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

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF JUSTICE PROGRAMS

Respondent

and

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
LOCAL 2830, AFL-CIO

Charging Party

Case No. 3-CA-10522

Inez Alfonso-Lasso, Esq. and
Scott D. Cooper, 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 July 30, 1991, by the Regional Director for the Washington Regional Office, Federal Labor Relations Authority, a hearing was held before the undersigned on October 9, 1991 at Washington, DC.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq., (herein called the Statute). It is based on a charge filed on May 8, 1991 by the American Federation of State, County and Municipal Employees, Local 2830, AFL-CIO (herein called the Union) against U.S. Department of Justice, Office of Justice Programs (herein called the Respondent).

The Complaint alleged, in substance, that on April 26, 1991 the Union requested Respondent to furnish data in regard to any decision to contract out to a private entity any reviews or investigations of unit employees, as well as data in regard to reviews or investigations which were conducted by any private entity pursuant to Respondent's instructions. Further, that since May 3, 1991 Respondent refused to furnish the said data and to comply with 5 U.S.C. 7114(b)(4) of the Statute - all in violation of section 7116(a)(1), (5) and (8) thereof.

Respondent's Amended Answer, dated October 2, 1991, denied that the requested data (a) is normally maintained by Respondent in the regular course of business, (b) is reasonably available, (c) is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining, (d) does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining, (e) is not prohibited from disclosure by law. It also denied the commission of any unfair labor practices as alleged in the Complaint.

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. Thereafter, briefs were filed which have been duly considered.

Upon the entire record herein, 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 Union has been, and still is, the exclusive representative of an appropriate unit of Respondent's employees for the purposes of collective bargaining.

2. At all times material herein a collective bargaining agreement existed between the Justice Systems Improvement Act Agencies and the Union which covered unit employees who were employed by Respondent herein.

3. In April 1991 Stuart Smith, a public information specialist employed by Respondent and president of the Union, was contacted by another employee. The latter said

he believed management was investigating him in connection with a speech he had given in Chicago. The employee asked Smith to be his representative.

4. Smith testified that he had been under investigation by management for a long time; that he had been questioned by his supervisor regarding time spent to negotiate with the U.S. Attorney's Office for the District of Columbia where another local union was the unit employees' representative. Also, he had received a counseling letter from Respondent re a Union newsletter about 1½ to 2 years ago.

5. Further testimony by Smith reveals that he was concerned that his colleagues were being investigated; that he did not know if there were other documents pertaining to him or other Union officials during the past years; and he wanted to learn whether management was keeping track of him and the other individuals.

6. Under date of March 26, 1991 a "purchase order" was prepared by a member of the senior staff of Respondent's Assistant Attorney General's Office. (G.C. Exhibit 7). Ricardo Narvaiz, Deputy Assistant General for Respondent since February 1991, testified it was due to an attorney in the Office of the General Counsel having engaged in conduct relating to Narvaiz and the Assistant General Counsel. The order provided that the contractor[1/] "shall provide information and assistance to the Office of Personnel in the performance of an investigation of alleged misconduct." The testimony of Narvaiz reflects that management decided it was not wise or appropriate to ask the attorney's colleagues to render advice on disciplinary action; that an objective determination by them might be difficult to obtain. Further, that Respondent sought an analysis rather than a factual investigation which had been completed.

7. Narvaiz also testified that he reviewed the order and directed that it be withdrawn since it bespeaks of an investigation. He directed that the withdrawal be communicated to Federal Personnel Management Inst. (FPMI). The order, which is referred to as an offer by Respondent, was never accepted by FPMI nor were any services performed thereunder.

1/ Federal Personnel Management Inst.

8. Record facts show that there were no other orders for supplies or services re private investigations of unit employees issued in the time frame set forth herein.

