

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE INTERIOR
BUREAU OF MINES, PITTSBURGH RESEARCH CENTER

Respondent

and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1916

Case No. BP-CA-20866

Charging Party

Beatrice G. Chester, Esq.

For the Respondent

Philip T. Roberts, Esq.

For the General Counsel

Before: ELI NASH, JR.

Administrative Law Judge

DECISION

Statement of the Case

The American Federation of Government Employees, Local 1916 (herein called the Union) filed an unfair labor practice charge on April 27, 1992, against U.S. Department of the Interior, Bureau of Mines, Pittsburgh Research Center (herein called Respondent). Thereafter, on June 4, 1992, the Boston Regional Director, Federal Labor Relations Authority (herein called the Authority) pursuant to section of the Rules and Regulations of the Authority transferred the case to the Chicago Region of the Authority. On July 23, 1992, the Chicago Regional Director of the Authority issued a Complaint and Notice of Hearing alleging that Respondent violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, as amended, (herein called the Statute) by failing to provide certain information to the Union pertaining to a supervisor.

On August 17, 1992 Respondent filed a motion to dismiss the complaint, or, in the alternative, motion for summary judgment. The matter was set for hearing on January 28, 1993.⁽¹⁾ On January 15, 1993, the General Counsel referred Respondent's motion, its opposition and a cross-motion for summary judgment to the Chief

Administrative Law Judge. Subsequently, on January 26, 1993 Respondent filed an opposition to the General Counsel's cross-motion for summary judgment.

On April 21, 1993 the parties each had an opportunity to orally present their respective positions concerning the matter. The General Counsel urged that the documentation and pleading indicated that the requested information did not exist and that Respondent did not tell the Union it did not exist and, consequently a violation occurred.

To the contrary, Respondent claims, the Union never showed the necessity for the requested information, that it was uncertain as to what information the Union needed but, in any event, upon checking its files it realized that there was certain information it did not have, its relevancy notwithstanding. Thus, Respondent argues that the complaint should be dismissed, or summary judgment granted as a matter of law, because the complaint fails to demonstrate that it failed to comply with section 7114(b) of the Statute.

The information which Respondent allegedly failed to furnish the Union pertained to Research Supervisor George R. Bockosh's Factor IV Supplement and a list of his publications, and data concerning requests to prepare/present technical publications/presentations submitted to Bockosh by members of the Mining Systems and Human Engineering group during the past three years, including Bockosh's decisions on such requests. According to Respondent, such information is not normally maintained by it in the regular course of business, such information is not reasonably available and, furthermore the information was not necessary for processing a pending grievance. In addition, Respondent urged that disclosure of personal data, should this be the information the Union sought, would violate the Privacy Act. Finally, it maintained that clarification of the information was sought from the Union, but the Union failed to furnish additional information demonstrating the necessity and relevancy of the information at issue. Therefore, Respondent maintains that it did not commit an unfair labor practice within the meaning of section 7115(a)(1), (5) and (8) of the Statute.

Since the narrow issue in the case is whether or not the Union was informed that the requested information did not exist in Respondent's file, both sides agree that summary judgment is an appropriate manner of disposing of the case. Department of the Navy, U.S. Naval Ordnance Station, Louisville, Kentucky, 33 FLRA 3, 4 (1988). Thus, the motion is to be granted if the "pleading, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I agree with the parties.

Findings of Fact

The relevant facts are as follow:

The Union filed a grievance because of Respondent's failure to allow an employee, David Shapiro, to present a technical paper at a European Conference. The complaint alleges that, by letters dated March 3, March 12 and April 3, 1992 the Union requested Respondent furnish data pertaining to: (1) Research Supervisor George R. Bockosh's Factor IV Supplement (Professional Accomplishments and Experience Statement) and his publications, and (2) requests to prepare/present technical publications/presentations submitted to Bockosh by members of the MSHE group during the past three years, including Bockosh's decisions on such requests.

On March 9, 1992, Respondent informed the Union that Bockosh's qualifications to make the decision being grieved related to assignment and acceptance of work products, a management right. Respondent requested the Union provide clarification relating to relevance and necessity but the Union failed to provide such clarification.

