuracy of the data provided by the Employer, we note that the Union may request the additional information it desires under section 7114(b)(4) of the Statute.

Mr. Madison testified that, during the negotiations, the Union did not waive its statutory right under section 7114(b)(4) of the Statute to obtain information regarding the names of nonbargaining unit employees.

Respondent admits, and I find, that information regarding the name of the nonbargaining unit employee tested under its Drug Testing Program in April 1991 is normally maintained in the regular course of business, is reasonably available, does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining, and is not prohibited from disclosure by law.

B. Discussion and Conclusions

Respondent agrees with the General Counsel that, absent a waiver of the right to receive the names of nonbargaining unit employees selected for random drug testing, the information is "necessary" and the Union would be entitled to it under the Authority's decision in U.S. Department of Transportation, Federal Aviation Administration, 46 FLRA 1475 (1993). See also U.S. Department of Transportation, Washington, D.C. and Federal Aviation Administration, New England Region, Bradley Air Traffic Control Tower, Windsor Locks, Connecticut, 47 FLRA 110 (1993). Respondent contends that the Union did clearly and unmistakably waive any right to receive the names of nonbargaining unit employees. The General Counsel and the Union dispute that contention.

The record establishes that, in spite of the asserted importance of having a provision that the Respondent provide the Union the names of nonbargaining unit employees chosen for random drug testing in order to police the randomness of Respondent's drug testing program, the Union traded off the proposal during the bargaining process for something else. Given this quid pro quo exchange during the negotiations, the Union waived its right to require the Respondent to furnish the names of nonbargaining unit employees in these circumstances for the life of the agreement. U.S. Department of the Navy, United States Marine Corps, Washington, D.C. and Marine Corps Logistics Base, Albany, Georgia, 38 FLRA 832 (1990); U.S. Marine Corps, Combat Development Command, Quantico Marine Corps Base, Quantico, Virginia, 46 FLRA 560 (1992).

The parties are bound by the provision imposed by the FSIP. The FSIP decision concerning the provision imposed provides that the Union may request the "additional information it desires under section 7114(b)(4) of the Statute" [the position titles of nonbargaining unit employees] should "legitimate questions arise . . . concerning the accuracy of the data provided by the Employer" [the names of bargaining unit employees and the number of nonunit employees].

It is concluded that a preponderance of the evidence does not establish that Respondent violated section 7116(a)(1) and (5) and (8) of the Statute, as alleged, by failing to furnish the Union the names of nonunit employees the Respondent tested during its Drug Testing Program.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, November 30, 1994

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. AT-CA-20190, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Ms. Barbara J. Bahr
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Dated: November 30, 1994

Washington, DC