Office of Administrative Law Judges

FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FORT DIX, NEW JERSEY
Respondent

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2001
Charging Party

Case No. BN-CA-06-0188

David J. Mithen
Philip T. Roberts
For the General Counsel

Ly T. Nguyen
Kenneth Hyle
For the Respondent

Michael S. Smith
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

On February 22, 2006, the American Federation of Government Employees, Local 2001 (the Union or Charging Party) filed an unfair labor practice charge against the Federal Bureau of Prisons, Federal Correctional Institution, Fort Dix, New Jersey (the Agency or Respondent). After an investigation, the Director of the Washington, D.C. Regional Office of the Authority issued an unfair labor practice complaint on July 12, 2006, alleging that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with the crediting plan used to score the narrative responses of applicants for a promotion. The Respondent filed a timely answer to the complaint, admitting that it had refused to furnish the requested information to the Union but denying that it was obligated to do so.

A hearing in this matter was held in Philadelphia, Pennsylvania, on September 14, 2006, at which all parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

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 Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. The American Federation of Government Employees, Council of Prison Locals, AFL-CIO (AFGE), a labor organization within the meaning of section 7103(a)(4) of the Statute, is the exclusive representative of a nationwide bargaining unit of certain classes of employees of the Federal Bureau of Prisons (BOP). The Charging Party is an agent of AFGE for the purpose of representing employees at the Federal Correctional Institution at Fort Dix (FCI). At all relevant times, AFGE and BOP have been parties to a nationwide collective bargaining agreement (CBA) that contains a negotiated grievance procedure.

The Agency has published its Human Resource Manual as Program Statement (or PS) 3000.02, and a portion of that manual pertaining to merit promotions is Resp. Ex. 1. That document, as well as testimony, reflects that applicants for merit promotions are rated by a two-member panel consisting of non-bargaining unit members (usually a supervisor and a human resource representative). Applicants submit an application form, a copy of their most recent performance appraisal, and Supplemental Application Forms (SAFs) on which they have composed narrative explanations of how they feel they meet each of the job elements for the vacant position. [1] Tr. 31-32, 104-05. Each member of the rating panel evaluates each applicant's experience, education and narrative responses and gives the applicants a score (from 0 to 5) for each job element. [2] The combined scores from the raters represent one part of the applicant's total score; the applicants also receive points based on their most recent performance appraisal and on

1. These elements are also known as Knowledge, Skills and Abilities, or KSAs.

2. If the ratings for an applicant differ by more than 2 points for any individual job element, the panel members are supposed to discuss the matter and adjust their scores to reduce the discrepancy. Tr. 107; Resp. Ex. 1 at page 35.

the number of awards they have received in the last five years. Tr. 108; Resp. Ex. 1 and 2. Those applicants scoring in the upper half of the applicant pool are then placed on a "best qualified" or BQ list, [3] which is forwarded to the Warden, who makes the promotion selections. Tr. 115-16. The Warden may select any applicant on the BQ list for promotion, as well as anyone who qualified for the position noncompetitively. Tr. 115-16, 124; Resp. Ex. 1 at page 37.

One tool used by the members of a rating panel is the crediting plan, which is designed specially for each position. PS 3000.02, at page 35, describes the use of a crediting plan in this way:

> Each member of the rating panel will consider how well the applicant's experience, as described in the job elements, has prepared the candidate for the position to be filled. The score for experience is the total number of points awarded by application of the crediting plan.
>
> The raters will review the SAFs of each qualified applicant and use the crediting plan to determine a rating for each element. . . Credit must be given to the highest level possible, based on any single accomplishment that satisfies the level definition. The task examples provided under each level definition serve as a point of reference when crediting an applicant's experience, education, and training.
>
> These examples are only to be used as benchmarks; an applicant is not required to satisfy any specific example but must demonstrate training or experience which satisfies the level definition. If an applicant fails to satisfy the "Barely Acceptable" level of an element or fails to submit the SAF for an element, a score of zero (0) will be assigned.

Witnesses described the crediting plan as:

> . . . a guide, so that the KSAs are scored less subjectively and more objectively. . . . it'll address key points of experience, key words that are in there. It will actually say if you have so many items of experience, then you may deserve a higher score. If you have fewer items of experience, then you'll get a lower score. And it actually will tell you this is what's five points, if the person says this, this, this and this. Four points if the person says this, this, this or this. So on and so forth down.

Tr. 36; see also similar testimony at Tr. 106-07, 166-67.

Michael Smith, a GS-11 education specialist at the FCI, has been a steward for the Union since 2004. In February of 2005, Smith filed a grievance on behalf of an employee, Brian Kokotajlo, who had applied for a Material Handler Supervisor position and was rated "unqualified." G.C. Ex. 2. This was, in fact, the first time Smith had handled a promotion case as a steward. Tr. 37. According to Smith, he made an appointment with Jack Jenkins, the Agency's Employee Services Manager, [4] to review all of the documents collected by the Agency in relation to the vacancy announcement, and he reviewed those documents on February 9 in the Employee Services office. [5] On viewing Kokotajlo's narrative responses for the job elements of the position, Smith noticed that Kokotajlo had received 0 points for two different elements, despite the fact that his narrative responses appeared to reflect considerable experience in those areas. Tr. 37. Smith asked Jenkins about this apparent discrepancy, and Jenkins showed him the crediting plan that the raters on the promotion board had used to score the applications. [6] *Id*. By comparing the crediting plan to Kokotajlo's KSA narratives, Smith could see that Kokotajlo had cited things which should (in Smith's view) have accorded him points from the raters. He mentioned these factors to Jenkins, but Jenkins would not change Kokotajlo's scores. However, a few weeks later, the Agency offered to settle the grievance by giving Kokotajlo the Material Handler Supervisor position. Tr. 40-42.

