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

SACRAMENTO AIR LOGISTICS CENTER, MCCLELLAN AIR FORCE BASE, CALIFORNIA Respondent	
and	Case Nos. SF-CA-20247 SF-CA-20536
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1857, AFL-CIO Charging Party	

Jennifer J. Kelly
Telin W. Ozier, Captain, USAF
Counsel for the Respondent

Stefanie Arthur
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The consolidated unfair labor practice complaint alleges that Respondent 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 Charging Party certain information requested on January 3, March 18, and April 9, 1992, pursuant to section 7114(b)(4) of the Statute, consisting of a checklist for disciplinary action/ERS disciplinary action advice form relevant to a proposed reprimand and reprimand of a bargaining unit employee.

Respondent's answer admitted the allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute. Respondent also denied that the

requested form is normally maintained in the regular course of business, is necessary, and is not prohibited from disclosure by law.

A hearing was held in Sacramento, California on September 22, 1992. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs on December 16, 1992.

On May 17, 1993 Counsel for the Respondent filed a request to reopen and rehear the case. Counsel represented that she had "recently become aware of facts which are material to the issues . . . and . . . disclosure of said facts is likely to cause the parties to alter their respective briefs. . . ." Counsel for the General Counsel responded to the request by asking that Respondent be compelled to present an offer of proof. Counsel for the General Counsel reported that Counsel for Respondent refused to reveal the alleged "facts" to her in a telephone call except to state that there was a mistake in the record and the "facts" would "inure to the benefit" of the General Counsel.

The Authority must protect the integrity of its processes and the public in general by demanding the highest standards of integrity and performance from the professionals practicing before it. Counsel have a professional obligation to be candid about matters which would affect the integrity of the Authority's processes, and I wish Counsel for the Respondent had been more forthcoming. Nevertheless, recognizing counsels' obligations in this regard, I should be able to rely on the integrity of the submissions made. Accordingly, I note that (1) there is no representation that false evidence has been offered, that counsel has made a false statement of fact or law, that fraud has been perpetrated, or that there has been a change in legal standards; (2) there is no representation that there has been a manifest error of law or fact or that the "new" facts would be of substantial or controlling effect; and (3) that it is only represented that "disclosure of said facts is likely to cause the parties to alter their respective briefs." Under these circumstances, and considering the burden on the parties and this Office of a reopening at this late date, the lack of prejudice, and considerations of economy, the requests of Counsel for Respondent and of the General Counsel are denied.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining, including employees of Respondent.

The Charging Party (Union) is an agent of AFGE for purposes of representing unit employees at Respondent. (GC Ex. 1(c)(d)).

Department of Air Force Regulation (AFR) 40-750 governs disciplinary and adverse actions. The term "disciplinary action" is defined as including the lesser actions of oral admonishments and reprimands while "adverse action" includes only the more severe actions of removals, suspensions, furloughs for 30 days or less, or reductions in grade or pay. Bargaining unit employees generally have an optional right to appeal removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 days or less to the Merit Systems Protection Board while final decisions on oral admonishments, reprimands, and suspensions for 14 days or less may only be grieved through the negotiated grievance procedure.

AFR 40-750 requires that Commanders "administer fair, impartial, consistent, and regulatory correct disciplinary and adverse action programs within their activity." Civilian personnel officers assist "commanders, managers, and supervisors to ensure that all requirements are met for disciplinary and adverse actions." Under the regulations, other offices may also be designated as points of coordination. "As a minimum, notices of final decision for adverse actions are coordinated with the office of the staff judge advocate before delivery to employees."

Section F, paragraph 34 of AFR 40-750 provides:

> **Section F - Selection of Appropriate Disciplinary Actions**
>
> **34. Penalty Selection.** The determination of which penalty to impose in a particular situation requires the application of responsible judgment to Air Force disciplinary policy. The disciplinary action taken is based on the conclusions that there is sufficient evidence available to support the reason(s) for action and that the action is warranted and reasonable in terms of the circumstances which prompted it.

a. Governing Criteria. In determining the appropriate penalty, management observes the principle of "like penalties for like offenses in like circumstances." This means that penalties will be applied as consistently as possible considering the particular circumstances of the cause for disciplinary action. It does not mean that penalties will be applied with ". . . mathematical rigidity or perfect consistency regardless of variations in circumstances or changes in prevailing regulations, standards, or mores," (*Douglas v. Veterans Administration, et al.*, MSPB Decision No. AT075299006, 10 April 1981). The penalty selected should not be disproportionate to the offense, should contribute to the solution of the problem and to the attainment of an effective management environment, and should take into consideration all relevant penalty selection factors.

b. Factors in Penalty Selection. Some of the factors that may be relevant in selecting the appropriate penalty are listed below. Not all of the factors will be relevant in every case and others may be relevant in particular cases. Selection of an appropriate penalty involves a responsible balancing of the relevant factors based on the individual case. Some of the relevant factors may weigh in the employee's favor while others may not or may even cause management to view the situation as more serious and deserving of a more severe penalty than originally thought. The factors are:

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

(2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.

