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

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT Respondent	
and	Case No.3-CA-10066
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 476, AFL-CIO Charging Party	

Anthony DeMarko, Esq.
For the Respondent

Ana de la Torre, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on January 31, 1991 by the Regional Director for the Washington Region, Federal Labor Relations Authority, a hearing was held before the undersigned on April 9, 1991 at Washington, DC.

This case arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. section 7101, et seq. (herein called the Statute). It is based on an amended charge filed on January 30, 1991 by the American Federation of Government Employees, Local 476, AFL-CIO (herein called the Union) against U.S. Department of Housing and Urban Development (herein called the Respondent).

The Complaint alleged, in substance, that on April 12 and April 30, 1990 the Union requested Respondent to furnish

it with a copy of the merit staffing file for vacancy announcement 00-MSD-89-0159z; that Respondent since April 30, 1990 has refused to furnish such information; that Respondent has refused to comply with section 7114(b)(4) of the Statute - all in violation of section 7116(a)(1), (5), and (8) thereof.1/

Respondent's Answer, dated February 14, 1991 admits the request for the information as alleged. It denies that (a) the information is reasonably available; (b) it is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; (c) the information is not prohibited from disclosure by law. The Answer further denied that it refused to furnish the requested information as well as the commission of any unfair labor practices.2/

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Briefs were filed on May 9, 1991 which have been duly considered.

Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the American Federation of Government Employees, AFL-CIO (AFGE) has been the exclusive representative of a nationwide consolidated appropriate unit of Respondent's employees.

2. At all times material herein the Union herein has been the designated agent of AFGE to represent the unit

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1/ At the hearing the undersigned granted General Counsel's Motion to Amend the Complaint by adding paragraph 17(a) as follows: "Since April 30, 1990 Respondent has failed to respond to the Union's information request described in paragraph 11."

2/ Respondent also amended its Answer at the hearing to deny the amendment to the Complaint, paragraph 17(a), as heretofore described.

employees at Respondent's Headquarters office in Washington, DC.

3. At all times material herein Respondent and AFGE have been parties to a collective bargaining agreement covering the unit employees at Respondent's Headquarters. Article 22, "Grievance Procedures," sets forth time limits for the filing of grievances. It provides, in substance, that if either party has a grievance over a matter covered by the procedure, that party shall notify the other party, within 30 days of becoming aware thereof.

4. A Vacancy Announcement for the position of Financial Operations Analyst 0159 was issued by Respondent on July 18, 1989. The Announcement was closed on September 18, 1989 and a selection was made in December 1989.

5. During 1990 several employees approached Barbara Davidson, President of the Union, regarding their non-selection for that position. One employee who was not on the best qualified list told Davidson that she should be on the list since she had the same experience and ratings as others who were on the list.

6. Prior to April 12, 1990,[3/] Davidson spoke to Beverly Swilley, who was personnel management specialist in the Office of Personnel and Training. She told Swilley that an employee wanted to know why she didn't make the best qualified list and was a potential grievant. Davidson stated she wanted to review the merit staffing files - the 171s of some of the best qualified employees on the merit promotion list - and look at them with her constituent. Swilley informed her supervisor, Pam Avise, about Davidson's request and the supervisor notified Theodore Ford, Acting Director of Employee Classification Division.

7. After the matter was discussed among the management officials, Swilley informed Davidson that the latter could look at the files but not the employee or any applicant.

8. Several days before April 12, Davidson called Ford and repeated her request to review the applications and ratings of the applicants. She wanted to bring another individual (a constituent) with her and so advised Ford.

3/ Unless otherwise indicated, all dates hereinafter mentioned occur in 1990.

The latter stated that the Union representative could compare the individual's application with the rating criteria, but not go into other applicant's rating - other than the cut off score - with the individual being present.[4/] Ford testified that the Union would be permitted, as always, to review the files unsanitized as long as they don't want copies; it can review the total merit staffing case file as long as the individual is not present.

9. The record reflects that merit staffing is the process which brings to the department both status and non-status candidates by recruitment and under competitive service regulations.

