UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. IMMIGRATION AND NATURALIZATION SERVICE,

BORDER PATROL, TUCSON, ARIZONA

Respondent

and

Case Nos. DE-CA-60715

NATIONAL BORDER PATROL COUNCIL,

DE-CA-60791

LOCAL 2544

Charging Party

Beth F. Eberle

Representative of the Respondent

Michael D. Albon

Representative of the Charging Party

Hazel E. Hanley

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The issue in this unfair labor practice case is whether the U.S. Immigration and Naturalization Service, Border Patrol, Tucson, Arizona (Respondent) failed to comply with section 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7114 (b)(4), in violation of section 7116(a)(1), (5) and (8) of the Statute, 5 U.S.C. § 7116(a)(1), (5) and (8), by failing to reply to information requests and failing to provide the National Border Patrol Council, AFGE, Local 2544 (Union) information that the Union had requested.

For the reasons explained below, I conclude that a preponderance of the evidence supports the alleged violations.

A hearing was held in Tucson, Arizona. The Respondent, the Union, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Only the General Counsel filed a post-hearing brief. 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 Parties

At all times material to these proceedings, the American Federation of Government Employees (AFGE), AFL-CIO, Local 2544 has been an affiliate and agent of the AFGE, National Border Patrol Council, the exclusive representative of a nationwide unit of employees appropriate for collective bargaining with the Immigration and Naturalization Service (INS) including the Respondent activity.

Proposal to Suspend

On March 4, 1996 the elevator of a Cessna 182 aircraft was damaged while pilot Galen R. Borden was returning the aircraft to a parking spot inside the hangar. On April 4, 1996 the Respondent proposed to suspend Borden for five days for "carelessness resulting in damage to government property."

April 9, 1996, Information Request

By letter dated April 9, 1996, the Union, representing Borden by Union steward Michael C. Albon, requested Respondent to provide certain information in accordance with section 7114(b)(4) of the Statute. Albon stated that he needed "the requested information for the purpose of investigating the proposed suspension and preparing the Union's response" and that all of "the information is required for the investigation of disparate treatment, retaliation, and discipline not complying with Service policy." Albon stated that the information could be supplied in sanitized form. He requested an extension of time to reply to the proposed suspension until seven days after receipt of the information. The five items the Union requested were:

1. A copy of all material relating to Mr. Borden's March 4, 1996, incident for which the suspension is proposed whether or not the proposal was based on that material;

2. A copy of all counseling documents relating to the alleged counseling of Mr. Borden for a June 19, 1995, incident;

3. A copy of all documents relating to an incident that occurred on or about March 17, 1994, where PAIC Williams carelessly started aircraft N4869N with the tow bar still attached causing damage to the propeller and destroying the tow bar. If no such documents exist concerning this matter, a statement to that effect will be required.

4. A copy of any document relating to any similar incident where an aircraft struck any object or any part of the hangar in Tucson when being moved in or out of the hangar

within the last three years;

5. A copy of all proposals and final decision letters relating to like or similar charges for the past five years within the Western Region.

The Respondent's Partial Reply and Referral of Request

On April 11, 1996, the Respondent, by Robert F. Coffin, replied to Albon's April 9 request. Coffin directly provided a response to only item number one of Albon's request, that is, "the material [he] used in arriving at the proposal." In so doing, Coffin also provided a statement by the patrol agent in charge stating that Borden had been counseled relating to a June 19, 1995 incident; however, Coffin did not specifically respond to item two regarding "counseling documents." Coffin also did not respond to requests three or four. Concerning item five, Coffin informed Albon that he had forwarded the April 9 letter to Beth Eberle, Western Region, for a "direct response to paragraph 5." The Union's request for an extension of time to reply to the proposed suspension was denied.

No Reply by the Western Region

The Western Regional Office of INS has four journeymen labor relations specialists including Beth Eberle. James LoSasso is their supervisor. Beth Eberle testified that she received a copy of Mr. Albon's request on April 10, 1996. From time to time she worked on a response but never finished it. The pressure of other work caused her to push it "to the last side of my desk." It laid there and was forgotten. Ms. Eberle said there was no intent to deny the Union the information which was considered "releasable." The request was simply never responded to due to negligence.

Reply to Proposal

By letter dated April 18, 1996, Albon, as designated representative, submitted Mr. Borden's written response to the proposed five-day suspension. Albon stated, in part, that although his request for information has not been complied with, he was furnishing information concerning four other known similar incidents in Tucson which resulted in significantly less discipline or no discipline at all. Albon argued that Borden's five day suspension was excessive and that he was being treated

disparately from other employees who had similar incidents.