(3) The employee's past disciplinary record.

(4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.

(5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties.

(6) The consistency of the penalty with those imposed upon other employees for the same or similar offenses in like or similar circumstances.

(7) The consistency of the penalty with the Guide to Disciplinary Actions . . . .

(8) The notoriety of the offense or its impact upon the reputation of the Air Force.

(9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

(10) The potential for the employee's rehabilitation.

(11) The mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

(12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

c. Penalty Support. If an action is grieved or appealed, management must be prepared to support the appropriateness of the penalty (see paragraph 12b(2)). A statement of management's reasoning as to the appropriateness of the penalty imposed must be included in the record described in paragraph 22.

. . .

22. Recording Actions. A record of actions taken under this publication is sent to the CCPO for retention. That record includes a copy of the notice of proposed action, if applicable, any answer the employee may have made (including summaries of oral answers), the notice of decision and the reasons therefore [sic], any order effecting the action, a statement of management's reasoning as to the appropriateness of the penalty imposed in disciplinary actions, and any supporting material. Supporting material is that on which management based its notice of proposed action, if applicable, and relied on to support the reasons in the notice of decision (see paragraph 27 for a discussion of the supporting material).

. . .

27. Material Relied on To Support the Action. Management assembles the material relied on to support the reason(s) for the proposed action and makes the file available to the employee. This material may include, but is not limited to, statements of witnesses, documents, investigative reports or extracts from the reports, and relevant material concerning any previous record or action relied upon as part of the basis for the current action. A copy of the supporting material may, at management's discretion, be enclosed with the notice of proposed action. If this is done, the notice includes a statement that a copy of the material is enclosed. Since all supporting material must be open to review by the employee, the employee's representative, or the employee's designated physician under 5 C.F.R. 297.204(c), material which cannot be shown to these individuals because its disclosure would violate a pledge of confidence, or because it is in some way restricted or classified, cannot be used to support reasons for the action. If management wishes to use such material, it must obtain it in a form which can be made available for the employee's review. See FPM Chapter 752, Subchapter 3.

Under AFR 40-750, the employee and his representative have the right to make an oral and/or written reply concerning the proposed discipline. After a final decision is made on the proposed action, and the final notice of discipline is issued, the employee may file a grievance, under the parties'

negotiated grievance procedure, contesting the final decision. The unresolved grievances may be submitted to arbitration.

On January 2, 1992, Rodney E. Wagner, General Foreman, NDI Operations Support Branch, TINC, issued a Notice of Proposed Reprimand to employee Leo A. Wanner for an alleged 15 minutes AWOL on November 19, 1991. (GC Ex. 2).

Matthew Lee, then the Union's TI directorate steward, represented Wanner in responding to the proposed reprimand. (Tr. 15). On January 8, 1992, Lee submitted a preliminary response to the proposal, pointing out that the proposing official, Mr. Wagner, did not participate in the events of November 19, 1991 as stated in the proposed reprimand. (GC Ex 4). On January 10, 1992, a Correction to the Notice of Proposed Reprimand issued, identifying Robert Gates, Wanner's first level supervisor, as the official involved in the events. (GC Ex. 5).

Matthew Lee later represented Wanner during an oral reply to the proposal. In his defense, Wanner and Lee contended that Wanner had not been tardy on the subject date and also, that the tardy and AWOL were based on anti-union animus (Tr. 19). Mr. Wanner was an active Union steward and the Union argued that the proposed reprimand, as well as other actions taken against Wanner, were reprisal for these protected activities (GC Ex. 12).

During the time period covered by this case, Archie Gandy was the Labor Relations Liaison for the TI Directorate at Respondent. (GC Ex. 1(c)(d)). Gandy has been designated by Respondent to handle requests for information from the Union for matters involving the TI Directorate. (Tr. 104-105).

