VETERANS ADMINISTRATION REGIONAL OFFICE, SAN FRANCISCO, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1159, AFL-CIO Charging Party	Case No. SF-CA-20980

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 **FEBRUARY 13, 1995**, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: January 12, 1995

Washington, DC

MEMORANDUM DATE: January 12, 1995

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: VETERANS ADMINISTRATION REGIONAL OFFICE, SAN FRANCISCO, CALIFORNIA

Respondent

and Case No. SF-CA-20980

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1159, AFL-CIO

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

VETERANS ADMINISTRATION REGIONAL OFFICE, SAN FRANCISCO, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1159, AFL-CIO Charging Party	Case No. SF-CA-20980

S. Kent Sullivan, Esq.
For the Respondent

John R. Pannozzo, Jr. Esq.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

The American Federation of Government Employees, Local 1159, AFL-CIO (hereinafter called the Union) filed an unfair labor practice charge on September 30, 1992, and a First Amended Charge on January 20, 1993, against the Department of Veterans Affairs Regional Office (hereinafter called Respondent).[1] Thereafter, on January 20, 1993, the San Francisco Regional Director, Federal Labor Relations Authority (hereinafter called Authority) issued a Complaint and Notice of Hearing alleging that Respondent violated section 7116(a)(1), (5) and (8), of the Federal Service Labor-Management Relations Statute, as amended, (hereinafter called the Statute) by failing to furnish the Union a copy of the

[1] It is noted that the official designation of the Respondent is now United States Department of Veterans Affairs Regional Office, FKA, Veterans Administration Regional Office, San Francisco, California.

Unit 211b leave record log and/or time cards showing the leave taken by a certain bargaining unit employee from July 1, 1991 to October 31, 1991.2

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

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

Findings of Fact

Allen W. Thayer is a Veterans Claims Examiner (hereinafter called adjudicator) at Respondent's facility. On November 6, 1991, Thayer was placed on a ninety (90) day Performance Improvement Plan, his within grade increase was withheld. Thayer's anniversary date for a within grade increase was November 17, 1991. However, Thayer's performance during the period from July 1, 1991 through October 31, 1991, in the critical element of Workload Management had been Unacceptable. In this regard, Thayer failed to meet production requirements for this particular element during this four month period. The end products Thayer achieved per hour statistics for the four month period were: July 1991 - 0.80; August 1991 - 1.03; September 1991 - 0.95 and October 1991 - 1.76.

The standard for Journeyman Adjudicators to attain a Fully Successful rating is 1.50 end products per hours.

An adjudicator determines whether veterans or other applicants are eligible for monetary benefits and prepares an award or disallowance of an award for approval by an authorizer (hereinafter called authorizer), who is also called a Senior Veterans Claims Examiner. If the action is correct, it is approved by the authorizer, and if the action is not acceptable, it is returned by the authorizer to the adjudicator with instructions for correction. The adjudicator prepares award or disallowance of award letters on a Honeywell word processor, affixes the letter to the applicant's file or to the action document and forwards that documentation to an authorizer for his authorization or disauthorization. Joseph Day served as Thayer's authorizer from July 1, 1991 through October 4, 1991. To avoid con-

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The Complaint was amended at the hearing, deleting an allegation that Respondent did not furnish a copy of a performance appraisal for a bargaining unit employee.

fusion, it must be noted that the authorizer has no supervisory authority or any input into an adjudicator's within grade increase.

On November 20, 1991, Thayer requested a reconsideration of the decision to withhold his within grade increase, based upon a number of mitigating circumstances involving authorizer Day.[3] Namely, that Day had taken sick leave, annual leave and had served on jury duty for a significant period of time from July 1, 1991 through October 1, 1991. Thayer's reconsideration letter further stated that Day's absences resulted in a large backlog of cases to authorize. These backlogged cases took as much as three and one-half weeks for Day to return to Thayer, often with only minor changes to the award which resulted in a complete retyping of the award or disallowance of award letter. Thayer felt that the increased backlog placed additional pressure on Day, thereby causing him to return cases for insignificant reasons which involved only minor differences in writing style.