In November of 2005, a promotion board was conducted, pursuant to Vacancy Announcement 05-DIX-025, to consider applications for GS-8 Senior Officer Specialist positions. Two GS-7 correctional officers, Michael Tay and Kyle Clark, who were among those not selected for promotion, consulted the Union separately about their situations. Subsequently, Smith sent an information request dated December 15, 2005, to Ms. Dynan, who was now the Employee Services Manager. G.C. Ex. 4. The Union sought essentially all documents from the promotion board file, as well as applicable regulations and "[t]he 'Crediting Plan' used

3. The method of determining the best qualified list is described somewhat differently in PS 3000.02 at pages 36-37, but the discrepancy is not material to this case.

4. The Employee Service Manager in late 2004 was Jack Jenkins, but since early 2005 this position has been held by Christine Dynan.

5. According to the standing practice between the Agency and the Union, Union representatives are not permitted to copy any of these promotion documents or to remove them from the Agency's offices.

6. Smith testified that until this meeting, he did not even know what a crediting plan was. Tr. 37.

to score the candidates [sic] KSA's." *Id*. at 3-4. The letter indicated that the Union was investigating "the possible introduction of inadmissable criteria being used to select and/or not select this past group of GS-8 candidates." *Id*. at 1. It further stated that the Union needed the requested information "to provide adequate and effective representation for Officers Tay and Clark" and "to determine if the Agency acted in accordance with all applicable laws and regulations in their conduct of a proper merit system promotion board review." *Id*. The letter requested that the information be delivered to Smith at the FCI.

On December 28, 2005, Dynan responded to the information request, denying some of the items sought and referring the Union to information on the Agency's website. G.C. Ex. 5. She refused to provide the Union with the crediting plan for the position, asserting that this document may be seen only by members of the rating panel. She further indicated that an applicant's representative is entitled to examine the entire promotion file but must maintain the confidentiality of that information, and she invited Smith to make an appointment to review the file. *Id*.

On January 19, 2006, Smith and another steward, Derek Smaw, went to the Employee Services office in person and were allowed to view the complete file relating to the recent GS-8 promotion board, but they were not allowed to see the crediting plan. Employees Tay and Clark did not accompany the Union stewards. Tr. 51. On reviewing Tay and Clark's narrative responses regarding the elements of the job, Smith said that he found their scores to be "unusually low . . . deserving of more points." Tr. 48. He therefore spoke first to Paulette Savage (an assistant in the Employee Services office) and then to Dynan, emphasizing to them that he needed to compare the narrative responses to the crediting plan in order to "determine if the KSAs were scored properly." Tr. 49-50. He told them that the Union did not want to take the crediting plan out of the office or make copies of it, but that they only wanted to look at the document. Tr. 49, 51. However, Dynan and Savage continued to refuse to allow the Union stewards to see the crediting plan.

After the Union's review of the promotion file on January 19, the parties continued to discuss their respective positions concerning disclosure of the crediting plan, but neither party's position changed substantively. Smith sent an email to Dynan later that same day, asserting that "[l]ogic and reasoning dictates that my ability to represent bargaining unit staff with regard to promotions boards is nullified and rendered moot without full disclosure of the entirety of the board." G.C. Ex. 6. Dynan responded a few days later, citing portions of the Human Resource Manual to the effect that only non-bargaining unit personnel may serve as raters, and that crediting plans are restricted to rating officials only. G.C. Ex. 7. Smith countered on January 24 that the Human Resource Manual gave the Union the right to view "the entire promotion file", and that it did not expressly prohibit Union representatives from seeing crediting plans in the performance of their representative functions. G.C. Ex. 8.

Smith followed up on January 31 with a second formal information request. G.C. Ex. 9. This second request was essentially identical to the first, asking for the same seven categories of documents, but it added a section labeled "Particularized Need" on the fourth page. In this section, the Union noted that Tay and Clark contended "that irregularities occurred in the selection process" and that the Union needed the information "to determine whether the agency misapplied and violated established merit promotion principles and procedures in the rating and ranking of applicants.≅ G.C. Ex. 9 at 4. The letter further specified, among other things, that the seven categories of information were needed to:

> (2) determine whether the rating and ranking factors were applied uniformly . . . (4) compare the applicants, and the credit they received for each KSA; and (5) learn what guidance the selecting official relied on in determining how applicants should be rated and ranked, and what was used to establish the selection certificate.

Id. at 4. The Union indicated that Privacy Act data should be sanitized, and Smith requested that if the Agency felt it could not release information for any reason, he and Dynan should meet "to discuss other options that will satisfy the Union's need for information." *Id*. at 5. In a cover letter attached to the information request, Smith addressed specifically his request for the crediting plan, asserting that he had seen nothing that prohibited him from viewing it and that he had found FLRA decisions "in the union's favor." *Id*. at 7.

The Agency's final response to the Union was an email sent to the Union president on February 21, 2006. G.C. Ex. 10. In the letter, Dynan cited three decisions from the United States Court of Appeals and an FLRA decision, which she interpreted as upholding the need to keep crediting plans confidential and finding no particularized need for a union to see them.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel asserts that the Respondent violated section 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with the crediting plan used by members of the Rating Panel to score the applicants for promotion to GS-8 Senior Officer Specialist. The GC argues that all elements of a valid information request under section 7114(b)(4) were met: the information was normally maintained by the Agency; it was reasonably available; it was necessary for full and proper discussion of subjects within the scope of bargaining; it did not constitute guidance or advice to supervisors relating to collective bargaining; and its disclosure was not prohibited by law. Because the Respondent admitted in its answer to the complaint that the crediting plan was normally maintained and reasonably available, the GC focused its brief on the remaining elements.