On January 3, 1992, the Union submitted a request for information, including among other items, the "Checklist for Disciplinary Action/ERS Disciplinary Action Advice Form for the subject notice of proposed reprimand." The request stated that the "above requested data is required for full and proper understanding of [the] notice of proposed reprimanded (sic) presented to Mr. Wanner on 2 January 1992[.] In addition, the data requested is required to determine if the procedures used to propose the reprimand were in accordance with all applicable laws, rules, and regulations." The Union requested that the data be unsanitized, except for social security numbers. (GC Ex. 3).

The Checklist for Disciplinary Action and the ERS Disciplinary Action Advice Form are two different names for substantially the same document used by Respondent in previous

years from about 1988 to 1991. (Tr. 20; GC Exs. 7, 8, 9). The form, under either name, required basic summary information concerning the proposed or final decision, such as the names of the proposing and deciding officials, the dates of the offense, and of procedural actions, the range of penalties allowed by AFR 40-750, and it required written consideration by the proposing and deciding officials of the factors to be used in selecting the appropriate penalty as set forth in AFR 40-750.

The form was prepared by the proposing official and the deciding official with guidance from the Employee Relations Specialist (ERS), at the time the officials issued their respective action. It was placed in the record compiled under paragraphs 22 and 27 of AFR 40-750 as a "statement of management's reasoning as to the appropriateness of the penalty imposed" (Tr. 62-63, 78) and was provided to the employee's Union representative when the representative requested the material relied on to support the action under paragraph 27 of AFR 40-750 (Tr. 21-23).

By letter dated January 23, 1992, Archie Gandy refused to provide the requested checklist for disciplinary action on the grounds that it was an attorney work product and not for release. (GC Ex. 6).

On March 13, 1992, Billie D. Shaw, Chief, Mag Penetrant/Ultrasonic Branch issued the Decision to Reprimand Leo Wanner for an AWOL on November 19, 1991. (GC Ex. 10).

In preparation for filing a grievance over the reprimand, on March 18, 1992, the Union requested, among other items, that Respondent provide the disciplinary advice form for the Decision to Reprimand. This data was again requested for "full and proper understanding of the decision to reprimand" and to "determine if procedures used to substantiate the decision to reprimand were in accordance with all applicable laws, rules, and regulations." The data was again requested in unsanitized form. (GC Ex. 11).

On April 7, 1992, a grievance was filed over the reprimand alleging, as the Union had argued earlier, that Wanner was not tardy and that the decision to reprimand was based on anti-union animus. (GC Ex. 12; Tr. 32).

By letter dated April 2, 1992, Arthur L. Bryant, Acting TI Labor-Management Liaison, informed the Union that the "Checklist for Disciplinary Action/ERS Disciplinary Action Advice Form for the Decision to Reprimand" was "no longer used. Therefore, it is not available." (GC Ex. 13).

In light of this reply, on April 9, 1992, the Union submitted another request in which it asked for "The form(s) used in lieu of the Checklist for Disciplinary Action/ERS Disciplinary Action Advice Form." The Union again requested the information for the same reasons and in an unsanitized format. (GC Ex. 14).

By letter dated April 15, 1992, Archie Gandy informed the Union that "whatever form may exist, if any" as a replacement for the disciplinary advice form "would be an internal management document not used for the purpose of processing a grievance. The union is not entitled to internal management documents." (GC Ex. 15).

By letter dated April 17, 1992, Lee disputed Gandy's assertion that the replacement disciplinary action form, if any, was an internal management document protected under section 7114(b)(4)(C) or that it was protected as an attorney work product and again requested the data. (GC Ex. 16).

Lee requested the disciplinary advice form relative to Wanner's proposed reprimand and the final decision because the form contained the proposing and deciding officials' rationale for their respective decisions prepared at the time of each decision. (Tr. 27). Lee requested the form in order to review management's responses to the various factors enumerated on the form. Lee hoped this would assist the Union in determining how to proceed in its representation of Wanner. Specifically, Lee had reason to believe that there was serious conflict between Wanner, his supervisor Gates, and some of his co-workers because of Wanner's Union activities. Lee wanted to see whether the proposing official[1/] and/or deciding official had considered these conflicts and/or whether there were differences between the proposing and deciding officials' considerations. In particular, Item D under "Penalty Selection" requires the proposing and deciding officials to comment on Wanner's "performance on the job, working relationship with co-employees, and dependability - reliability," and Item J requests a review and description of "unusual job tensions . . . harassment, bad faith, malice, or provocation of others." The comments provided in response to these items may have discussed Wanner's conflicts with his supervisor and co-workers in relation to his protected activities. (Tr. 40-41).