On December 5, 1991, Respondent's Assistant Director John C. Spangler denied Thayer's reconsideration request. Union Steward Denise Wilson, filed a first step grievance on January 6, 1992, concerning the withholding of Thayer's within grade increase, which was dated on November 17, 1991. The first step grievance noted, in part, that Day's heavy workload was "frequently unrelieved" while he was out of the office on leave.

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[3] The pertinent parts of the Master Agreement reveal the following:

> Amended Article 32 (Performance Appraisal System), § 6D., as set forth in Supplement No. 1 to the Master Agreement, effective April 1, 1987, permits a supervisor to "make allowances for job related factors beyond the control of the employee" when completing an evaluation. Amended Article 33 (Within Grade Increases), § 1B.1., as set forth in Supplement No. 1 to the Master Agreement, states that an "employee will be considered to have attained an acceptable level of competence when he/she is currently performing at the fully successful level or better under the performance appraisal system, and such performance is documented by a rating of at least fully successful." Articles 32 and 33 of the Master Agreement described the requirements that had to be met in order for Thayer to receive his within grade increase.

Subsequently, Thayer's within grade increase was approved by Respondent on January 12, 1992, the beginning date of the first pay period following the three month review period. The approved within grade increase was not made retroactive to Thayer's November 17, 1991 anniversary date. Respondent's Section Chief Harold Pearman denied the first step grievance and its request for retroactive approval of Thayer's within grade increase stating specifically that mitigation of Thayer's failure to achieve the production standard prior to October 1, 1991, was not supported.

On January 28, 1992, Wilson, filed a second step grievance and information request on Thayer's behalf. One of the documents requested was a copy of the Unit 211b Leave Record Log and/or the actual time cards of Day for the period July 1, 1991 through October 31, 1991. Around March 12, 1992, Wilson, again requested a copy of the Union 211b Leave Record Log and/or the actual time cards of Day for the period July 1, 1991 through October 31, 1991.

Wilson testified that the records were requested because Thayer had alleged, in part, that Day's frequent absences from Unit 211b on sick and annual leave was a significant mitigating factor in Thayer's failure to meet his own production standards during the period, thereby delaying his within grade increase. It was further noted that Day's leave records could establish that he was absent from Unit 211b for the following reason:

> an excessive amount of time during this period, and provide evidence that his authorization workload was 'backed up' to the extent that he could not handle Mr. Thayer's authorization cases in a routine and efficient manner.

Furthermore, Wilson made it clear that the records requested for Day were job related, pertained to the performance of his duties and had nothing to do with his personal life.

On March 27, 1992, Respondent's Staff Attorney Barbara Ann Konno, forwarded an advice memorandum to Respondent's Personnel Officer Lewis F. Celli, which denied the Charging Party's January 28, 1992 and March 12, 1992 information requests. Konno's memorandum cited Privacy Act and Freedom of Information Act concerns in concluding that the requested information was "neither necessary nor relevant. . . ."

Thereafter, April 1, 1992, Respondent, through Adjudication Officer Verrill, denied the Charging Party's March 12, 1992 information request.4

Thayer testified that during the Summer of 1991, the Honeywell word processor at his work station only had storage capacity for ten letters. Thayer stated that there were three authorizers in Unit 211b during the July 1, 1991 through October 31, 1991 timeframe, but he worked exclusively for Day. Thayer estimated that during this sixteen week period, Day took between three to four weeks of annual leave, one to two weeks of sick leave and one to two weeks of jury duty.

At the time that Day's case count became most acute, there was very little attention given to Day's cases by the other authorizers, since they too were off on leave. Generally, the average amount of pending casework that an authorizer has at any particular time is confined to one cabinet consisting of four storage shelves. The top shelf is reserved for incoming, unscreened cases that require authorization, including retire pay matters that are subject to certain deadlines. At some point, after Day returned from leave, Day commandeered a second cabinet for the purpose of maintaining the pending authorization casework at this work station. Day's pending authorization casework completely filled both cabinets and, at various points, pending cases were on the floor or on a cart.

The other authorizers also took annual leave during the Summer of 1991. During Day's absences, Unit Chief Larry Brewer did not assist in distributing Day's pending cases to other authorizers in those situations when the cases backed up. Brewer, during this timeframe, conducted quality improvement training and was involved with litigation concerning a termination action. Thayer informed Wilson about Day's excessive absences prior to the submission of the information requests.