Relying on the standard set forth in *Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661 (1995) (*IRS, Kansas City*), the GC maintains that the Union demonstrated that the crediting plan was necessary for it to fully and properly understand why Tay and Clark were not promoted and to negotiate with the Agency regarding the matter. Because the crediting plan was used by rating officials in scoring each applicant's KSAs, the GC argues that it was "absolutely necessary" to see the crediting plan in order to understand whether the rating officials scored the applicants correctly. G.C. Brief at 22. While the other components of an applicant's score were based on objective factors (the applicant's most recent appraisal and awards), the scoring of each KSA narrative was highly subjective, and the crediting plan was the Union's only effective tool for understanding whether the narratives were scored in accordance with Agency policy.

The General Counsel disputes the Respondent's contention that the Union could have adequately evaluated the KSA narratives simply by comparing the narratives and scores of the highly-rated applicants to the narratives of Tay and Clark. Such a comparison would not provide the kind of "concrete evidence" needed to support a grievance, in the GC's view. *Id*. at 23. The General Counsel also denies that Clark's inclusion on the Best Qualified list made his KSA ratings (and thus the crediting plan) irrelevant to his case. Even though Clark's name was submitted to the Warden, and the Warden did not directly utilize the crediting plan in selecting from the BQ list, the GC notes that the relative scores of the applicants were likely an important factor in the Warden's decision, and therefore the Union should have had the opportunity to see the crediting plan in an effort to raise his KSA scores.

The General Counsel further insists that the Union articulated its particularized need for the crediting plan to Dynan. After submitting his original information request on December 15, Smith sent several emails to Dynan explaining that the crediting plan was essential to his evaluation of Tay and Clark's potential grievances, and disputing the Agency's assertion that bargaining unit employees were restricted from seeing the crediting plan. *See* G.C. Ex. 6, 8, 9. In particular, Smith's information request of January 31 is cited as evidence that the Union diligently heeded the guidelines of recent Authority decisions that bargaining parties should engage in a dialogue and seek ways of accommodating the concerns and needs of the other party. *See IRS, Kansas City*, 50 FLRA at 670-71. In his January 31 letter, Smith added two paragraphs entitled "Particularized Need," and he sought to explain specifically why he needed the crediting plan for Tay and Clark's cases. Among the reasons cited by the Union here were to "determine whether the rating and ranking factors were applied uniformly;" to "compare the applicants, and the credit they received for each KSA;" and to "learn what guidance the selecting official relied on in determining how applicants should be rated and ranked". G.C. Ex. 9 at 4. In doing so, the Union met its burden of demonstrating particularized need, the GC asserts.

The General Counsel further submits that the crediting plan does not constitute guidance to management relating to collective bargaining, pursuant to section 7114(b)(4)(C) of the Statute. While the crediting plan clearly was meant as guidance for the rating officials, it was not guidance relating to the collective bargaining process, and thus it does not fit within the narrow statutory exception to the general duty to furnish information. *See United States Department of the Army, Army Corps of Engineers, Portland District, Portland, Oregon*, 60 FLRA 413, 416 (2004) (*Army Corps of Engineers*). [7]

After defending the Union's need for the crediting plan, the General Counsel argues that the countervailing interests asserted by the Agency against disclosure of the crediting plan are outweighed by the Union's inter-

7. Although the Respondent denied in its answer that the requested information did not constitute such management guidance, it never contested this point at the hearing or in its post-hearing brief.

ests in seeing the plan, particularly since the Union was willing to accept a very limited form of disclosure. The GC asserts that the fears expressed by the Agency (that disclosure would allow employees to falsify or embellish their applications to suit the terms of the crediting plan, thereby rendering the plan useless) are both speculative and contrary to the actual experience of the parties. Citing *Federal Aviation Administration, Aviation Standards National Field Office, Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma*, 43 FLRA 1221, 1230 (1992) *(FAA, Oklahoma City*), the GC says the Authority does not presume that a union will allow information to be used for purposes other than those for which it is requested, absent record evidence of misuse. Moreover, the crediting plan for Material Handler Supervisor had been shown to the Union in the Kokotajlo grievance in February 2005, and there was no evidence to suggest that this disclosure had any adverse effects on future vacancies in that position.

The General Counsel also emphasizes the narrow form of disclosure that the Union sought in this case. Although the information request asked that the information be "delivered" to Smith (G.C. Ex. 9 at 5), Smith and Dynan both testified that the practice of the parties was to allow Union representatives to come to the Human Resource office, where they could look at the entire promotion board file and take notes, but they could not photocopy or remove any documents from the office. It was under these restrictions that Smith had reviewed the crediting plan in the Kokotajlo case, and Smith testified that he took pains to make sure Dynan understood that that was all he was seeking for the GS-8 correctional officer crediting plan. The GC argues that even if the crediting plan could not be made' public to all employees, there was no appreciable danger in allowing Smith, a GS-11 employee in a non-correctional officer position, to simply look at the document. The Agency's refusal to allow such a narrow form of disclosure shows, in the GC's opinion, that Respondent failed in its duty "to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed." *IRS, Kansas City*, 50 FLRA at 670-71.