1/ Although the proposal was actually signed by Rodney Wagner, the proposing official, whose considerations would be reflected on the form, was Wanner's supervisor, Robert Gates. (GC Ex. 5).

While Gandy's correspondence to the Union implied that the disciplinary action form had been replaced by another form, Respondent did not inform the Union that the replacement document was called a "Disciplinary Litigation Advice" form. (GC Ex. 15).

The Disciplinary Litigation Advice form was created by Captain Telin W. Ozier, Chief of Respondent's Labor Law Division, to replace the previous ERS Checklist for Disciplinary Action. Captain Ozier decided that the form was only needed for purposes of litigation when an employee appeals the disciplinary action, such as in a grievance, or to the Merit Systems Protection Board or the courts. She requested that the form be completed in all cases of proposed discipline. (Tr. 63-64, 98).

Although somewhat different in format, the Disciplinary Litigation Advice form is virtually identical to the previous disciplinary advice forms. (R Ex. 1). (A copy of the form is attached as Attachment 1.) One apparent difference, other than the name of the document, is the statement placed at the top of the form, as follows:

> This document is an attorney work product; prepared at the advice of and under the guidance of the Office of the Staff Judge Advocate and in direct or indirect anticipation of litigation. It is not for release or transfer outside the Air Force without the specific approval of the originator or higher authority. It is not subject to release or discovery under P.L. 93-502 (5 USC 552).

The form also calls for a list of potential witnesses, and there is a new single line "SL Referral: YES___ or NO___" at the bottom of the first page.[2/] (Compare GC Exs. 7, 8, 9 with R Ex. 1). The majority of the litigation advice form consists of the same factors, enumerated in AFR 40-750, Section F, which are to considered and described by the proposing and deciding officials relative to their respective decisions. (Jt Ex. 1). The new form also calls for the

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2/ The "SL Referral" question would elicit whether a referral had been made to the Social Actions Office which assists in finding rehabilitative services for employees having problems due to stress, alcohol, drug abuse, or other matters. Air Force Regulation 40-742 generally requires that information and records on clients who are, or were, receiving rehabilative services be kept confidential. (Tr. 75; R Ex. 2).

proposing and deciding official to "offer any other opinions you may have on the subject."

The ERS provides assistance and guidance to supervisors relative to the issuance of disciplinary actions. Prior to the preparation of any proposal, and before the final decision issues, the ERS reviews the alternatives to discipline and the propriety of the management action with the proposing or deciding official. Once a determination has been made to propose or impose discipline, the ERS insures that the AFR 40-750 factors are considered and the appropriate penalty is selected. As part of this process, the ERS ensures that the litigation advice form is completed in every case. (Tr. 94, 95, 101).

The Disciplinary Litigation Advice form is completed in the same manner as the previous forms. Both the proposing and deciding officials' considerations are recorded at the time of each action. The entire form may be completed by the ERS or the officials may complete the penalty selection questions themselves. In either event, the form contains a contemporaneous statement of each official's considerations in proposing or issuing the discipline. (Tr. 67, 72, 83-86, 95-97).

After it is completed, the litigation advice form is maintained by the ERS in a separate file in the civilian personnel office. This form is now kept separate from the disciplinary case file that goes through the coordination process and is kept separate from the employee's official personnel folder. The form is not used, as were the former forms, as a "statement of management reasoning as to the appropriateness of the penalty imposed" under paragraphs 22 and 27 of AFR 40-750. Instead, "a blurb," presumably a very short statement of the reasoning, is substituted instead. (Tr. 78).[3/] If a grievance or MSPB appeal is filed, the form is then forwarded to the Staff Judge Advocate along with the entire disciplinary action file. If no appeal is taken from the discipline, the form is eventually discarded. (Tr. 71, 98-99).

A Disciplinary Litigation Action form was prepared by Respondent relative to the proposal and final decision to reprimand Leo Wanner. (Tr. 82, 99). Respondent has never provided the Union with that Disciplinary Litigation Advice form. (Tr. 38-39).

3/ Respondent does not argue that this "blurb" would fulfill the Union's information request or need.