The Unit 211b Leave Record Log, kept by Brewer on a daily basis, in a two-drawer file cabinet, information regarding the date of leave usage, the type of leave usage (annual, sick etc.) and a leave balance. The Unit 211b Leave Record Log would not specify the reason(s) why the leave was taken by the employee, that information would be contained in the Remarks sections on the Standard Form 71. The front side of the SF 71 contains a Remarks section which permits an employee to explain the reason(s) why he/she wishes to take the annual, sick or leave without pay. The reverse of the SF

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4 The parties orally agreed to freeze the Thayer grievance at the second step of the grievance procedure pending the outcome of this unfair labor practice matter.

71 also contains a Remarks section which permits an employee to provide specific information concerning his/her sickness, on-the-job injury or off-the-job injury. The Union did not request Day's SF 71 nor was it concerned about the reasons for Day's leave requests. Day testified that he did not want the requested leave records furnished to the Charging Party based on privacy grounds.

Time cards are prepared from information contained on the employee time sheets. The information is transcribed to the time cards in Unit 211b by another adjudicator or by a claims clerk. The employees complete the time sheets on a daily basis and the time cards are also kept in Brewer's two-drawer file cabinet. The time sheet contains the employee's signature and his/her time in and out of work. The actual time cards would indicate how much leave was used by Day on a bi-weekly basis, the type of leave usage, the date of leave usage and the leave balance. The Union was not concerned with the reasons why Day took annual and sick leave.

Thayer also testified that his production performance was negatively impacted upon by Day's excessive absences from work. Specifically, Thayer says that because the cases became old he encountered the following problems occurred: he had to refresh his recollection of the facts, familiarize himself with the case and he required additional time to recompose the award/disallowance of award letter since that letter had been deleted from the ten-document Honeywell word processing file. Pearman testified that Respondent has always used Honeywell equipment. However, at some unspecified date, a Wang system was installed at the work place which caused additional problems for all employees. Thayer shared these concerns with Wilson. In addition, interim rate changes would result in the redrafting of an award paragraph.

Typically, it would take twice as long to redraft an award/disallowance of award letter based on Day's excessive absences. However, it is a dependency project case with a number of award lines were returned to Thayer, it could take an additional thirty minutes to an hour in order to complete an award letter. Moreover, the award/disallowance of award letters concerning retirement pay cases had to be recomposed.

As a result of Day's excessive absences, at one time, there was a three and one-half week backlog of cases and hundreds of cases remained at Day's work station for weeks at a time. Further, Thayer felt that Day, because of the pressures that he was experiencing to get the work off his desk, began making erroneous disauthorizations and dis-authorizing cases for minor reasons. Thayer was unable to devote his attention to other matters when Day returned cases to his desk. Moreover, Thayer's production statistics were

adversely affected since he would not receive credit for work performed that month.

Wilson testified that the adjudicator is responsible for initially preparing the claim, drafting the letter and determining the applicable rate. The adjudicator receives production credit for an award once it is approved and the authorizer inputs a particular code into the computer. An authorizer is required to make a decision concerning a case within six days.

In addition, Wilson asserted that she requested the leave information based on Thayer's representations that Day's excessive absences had adversely affected his ability to meet his production standards. In addressing the interrelationship between Articles 32 and 33 of the Master Agreement, Wilson stated that Thayer needed to demonstrate an "acceptable level of competence," per Article 33, § 1B.1. of the Master Agreement, in order to receive his within grade increase. Wilson also noted that the instructions for completing the performance appraisal and determining whether Thayer met threshold "acceptable level of competence" requirement were contained in Article 32 of the Master Agreement. Article 32, §6D of the Master Agreement permitted rating officials to consider job-related mitigating circumstances, such as Day's alleged excessive absences, that were "beyond the control of the employee" before issuing a final appraisal.

The adjudicator Workload Management Statistics indicate that during the months of July, August and September 1991, Thayer worked exclusive with Day. The Senior adjudicator Monthly Statistical Report indicates that Day's production for the months of July (133), August (183) and October 1991 (153) was extremely low when compared with the other authorizers. The Division Averages for the same three month period were 368, 376 and 435, respectively. The Union believed that Day's excessive absences from work could have been the reason for this monthly production during this four month period.

