

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

INTERNAL REVENUE SERVICE,
WASHINGTON, D.C.

AND

INTERNAL REVENUE SERVICE,
SALT LAKE DISTRICT OFFICE,
SALT LAKE CITY, UTAH

Respondents

AND

NATIONAL TREASURY EMPLOYEES
UNION

Charging Party

Case No. 7-CA-90690

Hazel E. Hanley, Esquire
For the General Counsel

Dean DeHart
For the Charging Party

James E. Dumerer, Esquire
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5. U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on September 20, 1989, by the National Treasury Employees Union, (hereinafter called the

Charging Party or NTEU), a Complaint and Notice of Hearing was issued on December 29, 1989, by the Regional Director for Region VII, Federal Labor Relations Authority, Denver, Colorado. The Complaint alleges that the Internal Revenue Service, Washington, D.C. (hereinafter called Respondent Washington), and the Internal Revenue Service, Salt Lake City District Office, Salt Lake City, Utah, (hereinafter called Respondent Salt Lake), and collectively hereinafter called Respondents, violated Sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of their actions in failing and refusing to provide certain requested information to the NTEU.

A hearing was held in the captioned matter on March 6, 1990 in Denver, Colorado. All parties were afforded the full opportunity to be heard, to examine and cross-examine the sole witness, and to introduce evidence bearing on the issues involved herein. The parties all submitted post-hearing briefs on April 6, 1990 which have been duly considered.

Upon the basis of the entire record, including my observation of the sole witness and his demeanor, I make the following findings of fact, conclusions and recommendations.^{1/}

Findings of Fact

At all times material to this case, the NTEU has been the exclusive representative of all professional employees

^{1/} The record facts are not in dispute. However, there is a question as to whether the requested information exists. Although Respondents in their answer admitted its existence, at a prehearing discussion Respondents' Counsel stated that just prior to the hearing he learned for the first time that "Branch Chiefs 1988 appraisals" had not been made. However, although given the opportunity, Respondents' Counsel did not on the record deny allegations 9(b) and (c) of the complaint which stated that the requested information is normally maintained by Respondents and is reasonably available. Respondent made no attempt to put any evidence into the record indicating that the requested information did not exist. Accordingly, inasmuch as the undersigned's decision must be based upon record evidence, in the absence of any record evidence to the contrary, it will be assumed that the requested data does exist.

employed at Respondents' Salt Lake City facility, including Ms. Lois Long, a Revenue Officer. On January 5, 1989, NTEU Chapter 17 filed a first step grievance on Ms. Long's behalf, alleging that Ms. Long had been omitted from the Best Qualified List for a GS-1169-12 position because of an improper ranking for the position. As a result, Ms. Long was not selected for that position on December 20, 1988.

Subsequently, after Chapter 17 exhausted internal procedures, Ms. Long's grievance was sent to the NTEU's Field Office in Denver. The field representative first assigned to the grievance, Ms. Kathleen MacKenzie, noted that Ms. Long's 1988 performance appraisal had been lowered from previously outstanding ratings in some critical elements without apparent reason. Ms. MacKenzie prepared a memorandum for NTEU's Regional Counsel, James Bailey, in which she recommended arbitration. Mr. Bailey concurred with Ms. MacKenzie's analysis, and he further recommended that Ms. MacKenzie prepare an information request for, inter alia, all Branch Chiefs' group appraisals (Operational Reviews) that had been prepared for the groups of revenue officers with whom Ms. Long worked in 1987 and 1988.

The NTEU's Denver Field Office had experience with the group appraisals prepared by Branch Chiefs concerning their Group Managers. While the group appraisals contain general references to the overall performance of a group, such appraisals also on occasion included specific references to individual employees' performances, and Branch Chiefs often direct their Group Managers to take action regarding employees' performances. For example, at arbitration hearings and at Merit Systems Protection Board (MSPB) hearings where the NTEU had challenged personnel actions based upon performance, Respondents have offered Operational Reviews as evidence in support of their personnel actions. The NTEU thus knew that such Operational Reviews contain information from employees' individual performance folders, their current performance evaluations, their case file analyses, their field visit memoranda, their overage cases, their daily reports, their leave and time sheets, as well as their Group Manager's assessments of their effectiveness.

Moreover, from the NTEU's experience with Operational Reviews submitted during performance-related hearings, the NTEU knew the Branch Chiefs directed Group Managers to address employees' performance problems by maintaining "drop files" on employees for future evaluation. The NTEU further knew that arbitrators have extensively quoted from Operational Reviews in framing their awards. In fact, the

NTEU won an arbitration award based on a "smoking gun" in an Operational Review. In this later Operational Review the Branch Chief told his Group Manager not to promote the grievant to a position for which she had not even applied.