In sum, the General Counsel argues that the Union needed the crediting plan in order to evaluate whether Tay and Clark's KSA narratives had been scored properly, and that any countervailing antidisclosure interests of the Agency were outweighed by the Union's need and the Union's willingness to review the information in a highly restrictive manner. To remedy the Agency's unlawful refusal, it is requested that the Respondent be ordered to allow the Union to review the crediting plan and to post a notice to that effect.

Respondent

The Respondent makes two principal arguments for its refusal to allow Smith and the Union to see the crediting plan. First, it argues that the Union failed to demonstrate a particularized need for the crediting plan, and second, it argues that the countervailing anti-disclosure interests outweigh the Union's interest in seeing it.

On its first point, the Agency notes that the Union's initial information request, dated December 15, 2005, asked for seven different categories of information and consisted mainly of "boilerplate" language that applied equally to all of the data. While the Union's subsequent request, dated January 31, 2006, added a section on "particularized need," the Agency submits that the Union's explanations were still generic in nature and were not tailored to the specific cases of Tay and Clark. Thus the Union's explanation for why it needed the crediting plan was the same as its explanation for needing the other documents sought, and it could apply just as readily to any employee as it did to Tay and Clark. In the Agency's view, this is not "particularized" need.

The Agency further argues that Smith's comment, allegedly made verbally to management representatives, that Tay and Clark's KSA scores were "unusually low" was conclusory in nature and unsupported, and it did not permit the Agency to make a reasoned judgment as to whether disclosure of the crediting plan was necessary. More broadly, the Respondent asserts that the crediting plan was not necessary for the Union to pursue its potential grievance on behalf of Tay and Clark, because the documents shown to the Union afforded the Union a sufficient basis on which to make its case. Specifically, Dynan testified that the best evidence for the Union and any unsuccessful applicants is the KSA narratives in each applicant's record. The Union had access to the entire file from the GS-8 promotion board, including each applicant's KSA narratives, the scores given by each rating official to each applicant, and the total scores for each applicant. This enabled the Union to compare the narratives written by Tay and Clark to those written by the successful applicants, and if a disparity in the scoring existed, it would be evident from a diligent review of this information.

Finally, with regard to particularized need, the Agency argues that the crediting plan would have been of no use whatever to Clark, because his KSA scores were high enough to make the Best Qualified list. All

applicants on the BQ list were referred to the Warden, who then had total discretion to select anyone on the list, regardless of his KSA or other scores. Thus even if Clark's KSA ratings should have been higher, a higher score would not have given Clark any additional advantage in being selected for promotion. Accordingly, the Agency submits that the crediting plan was not even relevant, much less necessary, for the discussion or evaluation of Clark's grievance.

Next, the Respondent asserts that there are strong countervailing interests against allowing employees to see the contents of crediting plans. Witnesses for the Agency likened crediting plans to tests and examinations, in that employees would be unfairly advantaged if they knew how to answer the KSA narratives, thereby rendering the entire process unreliable. They testified that employees have falsified information on their applications, and that it is often impossible for the Agency to verify all the information contained in employee applications and KSA narratives. Thus the Agency places a premium on employees not knowing what items of information will be scored highest and lowest, to protect the integrity of the selection process.

The Respondent asserts that the Authority and the Federal courts have in recent years recognized the need for confidentiality of crediting plans and upheld agencies' refusal to disclose them. In the context of FOIA requests by employees or unions, the D.C. Circuit in *National Treasury Employees Union v. U.S. Customs Service*, 802 F.2d 525 (D.C. Cir. 1986), and the Seventh Circuit in *Kaganove v. Environmental Protection Agency*, 856 F.2d 884 (7th Cir. 1988) held that the release of crediting plans would render them ineffectual, because employees would be able to alter their applications to suit the requirements of the crediting plans. In the context of a union's information request pursuant to section 7114(b)(4) of the Statute, similar concerns about disclosure were expressed by the D.C. Circuit in *United States Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania v. FLRA*, 988 F.2d 1267 (D.C. Cir. 1993) (*BOP v. FLRA*), *reversing U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania*, 40 FLRA 449 (1991) (*Allenwood I*). And when the BOP refused a subsequent union request for a crediting plan as part of a promotion grievance, the Authority held that the union had not demonstrated a particularized need for the crediting plan. *Federal Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania*, 51 FLRA 650 (1995) (*Allenwood II*).

The Respondent argues here, as in *Allenwood II*, that the Union's information request did not establish a particularized need for the crediting plan, but it also argues that these cases further demonstrate the Agency's interest in keeping its crediting plans confidential. Thus, even if the Union were to demonstrate a particularized need to see a crediting plan, the Respondent argues that disclosure to the Union would still pose an unreasonable threat to the fairness and reliability of the promotion process. That is, even if the Union promised to keep the crediting plan confidential, key aspects of the plan could be leaked to employees, either inadvertantly or on purpose. The Agency notes that while Smith was a GS-11 education specialist, the other steward, Mr. Smaw, was a GS-7 correctional officer who would have benefited directly by seeing the crediting plan for GS-8 officers. Finally, the Agency argues that there is no adequate sanction against the Union, in the case of a crediting plan leaking to employees, that is sufficient to remedy the harm that would be caused. Thus the Respondent insists that the crediting plan must not be shown even to a single member of the bargaining unit.

Analysis

Section 7114 of the Statute provides, in pertinent part:

> (b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation —
>
> . . .
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining[.]