Captain Ozier testified that the Union did not articulate a particularized need for the data, and the information sought by the Union in the Disciplinary Litigation Advice form is otherwise available to the Union. She said the Union could write a letter to the proposing and deciding officials seeking their rationale for their decisions. (Tr. 68-69, 80). Captain Ozier testified that disclosure of the form itself would have a chilling effect on the disciplinary process because supervisors would not be as forthcoming with the information if they knew it would be made available to the Union upon request. She claimed that, if ordered to release it to the Union, she would advise that the form no longer be used. Therefore, supervisors would not be able to refresh their recollection and remember what they considered concerning the AFR 40-750 factors. (Tr. 68-70).

Discussion and Conclusions

Under section 7114(a) of the Statute, a labor organization which has been accorded exclusive recognition is entitled to "act for, and negotiate collective bargaining agreements" covering all employees in the unit. Section 7114(b)(4) of the Statute provides that an agency shall, upon request, furnish the exclusive representative, to the extent not prohibited by law, data which is normally maintained in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

Respondent admits that the information requested does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. (GC Ex. 1(c), par. 16).

Whether Data Is Prohibited By Law From Disclosure

1. Attorney Work Product

Respondent claims that the Disciplinary Litigation Advice form is an attorney work product and its disclosure is prohibited by law under the guidelines provided by Hickman v. Taylor, 329 U.S. 495 (1947) and United States v. Noble, 422 U.S. 225 (1975). The attorney work product privilege protects material prepared by attorneys and their agents in contemplation of litigation. Respondent argues that (1) the form was developed in anticipation of, and as a prepatory document for, litigation for use by the JAG Office attorneys,

(2) the employee relations specialist acts as an agent of the JAG attorney in interviewing and documenting on the form the thoughts of potential witnesses, and (3) the form is used to capture both the thoughts and opinions, as well as the basis, of the decisions of the proposing and deciding officials because of the likelihood that they will be witnesses if litigation arises.

I agree with Counsel for the General Counsel that the form is not privileged from disclosure as an attorney work product. While the form would be used by the JAG attorney as the basic reference document to prepare a case for litigation, the genesis of the document was not the contemplation of ligation. Previous versions of the form, containing essentially the same information sought here, were placed in disciplinary records consistent with the Regulation and provided to the Union upon request. The record shows that the form is prepared in the ordinary course of the Respondent's business in every case of disciplinary action. While AFR 40-750 does not require a form, Respondent's procedure complies with Section F, paragraph 34.b. of the Regulations which requires "a responsible balancing of the relevant factors based on the individual case" to select the appropriate penalty regardless of whether that action results in litigation.

The employee relations specialist makes sure that the form is completed by the supervisors in every disciplinary action. The specialist acts not strictly as an agent or "law clerk" of the JAG Office, as contended by Respondent, but as part of his or her primary job function to provide advice and direction to proposing and deciding officials and ensure that all requirements for disciplinary actions are met. There is no evidence that the employee relations specialist is supervised by an attorney.

The form does not set forth the attorney or agent's theory of the case or his litigation strategy. As relevant here, it merely explains the proposing and deciding officials' reasoning for selecting the appropriate penalty as required by AFR 40-750. Such communications, made after the decisions and designed to explain them, are not privileged. Cf. N.L.R.B. v. Sears, Roebuck & Co., 95 S. Ct. 1504, 1517 (1975). Section F, paragraph 34.c. of AFR 40-750 requires that "a statement of management's reasoning as to the appropriateness of the penalty imposed" be included in the record of such action, and paragraph 27 requires that supporting material, including statements of witnesses, be made available to the employee. The Regulation goes on to state that "material which cannot be shown to these individuals because its disclosure would

violate a pledge of confidence, or because it is in some way restricted or classified, cannot be used to support reasons for the action." An agency is bound by its own regulations. Vitarelli v. Seaton, 359 U.S. 535, 547 (1959).

The Union had a substantial need for the form. See Fed. R. Civ. P. 26(b)(3). It would provide the Union a fair opportunity on behalf of the employee to consider and possibly respond to the alleged factors considered by the proposing official before the agency's deciding official and, in processing a grievance, the Union could consider and possibly contest the weight given to those factors in the agency's final decision.

Respondent contends that the Union could secure the information by directly contacting the proposing and deciding officials and asking them the basis for their actions. This would not provide the substantial equivalent of the material sought as it would require the Union to rely upon the after-the-fact recitations of persons whose memories may have faded, or who may have a reason to dissemble or fabricate. The Union is not seeking such after-the-fact explanations. It wants the rationale for the penalty selected which was given by the supervisors at the time the discipline was proposed and issued.