9. As a result of his concerns, as aforesaid, Smith wrote a letter on April 26, 1991[2] to James Gurule, Respondent's Assistant Attorney General. He stated that it was his understanding that management had entered into an agreement or arrangement with outside persons or firms to investigate possible alleged misconduct by employees, including himself. Because he believed this violated the National Agreement and impacted Agency working conditions, Smith requested Respondent to supply the Union with the following:

a. A copy of all document(s) or record(s) involving any arrangement with any person not an employee of the Department of Justice or any public or private entity hired by or under contract with the Office of Justice Programs or other Department of Justice unit that in any way concerns current or future reviews or investigations of the conduct or activities of any Office of Justice Programs employee or employees.

b. The justification for any agreement or arrangement entered into which is covered under item a.

c. All records concerning any other type of investiation that may have been conducted into my activities at any time during the past ten years.

d. All records concerning an investigation of AFSCME Local 2830 or any other AFSCME Local 2830 official during the past five years.

e. All records concerning any investigation of Kim Rendelson during the past five years.

10. In his letter to management, Smith stated the data was needed to perform the Union's representational functions, which included the administration of the current bargaining

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2/ The parties stipulated that, although the letter (G.C. Exh. 2) is dated 1989, the correct year is 1991.

agreement, and to determine whether or not to file a grievance.

11. In a reply dated May 3, 1991[3] Gurule stated that unit employees have always been subject to investigations, which are not conducted by other unit employees; that decisions as to whether work would be done in-house or by contract are reserved to management. In response to the designated requests by the Union for documents or records, Gurule set forth as to each request the following:

a. You are not entitled to the information requested under the union agreement. Moreover, under the Freedom of Information Act, 5 U.S.C. § 552 (b)(5), documents which are deliberative and predecisional in nature are exempt from disclosure.

b. Please see the answer to request "a" above. Further, your right under 5 U.S.C. § 7114(b)(2) to request "data" refers to existing data. 5 U.S.C. § 7114(b)(2) does not require management to create additional data.

c. Please see the answer to request "a."

d. OJP examines only matters within its area of responsibility to effect appropriate discipline for specific individual OJP employees. Consequently, OJP would not investigate the union. Please reference response to question "a."

e. Please see the answer to request "a." Furthermore, as you are aware, Ms. Rendelson is no longer employed by the Office of Justice Programs.

12. Record facts show that, after the matter was researched by Narvaiz's senior staff, it was learned that no outside persons or entities were retained to conduct an investigation of its employees. Further, that no agreement or arrangement was made by Respondent with such persons or entities to conduct such investigations. Neither has any employee been investigated by the Office of Professional Responsibility in past years.

3/ Unless otherwise indicated, all dates hereinafter mentioned occur in 1991.

13. Narvaiz also testified no investigation was made of the Union or its officials, and there are no records or data in this regard. As to Smith, Respondent's official testified it was not clear whether the request pertained to Smith's official union activities while on the job or to his regular work tasks. Accordingly, no direct reply was made in respect to the request re Smith's past actions.4/

14. Under date of May 6 Union President Smith wrote Gurule rejecting the reasons given by Respondent that the information requested could not be furnished to the Union. Smith asserted that the Union claimed the right to negotiate over the impact and implementation plans to contract out investigations, and it requested negotiations thereon.5/

15. At a meeting held on May 20 the representative from management and the Union discussed general labor-management matters. While reference was made in passing to the Union's request of April 26, no formal notification was given to the Union that documents sought by the Union did not exist. Smith testified there was no discussion at this meeting re the Union's request for documents nor did management state definitely that the data did not exist.6/

16. Smith wrote Respondent on July 17, stating that the "purchase order" was never sent by management to the Union; that the latter secured it from an employee, and Respondent had not complied with the Union's request for data, which embraced more than the "purchase order".

4/ Narvaiz did testify there may be some attorney work files re a counseling session and a counseling letter. As to all personnel actions taken concerning Smith, Narvaiz stated he could not speak with certainty since his tenure has been for only one year.

5/ While his letter included a request to negotiate over the impact and implementation of plans to contract out investigations, the Complaint herein does not allege a refusal to bargain thereon. The sole allegation concerns a refusal to furnish information to the Union.

6/ Narvaiz testified he had some recollection that the Union was told otherwise at this meeting. Based on his clearer recollection, more precise and unrefuted details concerning the meeting, I credit Smith in this regard.