The Agency has admitted here that the crediting plan sought by the Union was normally maintained and reasonably available. While the Agency denied in its answer that the crediting plan does not constitute guid-

ance relating to collective bargaining and that disclosure is not prohibited by law, it has offered no evidence to support these assertions, and the record clearly supports the General Counsel's allegations. Thus the only real issue before me is whether the crediting plan is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining".

In response to several adverse court decisions, the Authority in its 1995 *IRS, Kansas City* decision reviewed its policy for determining whether information is "necessary" under section 7114(b)(4)(B). In that decision, the Authority adopted an analytical framework for determining necessity that requires unions requesting information to show a "particularized need" for the information and agencies to articulate any countervailing anti-disclosure interests that might be present. The determination of whether requested information is "necessary" is made based on weighing the needs and interests articulated by the parties regarding the request.

Under the framework adopted in *IRS, Kansas City*, a union has the initial responsibility of establishing a particularized need for information requested. To establish a particularized need, the union must articulate with specificity why it needs the information requested, including the uses to which it will put the information and the connection between those uses and the union's responsibilities as exclusive representative. It is not sufficient that the information would simply be useful or relevant; instead, the information must be "required in order for the union adequately to represent its members." 50 FLRA at 669-70. Generally, the question of whether the union has met its responsibility will be judged by whether it adequately articulated its need at or near the time of its request, rather than at the hearing in any litigation over the request. *See, e.g., U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 51 FLRA 1467, 1473 (1996).

Once a union makes a request and articulates its need, the agency must respond. In responding, an agency cannot simply say "no." If it denies a request for information, it must identify and articulate its countervailing anti-disclosure interests. *IRS, Kansas City*, 50 FLRA at 670. As appropriate under the circumstances of each case, the agency must either furnish the information, ask for clarification of the request, identify its countervailing or other anti-disclosure interests, or inform the union that the information requested does not exist or is not maintained by the agency. Moreover, an agency must fulfill these responsibilities in a timely manner. For example, it must articulate its anti-disclosure interests to the union at or near the time it denies the union's information request. *See Federal Aviation Administration*, 55 FLRA 254, 260 (1999). And when an agency requests clarification or raises legitimate anti-disclosure interests, it is incumbent on the union to respond in a timely and constructive manner. A union's failure to do so is taken into account in determining whether it has established a particularized need for the information. *United States Department of the Air Force, Air Force Materiel Command, Kirtland Air Force Base, Albuquerque, New Mexico*, 60 FLRA 791, 794-95 (2005) (*Kirtland*).

As interpreted by the Authority, section 7114(b)(4) requires parties to engage in an exchange or dialogue with respect to the information request for the purpose of communicating their respective interests and attempting to work out an accommodation of those interests and agreement on disclosure of information. Often, one party's satisfaction of its responsibilities will depend on the degree to which it has responded to the interests and concerns raised by the other party, rather than simply saying "no" or resorting to litigation. If the parties do not reach agreement and the dispute proceeds to litigation,

> an unfair labor practice will be found if a union has established a particularized need, as defined herein, for the requested information and either: (1) the agency has not established a countervailing interest; or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need.

50 FLRA at 671.

Applying these principles to the facts of this case, the best starting point is the Union's information request (G.C. Ex. 4, as revised by G.C. Ex. 9). [8] This is a very long document containing a considerable amount of generalized legalistic language (entire sections titled "definitions" and "instructions") challenging the reader before he or she even learns what information is actually being sought. This document, which Smith admitted he did not create himself but took from a template used by

8. Most of the correspondence between Smith and Dynan between December 15 and January 31 focused on what is, for me, a side issue: whether the crediting plan is part of the "promotion file" or "promotion board." *See* G.C. Ex. 6-8 and 10 and Resp. Ex. 1 at 6. While the meaning of this term may have some relevance for the parties in their bargaining relationship, there is insufficient evidence of record for me to ascertain its meaning; moreover, deciding that question would not help to resolve the statutory issue of whether the crediting plan was necessary for the Union to fully represent Clark and Tay regarding the GS-8 promotions.

the Union (Tr. 86), resembles a discovery request drafted by a lawyer for civil court litigation. I must express here a personal note of dismay that the everyday process of information gathering, embodied in section 7114(a)(4) of the Statute, has become so formalized and encrusted with boilerplate as this. Unlike civil litigation, the individuals carrying out the daily responsibilities of labor-management communication are not lawyers but bargaining unit employees and personnel specialists, and it taxes everyone's energy and good will to require them to play the part of lawyers. Although the Authority has emphasized in *IRS, Kansas City* and its progeny that unions have a significant burden in articulating the need for information, the key to meeting that burden is in the quality, not the quantity, of their request.

In this case, the management officials receiving the Union's information request were asked to sift through the pages of legalisms in order to identify the Union's actual purpose and need for the information. The statement of need is articulated briefly in the introductory paragraphs of G.C. Ex. 9 and in more detail on page 4. First, the Union identifies the grievants by name, indicates that they are complaining of being passed over for promotion, and states that it is investigating "the possible introduction of inadmissable [sic] criteria being used to select and/or not select this past group of GS-8 candidates." *Id*. at 1. Then the Union states that it will use the information to help it determine whether to file a grievance or a complaint with the FLRA or Office of Special Counsel, or to prepare a case for arbitration or litigation, if necessary. More specifically, it says the information "is required to determine if the Agency acted in accordance with all applicable laws and regulations in their conduct of a proper merit system promotion board review." *Id*. In the "particularized need" section of the document, the Union repeats that it needs the information to determine whether the Agency "violated established merit promotion principles and procedures", and it specifies that the Union is looking particularly at "the rating and ranking of applicants." *Id*. at 4. The second paragraph further specifies that the Union needs the information to (among other things) "determine whether the rating and ranking factors were applied uniformly;" "compare the applicants, and the credit they received for each KSA;" and "learn what guidance the selecting official relied on in determining how applicants should be rated and ranked[.]" *Id*.

