

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

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U.S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS, WASHINGTON, D.C..
AND BUREAU OF THE CENSUS,
DATA PREPARATION DIVISION,
JEFFERSONVILLE, INDIANA

Respondents

and

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES, LOCAL 1428

Charging Party
.....

Case No. 5-CA-10213

Bruce I. Waxman
Counsel for the Respondents

Susanne S. Matlin
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 Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana (DPD) 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), by refusing to furnish the names and home addresses of bargaining unit employees to the Charging Party (Union), and that Respondent U.S. Department of Commerce, Bureau of the Census, Washington, D.C. (BOC) violated section 7116(a)(1) of the Statute by directing Respondent DPD to not furnish the Charging Party with the names and home address of unit employees. Further, the Complaint alleges that Respondent DPD unlawfully repudiated a provision of its negotiated agreement with the Charging Party by failing to

provide the Charging Party with the names and home addresses of bargaining unit employees.

The Respondents filed an answer dated May 13, 1991. The answer admitted most of the substantive allegations of the complaint, but denied the allegations pertaining to the necessity of the information, the lack of a legal prohibition for release of the information, and the conclusions of law.

The answer also raised three affirmative defenses. First, it alleged that the complaint was invalid and the FLRA lacked jurisdiction over Respondent BOC because of the failure to serve Respondent BOC. Second, it claimed that the release of the information was prohibited by law. Third, the Respondents pleaded that the availability of alternative means of communication to the Union rebutted any presumption of necessity. The answer was amended on June 6, 1991 to add a fourth affirmative defense which denied that the requested information (i.e., the employee addresses) constituted data under 5 U.S.C. § 7114(b)(4).

On or about May 23, 1991, Counsel for the General Counsel moved for summary judgment. The Regional Director transferred the motion to the Chief Administrative Law Judge, pursuant to section 2423.22(b)(1) of the Regulations, and it was assigned to the undersigned for disposition pursuant to section 2423.19(k) and section 2423.22(b)(3) of the Regulations. Respondent served its opposition with attached exhibits and an affidavit on June 12, 1991.

Based upon the entire record, and it appearing that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. The Union is the certified exclusive representative of all the employees of the Bureau of the Census, Data Preparation Division in Jeffersonville, Indiana, appropriate for collective bargaining at the Respondent DPD.

2. At all times material Respondent DPD and the Union were parties to a collective bargaining agreement, effective April 15, 1987.

3. Article 13 of the negotiated agreement provides for a number of means by which the Union may communicate with bargaining unit employees. These means include: (a) meetings (Section 13.2); (b) bulletin boards (Section 13.4); (c) distribution of literature on the DPD's premises (Section 13.5); and (d) use of the DPD's inter-office mail system (Section 13.6). In addition, Section 13.3 permits the Union to obtain a list of bargaining unit employees, by organization code twice annually in connection with union membership drives, and Section 13.10 provides that the "Employer will furnish the Union with the names and addresses of all bargaining unit employees yearly. The Union agrees to protect the privacy of this information."

4. On October 17, 1990, the Union, by President Sonya Constantine, requested that Respondent DPD, by Stanley Domzalski, DPD Personnel Officer, furnish the Union the names and home addresses of all employees within the bargaining unit. The Union based its request on Article 13, Section 13.10 of the negotiated agreement and the September 26, 1990 decision of the Federal Labor Relations Authority in U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 37 FLRA 515 (1990), (Portsmouth Naval Shipyard), application for enforcement filed sub nom. FLRA v. U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, No. 90-1949 (1st Cir., Oct. 1, 1990).

5. Respondent admit, and I find, that on or about October 25, 1990, Respondent BOC directed Respondent DPD to not furnish the Union with the information requested.

6. By letter dated October 25, 1990, Respondent DPD, by Muriel Warton, Labor Relations Officer, refused to provide the Union with the information requested. Respondent DPD stated in part:

Because this issue is still in litigation we have been advised by Census Bureau Headquarters and Department of Commerce that we cannot release the names and addresses of unit employees at this time. However, as has been our continuing position, we are prepared to offer alternatives. I understand that the purposes of your request is to obtain feedback from bargaining unit employees regarding the upcoming contract

negotiations. We could make the inter-office mail system available to the union for the distribution of information or we could furnish the union with labels of the addresses of bargaining unit employees without the names. Please advise me if either of these alternatives is acceptable or if you have any other suggestions.

7. By memorandum of December 11, 1990, the Union reiterated its request to Respondent DPD for the names and addresses of the bargaining unit employees in accordance with Article 13, Section 13.10 of the negotiated agreement. The Union did not respond to the DPD's offer of alternative means of communication with bargaining unit employees.

8. Respondent DPD responded by memorandum dated January 17, 1991. The memorandum reiterated the agency's refusal to release the information based upon pending litigation, stating, in part, "[T]he Census Bureau's position remains unchanged."

9. Respondents admit, and I find, that the information requested by the Union, the names and home addresses of all bargaining unit employees, is normally maintained by Respondent DPD in the regular course of business, is reasonably available, and does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining.