In a subsequent letter of March 25, 1992, Respondent again stated that Bockosh's qualifications to make the decision being grieved are considered a reserved management right. According to accepted practice, Shapiro's report was not assigned for the immediate purpose of publication.

On April 15, 1992, Respondent reiterated its position that Bockosh's qualifications to make the decision being grieved were not relevant or necessary to the grievance. Since Shapiro's draft internal report was not final, it could not be processed through customary channels for publication. Respondent was not able to locate records concerning actions on internal reports that the author wanted to have published (requests to prepare/present technical publications). However, a list of internal reports which had been "approved" in Mining Systems and Human Engineering since 1982 was furnished to the Union as an attachment to the April 15, 1992 letter. Respondent also attached four separate letters containing peer review comments on Shapiro's internal report.

In its Answer, Respondent denied that the information requested is regularly maintained by it in the normal course of business, and that it is reasonably available. Respondent also denied that the information is necessary and alleged that any personal information requested is prohibited by law. Respondent further alleged that the Union failed to provide clarification demonstrating the relevance and necessity of the information requested.

Respondent does not have a copy of Bockosh's resume in its files, or a list of his publications, as requested in the Union's April 3, 1992 letter. In addition, since Factor IV Supplements are not part of the classification requirements for Bockosh's supervisory position, such factors are not maintained in Respondent's records for such position. Rather, Bockosh's position is graded by reference to the Supervisory Grade Evaluation Guide, Part II, published in January 1976. Factor IV Supplements, consisting of a Statement of Professional Accomplishments and Experience, are only required for positions graded under the Research Grade Evaluation Guide, Part I, published in June 1964 or the Equipment Development Grade Evaluation Guide, Part III, Experimental Development, published in June 1968.

Conclusions

The Complaint alleged and the Respondent admitted, *inter alia*, that on March 3, March 12 and April 3, 1992, American Federation of Government Employees, Local 1916 (the Union) requested certain information. In its Motion, the Respondent attached a copy of these requests. The Respondent further admits responding to these three requests by letters dated March 9, March 25 and April 15, 1992, respectively.

In its letters dated March 3, March 12, and April 3, 1992, the Union requested, *inter alia*, a copy of Research Supervisor Bockosh's resume, Factor IV Supplements and a list of his publications. In its responses dated March 9, March 25 and April 15, 1992, Respondent at no time indicated that these or any of the other documents listed in the Complaint did not exist. In its Motion, however, the Respondent maintains that it does not have a copy of these documents in its records. In its Motion, Respondent further indicated that its records

do not contain any of the requested information. Concerning the issue of whether the information is maintained, Respondent asserted in its Motion that its "records did not contain" the requested information. In clarifying this contention, it becomes clear that the information in fact is not normally maintained in the regular course of business. However, it is also clear that Respondent was merely asserting that it did not have current copies of the requested data, but that indeed it did maintain some of the requested data albeit the data was not in its view current enough to meet what it felt was the Union's need.

In this case, a response to the Union's request was necessary to allow it to fully understand the reasons for Respondent's failure to allow Shapiro to present his technical paper at a conference and for it to effectively represent Shapiro in the matter. With regard to the issue of whether there was a "particularized need" for the requested information, it is now clear that the particularized need test is applicable where the information sought constitutes "management advice, guidance, counsel or training. . .". National Park Service, National Capital Region, United States Park Police, 48 FLRA No. 127. The information sought herein does not constitute intramanagement materials, but is information concerning the qualifications of a reviewing official. In any event, this information was requested in connection with an existing grievance making its need apparent.