In view of the foregoing, the NTEU was interested in Operational Reviews covering groups to which Ms. Long belonged because the drop in her numerical ratings was significant and not otherwise explained; thus, the NTEU suspected Ms. Long might have been a "victim of reprisal."

In addition to the performance-related facts utilized by Branch Chiefs in the Operational Reviews, the NTEU also knew that the reviews prepared on an annual basis were maintained for several years. For example, Respondents, on August 22, 1985, produced Operational Reviews at an MSPB hearing that were dated September 19, 1983 and May 1, 1984, a 24-month period.

The Branch Chiefs' Operational Reviews, examples of which are contained in the record as G.C. Exhibits 16 and 17, indicate that for the most part they are factual summaries of the various operations conducted by the Group. Thus they set forth the inventory of the operations or divisions, the age of the cases, suggest which cases, etc. should be given priority and various procedures to be utilized to expedite reductions in inventory. Additionally, they name employees and the amount of time such employees took to complete particular cases etc., and go on to suggest various ways to handle case loads or correct pending problems. The Operational Reviews are in the main a factual summary of the status of a Group's case load. A review is made for each program managed by the Group. Following a review of the program, an "Action Item" appears. Typical "Action Items" read as follows:

Action Item: Please wrap up the TCMP audit ASAP, with related years. The TCMP checksheet should be prepared as an "estimated" checksheet before 3/31/88. The Corporate TCMP is scheduled to start in October 1988. Learning from this last 1040 TCMP case, I would suggest having your agents assigned corporate TCMP to open all their cases ASAP to evaluate their complexity in hopes of avoiding open the most difficult case last.

Action Item: Continue to emphasize the FIFO method of case work. With just a few exceptions, your agents appear to have their inventory under control. Further workload reviews (WR) should continue to be geared towards OLDEST cases first, with set action dates and close follow up established.

Realizing how helpful the Operational Reviews can be in cases involving employee performances, Ms. MacKenzie, on July 7, 1989, sent a letter to Respondents' Regional Office and requested Respondents' Attorney, Ms. Susan Neiser, to provide Operational Reviews prepared by the Branch Chiefs over the Group Managers who directly supervised Ms. Long in 1988. In about mid-July, Mr. Dean DeHart took over Ms. Long's grievance. On August 9, 1989, Mr. Gary A. Anderson, IRS' Assistant Regional Counsel, wrote a letter to Mr. DeHart in response to the NTEU's July 17 request. Mr. Anderson refused to provide the Operational Review.

On August 28, 1989, Mr. DeHart sent another letter to Ms. Neiser in which he reasserted Ms. MacKenzie's July 7, 1989 request, and he argued, despite Mr. Anderson's contention to the contrary, that the group reviews were:

. . . necessary and relevant to verify that an arbitrary reduction in Ms. Long's appraisal scores took place on the instructions of the Branch Chief.

In addition to this letter asserting the necessity and relevance of the Operational Review, Mr. DeHart had at least one telephone conversation with Ms. Neiser on September 19, 1989, during which she, Ms. Neiser, reiterated Respondent's objection to releasing the Operational Reviews to the NTEU, namely, that they constituted internal management, counsel and guidance.

On September 29, 1989, Ms. Neiser responded by letter to Mr. DeHart's second request for the Operational Review. Ms. Neiser informed Mr. DeHart that the review was not subject to release to the NTEU because it constituted internal management advice within the meaning of 5 U.S.C. Section 7114(b)(4)(C), and it was not relevant or necessary to resolve Ms. Long's grievance. Respondents have never provided the requested Operational Review.

Discussion and Conclusions

The General Counsel and the Charging Party take the position (1) that the requested material is necessary and relevant to an intelligent analysis of the merits of Ms. Long's grievance, (2) that the requested material is readily available, and (3) that it does not constitute a part of the Respondents' deliberative process within the meaning of Section 7114(b)(4)(C), nor is disclosure of the material otherwise prohibited by law. In support of (1) and (2) they rely on the fact that past experience has demonstrated that the Operational Reviews do on occasion contain adverse remarks, etc., about individual employees and that such Operational Reviews have been retained by Respondents for several years. As to (3) the General Counsel and the Charging Party point out that the Operational Reviews are merely a factual summary of the Branch's operation with suggested ways of improvement and not part of the deliberative process. In view of the foregoing, it is the position of the General Counsel and the Charging Party that the NTEU is entitled to the Operational Reviews and that Respondents' refusal and failure to make them available was violative of Sections 7116(a)(1), (5) and (8) of the Statute.

Respondents on the other hand take the position that the Operational Review is not relevant and necessary to the NTEU's representational responsibilities and that in any event, the Operational Review is "exempt from release pursuant to the governmental deliberative process privilege and because they constitute guidance or advice provided for management officials or supervisors, relating to collective bargaining."