10. Under date of April 12 Davidson wrote Ford requesting a copy of all information in the merit staffing file[5/] for vacancy announcement 0159. She stated that the request included the SF-171s of all applicants, and those with HUD status and those from the OPM register. It also included:

> "all correspondence with applicants, all notes, the scoring sheets, the crediting plan, the names of the panel members and which members scored which applicants, any correspondence related to the determination to interview only best qualified candidates with HUD status at the GS-7 level, all candidates who were interviewed and notes from the interviews, etc."

Davidson added that the information should be provided no later than 10 days after the request is received; that several employees have potential grievances and data is needed to decide whether to file such grievances.

11. Since no response was received from Ford to the April 12 memo, Davidson sent another memo to Ford on

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4/ While Davidson testified she told Ford of her request to also see the crediting plan, Ford stated that the Union representative did not mention the plan. In view of the later written request for the crediting plan and the ultimate determination, I do not find it necessary to resolve this conflict in testimonies.

5/ The merit staffing file includes the crediting plan.

April 30, which referred to the Union's earlier request for all information contained in the merit staffing file for vacancy announcement 0159. Davidson repeated the Union's request in accordance with section 7114(b)(4) of the Statute.

12. Under date of November 6 Respondent replied to the Union's request for information.[6/] With respect to the crediting plan, the Union was advised in the memo that a blanket disclosure of such plan was not required by law or FPM Supplement 335-1, Subchapter 556. Respondent stated it would give consideration to a request if made in conjunction with a specific grievance in which the Union is the representative. With regard to the request for the merit staffing file relating to vacancy announcement 0159, Respondent repeated its willingness to provide limited access thereto; that until a grievance is filed no determination could be made as to whether the circumstances justify disclosure.

13. No grievance was filed concerning an employee's failure to be in the best qualified list or with respect to other non-selection of a particular employee for the position in vacancy announcement 0159.

Conclusions

Respondent resists any attempt by the Union to obtain the crediting plan pertaining to the vacancy announcement involved herein. It contends that such release is prohibited by the Federal Personnel Manual Supplement 335-1, which requires that it be shown the release would not create any unfair advantage to some candidates or compromise the utility of the selection process. Moreover, no grievance was filed, or could have been under the contract, and thus it cannot be determined whether a disclosure is justified. Otherwise, providing the plan would be a blanket disclosure.

With respect to the other data sought by the Union, Respondent asserts that it offered to allow the Union representative to review it by herself and have a personnel specialist explain how the particular employee failed compared to those who made the list. Her failure to accept the offer amounts to a waiver of the right to the data. Further, Respondent contends the information was not shown

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6/ Ford testified that his failure to reply earlier to the April 12 and April 30 requests was due to an oversight on his part based on "a lot going on."

to be necessary since no grievance was filed or could be filed under the contract. Moreover, it is insisted the request was burdensome to management since it consisted of 300 applications relating to the vacancy announcement, and assembling the data would entail one or more employees working several weeks on the matter.

Under section 7114(b)(4) of the Statute an agency's duty to negotiate in good faith requires that it furnish a union, upon request, with data that (1) is normally maintained by the agency in the regular course of business; (2) is reasonably available and necessary for discussion, understanding and negotiation of subjects within the scope of collective bargaining; and (3) does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining.7/ It is also well established that the exclusive representative is entitled to information that is necessary to enable it to carry out effectively its representational functions, including information to assist it in the investigation, evaluation and processing of a grievance. See Department of Health and Human Services, Social Security Administration, et al., 39 FLRA 298, and cases cited therein.

The Authority has addressed the question as to whether an agency is obliged to turn over a crediting plan to a union in connection with its duty to bargain. In National Treasury Employees Union and Department of the Treasury, U.S. Customs Service, 23 FLRA No. 681, the issue involved the negotiability of a proposal to furnish a crediting plan. The proposal was found to be outside the duty to bargain since its disclosure was required without regard to whether a release of the crediting plan would undermine the fairness and validity of the selection process. The Authority found that such release under FPM Supplement 335-1 is authorized where it would not create any unfair advantage to some candidates or compromise the utility of the selection process.