Decision to Suspend

By letter dated June 4, 1996, the Respondent advised Pilot Borden that the reason for the proposed suspension was sustained and the disciplinary action of a five day suspension was warranted. The Respondent took issue with some of the anecdotal evidence concerning other incidents cited in Albon's response.

The June 9, 1996, Information Request

By letter dated June 9, 1996, Union steward Albon made a second data request to the Respondent pursuant to the Statute. Albon stated that he needed the information for the purpose of filing a grievance and/or arbitration concerning Mr. Borden's five day suspension. He stated that all the information "is required for the investigation of disparate treatment, retaliation, and discipline not complying with Service policy . . . [and] may be provided in a sanitized form." The request again sought data concerning other pilots being involved in damage to aircraft in Tucson, as follows:

> 1. A copy of all documents relating to an incident that occurred on or about March 17, 1994, where PAIC Williams carelessly started aircraft N4869N with the tow bar still attached causing damage to the propeller and destroying the tow bar. If no such documents exist concerning this matter, a statement to that effect will be required.
>
> 2. A copy of all documents relating to the October 6, 1996, aircraft incident involving Super Cub N6609L with Robin Hood as the pilot (EFO file 331.61 and TCA file 7135/34.1).

No Reply Received

Albon sent the request by regular mail. Neither Albon nor any other

official of the Union ever received any response to the June 9, 1996, request.[1]

Grievance Concerning Suspension

Albon filed a grievance on behalf of Pilot Borden which was pending at step three as of the date of the hearing.

Hearing Testimony Concerning Reasons for the Information Requests

Respondent at no time gave Albon the opportunity to explain the Union's particularized need for the data or to hone down the scope of information requested to fewer years or for aircraft incidents only. Therefore, the only opportunity for the Union to explain and clarify its requests for information was at the April 11, 1997, hearing in these proceedings, during which Albon explained/clarified each of his itemized requests.

Concerning item two of the April 9, 1996, request, Albon explained that it was alleged in the proposed discipline that Borden had been previously counseled for an incident involving a helicopter that he was putting back in the hangar. However, the Union had no evidence that Borden had ever been counseled; therefore, the Union wanted such documents or a statement that no formal counseling documents had been prepared.

Concerning item three, the request for documents relating to an incident involving PAIC Williams, Albon explained that the information on PAIC Williams or a written statement that none existed was necessary because the Union "wanted to compare the way Mr. Williams was treated to the way Mr. Borden was treated and to see if Mr. Williams was held to the same standard that Mr. Borden was held to." When asked whether or not release of such investigative files on PAIC Williams would violate the Privacy Act, Albon explained that it could not because everyone in Air Operations "knew this event took place and it took place in front of a couple of employees, . . . And in my request I also indicated that I would accept any information in sanitized form." As for requesting a statement that no documentation existed on PAIC Williams' incident, Albon explained that Williams had never posted a safety action memo alerting pilots that the propeller had been damaged nor warned pilots of the discrepancy through posting his daily flight log. Albon knew that a document existed relating to the purchase of a new tow bar as a result of the incident as he had seen the order form and the $170.00 receipt for a new tow bar.

With regard to item four, documents relating to similar incidents in Tucson within the last three years, Albon explained that the Union and Borden "knew of several incidents that occurred and we wanted to compare how those unit employees were treated with reference to Mr. Borden." The reason Albon requested three years of such incidents involving aircraft in hangars was "to make sure we encompassed Mr. Williams' [1994] incident." Again, Albon explained that everyone in Air Operations, Tucson, a small office, knew what had happened to aircraft and to pilots, and any documentation with personal identifiers could be sanitized so as not to violate the Privacy Act.

Concerning item five of the April 9, 1996 request, which called for a copy of all proposals and final decision letters relating to like or similar charges for the past five years within the Western Region, Albon explained that Mr. Borden was charged with carelessness resulting in damage to government property and the Union was looking for similar proposals, charges, decision letters concerning that charge, to see how Mr. Borden was treated compared to other unit employees under similar circumstances. Albon stated that if, for example, a 31 day suspension for an auto accident in El Centro, another Sector in the Western Region, was a result of "damage to government property and resulted from carelessness it would be very similar" to what he was investigating in the charge against Borden. Albon further explained that "failure to exercise proper caution in the operation of a government aircraft" would be another charge that would assist the Union in the investigation of Borden's case, especially, if that careless operation of aircraft resulted in a mere reprimand for a crash, because, as Albon explained, ". . . one of the things, . . . they kept talking about in their proposal [against Borden] was dollar amount of damage, so a more severe accident" was exactly the kind of incident the Union needed to compare to Borden's five day suspension when the crash in another sector resulted a mere reprimand.