In agreement with the General Counsel and Charging Party, I find based upon the uncontroverted and credited testimony of Mr. DeHart, the sole witness in this proceeding, that the Operational Review is relevant and necessary to the NTEU's representational responsibility with regard to Ms. Long's grievance and that the 1988 Operational Review is reasonably available. In reaching this conclusion I rely on Mr. DeHart's testimony concerning the NTEU's experience with other Operational Reviews in the past and the fact that such reviews produced the "smoking gun" which the NTEU was looking for in support of its grievance relative to another employee.^{2/} With respect to the availability of the 1988

^{2/} See Veterans Administration, Washington, D.C. and Veterans Administration Regional Office, Buffalo, New York, 28 FLRA 260.

Operational Review, I rely on the Respondents' admission to such fact in its answer and the absence of any evidence to the contrary in the record.

Having concluded that the requested information is necessary and relevant to the NTEU's representational responsibilities in connection with the processing of Ms. Long's grievance, and that such information is readily available, it must now be determined whether, as alleged by Counsel for the Respondents, the requested information, i.e. the 1988 Operational Review, is exempt from disclosure since it constitutes part of Respondents' deliberative process within the meaning of 5 U.S.C. Section 552(b)(5) of the FOIA and/or constitutes guidance, advice, counsel, or training provided management or supervisors, relating to collective bargaining within the meaning of Section 7114(b)(4)(C) of the Statute.

Based primarily upon a reading of General Counsel's Exhibits 16 and 17, which are typical Operational Reviews conducted by Branch Chiefs, I am convinced that the requested Operational Review is definitely not within the exemption set forth in Section 7114(b)(4)(C) of the Statute since it is nothing more than a factual summary of the status of a branch's current work load along with suggestions as to the steps to be taken to reduce such work load. Moreover, the Operational Review is unrelated to collective bargaining. Accordingly, in view of the foregoing, I find that Section 7114(b)(4)(C) of the Statute does not prohibit the disclosure of the Operational Review requested by the NTEU. Cf. National Weather Service, 30 FLRA 127, 143.

Similarly, I can not find, as alleged by Respondents, that the Operational Review falls within the "inter-agency memorandums" exemption set forth in 5 U.S.C. Section 552(b)(5) of the FOIA. As pointed out by the Supreme Court in NLRB v. Sears, Roebuck & Co., 95 S. Ct. 1504, 1516, the privilege and or exemption set forth in Section 552(b)(5) of the FOIA has been uniformly recognized by the courts to be for "purposes of protecting the decision making processes of government agencies" and the focus is on documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Inasmuch as the Operational Review requested by the NTEU clearly does not fall within the aforementioned categories since it contains nothing more than a factual summary of the current workload of the branch and suggestions as to the steps to be taken to reduce such workload, I find that the requested Operational Review does

not fall within the exception set forth in Section 552(b)(5) of FOIA.

Accordingly, based upon the foregoing analysis and conclusions, I find that the Respondents violated Sections 7116(a)(1), (5) and (8) of the Statute by virtue of its action in failing and refusing to provide the NTEU with the requested 1988 Operational Review.

It is hereby recommended that the Authority issue the following Order designed to effectuate the purposes and policies of the Statute.

ORDER

Pursuant to Section 2423.29 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 Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Salt Lake District Office, Salt Lake City, Utah, shall:

1. Cease and desist from:

(a) Refusing to furnish, the National Treasury Employees Union, the exclusive representative of certain of its employees, the Branch Chiefs' 1988 Operational Reviews for all groups wherein Ms. Lois Long was employed.

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

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

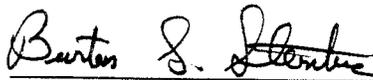
(a) Upon request furnish the National Treasury Employees Union the Branch Chiefs' 1988 Operational Reviews for all groups wherein Ms. Lois Long was employed.

(b) Post at its Salt Lake District Office 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 District Director in charge of the Salt Lake City, Utah District Office, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are

customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region VII, Federal Labor Relations Authority, Denver, Colorado, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., July 19, 1990



BURTON S. STERNBURG
Administrative Law Judge

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 refuse to furnish, upon request of the National Treasury Employees Union, the exclusive representative of a unit of our employees, the data requested by the National Treasury Employees Union in its letter of July 7, 1989, namely, the Branch Chiefs' 1988 Operational Reviews for all groups wherein Ms. Lois Long was employed.

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

WE WILL furnish the National Treasury Employees Union, the exclusive representative of a unit of our employees, the data requested by the National Treasury Employees Union in its letter of July 7, 1989, namely, the Branch Chiefs' 1988 Operational Reviews for all groups wherein Ms. Lois Long was employed.

(Activity)

Dated: _____ 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, Region VII, whose address is: 535 - 16th Street, Suite 310, Denver, Colorado 80202, and whose telephone number is: (303) 844-5224.