Whether or not the release of a crediting plan would create such an advantage, or compromise the selection

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7/ Respondent does not dispute that the data is normally maintained in the regular course of business. Nor does it claim that the information constituted guidance, advice, counsel or training for management officials relating to collective bargaining.

process, depends on the circumstances of a particular case. In adapting such approach, the Authority held in Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 26 FLRA 407, that such disclosure would not be contrary to the FPM requirements. The requests were limited to two specific selection actions and did not require disclosure of all crediting plans. Further, the selection action which was involved had been substantially completed.

In the case at hand I conclude that release of the crediting plan would not, as was true in the Fort Bragg case, supra, compromise the selection process nor redound to the advantage of candidates for selection. The Union herein sought only the plan relating to the particular vacancy announcement 0159 and did not seek disclosure of all crediting plans. Further, the selection was made for the vacancy prior to the request for the crediting plan. Thus, I do not believe its disclosure would result in an unfair advantage to prospective candidates. Nor do I believe that release of this crediting plan relating to the said vacancy announcement will destroy the integrity of the Agency's selection process.8/ See also, American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, U.S. Army Test Measurement and Diagnostic Equipment Support Group, et al., 27 FLRA 69, 75-76.

It is also contended by Respondent that there was no obligation to furnish the crediting plan inasmuch as no grievance was filed, and none could be filed under the applicable contractual provision. This contention is rejected. The Authority has repeatedly held that there is no requirement that the information requested under section 7114(b)(4) be used in a grievance. Department of Health and Human Services, Social Security Administration, supra; U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 37 FLRA 1310. Respondent's assertion that the grievance was nongrievable does not relieve it of the duty to furnish information under the Statute. Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina,

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8/ While Respondent claims the Union did not request or mention the crediting plan initially, it did ask for the merit staffing file which included the plan. Moreover, it specifically asked for the crediting plan in its written requests of April 12 and 30.

34 FLRA 461; Internal Revenue Service, National Office, 21 FLRA 646.

With respect to the remaining data, Respondent questions the necessity therefor. It posits this contention on the assertion that the request was too broad and burdensome since only one individual, who complained, was involved. Further, it maintains that the willingness to let the Union look at the staffing file, without the presence of the individual, fulfilled its obligation under the Statute.

The Union herein sought the merit staffing file in order to determine whether the employee had a justifiable complaint that she should have been placed on the best qualified list for the vacant financial operations analyst position. I am satisfied that such information, as requested, was necessary for the Union to make that determination. Only by comparing the scoring sheets and notes, and reviewing the crediting plan plus other correspondence in the file, could the Union properly evaluate the employee's claims of disparate treatment. Further, the Respondent did not challenge the relevance of the data requested when Davidson first asked to review the file. Contrariwise, the agency was willing to allow her to look at it, albeit without the presence of the individual, and no objection was interposed that the information was not necessary for the Union to fulfill its representational functions. Moreover, such data is akin to the information sought by the Union - the promotion file with the crediting plan - in the Fort Bragg, case, 84 FLRA 461, which the Authority found was necessary and relevant concerning an employee's nonselection for a position. While it is true that Respondent offered to let the Union review the file, this did not satisfy its duty under the Statute. Allowing a union to look at information, which it is entitled to, does not discharge an agency's duty to furnish such data. U.S. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 38 FLRA 3. Apart from its right to review the file without the limitation imposed by Respondent, the Union was entitled to a copy of the data in the file which it requested. Internal Revenue Service, Washington, D.C., 32 FLRA 920.9/

9/ Respondent argues that it could not furnish any of the requested data until a grievance was filed. Since it asserts none could be timely filed, the data need not be supplied. As indicated in the cases heretofore cited, this
(Footnote continued on next page.)

In its brief Respondent maintains that providing the data requested would be a burdensome task. However, the record lends no support for this contention. No testimony was adduced, nor was any evidence submitted, which would establish that an onerous burden would be imposed upon the Agency to furnish the information. Since the extent of the alleged burden is not clearly established in the record, and was not raised at the hearing as an issue, I conclude Respondent has not shown that the information was available only through excessive means. See U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, supra.