AFR 40-750, consistent with 5 C.F.R. § 297.204(c), contemplates that all material used to support the disciplinary action will be made available to the employee and his or her representative. Therefore, I do not see how disclosure of this form, concerning the factors considered by supervisors in the selection of a penalty, could have a chilling effect on the disciplinary process as urged by Respondent. Indeed, one observer, commenting on key points from a recent MSPB decision, Horn v. Postal Service, CH 075292055711 (March 10, 1993), stated, "[T]he best practice is to inform the appellant of the Douglas factors relied on by both the proposing and the deciding officials. That way, the appellant cannot claim he was not on notice of all the factors relied on by the agency in the case." Update, FPMI Communications, Inc. (May 1993), 12.

2. Disclosure of Social Action Referral

As noted, the Disciplinary Litigation Advice form contains a line titled "SL Referral: Yes___ or No___." Respondent claims that, since the Union requested the data in an unsanitized form, the disclosure of whether or not an employee has been referred to Social Actions (SL) is

prohibited under the confidentiality requirements of that program and the Freedom of Information Act, 5 U.S.C. § 522a.

As Counsel for the General Counsel points out, Respondent had no reason to conclude that the Union's request encompassed the question regarding SL referral. The Union had never seen the new form and was basing its request for the document on the information included in previous versions which did not contain any question concerning referral to Social Actions.

Under these circumstances, Respondent was obligated to indicate to the Union that it was refusing to provide the document because the Union requested unsanitized information, the reason for its position in light of the revised form, and offer to provide the necessary information in sanitized form with the SL referral question excised. See U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, 46 FLRA 1526, 1578 (1993) (Justice).

Since the Union was not seeking information concerning whether or not the employee had been referred to Social Actions, and this question and answer could be excised, it is not necessary to decide in this case whether disclosure of an answer to the SL referral question would be prohibited by law within the meaning of section 7114(b)(4). Justice, 46 FLRA at 1577.

Normally Maintained

Respondent contends that the Disciplinary Litigation Advice form is not "normally maintained by the agency in the regular course of business" because it is kept out of the flow of the normal course of business. Respondent points out that the form does not accompany the disciplinary case file through the coordination process, is not a part of the employee's official personnel folder, and is maintained in a separate file in the Personnel Office. If there is no litigation the document is destroyed. If there is, the document is sent to the JAG Office for its use.

In determining whether information is normally maintained by an agency, the Authority examines whether the information is within the control of the agency. Justice, 46 FLRA at 1537. The Disciplinary Litigation Advice form is clearly within the control of the Respondent. It is at all times within the control of either Respondent's Personnel Office or the JAG Office.

The facts also demonstrate that it is normally maintained by the agency in the regular course of business. The form is prepared in every disciplinary case and is maintained in a file in the Personnel Office until the time for appeals has expired or it is transferred to the JAG Office for its use in the appeals process.

Reasonably Available

In determining whether information is reasonably available to an agency, the Authority determines whether the information is accessible or obtainable through means which are not extreme or excessive. Justice, 46 FLRA at 1537. Aside from claiming that the form is not "legally available" to the Union, Respondent does not argue that the form is not otherwise "reasonably available" to the Respondent as determined by the Authority. As the form is readily available to Respondent from either the Personnel Office or the JAG Office, it is "reasonably available" within the meaning of section 7114(b)(4).

Necessary

The Union requested the form by its former names. When the Union was informed that documents by those names were no longer used, the Union specifically requested the document used in lieu of the previously named disciplinary advice forms. It is apparent from Respondent's responses that the requests were adequate and that Respondent knew which document the Union sought and the purposes for which they were sought. Respondent did not seek any clarification of the requests.

The Union's request of January 3, 1992 was relevant to the proposed reprimand of January 2, 1992, and the Union's requests of March 18 and April 9, 1992 were relevant to the reprimand of March 13, 1992 for an alleged AWOL on November 19, 1991. In each the Union representative stated that the information was being sought for "full and proper understanding" of the proposed or decision to reprimand and that the data was requested for "full and proper understanding of the [proposal or] decision to reprimand" and to "determine if the procedures used to substantiate the [proposal or] decision to reprimand were in accordance with all applicable laws, rules, and regulations."

The Union contended that the employee had not been AWOL as alleged and that the action against him was motivated by Union animus of the supervisor, Robert Gates, and by other unlawful considerations. The Union representative had reason to believe that there was a serious conflict between the

employee and his supervisor and coworkers because of the employee's protected activities. Certain portions of the form calling for the supervisor's consideration of the employee's working relationships, unusual job tensions, harassment, bad faith, and malice or provocation by others could have shown what consideration, if any, was given by the supervisors to the employee's protected activities in relation to these factors and the selection of the appropriate punishment.