Albon further explained that he requested five years' worth of "similar charges" because he understood adverse actions were maintained by the Western Region for five years. Inasmuch as Respondent never responded to item 5, Albon was never informed prior to the hearing that adverse actions are maintained for only four years and disciplinary actions for two years.

Albon wanted the original proposal, the charge, and the final decision letter in order to compare whether or not the pilot's actual discipline had been reduced and, if so, to what extent because, in Borden's case, the final decision was the same as the proposal. Albon stated that the Union needed information throughout the Western Region because the National Border Patrol Council and INS Border Patrol operate under a nationwide collective bargaining agreement and are subject to the same government-wide regulations. Albon further explained that he needed

more than Tucson Sector information, because Air Operations is such a small component of the Border Patrol; thus, to "get a comparison, the broader the scope the better the comparison." To broaden that scope, Albon used a broader term in request number 5 -- "similar charges" -- rather than the precision in request number 4 -- "incidents involving aircraft striking objects or parts of hangars" -- in the Tucson Sector.

Concerning the June 9, 1996 information request, Albon testified that in item 1, he repeated verbatim the request made in item 3 on April 9, concerning Williams' damage to the tow bar and propeller of N4869N. The reason Albon repeated his request was because the Union knew of at least $170.00 worth of damage; yet, the Respondent, in deciding to impose a five day suspension for Borden, implied there was no damage as a result of the Williams' incident. The Union was looking for a memorandum, possible accident investigation, safety action message, or anything that may pertain to this incident and the damage inflicted. As for item 2 in the follow-up June 9 request, Albon was specifying another known aircraft mishap, not involving a hangar, but contact with the runway, when Pilot Hood ground looped Super Cub N66090 on October 6, 1995. Thus, Albon gave the date, the pilot's name, the aircraft identification number, the nature of the incident, and cross-referenced the Tucson and El Paso file numbers. Albon stated that the reason the Union persisted in its request was due to the Respondent's final decision letter on Borden's suspension, stating that Hood's incident had not involved pilot error. Albon said he knew otherwise, because Hood had told Albon he had received an oral admonishment, but had not been willing to turn over the paperwork.

Albon testified that the Union still needs the information requested on April 9, 1996, and repeated and/or refined in the request dated June 9, 1996, because Borden's grievance is pending at step three and the Union may consider invoking arbitration once Respondent acts at that stage.

The Respondent's Position at the Hearing

As noted above, Ms. Eberle testified that the Respondent did fail to respond to the April 9, 1996 request and has no record of the June 9, 1996 request. Further, Ms. Eberle testified that the information is "releasable"; that the "agency had no ulterior motive for hiding the information from Mr. Albon. It essentially was neglected and not done." According to Ms. Eberle, "The agency has destroyed some of the records."

Records Retention and Destruction

Ms. Eberle was referring to the INS records retention policy whereby adverse action files are destroyed after four years and disciplinary action files are purged at two years. In response to the General Counsel's subpoena (which was not identical in all respects to the information requests), Eberle advised that a search of a log maintained by the Region "in an effort to find the widest range [of] records possible" revealed an abstract of four cases involving aircraft pilots, but the case files had been destroyed pursuant to the file retention policy. These involved: (1) a 1991 three day suspension for "Negl/Aircraft"; (2) a 1992 31 day suspension for misuse of a government vehicle; (3) a 1992 written reprimand for negligence; and (4) a 1994 written reprimand for crashing an aircraft.

Mr. Albon testified that cases two and four would be very helpful to him if case two involved carelessness in the handling of Government property and case four showed that minor discipline was imposed for major damage to an aircraft. Ms. Eberle maintained that cases two and four were not within the criteria requested either by the General Counsel or by Mr. Albon.

Discussion and Conclusions

The General Counsel contends: (1) that the Respondent's failure to furnish the Union with the information requested on April 9, 1996, and on June 9, 1996; (2) its failure to respond to items three to five in the April 9, 1996 request and to respond at all to the June 9, 1996 request; and (3) its destruction of requested information during the pendency of the Union's information request separately violated section 7116(a)(1), (5) and (8) of the Statute. The General Counsel requests a stronger than traditional remedy in view of the Respondent's obvious lack of a procedure to ensure timely and proper responses to statutory information requests.