17. Responding to a memo from management of September 13, Smith wrote Respondent on September 16 concerning the Union's request for documents. Smith asserted that the Union sought data concerning <u>any</u> investigations conducted into his activities during the past 10 years and all records of investigations of any other Union official during the past five years. He added that the Union requested all data (notes, messages, call slips, tapes and disks, or other records) created since January 1, 1980 which referred to Smith, any AFSCME[7/] entity, any local official within the past five years, or to any union organizing activities or meetings or functions, including social functions, including reference to meetings between Department of Justice employees and union representatives. Further, Smith asked for a list of documents of which Respondent had knowledge that are not in its possession or control, albeit documents held by the FBI, etc.

18. With respect to the Union's request concerning Kim Rendelson, Respondent asked the Union to obtain a waiver from the employee regarding an infringement of her privacy. The Union agreed to do so and submitted it to management. About four weeks after Respondent's receipt of the waiver, it sent the information concerning Rendelson. This submission by Respondent was made in September.

<u>Conclusions</u>

General Counsel contends that the data sought by the Union was necessary for the Union to administer the collective bargaining agreement and decide whether to file a grievance. It is asserted that, apart from actual or potential grievances, the right to receive data under section 7114(b)(4) includes all matters necessary for full and proper discussion so as to enable the Union to carry out its representational functions. Respondent's failure to comply with the request by Smith is alleged to constitute a violation of section 7116(a)(1), (5) and (8) of the Statute.

In addition, General Counsel maintains that Respondent violated the Statute by its (a) failure to inform the Union that some of the data requested on April 26 did not exist, and (b) failure to provide data as to Kim Rendelson until

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7/ Referring to American Federation of State, County and Municipal Employees, AFL-CIO.

four months after the charge was filed and until the Union provided a Privacy Act waiver.

Section 7114(b)(4) of the Statute requires an agency to furnish a union, upon request and to the extent not prohibited by law, data which (1) is normally maintained 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.

It is well established that an agency is obliged under section 7114(b)(4)(B) to provide an exclusive representative of its employees with information which is reasonably available and necessary for the union to fulfill its representational duties. Those duties include filing and processing of grievances. Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas, 41 FLRA 137, 141 (1991); U.S. Department of Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Helena District, Helena, Montana, 39 FLRA 241 (1991). In fulfilling its representational functions, a union would also be entitled to obtain certain disciplinary and adverse actions involving employees. See U.S. Department of Transportation, Federal Aviation Administration, 40 FLRA 690 (1991).

Despite this obligation, the Authority has held that an agency cannot be called upon to furnish data which does not exist. Its failure to furnish information not in its possession does not constitute an unfair labor practice. See Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, 23 FLRA 239 (1986); Army and Air Force Exchange Service (AAFES), Lowry Air Force Base Exchange, Ft. Carson, Colorado, 13 FLRA 392 (1983).

The request for information by the Union herein involved, in substance, the following records: (1) any arrangement with non-employees or entities concerning reviews or investigations by them of activities of Respondent's employees; (2) any other investigation conducted into Smith's activities during the past ten years; (3) any investigation of Local 2830 or other Local 2830 official during the past five years; (4) any investigation of Kim Rendelson during the past five years.

(1) The predicate for this request, as set forth in Smith's letter of April 26, refers to the fact that he was alerted to Respondent's having arranged or contracted with persons or firms outside the agency to investigate alleged misconduct of Respondent's employees. Smith alluded to such arrangement as being a change in procedure, which would have a major impact upon working conditions, and which prompted the request for records of such arrangements or contracts.

It is noted that Deputy Assistant General Narvaiz testified no arrangements or agreements were made with any outside persons or entities providing for the investigation of Respondent's employees. In support thereof Narvaiz stated he directed the executive assistant and the director of the Office of Personnel to check on whether any such arrangement or agreement had been made. Further, that no files, records, or data are on hand in this respect since they do not exist. No evidence was adduced to show that Respondent did enter into an agreement with outside entities for such investigations.

Stress is laid by the General Counsel on the contract management (purchase order) dated March 25, 1991, which provided that the Federal Personnel Management Inst. furnish information to the U.S. Department of Justice, Office of Personnel in an investigation of alleged misconduct. The record reflects that this order was prepared in error; that when he learned of its preparation, Narvaiz rescinded the order. Further, no arrangement was made with Federal Personnel Management to effectuate its terms or provisions. Apart from the fact that the Union eventually obtained a copy, albeit not directly from Respondent, I do not view Respondent's failure to furnish it to the Union to be a violation of its obligations since the order never became operative. The arrangement or agreement to conduct such investigation of Respondent's employees was never consummated.