That the justification offered by the supervisor in proposing the discipline, or by the deciding official in sustaining the reprimand, would be useful to the Union in representing Wanner, should have been, and in fact was, readily apparent to Respondent. As Respondent's co-counsel stated at the hearing, "[W]e would all probably understand what they're interested in is . . . what the supervisor had to say with regards to the Douglas factors." (Tr. 106).

The evidence demonstrates that the litigation advice form, insofar as it discusses the penalty selection factors, would have assisted the Union in evaluating the strengths and weakness of Wanner's position relative to the proposed or final reprimand; in preparing a response to the proposed reprimand; and in processing the later grievance. Thus, such information was necessary within the meaning of section 7114(b)(4) as interpreted by the Authority. Justice, 46 FLRA at 1535-36; 1574-75. See Pension Benefit Guaranty Corporation, 47 FLRA 595 (1993) (In determining whether an employee was subject to disparate treatment, it is appropriate to examine the extent to which the agency consistently relied on the Douglas elements when imposing adverse or disciplinary actions.)

The General Counsel does not contend, and the evidence does not show, that the rest of the information on page one of the form after "Governing Rules/Regulations," setting forth the names of potential witnesses, procedural dates, etc., is necessary. Therefore, it is concluded that the document may be furnished in a sanitized form. Any disputes over sanitization should be resolved in compliance proceedings. Justice, 46 FLRA at 1536, 1576-77.

The Respondent cites National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (NLRB v. FLRA) and Department of the Air Force, Scott Air Force Base v. FLRA 956 F.2d 1223 (D.C. Cir. 1992) (Scott AFB) in support of its argument that the requested information is not necessary. In NLRB v. FLRA the court concluded that an agency need not disclose certain requested information to a union unless the union has a "'particularized need' for such information." Id.

at 534. The court also held that the Statute requires the Authority to consider "countervailing interests" against disclosure. Id. at 531. Subsequently, the court issued its decision in Department of the Air Force, Scott Air Force Base v. FLRA, 956 F.2d 1223 (D.C. Cir. 1992) (Scott AFB), where, based on NLRB v. FLRA, the court determined that the Authority ordered disclosure of certain requested information "without adequately explaining the 'necessity' of the requested information" under section 7114(b)(4) of the Statute. Scott AFB, 956 F.2d at 114. The court held that the Authority had failed to consider the "countervailing interests against disclosure." Id.

The Authority has not to date addressed the merits of these decisions or determined the extent to which they apply to cases such as this. Nevertheless, the Authority has, in at least two cases, applied NLRA v. FLRA to find that the requested information was necessary even under that decision. See Justice, 46 FLRA at 1536-37 and U.S. Department of Transportation, Washington, D.C., 47 FLRA 110, 121-23 (1993).

The General Counsel argues that the information "would have been useful to the union" and is, therefore, "necessary" under Authority decisions to date. The General Counsel has not offered an alternative analysis under NLRB v. FLRA. (General Counsel's Brief at 11).

Respondent claims that the Union merely regurgitated the words of the Statute and did not articulate a particularized need; that disclosure would have a chilling effect on the disciplinary process as proposing and deciding officials would not be as candid in their statements; that Respondent must protect confidential employee information relating to Social Action referrals in the document; that the document is protected as an attorney work product; the information is otherwise available to the Union by writing a letter to the supervisors asking the same questions; and a proposal of discipline is not grievable.

The Union's need for the information and the Respondent's countervailing interests have been discussed above and in connection with the discussion of whether the form was privileged from disclosure as an attorney work product. I conclude that even if the Authority were to apply NLRB v. FLRA and Scott AFB to the circumstances of this case, those decisions would not preclude a determination that the requested information is necessary within the meaning of section 7114(b)(4) of the Statute.

Failure To Comply With Section 7114(b)(4)

Respondent was required by section 7114(b)(4) of the Statute to furnish the Union in a sanitized form, as set forth above, the Disciplinary Litigation Advice form prepared by Respondent relative to the proposed and final decision to reprimand Leo Wanner. The failure of Respondent to furnish the information violated section 7116(a)(1), (5) and (8) of the Statute, as alleged.

The fact that the form may be furnished in a sanitized manner does not relieve the Respondent of its violation of the Statute. Respondent refused to provide the Union with the requested information and did not indicate to the Union that it was refusing to do so because the Union requested unsanitized information nor did it ever offer to provide the information in any form. Justice, 46 FLRA at 1578.