Although the Union requested seven categories of information in its request, it did not give individual explanations of its need for each item or category. The explanation described above was apparently intended to apply equally to all of the requested information. Because of this, the Respondent argues that the Union did not establish a "particularized" need, because its rationale was not "specifically tailored to the circumstances" of why it needed the crediting plan. Respondent's Brief at 7. While it is true that a union must articulate its need for each specific piece of information requested, this does not mean that each item requested must have its own statement of particularized need. If, as here, the Union has provided one statement of need, applicable to all items, it runs the risk of not adequately explaining the need for certain items, but its explanation will be evaluated for each item nonetheless. The test is whether the explanation "permit[s] an agency to make a reasoned judgment as to whether the disclosure of the information is required under the Statute." *Kirtland*, 60 FLRA at 794, *quoting IRS, Kansas City*, 50 FLRA at 670. In this case, the only piece of information that is still in dispute is the crediting plan.

The introductory paragraphs of Smith's January 31 letter to Dynan offer a context and partial explanation for his information request. From this introduction, it is clear that the Union is investigating whether the Agency acted properly in passing over Tay and Clark for promotion: depending on the outcome of the investigation, the Union might file a grievance, unfair labor practice charge or other type of action. Then, after itemizing the information he wanted, Smith lists on page 4 seven potential uses for the information, and in the "particularized need" section he lists five additional reasons why the crediting plan is necessary for him to carry out these goals. Although the seven uses at the top of page 4 are too general to offer the Agency any real insight as to why the Union needs the crediting plan, the "particularized need" section is more detailed and addresses specifically how the crediting plan might be used to assist the Union in determining whether Tay or Clark were unfairly denied promotion. This is true because Smith identifies specific uses for the crediting plan in assisting him in evaluating whether Tay and Clark were improperly denied promotions: to "determine whether the rating and ranking factors were applied uniformly" and "compare the applicants, and the credit they received for each KSA[.]"

This brings us to the heart of the problem facing Smith and the Union in January 2006. Tay and Clark were upset that they were not selected for promotion, and the Union was trying to determine whether they had a basis for grieving the action. The Agency allowed Smith and Smaw to come into the Employee Services office on January 19, to stay as long as they liked, and to review the entire promotion file (except, of course, for

the crediting plan). They were able to read all of the applicants' KSA narratives and to see how each applicant was rated for each KSA. Dynan argues that the data made available to the Union was sufficient for it to "fully and properly discuss and understand" whether Tay and Clark were rated and ranked uniformly and fairly, to paraphrase the language of section 7114(b)(4)(B). Smith, on the other hand, argues that he needed the crediting plan to make sense of the raw data, because without seeing the crediting plan, the Union had no way of knowing the criteria on which the Agency placed greater or lesser importance. I think they are both right.

The truth is that the raw data available in the KSA narratives gave the Union significant ammunition with which to fight for Tay and Clark, if only Smith had done the painstaking work of sifting through all the applications, reading them carefully, and comparing the applicants' scores. [9] For example, one glaring error in the Rating Panel's scoring of Tay's application stands out immediately: for Element 025, Ability to Make Decisions in Emergency Situations, as well as for Element 026, Ability to Identify Signs of Discord, Tension, or Abnormal Behavior, Tay was given a "0" score by one rater and a "3" by the other. Resp. Ex. 4, pages 19 and 20. [10] The Agency's Human Resources Manual, a document available to the Union, sets guidelines for rating panels, and it states:

> Individual job element scores assigned by the raters will be compared to ensure a difference of more than 2 points does not exist between like elements. If a difference of more than 2 points exists, the raters shall mutually agree to change one or both rater's score(s) for the affected element(s).

Resp. Ex. 1 at 2. In Tay's case, the Rating Panel should have noticed this discrepancy, and Tay's score should either have been raised or lowered by at least one point on each of the two elements. The Union did not need the crediting plan to identify and raise this error, and at the least this would have forced the Agency to reevaluate Tay's application to determine whether it was rated properly. [11]

But perhaps the most significant evidence in any grievance over the scoring of KSA narratives is the narratives themselves. Tay was given scores of "0" on two elements and "1" on two others, out of a possible five points. The Union could have, and should have, reviewed Tay's narratives on these elements and compared them to the narratives of other applicants who received higher scores. Such a comparison might have indicated that Tay's essays appeared quite similar to those who were rated highly, in which case the Union would have had persuasive evidence of a disparity in the scoring; or it might have revealed that Tay's essays were facially inferior to the others, in which case the Union would have had legitimate grounds for dropping the case. If such a comparison reflected strong similarities between Tay's narratives and those of highly-rated applicants, then Smith could have argued much more strongly and persuasively to Dynan that the only way to properly evaluate the different applicants was by seeing the crediting plan. If the Agency had still refused to furnish the crediting plan at that point, the Union would have had strong evidence to support a grievance, as well as a stronger argument in this unfair labor practice case.