The Union believed that Day's excessive absences from work could have caused a corresponding drop in production for Thayer and adjudicator Roger Baldwin, who was also assigned to Day. Wilson testified that a unit assignment sheet, which was issued to her by the unit chief during that period, indicated that authorizer Day was responsible for authorization digits 42 through 49, adjudicator Baldwin for digits 42 through 46 and adjudicator Thayer for digits 46 to 49.[5] Baldwin's

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Pearman testified that Day also served as the authorizer for adjudicator Marge Highshaw. Highshaw's end product per hour averages were as follows: July (1.31), August (1.65), September (2.36) and October 1991 (3.28).

production for the months of July (1.25), August (1.34) and September 1991 (1.14), like Thayer's, was also below the 1.50 end product per hour production requirement. In October 1991, Thayer's (1.76) and Baldwin's (2.37) end product per hour production exceeded the 1.50 threshold.

Pearman said that based on Thayer's adjudicator Monthly Statistical Report for the months of May through October 1991, Thayer's 1.1 end product per hour production did not entitle him to a within grade increase. According to Pearman, Thayer was not producing at an acceptable level of competence and there were no mitigating circumstances that excused this performance. Pearman also speculated that Day's poor productivity could have been the by-product of an insufficient volume of work being generated by his adjudicators. Pearman admitted however, that adjudicator Marge Highshaw exceeded her production by twenty-five percent from May 1991 through January 1992.

There is no denial that Thayer's performance improved once he stopped working for Day, that Baldwin's production was below the 1.50 standard for the three months that he worked with Day and that Day's production was below his standard. Pearman also noted that the Union, upon seeing that Day's workload was far below that of other authorizers, could legitimately pursue the reason(s) why Day's production and workload figures were so far below the average. Pearman was unable to explain Day's poor production and acknowledged that the low production figures raised legitimate questions.

Pearman also recognized that upon seeing these production statistics, the Union might need to resolve the issue of Day's alleged excessive absences before they continued to process Thayer's grievance. Furthermore, Pearman allowed that a reasonable person, upon seeing Day's poor production and workload statistics, might need to determine whether Day's absences affected Thayer's productivity. It further seems that Pearman does recognize that Day's low production figures could be based on his absences from the worksite for part of or all of the period in question. Thus, Respondent, by furnish- ing the requested leave data, might enable the Union to resolve the issue of whether Day's absences affected Thayer's productivity.

While Pearman acknowledged that if it takes an adjudicator a long period of time to prepare a case, that adjudicator will complete fewer cases, and this in turn, negatively affects his production. Generally, the longer the case is kept by an authorizer, the longer it takes for an adjudicator to reacquaint himself with the case. An adjudicator would also require additional time to recompose a letter that is no longer stored in the word processor, and the

additional time that is needed to recompose that letter could have a negative impact on his productivity. Pearman acknowledged that the length of time taken by Day to return a case to Thayer could have affected Thayer's production.

Pearman does not deny that after reviewing Thayer's authorized and disauthorized production figures, Thayer was very close to meeting the production standard for the six month period preceding the denial of the within grade increase, including the months of August and September 1991. Thayer exceeded the 1.50 end product per hour standard by twenty-five percent in October 1991.

In regard to Thayer's production figures for the month of September 1991, Thayer received credit for 130 cases, had 60 cases returned and 11 of those 60 cases contained substantive or material errors. For those cases which contained substantive or material errors, it would take Thayer a long period of time to reacquaint himself with the matter, and even longer, if a substantial period of time had passed since the case was submitted for authorization. While reacquainting himself with these returned cases, Thayer is unable to adjudicate other matters thereby adversely affecting his productivity.

Pearman did not know, based on Thayer's production statistics, how long it took Day to return those 60 cases nor the reasons why those matters were returned to Thayer. Pearman's testimony concerning Thayer was based solely on the production numbers, Pearman did not focus on outside factors which could have impacted upon Thayer's performance. However, if an authorizer were absent for an excessive period of time, Pearman would consider that to be a job-related factor which was beyond the control of the employee per Article 32, § 6D. of the Master Agreement.

