

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 HOUSING .
AND URBAN DEVELOPMENT .
Respondent .
and . Case No. 3-CA-10256
AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
LOCAL 476, AFL-CIO .
Charging Party .
.....

Anthony J. De Marco, Esquire
For the Respondent

Ana de la Torre, Esquire
For the General Counsel

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 February 4, 1991, by American Federation of Government Employees, Local 476, AFL-CIO, (hereinafter called the Union), a Complaint and Notice of Hearing was issued by the Regional Director for Region III, Federal Labor Relations Authority, Washington, DC. The Complaint alleges that the U.S. Department of Housing and Urban Development, (hereinafter called the Respondent), violated Sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its action in refusing to furnish the Union "certain crediting plans,

including benchmarks, in it[s] Public and Indian Housing component".

A hearing was held in the captioned matter on June 13, 1991, in Washington, DC. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The General Counsel and the Respondent submitted post-hearing briefs on July 15 and 16, 1991, respectively, which have been duly considered.

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

Findings of Fact

The American Federation of Government Employees, AFL-CIO, (hereinafter called the AFGE), is the exclusive representative of a nationwide consolidated unit of Respondent's employees. The Union is an agent of AFGE for purposes of representing unit employees at Respondent's Headquarters Office located in Washington, DC.

The AFGE and the Respondent are parties to a collective bargaining agreement. The Grievance Procedure set forth in Article 22 of the collective bargaining agreement allows the Union, among other things, the right to process alleged equal employment violations through the grievance procedure. Article 19 of the collective bargaining agreement which is entitled "Equal Employment Opportunity" makes provisions for Union participation in the processing, monitoring and/or settlement of complaints dealing with alleged employment discrimination.

In the latter part of 1990, several unit employees complained to the Union about their non-selection for a number of advertised vacancy announcements in the Office of Public and Indian Housing (PIH). Inasmuch as the unit employees felt that they had been discriminated against, Ms. Barbara Davidson, President of the Union, requested Ms. Joan Ladesh, who is employed in the Office of Public and Indian Housing and who serves as the Union's Secretary and a member of the Union's Fair Practices Committee, to investigate the allegations of discrimination.

^{1/} The facts for the most part are not in dispute.

On October 11, 1990, Ms. Ladesh sent a memorandum to Mr. Theodore Ford, Director of Respondent's Employment and Classification Division, and informed him that she, in her capacity as a member of the Fair Practices Committee was evaluating the Affirmative Action Plan in PIH. She requested that Respondent make available on October 12, 1990, "all files containing the initial screening sheets and 171s of all individuals who competed" for one advertised vacancy in Public Housing and two advertised vacancies in Indian Housing. Ms. Ladesh further stated that on October 18, 1990 she would like to view all files of individuals who have competed for GS-14 positions in PIH over the past five years.

Ms. Ladesh, pursuant to her request, was given access to the merit staffing files referenced in her October 11, 1990 memorandum. However, upon review, she discovered that the "bench marks" and "crediting plans" for the vacancy announcements had been removed from the files. In response to her questions concerning the missing items, she was informed by an employee in the Employment and Classification Division that he, Marvin Lisney, had been instructed to remove the bench marks and crediting plans from the files prior to making them available to Ms. Ladesh.

On October 19, 1990, Ms. Ladesh and Ms. Davidson met with Mr. Ford and requested the bench marks and crediting plans applicable to the three vacancy announcements. Mr. Ford refused to make them available. On October 22, 1990, Ms. Davidson sent a memorandum to Mr. Ford wherein she commented on the fact that the merit staffing files made available to the Union did not contain bench marks and crediting plans and that in a meeting on October 19th that he, Mr. Ford, had informed the Union that the bench marks and crediting plans would not be available. The memorandum then went on to state as follows:

Under the previous contract, when the Union had an observer on the merit staffing panel, we always had access to the crediting plan and the bench marks. Without access to the criteria against which candidates are rated and ranked, it is impossible to adequately reconstruct the action--a right guaranteed by law and contract. The Union renews its request for access to the bench marks and crediting plans on the PIH files. If you will not allow us to review them in the context of our audit, then please provide copies of the information to us within ten days or sooner of receipt of this request in accordance with

7114(b)(4) of the Labor-Management Relations Statute.

On November 6, 1990, Mr. Matthew Raphael, Chief of Respondent's Labor Relations Branch, refused the Union's request for the bench marks and crediting plans on the ground that Respondent considered the Union's data request to amount to a "blanket disclosure of agency credit plans" which "would be contrary to the requirements of Federal Personnel Manual Supplement 355-1. Mr. Raphael further advised the Union that the Respondent would, however, consider the release of crediting plans when a request was made by the Union in conjunction with a specific grievance in which the Union was designated as representative.

According to the credited testimony of Ms. Davidson, the Union had a pending grievance on file on behalf of employee Eileen Blinick at the time that it made its request for crediting plans and the bench marks. The grievance concerned her non-selection for one of the advertised vacancies in PIH.

Mr. Ford and Ms. Carolyn Boyd, an Equal Employment Specialist, testified that one EEO complaint concerning non-selection for the vacancy announcements in question was filed on October 26, 1990. Mr. Ford further testified that to the best of his knowledge no grievances had been filed concerning the announcements.