Accordingly, I cannot accept the Union's argument that the crediting plan was truly "necessary" for it to fully and properly represent Tay and Clark. If the Union had fully examined the documentation already available to it (e.g. Resp. Ex. 1-10), and if it had then found that there were significant similarities between their grievants' applications and the applications of successful candidates, it might have been able to demonstrate that the crediting plan was the only way of rationally distinguishing the successful from the unsuccessful candidates. This, indeed, is what is meant by "particularized need." In the abstract, the Union offered a persuasive explanation of the importance of the crediting plan in identifying the job criteria the Agency values most and least, and in close cases, the crediting plan may well be the only way for the Union (or any person reviewing the work of the Rating Panel) to determine whether the Rating Panel performed its job rationally or irrationally, consistently or arbitrarily. Smith's letter of January 31, supplemented by his conversations on the subject with Dynan, adequately explained (in the Authority's words)

9. Smith may have looked at the employee applications on file, but he did not cite such evidence in his statement of particularized need for the crediting plan.

10. The scoring form used by the Agency, which is found at the back of each applicant's file, is confusing, because the raters here used different numbers to identify the six KSA elements. Closer examination, however, reveals that the first rater's Element 025 is the same as the second rater's Element 515, and the first rater's Element 026 is the same as the second rater's Element 512. *Compare, e.g.*, Resp. Ex. 4, pages 7, 13, 19 and 20.

11. Tay received an overall score of 44 for his entire application, and the threshold for making the BQ list was 54. See Resp. Ex. 3. Raising his score by two points would not have helped Tay enough to make the BQ list. But for purposes of my analysis, this is not material.

"the uses to which the union [would] put the information and the connection between those uses and the union's representational responsibilities under the Statute." 50 FLRA at 669. But what his letter did not do was to explain why the Union needed the crediting plan in the particular cases of Tay and Clark. Merely stating, as Smith did, that he read Tay and Clark's KSA narratives and felt they were "unusually low" and "were deserving of more points" (Tr. 48) was not a sufficient explanation to enable the Agency to make a reasoned judgment of the need for the crediting plan. [12] And while it might be essential to see the crediting plan in certain cases in order to determine, for example, "whether the rating and ranking factors were applied uniformly", Smith did not demonstrate why he could not make that determination in this case with the information already available to him.

This latter factor is particularly important in cases such as ours, where the Agency has raised significant anti-disclosure interests regarding a requested document. The issue of a union's right to crediting plans has been addressed by the Authority and the Federal courts on several occasions, and the Bureau of Prisons has a long history of refusing to disclose crediting plans. Thus, after the Authority held in *Allenwood I* that the agency was obligated to furnish a crediting plan to the union, the BOP successfully appealed to the Circuit Court in *BOP v. FLRA*, 988 F.2d at 1271-72, which held that the Authority had disregarded the agency's significant concerns about the damage that could be done if employees learned the contents of such plans. When, in *Allenwood II*, the AFGE requested the crediting plan used by the agency in relation to the nonselection of two bargaining unit employees, the Authority found that the union had not adequately explained its need for the document, but it never reached the issue of whether the agency's anti-disclosure interests outweighed the union's interest in seeing it. 51 FLRA at 655, 656 n.9. On the other hand, in *Health Care Financing Administration*, 56 FLRA 503 (2000) (*HCFA*), [13] the Authority held that a union had shown particularized need for (among other things) rating and ranking criteria relating to a promotion, but the agency in that case did not assert any anti-disclosure interests and thus the Authority did not address the issues that had been raised in cases such as *BOP v. FLRA*.

Two important lessons can be learned from these and other seemingly conflicting decisions concerning information requests: first, the cases are highly fact-specific; and second, we cannot extrapolate from one decision upholding a union's information request that other requests for the same information will automatically be upheld (or the converse). A union's particularized need will, in every case, depend in part on the objections raised by the agency and the status of the ongoing dialogue between the parties in seeking a mutual accommodation of their respective interests. Thus, the fact that the Union in our case explained its particularized need in the precise language used by the Authority in *HCFA* [14] *does not mean that the same* result will apply as in *HCFA*, because the agency in *HCFA* did not raise the security concerns that the Respondent has raised here. While Dynan's February 21 letter to the Union was somewhat late in coming, she had previously asserted in general terms the "restricted" nature of crediting plans, and the February 21 letter served to expand on the nature of her objection. It explicitly cited court and Authority decisions recognizing an agency's interests in protecting the confidentiality of crediting plans; as a result, the onus shifted to the Union to address the Agency's legitimate concerns.

Although Smith's letter to Dynan offered to meet with her if she refused to let him see the crediting plan, that was not sufficient to sustain the Union's burden of explaining why it could not make a full investigation of the promotion selections with the information that was already available to it. Once the Union received Dynan's February 21 letter, it needed to respond, by suggesting methods of protecting the confidentiality of the crediting plan and by demonstrating that the promotion board files it had already reviewed raised questions that could only be answered by seeing the crediting plan. As I have already stated, the remainder of the promotion file contained strong evidence which the Union could have analyzed and used in Tay or Clark's favor. The absence of any reference to or discussion of this evidence in the Union's information request was the difference between an abstract statement of "importance"

12. Indeed, Clark's KSA scores were not unusually low, as they were high enough to put him in the upper halfof the applicants.

13. I am sure it is no coincidence that the Union's "particularized need" statement in its second information request in our case (G.C. Ex. 9 at 4) repeated the exact language used by the Authority in summarizing the *HCFA* union's need for the information, which included the crediting plan for the position in dispute. 56 FLRA at 504.

14. It is not entirely clear whether the "rating and ranking factors" sought in *HCFA* were the same as a crediting plan, but they are at least similar.

and a particularized demonstration of "need." While the Union's January 31 request was likely sufficient for most information relating to the promotion board in dispute, [15] it was not sufficient for information such as the crediting plan, in light of the anti-disclosure interests raised by Dynan.