Conclusions

A. Positions of the Parties

While Respondent recognizes the duty to provide information that would enable an exclusive representative to process a grievance or to determine whether to file a grievance, it argues in this particular case that the Union did not demonstrate a "particularized need for the information." Its recurring theme seems to be that a limitation exists that requires the exclusive representative to show "a reasonable basis based on objective facts", NLRB v. George Koch Sons, Inc., 950 F.2d 1324, 1332 (7th Cir. 1991). Respond- dent argues, that all things considered, the Union in this case had sufficient data to determine that Thayer simply did not submit enough work to meet his production

standard for the period in question. Based on that fact, it maintains that the presence of the authorizer could not have affected Thayer's production. Additionally, Respondent urges that any evidence of mitigating circumstances involving an authorizer's atten- dance record would not help Thayer explain his failure to meet the production required. Finally, Respondent raised Privacy Act and Freedom of Information issues in the case.

The General Counsel takes the position that the requested information was necessary for the Union to fulfill its repre- sentational responsibilities in processing Thayer's grievance and that the productivity statistics for Thayer, Day and Baldwin, along with Day's work practices as told to the Union by Thayer could indeed raise legitimate concerns with the Union as to whether Day's absences were the cause of Thayer's poor production statistics. Its argument is, in essence, that the Union had an obligation to address all of the factors that might have affected Thayer's production statistics and furthermore, the requested information would have assisted the Union in determining whether to pursue Thayer's grievance to the second step of the grievance procedure.

Respondent admitted in its answer that the requested information is normally maintained by it in the regular course of business and, further that the requested information did not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collec- tive bargaining. Moreover, there is no record evidence requiring a conclusion to the contrary. In these circum- stances, there is no real issue concerning availability of and Respondent's maintaining the requested data or that the information was intramanagement information. Accordingly, it is found that the information requested is normally maintained in the regular course of business and that it does not constitute management guidance, advice, counsel or training related to collective bargaining under section 7114 (b)(4) of the Statute.

B. Was the requested information necessary for the Union to perform its representational responsibilities?

The investigation, evaluation and processing of potential grievances is undoubtedly a significant part of the exclusive representatives responsibility. The Authority has acknowledged that significance and consistently held that under section 7114(b)(4) of the Statute, the exclusive representative has a right to information that is neces- sary to enable it to fulfill its representational functions, including data which assists in resolving potential griev-

ances. Internal Revenue Service, 40 FLRA 1070 (1991); Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 37 FLRA 1310 (1990); Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California, 37 FLRA 987 (1990). Furthermore, it is clear that an exclusive representative is entitled to information under the Statute to realistically assess the strengths or weaknesses of a potential grievant's position. See Federal Aviation Administration, National Aviation Support Facility, Atlantic City Airport, New Jersey, 43 FLRA 191 (1991).

Respondent's argument that the Union made no showing of a "particularized need" for the information before hearing notwithstanding, it is my view that the Union's need for the information requested is clearly established on the record as one which would aid it in fulfilling its representational duties. While the Authority has definitely approved application of the "particularized need" test in information cases where the primary issue is whether the requested information constituted "management advice, guidance, counsel, or training. . ." and, therefore is normally not discoverable under section 7114(b)(4) of the Statute, it has not to date applied such a demanding test to documents that are not strictly "intramanagement". National Park Service, National Capital Region, United States Park Police, 48 FLRA No. 1151 (1993). Thus, the instant matter is not governed by the more exacting test for "intramanagement" materials, but falls under those cases where the requested information was found necessary because the exclusive representative needed the information in order to fulfill its representational functions.

The record reveals that the information in this case was necessary and relevant to realistically assess the strengths or weaknesses of Thayer's requested reconsideration of the decision to withold his within grade increase, based upon a number of mitigating factors involving authorizer Day. There is no question that the Union knew that Thayer's productivity did not meet production standards but, based on Thayer's representation that there were mitigating factors as to this failure it sought to find out, why. Seeking to assemble all the information surrounding those mitigating circumstances seems, in my view, a reasonable way to approach this problem. Put another way, in order to fulfill its representational functions, the exclusive representative had an affirmative responsibility to examine the mitigating factors surrounding the denial of the within grade, and gathering any information which could shed light on whether there was any supportable claim of mitigation, would be a part of that responsibility. Accordingly, it is found that the information was necessary for the purpose of fulfilling its functions.