With respect to "bench marks", Ms. Linda Hawkins, a Supervisory Management Specialist in the Office of Personnel and Training, credibly testified that a bench mark is nothing more than a job analysis. "It identifies what the knowledge, skills and the abilities are". According to Ms. Hawkins the bench marks were never removed from the files presented to the Union for examination and Respondent would gladly give the bench marks to the Union. To the extent that Mr. Raphael had stated in his November 6, 1990 memorandum that the bench marks would not be available until such time as a grievance was filed, Ms. Hawkins testified that he was in error and that unfortunately he did not understand what a bench mark consisted of. In this latter context, Respondent's Counsel made it clear at the hearing that Respondent had no objection whatsoever to making the bench marks available to the Union.

Discussion and Conclusions

The General Counsel takes the position that the Respondent violated Sections 7116(a)(1), (5) and (8) of the

Statute when it refused the Union's request to make the crediting plans and bench marks available to the Union since such material was necessary in order to investigate and evaluate potential grievances over the unit employees' non-selection for the advertised vacancies in PIH. In support of its position, the General Counsel relies, in the main, on the Authority's decisions in Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 26 FLRA 407; Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Region X, Seattle, Washington and American Federation of Government Employees, Local 3937, AFL-CIO, 39 FLRA 298; and U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania and American Federation of Government Employees, Council 33, Local No. 148, AFL-CIO, 40 FLRA 449.

Respondent, on the other hand, takes the position that it's refusal to make the crediting plans available did not constitute a violation of the Statute since, (1) disclosure is prohibited by FPM Supplement 355-1, (2) release of the crediting plans would compromise the selection process because Ms. Ladesh, who is eligible to bid on any future GS-14 vacancy, would be aware of the contents of the crediting plans and therefore could tailor her application for any announced vacancy, (3) there was no grievance pending at the time of the request for the crediting plans, and (4) the Union has not established the relevancy of the requested material.

Based upon the Authority's decision in U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, supra, and the cases cited therein, I find that the Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute when it refused to make the crediting plans available to the Union.

In U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, supra, the Union, pursuant to Section 7114(b)(4) of the Statute, requested that the Respondent furnish it with certain crediting plans for the purpose of processing a potential grievance challenging the non-selection of a bargaining unit employee for promotion. In finding that the Respondent violated the Statute by failing to make the crediting plan available the Authority specifically considered and rejected many of the identical defenses relied upon by the Respondent herein. Thus, the Authority found that the disclosure of the crediting plan

determining whether the non-selection of the complaining employees was based on inaccurate or discriminatory considerations. In such circumstances, Respondent was not required by Section 7114(b)(4) of the Statute to make the "bench marks" available to the Union. Accordingly, it will not be recommended that the Authority issue an order requiring the Respondent to make the "bench marks" available to the Union.

However, having concluded that the Respondent did violate Sections 7116(a)(1), (5) and (8) of the Statute by failing and refusing to make the crediting plans utilized to fill the announced vacancies available to the Union, it is 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 Statute, it is hereby ordered that 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 crediting plans requested by the Union in a letter dated October 22, 1990.

(b) 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 crediting plans requested by the Union in a letter dated October 22, 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

was not prohibited by FPM Supplement 355-1, that there need not be a pending grievance at the time the request is made, and that the release of the crediting plan would not create an unfair advantage or compromise the utility of the selection process since the selection had already been made. The Authority further noted that "the requests were limited to two specific selection actions and did not require the blanket disclosure of all agency credit plans". Finally, the Authority also concluded that the Union needed the credit plans in order to determine whether to file a grievance on behalf of the complaining employee. In reaching this latter conclusion the Authority stated, ". . . [that] the crediting plan is critical to a determination of whether the selection procedure was improperly conducted or whether there is a strong argument that the prospective grievant should have been chosen for the position".

Inasmuch as the facts of the instant case appear to be indistinguishable from those appearing in U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, supra, it is obvious that the conclusion set forth therein are equally applicable here.^{2/}

To the extent that Respondent contends that the General Counsel has failed to establish the relevancy of the requested information since the subsequent filing of an EEO complaint by an employee "removed any jurisdiction that the Union might have had to investigate an EEO allegation under the collective bargaining agreement," it is noted that at the time of the request for the crediting plans no such individual complaint had been filed and, that in any event, more than one employee appears to have complained to the Union about non-selection for the advertised vacancies. In such circumstances the Union would certainly need the crediting plans in order to determine the merits of the other employees' complaints.

With respect to the "bench marks" which, according to the credited testimony of Ms. Hawkins, are nothing more than a job analysis, I find that such "bench marks" were in the files made available to the Union for review. Moreover, I further find, in any event, that the record is devoid of any evidence, whatsoever, establishing that the possession of the "bench marks" is a necessary tool for purposes of

^{2/} The only difference appears to be in the number of vacancy announcements involved, i.e. three as opposed to one.

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, P.O. Box 33758, 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, September 6, 1991, Washington, DC


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 fail or refuse to furnish the American Federation of Government Employees, Local 476, AFL-CIO, the exclusive representative of a unit of our employees at the Headquarters Office in Washington, DC, the crediting plans requested by the Union in a letter dated October 22, 1990.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our 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 a letter dated October 22, 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, P.O. Box 33758, Washington, DC 20033-0758, and whose telephone number is: (202) 653-8500.