10. The charge was filed by the Union with the Chicago Regional Director on January 17, 1991, and an amended charge was filed by the Union on January 29, 1991. The activity or agency named in the charge and amended charge was the Respondent DPD.

11. Copies of the charge and amended charge were served only on the Respondent DPD.

12. By letter dated March 8, 1991, Bruce I. Waxman, Senior Labor Law Counsel, United States Department of Commerce, Office of the General Counsel, Washington, D.C. 20230, whose office address is Bureau of the Census, Room 3077, Federal Building 3, Washington, D.C. 20233, advised Susan Matlin, Esquire, Federal Labor Relations Authority, Chicago Region, that he was "now the agency representative in this case." Mr. Waxman stated, in part, "It is the position of the Department of Commerce that the Privacy Act

prohibits the release of employees' names and home addresses, under the circumstances of this case."

13. The complaint and notice of hearing was issued on April 15, 1991. The complaint named Respondent BOC and Respondent DPD as Respondents. Violations of the Statute were alleged against Respondent BOC for the first time.

14. The complaint and notice of hearing was served by certified mail on Respondent DPD through Joseph Harris, Chief, DPD, and on Respondent BOC by certified mail to Bruce Waxman, Senior Labor Law Counsel, at his Bureau of the Census office address in Washington, D.C.

15. Respondent DPD and BOC filed their answer dated May 13, 1991. The answer stated that it was being submitted "through their undersigned counsel," and it was signed by Bruce I. Waxman, again listing his Bureau of the Census office address.

Discussion, Conclusions, and Recommendations

Jurisdiction Over Respondent BOC

Respondents argue that the Authority lacks jurisdiction over Respondent BOC because Respondent BOC was not mentioned in the charge, served with the charge, contacted in the investigation, or served with the complaint. See 5 C.F.R §§ 2423.4(a)(2), 2423.6(b), 2423.7(b), and 2429.27(a) (1990).

With regard to the pre-complaint investigation of this case, it is well-settled that this matter is within the discretion of the General Counsel and is not reviewable by the Authority. It is the complaint, following the investigation of the charge, which establishes the issues for hearing and resolution by the Authority. Delaware Army and Air National Guard, 16 FLRA 398 (1984); Internal Revenue Service and Brookhaven Service Center, 6 FLRA 713, 724 (1981). As long as the allegations in the complaint bear a relationship to the charge, and are closely related to the events complained of in the charge, and the issuance and contents of the complaint comply with Authority regulations, the complaint is valid. Letterkenny Army Depot, 34 FLRA 606, 610 (1990).

The complaint meets these standards. Although Respondent BOC was not mentioned in the charge, it was obviously named in the complaint as a responsible party

because Respondent DPD continually asserted that its refusal to furnish the information was based on the acts of BOC.

Section 2429.27(a) provides, in relevant part, that service may be accomplished by serving counsel of record. Mr. Bruce I. Waxman was served with a copy of the complaint. The answer to the complaint and all subsequent pleadings in this case reflect that Mr. Waxman is counsel for both Respondent BOC and Respondent DPD. Therefore, there being no affidavit from Mr. Waxman attesting that he was not counsel of record for Respondent BOC at a material time,^{1/} I conclude that Respondent BOC was properly served with the complaint when its counsel, Mr. Waxman, was served.

The record also reflects that Respondent BOC had the opportunity to present its views to the Region prior to the issuance of the complaint. Mr. Waxman contacted counsel for the General Counsel during the investigation of the charge, prior to the complaint being filed, and asserted "the position of the Department of Commerce that the Privacy Act prohibits the release of employees' names and home addresses, under the circumstances of this case." See Department of the Army, Harry Diamond Laboratories, Adelphi, Maryland, 9 FLRA 575 (1982) at 575 n.1.

Accordingly, Respondents argument that the Authority lacks jurisdiction over Respondent BOC because of procedural irregularities is not sufficiently supported by its opposition to the motion to raise a genuine issue of material fact or deprive the General Counsel of judgment as a matter of law.

Names and Home Addresses

The General Counsel, relying on the Authority's decision in U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 37 FLRA 515 (1990), (Portsmouth Naval Shipyard), application for enforcement filed sub nom. FLRA v. U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, No. 90-1949 (1st Cir., Oct. 1, 1990), contends that she is entitled to summary judgment as it is undisputed that Respondent have denied the Union's request for the names and home addresses of the bargaining unit employees and this data is normally maintained and reasonably available.

^{1/} See Fed. R. Civ. P. 56(e).

The Respondents disagree with the Authority's rationale in its decision in Portsmouth Naval Shipyard. The Respondents contend that disclosure of employees' home addresses is prohibited by the Privacy Act, 5 U.S.C. § 552a, because such disclosure would constitute a clearly unwarranted invasion of personal privacy under exemption b(6) of the Freedom of Information Act, 5 U.S.C. § 552(b) (6). The Respondents argue that Portsmouth Naval Shipyard conflicts with Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) and FLRA v. Department of the Treasury, Financial Management Service, 884 F.2d 1446 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 863 (1990). The Respondents argue also that the disclosure of employees' home addresses does not constitute a "routine use" under existing regulations; that the names and home addresses do not constitute the type of data necessary for collective bargaining; and that the General Counsel has failed to demonstrate that the Union's alternative means of communication are insufficient.