Moving on to Respondent's argument that the Union had sufficient data to determine that Thayer simply did not submit enough work to meet his production standard. Respondent certainly makes a case on the withholding of the within grade which might work well before an arbitrator, but is of little value in this information case, where the merits of Thayer's case is not before the Authority. The only question to be determined by this forum is whether or not the requested data was necessary for the Union to realistically assess the strengths or weaknesses of Thayer's claim, allowing it to make a reasonable decision whether it should proceed with his grievance. In this regard, it is not sufficient for Respondent to make a one-sided determination that the exclusive representative has all the data it needs to perform its representational role. That decision it seems is one that must be made by the exclusive representative and where it can reasonably support the need, it should not be denied relevant information, even where an agency feels that the information is unnecessary. With this foundation, Respondent's own argument seems to turn against it, for the very language of Koch, supra, that "a reasonable basis based on objective facts", can certainly be read to mean that, if the exclusive representative here, faced with Thayer's claims needed all of the objective facts to determine, for itself, whether there might be mitigating factors for Thayer's lack of production and it, therefore, was entitled to investigate all of the facts in its independent assessment of Thayer's claim. Such being the case, it is concluded and found that the requested information, in the Union's opinion would have assisted it in determining whether Day's frequent absences from Unit 211b on sick and annual leave was a significant mitigating factor in Thayer's failure to meet his own production standards during the period for which Thayer was denied a within grade increase and, for precisely this reason, it was necessary for section 7114(b)(4)(B) purposes since the Union could have used the information to determine whether or not to proceed on Thayer's claim.

C. Privacy Act and Freedom of Information Act

There is a balancing test to determine whether the Privacy Act prohibits disclosure of information under section 7114(b)(4) of the Statute. See, U.S. Department of Transportation, Washington, D.C., 47 FLRA 110 (1993). Under that test a balance is struck between the employee's right to privacy against the public interest in disclosure. One can say with certainty that many individual employees will view information such as sought in this case, as private and thus, feel that the release of the information is an invasion of his or her own privacy. Be that as it may, the exclusive representative's need for the information should not be nullified or rendered any less important simply because of

individual concerns. This is particularly true, where as here, the exclusive representative is representing an employee who is questioning the efficacy of a performance rating. Clearly, early resolution of such grievances or potential grievances where the public interest is involved points toward a finding that the information should be made available in unsanitized form. Thus, release of requested data in unsanitized form has already been ordered despite the fact that the disclosure might be viewed as an invasion of personal privacy by individual employees. See U.S. Department of Veterans Affairs, Regional Office, San Diego, California 44 FLRA 312 (1992); Social Security Administration and Social Security Administration Field Operations Region II, 43 FLRA 164 (1991).

5 U.S.C. § 552a is the Privacy Act which regulates disclosure of information in an agency record within a system of records retrievable by reference to an individual's name or other personal identifier. Such records are generally prohibited from disclosure unless one of the specific Privacy Act exceptions under 5 U.S.C. § 552a(b) is applicable. Section 552a(b)(2) permits disclosure of Privacy Act protected information to the extent such information is required to be released under the Freedom of Information Act (hereinafter called FOIA) provides that all records in the possession of the federal government agencies must be disclosed upon request unless subject to a specific FOIA exemption. Section (b)(6) of the FOIA provides that information contained in personnel files may be withheld if disclosure of the information would constitute a "clearly unwarranted invasion of personal privacy." See generally, U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 37 FLRA 515 (1990), enforcement denied sub nom., FLRA v. U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 941 F.2d 49 (1st Cir.).

In making a determination as to whether requested information falls within the (b)(6) exemption, it is necessary to balance the competing interest of the employees' privacy against the public interest in disclosure. Moreover, the public interest to be examined when applying the balancing test required by exemption (b)(6), is that embodied in the Statute.

Here, there are serious public interests favoring the disclosure of the information in unsanitized form for there is minimal intrusion into the employees' privacy interests. In this case, the documents at issue which are arguably within the purview of the Privacy Act are the leave records of one employee. Their disclosure in unsanitized form appears essential to assist the Union in evaluating the merits of a performance rating related complaint and the processing of a

grievance concerning performance. The disclosure of the leave records of an employee alleged to have affected the performance of the grievant certainly serves the public interest since it aids the Union in monitoring the administration of the performance appraisal system, investigating and processing grievances and ensuring that employees are not treated unfairly. See e.g., U.S. Department of Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Helena District, Montana, 39 FLRA 241 (1991).