Record facts establish that Respondent did not change its practice of investigating alleged misconduct of its employees. Since no new procedure was put into effect, there were no arrangements or contracts with outside persons or entities which could be furnished the Union. Since they do not exist, Respondent could not provide this information or commit an unfair labor practice for failing to do so, and I so conclude. See U.S. Naval Supply Center, San Diego, California, 26 FLRA 324 (1987).

(2) In seeking data concerning any investigation of Smith's activities during the past ten years, the Union stated in its request that the information was necessary and relevant to the performance of its representational functions, including the administration of the current bargaining agreement. Further, it sought the data to determine whether to file a grievance.

Such objectives might entitle a union to obtain information when it becomes evident that the representative is considering action to be taken which requires, or necessitates, receiving certain data. In such instances, the conclusion is warranted that the data is necessary within the meaning of section 7114(b)(4)(B) of the Statute. However, the information sought must be sufficiently related to collective bargaining, if it be sought for such objective, so as to conclude that the data is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. See and compare Commander Naval Air Pacific, San Diego, California, et al., 41 FLRA 662 (1991). Moreover, if the information is sought to process a grievance, or consider such action, a union's bare assertion that it needs the data for that reason does not automatically oblige the agency to supply it. The obligation turns on the nature of the request and the circumstances in each case. Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New York Region, 21 FLRA 253 (1986).

Applying the foregoing principles to the instant case, and in respect to the request for any investigation by Respondent concerning Smith's activities, I am persuaded that it has not been shown that the request for records concerning investigations of Smith for ten years were necessary for the Union to fulfill its representational functions. It does not appear that Smith was either being investigated by Respondent or had been recently. No disciplinary action was being considered in regard to his activities, nor was any adverse action pending against him. Thus, no conduct toward Smith had been taken which would even prompt his filing a grievance. Moreover, no change was made by management in allowing Smith to conduct his activities that would impinge upon his representational duties. Apart from his generalization in the April 26 request, Smith gave no reason which would demonstrate that the data was necessary to fulfill

such duties.[8/] Thus, the request was more in the nature of a "fishing expedition". Accordingly, I conclude Respondent's failure to furnish any such records, if they even existed, was not violative of the Statute and did not constitute an unfair labor practice.

(3) Respondent's failure to furnish records of any investigation of Local 2830 or its officials in the past five years also does not warrant a finding of an unfair labor practice. The uncontradicted testimony of Narvaiz indicates that no such data is maintained by Respondent and does not exist. He testified that Respondent did not investigate the Union, nor were any of its officials under investigation. Apart from the non-existence of the records so requested in this instance, no evidence was adduced to show that such data, if available, was necessary within the meaning of section 7114(b)(4)(B). No steps were taken by management to make changes which might affect their representational duties so as to give rise to a grievance. Neither does it appear that any Union official, who was an employee, was the object of disciplinary action by Respondent. Under these circumstances I conclude that the data requested re the Union or its officials was not necessary for the Union to fulfill its duties as the collective bargaining representative.

(4) Although the Union acknowledges receipt of the data requested concerning employee Kim Rendelson, it contends that it was furnished four months after the charge was filed on May 7, 1991. It deems this untimely and to constitute a failure to comply with section 7114(b)(4) of the Statute.

Decisional law in the public sector does require that information, to which the bargaining agent is entitled, must be furnished in a timely manner without delay. Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 19 FLRA 790 (1985). In the case at hand the Respondent requested the Union to obtain from Rendelson a "Privacy" waiver before the data would be supplied. This request was

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8/ Nothing appears in the record to support the conclusion that this particular request bears directly on bargainable issues. See Social Security Administration, Office of Hearing and Appeals, Region II, New York, New York, 19 FLRA 328 (1985).

acceded to by the Union. About four weeks after Respondent received such waiver, it sent the requested information to the Union.

It is contended by General Counsel that the data was not furnished until four months after the charge was filed, and thus Respondent did not timely comply with the request. Accordingly, it is urged the delay was a failure to abide by the Statute so as to constitute an unfair labor practice.