In Portsmouth Naval Shipyard the Authority reaffirmed Farmers Home Administration, 23 FLRA 788 (1986), and concluded that the release of the names and home addresses of bargaining unit employees to their exclusive representatives is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by section 7114(b) (4) of the Statute. The Authority also determined that the release of the information generally is required without regard to whether alternative means of communication are available. Accordingly, the resolution of this case does not require consideration of whether alternative means of communication are available to the Union. Bureau of Public Debt, 40 FLRA 365 (1991); U.S. Naval Ordnance Station, 40 FLRA 348 (1991); U.S. Department of Veterans Affairs Medical Center, West Haven, Connecticut, 41 FLRA 29 (1991).

In U.S. Department of Interior, Washington, D.C., 37 FLRA 1129, 1131 (1990), the Authority specifically rejected the contention that employee names and addresses do not constitute "data" within the meaning of section 7114(b) (4).

The Union's request for the names and home addresses of unit employees satisfies the requirements of section 7114(b) (4). Therefore, the refusal to provide the data violated section 7116(a) (1), (5) and (8) of the Statute.

Repudiation of Article 13, Section 13.10 of the Negotiated Agreement

The Union based its requests of Respondent DPD for the names and addresses in part on Article 13, Section 13.10 of the collective bargaining agreement which provided, in part, that Respondent DPD would "furnish the Union with the names and addresses of all bargaining unit employees yearly." The consistent failure to comply with this clear and unambiguous provision of the parties' agreement because of pending litigation amounted to a repudiation of Article 13, Section 13.10 and violated section 7116(a)(1) and (5) of the Statute. Department of Defense, Warner Robins Air Logistics Center, 40 FLRA 1211 (1991); Department of Health and Human Services, Health Care Financing Administration, 39 FLRA 120, 130 (1991), reconsideration denied 40 FLRA 40 (1991); Department of the Navy, Naval Underwater Systems Center, Newport, Rhode Island, 30 FLRA 697 (1987); Rolla Research Center, U.S. Bureau of Mines, Rolla, Missouri, 29 FLRA 108, 115 (1987); supplemental decision 31 FLRA 1010 (1988).

Responsibility for the Violations

Respondents admit, and the correspondence reflects, that the refusal to provide the names and home addresses was done at the direction of Respondent BOC. Accordingly, Respondent BOC violated section 7116(a)(1) of the Statute in that it interfered with the collective bargaining relationship between Respondent DPD and the Union by (1) preventing Respondent DPD from complying with the Union's request for information pursuant to section 7114(b)(4) of the Statute, and (2) preventing Respondent DPD from honoring Article 13, Section 13.10 of its collective bargaining agreement with the Union. As Respondent DPD was acting ministerially and without discretion in the matter, it will be recommended that the complaint against Respondent DPD be dismissed. U.S. Department of the Interior, Washington, D.C. and National Park Service, Denver, Colorado and National Park Service, Rocky Mountain Regional Office, Denver, Colorado, 37 FLRA 1129 (1990).

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

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Commerce, Bureau of the Census, Washington, D.C. shall:

1. Cease and desist from:

(a) Directing the Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana not to furnish to the National Federation of Federal Employee, Local 1428, the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) Interfering with the bargaining relationship between the Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana and the National Federation of Federal Employees, Local 1428.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their 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 Relations Statute:

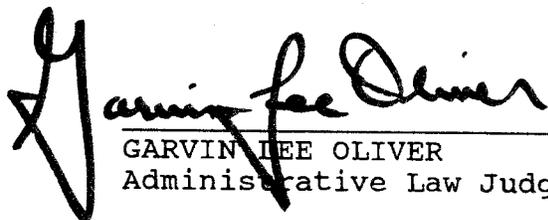
(a) Direct the Bureau of the Census, Data preparation Division, Jeffersonville, Indiana to furnish to the National Federation of Federal Employee, Local 1428, the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(b) Post at its facilities at the Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana 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 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 5, Federal Labor Relations Authority, Chicago, Illinois in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

The allegations in the complaint against Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana are dismissed.

Issued, Washington, DC, July 23, 1991



GARVIN LEE OLIVER
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 direct the Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana to refuse to furnish the National Federation of Federal Employee, Local 1428, the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit it represents.

WE WILL NOT interfere with the bargaining relationship between the Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana and the National Federation of Federal Employees, Local 1428.

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 direct the Bureau of the Census, Data Preparation Division, Jeffersonville, Indiana to furnish to the National Federation of Federal Employee, Local 1428, the exclusive representative of certain of its employees, the names and home addresses of all employees in the bargaining unit it represents.

(Agency)

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, Chicago Regional Office, whose address is: 175 W. Jackson Blvd., Suite 1359-A, Chicago, IL 60604, and whose telephone number is: (312) 353-6306.