Of particular note, Respondent has not articulated how, or in what manner, the disclosure of the requested information would constitute a clearly unwarranted invasion of employees' privacy interests to either the exclusive representative or to this forum. Respondent, in fact, has never stated how disclosure of the information implicates any privacy interests of the affected bargaining unit employee, or how the employee would be stigmatized by the release of the data. Furthermore, there is no evidence in the record or any reason to believe that the Union might ever publicize or carelessly circulate the information. See, e.g., Internal Revenue Service, Omaha District, Omaha, Nebraska, 25 FLRA 181 (1987).

The central purpose of FOIA is to ensure that the Government's activities be opened to the sharp eye of public scrutiny. U.S. Department of Justice v. Reporters Committee, 109 S. Ct. 1468, 1482 (1989)(Reporters Committee). Additionally, official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. The Union, without the leave records, would be unable to discern whether the performance appraisal here could or should have been subject to mitigating factors. Under these circumstances, it does not appear that the balancing of the employees' privacy interests against the exclusive representative's need for the information would result in a "clearly unwarranted" invasion of personal privacy.

Having rejected all of Respondent's arguments in this matter, it found that the release of the Unit 211b leave records of employee Day is not prohibited by law, specifically the Privacy Act. The release of such data is compatible with the Privacy Act and is consistent with section 7114(b)(4) of the Statute. Accordingly, it is found that Respondent's failure to provide the above information constituted a violation of section 7116(a)(1), (5) and (8) of the Statute.

Therefore, it is recommended that the Authority adopt the following:

Order

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Veterans Administration Regional Office, San Francisco, California, shall:

1. Cease and desist from:

(a) Failing and refusing to provide the exclusive representative of its employees an unsanitized copy of the Unit 211b leave record log and/or time cards showing the leave taken by a certain bargaining unit employee from July 1, 1991 to October 31, 1991 which is reasonably available and necessary for it to properly perform its representational responsibilities in connection with a grievance.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Upon request, furnish the American Federation of Government Employees, Local 1159, AFL-CIO, the exclusive representative of its employees, an unsanitized copy of the Unit 211b leave record log and/or time cards showing the leave taken by a certain bargaining unit employee from July 1, 1991 to October 31, 1991, which is reasonably available and necessary for it to properly perform its representational responsibilities in connection with a grievance.

(b) Post at its Veterans Administration Regional Office, San Francisco, California 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 Regional Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco, 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.

Issued, Washington, DC, January 12, 1995

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ELI NASH, JR.
Administrative Law Judges

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to provide the American Federation of Government Employees, Local 1159, AFL-CIO, the exclusive representative of our employees, an unsanitized copy of the Unit 211b leave record log and/or time cards showing the leave taken by a certain bargaining unit employee from July 1, 1991 to October 31, 1991, which is reasonably available and necessary for it to properly perform its representational responsibilities in connection with a grievance.

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

WE WILL, upon request, provide the American Federation of Government Employees, Local 1159, AFL-CIO, the exclusive representative of our employees, an unsanitized copy of the Unit 211b leave record log and/or time cards showing the leave taken by a certain bargaining unit employee from July 1, 1991 to October 31, 1991, which is reasonably available and necessary for it to properly perform its representational responsibilities in connection with a grievance.

(Activity)

Date: By:
(Signature) (Title)

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Regional Office, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: (415) 744-4000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. SF-CA-20980, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

S. Kent Sullivan, Esq.
Department of Veterans Affairs
Office of Regional Counsel
211 Main Street, Suite 1705
San Francisco, CA 94105

John R. Pannozzo, Jr., Esq.
Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103

Paul E. Moslander, President
American Federation of Government
Employees, Local 1159, AFL-CIO
P.O. Box 190215
San Francisco, CA 94119-0215

REGULAR MAIL:

Mr. Lewis Celli
Department of Veterans Affairs
Regional Office
211 Main Street, 7th Floor
San Francisco, CA 94105

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: January 12, 1995
Washington, DC