It is the General Counsel's contention that Respondent's failure to timely respond to the Union's requests of April 12 and April 30 constituted a violation of its duty to bargain. I agree. The Authority has held that failing and refusing to reply to a union's request for data under section 7114(b)(4) is violative of section 7116(a)(1), (5), and (8). U.S. Naval Supply Center, San Diego, California, 26 FLRA 324.

Respondent avers that it has complied with that requirement by advising Union representative Davidson, after the initial request to review the merit staffing file, that she could look at it without the constituent. Further the Agency points to the reply which it sent on November 6 to the two requests made in April by the Union.

As to management's initial response, it dealt solely with the right of the Union to examine part of the file alone. At that time the Union had not made a request for copies of the various items which it felt were necessary in order to adequately represent the employee re her non-selection on the best qualified list. The formal requests made on April 12 and April 30 sought copies of the specific items mentioned. Respondent's reply was not made until November 6, which followed the filing of the unfair labor practice charge filed on October 29. I do not view the response by Respondent six months after the Union's written requests to be timely. Moreover, such response was not forthcoming until after the charge was filed herein. Thus,

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argument has no validity. The Authority's decisions are clear that filing a grievance is not a condition precedent to obtaining information from an agency, nor is grievability determination a necessary element of its obligation to provide data.

I conclude Respondent failed to make a timely reply to such requests for data. Therefore, Respondent was not in compliance with section 7114(b)(4), and its failure was violative of the Statute.10/

In sum, I conclude Respondent violated sections 7116(a)(1), (5), and (8) by: (a) failing and refusing to furnish the data requested by the Union in its April 12 and April 30, 1990 memos to management; (b) failing to make a timely reply to such requests by the Union to furnish copies of the data specified therein. Accordingly, it is recommended that the Authority issue the following Order.11/

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 the U.S. Department of Housing and Urban Development, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 476, AFL-CIO, the exclusive representative of its unit employees at its Headquarters in Washington, DC, the data requested by the Union in its letters dated April 12, 1990 and April 30, 1990.

(b) Failing or refusing to make a timely reply to requests for information from the American Federation of

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10/ See Army and Air Force Exchange Service, McClellan Base Exchange, McClellan Air Force Base, California, 35 FLRA 764, (failure to reply to a bargaining request for over four months did not meet the agency's obligation to bargain).

11/ Respondent urges that, assuming arguendo a violation is found to have occurred, the remedy be limited to a cease and desist order. It is contended the matter is moot since no grievance was filed. As stated, the Authority has held there is no requirement that the data sought be used in a grievance. Further, whether a grievance may be filed under the contract, if the issue arises, will be determined by the arbitrator if the matter reaches arbitration. Thus, I find no basis for limiting the order as sought by Respondent, and I conclude such limitation would not effectuate the purposes and policies of the Statute.

Government Employees, Local 476, AFL-CIO, which reply is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Upon request, furnish the American Federation of Government Employees, Local 476, AFL-CIO, copies of the data requested by the Union in letters dated April 12, 1990 and April 30, 1990.

(b) Post at its facilities, 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 Director of the Employee Classification Division, Washington, DC 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, of the Washington Region, Federal Labor Relations Authority, 1111 - 18th Street, NW, 7th Floor, Washington, DC 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, June 19, 1991, Washington, DC

William Naimark

WILLIAM NAIMARK
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 fail or refuse to furnish the American Federation of Government Employees, Local 476, AFL-CIO, the exclusive representative of our unit employees at its Headquarters in Washington, DC, the data requested by the Union's in letters dated April 12, 1990 and April 30, 1990.

WE WILL NOT fail or refuse to make a timely reply to requests for information from the American Federation of Government Employees, Local 476, AFL-CIO, which reply is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

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 upon request, furnish the American Federation of Government Employees, Local 476, AFL-CIO, copies of the data requested by the Union in its letters dated April 12, 1990 and April 30, 1990.

_____
(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, Washington Region, whose address is: 1111 - 18th Street, NW, 7th Floor, Washington, DC 20033-0758, and whose telephone number is: (202) 653-8500.