While Respondent also argues that release of data concerning the Bockosh's qualifications would violate the Privacy Act, the Authority has found that the release to the exclusive representative of information concerning the qualifications of a reviewing official does not violate the Privacy Act. Patent Office Professional Association, 39 FLRA 783, 827-28 and n.9 (1991). Furthermore, the information sought here was in connection with a specifically identified grievance and in furtherance of the Union's representational responsibilities. In addition, the Union's grievance essentially involved the "worth of the researcher". The "worth" it sought to protect involves important future employment and research opportunities for this employee, and that "worth" almost certainly impacts on advancement and research opportunities which concerned conditions of employment under section 7103(a)(4). Therefore, the claim of a management right is not mystical since an aggressive, responsible exclusive representative might indeed pursue a grievance such as the one in this case, and prevail. For this reason, Respondent's assertion that the information is protected by a management right is less than persuasive. Accordingly, it found that the Union did establish that the information was necessary and relevant for it to perform its representational functions.

The Authority has held that while there is no duty to supply information which does not exist. Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol, 23 FLRA 239 (1986). An agency must however, at least inform the requesting union of the fact that the information in question does not exist, "even if the response is that the information sought does not exist." U.S. Naval Supply Center, San Diego, California, 26 FLRA 324, 326-27 (1987). Thus, when an agency responds to a union's request for information under section 7114(b)(4) of the Statute, but fails to inform the union that all or part of the information requested does not exist, the agency violates section 7116(a)(1), (5) and (8) of the Statute. Veterans Administration, Washington, D.C. and Veterans Administration Regional Office, Buffalo, New York, 28 FLRA 260, 266-67 (1987). Here, the lack of a full response kept the Union on a path seeking information when it did not exist, and thereby, probably creating a suspicion that the information did exist and preventing the Union from properly assessing its view of the grievance. Full disclosure at an early stage might have persuaded the Union that it was barking up the wrong tree.

Respondent knew upon examination of its files that some of the information the Union was seeking was missing. Under current law Respondent could have fulfilled its obligation under section 7114(b)(4) simply by

telling the Union that it did not have the information in its files. Respondent obviously misses the point that section 7114(b)(4) requires that it reply to requests which are "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." Thus, whenever, it discovered that the information requested was not available it had an affirmative obligation to inform the Union. In my view, to do otherwise, not only stirs needless litigation over irrelevant issues, but generates unnecessary costs for the government. Litigation in this case seems to the undersigned to give the same undesirable result as found in Marine Corps Logistics Base, Barstow, California, 14 FLRA 772, 779 (1984).

Based on the representations and exhibits contained in the Respondent's motion and the General Counsel's cross-motion, it is found there is no genuine issue of fact concerning the following: (1) the Union requested a copy of certain information; (2) these documents do not exist in the possession of the Respondent; and (3) the Respondent failed to inform the Union of the non-existence of these documents. Thus, as a matter of law, Respondent's failure to inform the Union of the non-existence of the requested documents violated section 7116(a)(1), (5) and (8) of the Statute.

Accordingly, it is recommended that Respondent's motion to dismiss the complaint, or, in the alternative, motion for summary judgment should be denied, and the General Counsel's cross-motion for summary judgment, granted.

Based on the foregoing, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Interior, Bureau of Mines, Pittsburgh Research Center, Pittsburgh, Pennsylvania shall:

1. Cease and desist from:

(a) Failing and refusing to reply to a request for information from the American Federation of Government Employees Local 1916, the exclusive representative of its employees, which reply is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

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

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Reply to requests for information made by the American Federation of Government Employees, Local 1916 the exclusive representative of its employees, which reply is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

(b) Post at its Pittsburgh, Pennsylvania facility, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, U.S. Department of the Interior, Bureau of Mines, Pittsburgh Pennsylvania 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 ensure that such notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, March 25, 1994.

ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to reply to requests for information from the American Federation of Government Employees, Local 1916, the exclusive representative of our employees, which reply is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

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

WE WILL reply to requests for information made by the American Federation of Government Employees, Local 1916, the exclusive representative of our employees, which reply is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.

(Activity)

Date: _____ By: _____

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Chicago Regional Office, 55 West Monroe, Suite 1150 Chicago, IL 60603-9729 and whose telephone number is: (312) 353-6306.

1. The Administrative Law Judge assigned to the matter was injured on January 22, 1993 and unable to hear the case on January 28, 1993, it was, therefore rescheduled for hearing on April 21, 1993.