Based on the foregoing findings and conclusions, it is recommended that the Authority issued 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 Sacramento Air Logistics Center, McClellan Air Force Base, California, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 1857, AFL-CIO (Union), the agent of the exclusive representative of certain of its employees, with data requested on January 3, March 18, and April 9, 1992 consisting of a Disciplinary Litigation Advice form in a sanitized form.

(b) In any like or related manner, failing or refusing to furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

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

(a) Furnish the Union with data requested on January 3, March 18, and April 9, 1992 consisting of a Disciplinary Litigation Advice form in a sanitized form.

(b) Otherwise furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

(c) 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 Commander 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.

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

Issued, June 14, 1993, Washington, DC

GARVIN LEE OLIVER
Administrative Law Judge

ATTACHMENTS

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 NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 1857, AFL-CIO (Union), the agent of the exclusive representative of certain of our employees, with data requested on January 3, March 18, and April 9, 1992 consisting of a Disciplinary Litigation Advice form in a sanitized form.

WE WILL NOT in any like or related manner, fail or refuse to furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

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

WE WILL furnish the Union with data requested on January 3, March 18, and April 9, 1992 consisting of a Disciplinary Litigation Advice form in a sanitized form.

_____
(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, San Francisco Region, 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 744-4000.

Disciplinary Litigation Advice

This document is an attorney work product; prepared at the advice of and under the guidance of the Office of the Staff Judge Advocate and in direct or indirect anticipation of litigation. It is not for release or transfer outside the Air Force without the specific approval of the originator or higher authority. It is not subject to release or discovery under P.L. 93-502 (5 USC 552).

Attorney: _____

EMPLOYEE NAME: _____ Type of Appt: _____

Title, Series, Grade, Orgn:

_____

Proposed Official: _____ Deciding Official: _____
Title/Orgn: _____ Title/Orgn: _____
Telephone Extension: _____ Telephone Extension: _____

Nature of the Offense Alleged: _____

_____

Governing Rules/Regulations: _____

Potential Witnesses:

NAME	POSITION	TELEPHONE EXT.
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Any Memoranda or reports prepared? (If so, please identify) _____

Date(s) of offense(s) _____

Date Discovered: _____

Range of Penalties (AFR 40-750, Attach 3): _____

Date of Proposed, Method of Delivery: _____

Date and Method of Delivery: _____

Date of method of Reply: _____

Date of Decision, Method of Delivery: _____

# of Days between offense/discovery and proposal: _____

# of Days between proposal and decision:

SL Referral: YES_____ or NO_____ 1253

PENALTY SELECTION (Reference AFR 40-750, Section F, and Attchs 3-4)
(Review required under Douglas v. Veterans Administration.)

A. Describe the nature of seriousness of the offense(s), the relationship to the employee's position and responsibilities, including whether the offense was intentional or inadvertent or technical, or was committed maliciously and/or for gain, or was frequently repeated:

B. Cite review of the employee's job level and type of employment, including whether the position is one which is supervisory or fiduciary; consider the contacts the employee has with the public, and the prominence of the employee's position:

C. Describe the nature of past disciplinary actions (if any) and cite the dates of such actions:
(If none, so state.)

D. Review and describe the employee's past work record, including the length of the employee's service, performance on the job, working relationship with co-employees, and dependability/reliability:

E. Describe the effect of the offense upon the employee's ability to perform at a satisfactory level and the effect, if any, upon the supervisor's confidence in the employee's ability to perform assigned duties:

F. Is the penalty proposed or imposed consistent with any proposed or imposed for other employees for the same or similar offenses in like or similar circumstances ?

G. Is the penalty consistent with the Guide to Disciplinary Actions ?

H. Specifically describe the manner or method by which the employee was on notice of any rules or regulations which are alleged to have been violated:

I. Does the employee have potential for rehabilitation ? Why or why not ?

J. Review and describe any mitigating circumstances surrounding the offense such as unusual job tensions, personal problems, mental impairments, harassment, bad faith, malice, or provocation of others:

K. Describe consideration given to alternative sanctions and their effectiveness to deter such conduct in the future, by both the employee and others:

L. Does this action comply with present Air Force Policy ? _____

M. Is this action constructive ? _____

N. Offer any other opinions you may have on the subject:

Date sent to SM-ALC/JA: _____ _____

INITIALS:

ERS: _____ Proposing Official: _____ Deciding Official: _____