Therefore, I conclude that the Union did not demonstrate a particularized need for the crediting plan in the circumstances of this case. Having reached such a conclusion, it is unnecessary for me to resolve the other issues raised by the Respondent. However, the recurring nature of the dispute between the BOP and the AFGE over crediting plans, and the likelihood that the Union will sometimes be able to demonstrate a particularized need to see these plans, persuade me to comment on some of these issues and to encourage the Agency to seriously consider ways of accommodating appropriate Union requests with its own interest in the confidentiality of crediting plans.

In this regard, it is important to note that the Union in this case had made it clear to the Agency that it was only seeking a very narrow form of disclosure of the crediting plan. Even though the Union's information requests of December 15 and January 31 asked the Agency to "deliver" the requested documents to Smith, Smith made it quite clear to Dynan that he only sought to look at them in the Employee Services office, and that he had no intention of taking them out of the office. Indeed, it was the long-established practice of the parties that Union representatives would only review personnel files in the Employee Services office. Thus, while the Respondent sought to suggest at the hearing that the Union was asking for permanent copies of the requested documents, Dynan understood full well that this was not the case. [16]

At the hearing, the Respondent offered testimony amplifying Dynan's concerns about the dangers of allowing the Union to even see the crediting plan, while the General Counsel offered testimony minimizing those concerns. It would have been preferable for the parties to have had this exchange at the time of the information request, but this case does offer some useful lessons for future cases. For instance, the Agency legitimately points to the fact that Union Steward Smaw is a GS-7 correctional officer who would directly benefit from seeing the contents of the crediting plan for GS-8 correctional officers. Smith, on the other hand, is at a grade level and in a career path that makes it highly unlikely that he could benefit from seeing this plan. The obvious compromise here would have been for the parties to agree that only Smith could see the crediting plan, but of course that compromise was never discussed, largely because the Agency refused the Union's offer to engage in any personal discussions on these issues.

The Agency's confidentiality concerns go beyond the question of whether Smaw (or another GS-7 correctional officer) could see the crediting plan: it asserts that even if only Smith had seen the plan, the risk of its exposure to the rank and file was still unreasonably great. The General Counsel points to the earlier, voluntary disclosure of the crediting plan for a WS-06 Material Handler Supervisor position as a demonstration that disclosure would not have the dire consequences predicted by the Agency. While there was no evidence that the Union misused or leaked any aspects of that earlier crediting plan, and the Union deserves some credit for that, the crediting plan for a GS-8 correctional officer position affects far more bargaining unit members, and vacancies will likely recur more often, than for a material handler supervisor. Thus I doubt that the earlier disclosure warrants a conclusion that all disclosures of crediting plans will be secure.

Even if the Union were simply allowed to look at the crediting plan in the Employee Services office, as it did here with the other documents in the promotion file, the Agency questions whether crucial portions of the crediting plan might leak out to potential applicants. For instance, if Smith were allowed to review the GS-8 crediting plan and then counsel unsuccessful applicants such as Clark and Tay, it seems unavoidable that he would need to explain to them how their KSA narratives fell short of the guidelines set forth in the crediting plan. This would give the applicants some idea of what is in the crediting plan, but the Union should be able to counsel applicants in general terms about their applications and the crediting plan without compromising the validity of the plan. Moreover, the Union should be given the benefit of the doubt, absent evidence to the contrary, that it will maintain confidentiality if it has agreed to do so, and that it will not use information for purposes other than those for which it seeks them. *FAA, Oklahoma City*, 43 FLRA at 1230. I disagree with Respondent's claim that there were no adequate remedies available if

15. ndeed, if the Agency had not written its February 22 letter and explained the basis for its claim that crediting plans must be kept confidential, the Union's January 31 letter would probably have justified its request for the crediting plan, just as the union's letter in *HCFA* was sufficient. *See* 56 FLRA at 507 n.3.

16. It should be noted, however, that a union's right to information under section 7114(b) (4) normally involves the right to copies of the requested documents. *U.S. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington,* 38 FLRA 3, 7 (1990).

the Union leaked the information improperly. If the Union understood that a failure to maintain the confidentiality of information would result in its being prohibited from obtaining further information of that nature, it would have a strong interest in keeping its promises.

In this case, the Union demonstrated a sincere interest in reaching a mutual accommodation with the Agency, and a Union official (Smith) was available to review the crediting plan, without making a copy of it, who would not personally benefit from seeing it. If, after examining the remainder of the promotion file, including the applicants' KSA narratives, the Union could have demonstrated that there were possible mistakes, inequities or inconsistencies in the rating of the narratives that could only be explained by seeing the crediting plan, the Union would likely have been entitled to see it, under limited conditions protecting the confidentiality of the document. The Union's fatal error in this case was that it did not demonstrate this necessity, after the Agency cited legitimate anti-disclosure interests. If, in future cases, the Union makes the additional showing of necessity, the Agency should demonstrate an equally sincere interest in finding a way of accommodating the Union's interest in seeing the crediting plan with its own interest in confidentiality. Since the parties have frequently clashed on the disclosure of crediting plans, I would hope that they might consider my observations and develop mutually acceptable conditions for a Union official to see crediting plans (upon a showing of particularized need) while protecting the document's confidentiality.

Because the Union here did not demonstrate a particularized need for the information it requested, the Respondent was not obligated to furnish the information under section 7114(b)(4) of the Statute.

I therefore recommend that the Authority issue the following order:

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, DC, December 14, 2006.

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RICHARD A. PEARSON
Administrative Law Judge