While a delay of four months in supplying information to the bargaining representative may well constitute such a failure in most circumstances, I am not persuaded that Respondent may be charged with a delay of that length of time. The Union acceded to management's request for a waiver from Kim Rendelson regarding a defense or objection based on privacy. Respondent submitted the data four weeks after it received the waiver. Under such circumstances, it would seem reasonable to fix Respondent's obligation as attaching when it was in receipt of said waiver, and not from the date the charge was filed as urged by General Counsel.

In this posture, an interim of four weeks from the time when management received the waiver and the date it supplied the Rendelson data would not be so lengthy as to be untimely. Accordingly, I conclude that, under the particular circumstances surrounding this particular request, the delay was not unreasonable and Respondent did not, in this regard, fail to comply with its statutory obligation under section 7114(b)(4).

A final issue is posed as to whether Respondent failed to inform the Union that certain of the requested data did not exist. The Authority has held that it is not sufficient to merely respond to a union's request for data. An agency must notify the collective bargaining representative that it does not maintain the information which the union requested. Social Security Administration, Baltimore, Maryland and Social Security Administration Area II, Boston Region, Boston, Massachusetts, 39 FLRA 650 (1991). See also U.S. Naval Supply Center, San Diego, California, supra.

The record herein does not, in my opinion, support a conclusion that Respondent did inform the Union, upon the latter's request, that the data sought did not exist. In its response of May 3, 1991 to the initial request, Respondent set forth reasons why the data need not be furnished and

refers particularly to the Freedom of Information Act which exempts documents from disclosure. While the response states that the data must be existent, it is too equivocal to be deemed a clear explanation that the data is not maintained. Further, such response does not refer specifically to each of the enumerated items requested by the Union.

No other written or formal statement was sent by management to inform the Union of the non-existence of the information. Narvaiz testified he informed Smith on several occasions that no contract existed, and that he told the Union representative on May 20 that the latter was "barking up the wrong tree." Smith denies that was told on May 20 or on other occasions that the information sought did not exist. Based on Smith's clearer recollection of the events, as well as the failure of Narvaiz to specify the individual items which were allegedly unavailable, I find that Respondent did not advise the Union explicitly on May 20 or at other times that the information was not in existence and thus could not be supplied as requested. Accordingly, I conclude that Respondent's failure to so respond to the request as required by section 7114(b)(4) and constitutes a violation of section 7116(a)(1), (5) and (8) of the Statute.

Having concluded that the Respondent did not violate section 7116(a)(1), (5) and (8) of the Statute by failing to furnish the Union the data requested on April 26, 1991, it is recommended that the Authority dismiss the allegations in the Complaint with respect thereto.

Having concluded that Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to inform the Union that the requested data was not in existence in compliance with Respondent's obligation under section 7114(b)(4) of the Statute, it is recommended that the Authority issue the following Order:

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 Justice, Office of Justice Programs, shall:

1. Cease and desist from:

(a) Failing or refusing to inform the American Federation of State, County and Municipal Employees, Local 2830, AFL-CIO, the exclusive representative of its

employees, where appropriate, that information requested in connection with its representation of unit employees does not exist or is not reasonably available.

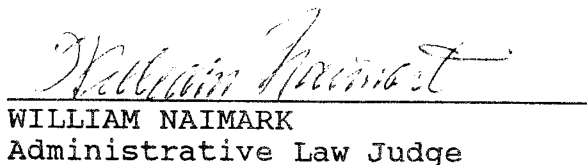
(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Post at its facilities where bargaining unit employees represented by the American Federation of State, County and Municipal Employees, Local 2830, AFL-CIO are located, 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 Assistant Attorney General of the Office of Justice Programs 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.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Regional Office, Federal Labor Relations Authority, 1111 18th Street, NW, Suite 700, 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, Washington, DC, January 17, 1992



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 inform the American Federation of State, County and Municipal Employees, Local 2830, AFL-CIO, the exclusive representative of our employees, where appropriate, that information requested in connection with our representation of unit employees does not exist or is not reasonably available.

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.

____
(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 Washington Regional Office, Federal Labor Relations Authority, 1111 18th Street, NW, Suite 700, P.O. Box 33758, Washington, DC 20033-0758, and whose telephone number is: (202) 653-8500.