The Information Was Necessary

There is no dispute, and the record establishes, that the Union sufficiently articulated and established a particularized need for the information requested on April 9, 1996 and June 9, 1996. See Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA 661 (1995)(IRS, Kansas City)(the analytical framework for determining whether requested information is necessary within the meaning of section 7114(b)(4) of the Statute). The Union sought information concerning similar incidents in Tucson and within the Western Region to establish that Pilot Borden was being treated disparately with more severe punishment than other employees who had similar incidents. See U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota, 52 FLRA 1323, 1331 (1997)(INS, Twin Cities) petition for

review filed sub nom. U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota v. FLRA, No. 97-1388 (D.C. Cir.)(union articulated particularized need; MSPB has consistently recognized the importance of how an employer has treated other employees who committed similar offenses). The Union further explained at the hearing its previously-stated reasons for requesting the information. See U.S. Department of Transportation, Federal Aviation Administration, New England Region, Bradley Air Traffic Control Tower, Windsor Locks, Connecticut, 51 FLRA 1054, 1067-68 (1996).

Alleged Violation Established

The Respondent has not asserted any anti-disclosure interests and the other statutory requirements of section 7114(b)(4) have been met.[(2)] Therefore, it is concluded that by its conduct in failing to furnish the Union with items three through five requested on April 9, 1996, and the information requested on June 9, 1996, and its failure to reply to these Union requests, the Respondent refused to comply with section 7114(b)(4) of the Statute in violation of section 7116(a)(1), (5) and (8) of the Statute, as alleged. By failing to respond to the Union requests and/or advising the Union if the requested information does not exist, the Respondent acted inconsistent with the duty to negotiate in good faith and independently violated section 7116(a)(1) and (5), as alleged. Social Security Administration, Dallas Region, Dallas, Texas, 51 FLRA 1219, 1226-27 (1996)(SSA Dallas).

The General Counsel requests that the Respondent be found to have independently violated section 7116(a)(1), (5) and (8) of the Statute by the destruction of documents within the scope of item 5 of the Union's April 9, 1996, request. As in SSA Dallas, destruction was neither pled nor litigated as an independent violation, but was raised for the first time in the General Counsel's post-hearing brief. As the Respondent was not afforded notice and an opportunity to fully and fairly litigate the issue of whether the destruction of certain documents within the scope of item 5 constituted a separate violation of the Statute, that issue, as in SSA Dallas, is not properly placed before the Authority at this time. Rather, the matter can be addressed, at least in the first instance, during the compliance stage of these proceedings. INS, Twin Cities, 52 FLRA at 1337-38.

Remedy

The General Counsel requests a nontraditional remedy in the nature of a compulsory procedure modeled after the Authority's standard in IRS, Kansas City to ensure that the Respondent makes timely and proper responses to information requests.

The Authority recently discussed its approach to evaluating requests for nontraditional remedies in F.E. Warren Air Force Base, Cheyenne, Wyoming, 52 FLRA 149 (1996)(Warren) and Department of Veterans Affairs Medical Center, Phoenix, Arizona, 52 FLRA 182 (1996). In Warren, the Authority concluded that nontraditional remedies must satisfy the same broad objectives that the Authority described in United States Department of Justice, Bureau of Prisons, Safford, Arizona, 35 FLRA 431, 444-45 (1990)(Safford). That is, assuming there are no legal or public policy objections to a nontraditional proposed remedy, the questions are whether the remedy is reasonably necessary and would be effective to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. Warren, 52 FLRA at 161; Safford, 35 FLRA at 444-45. As the Authority additionally noted in Warren, the above questions are essentially factual and therefore should be decided in the same fashion that other factual issues are resolved: the General Counsel bears the burden of persuasion, and the Judge is responsible initially for determining whether the remedy is warranted.

I agree with the General Counsel that the remedy is reasonably necessary to "recreate the conditions and relationships" with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. The compulsory procedure will ensure timely and proper responses to information requests. The record shows that, even though the information was considered "releasable," the Respondent's agent considered other work to be more pressing and pushed the first information request aside until it was forgotten. The second request was never responded to either. Such dilatory treatment warrants a stronger than traditional remedy. Furthermore, the General Counsel's proposed procedure will in effect require by order what the Authority requires of parties generally under the standard established in IRS, Kansas City. There, the Authority stated:

> We conclude that applying a standard which requires parties to articulate and exchange their respective interests in disclosing information serves several important purposes. It "facilitates and encourages the amicable settlements of disputes . . ." and, thereby, effectuates the purposes and policies of the Statute. 5 U.S.C. § 7101(a)(1)(C). It also facilitates the exchange of information, with the result that

both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. In addition, it permits the parties 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.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Immigration and Naturalization Service, Border Patrol, Tucson Sector, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Border Patrol Council, AFGE, Local 2544, the exclusive representative of certain of its employees, with items three through five requested on April 9, 1996, and the information requested on June 9, 1996, which information is necessary for the investigation and processing of the Union's response to a proposed suspension and the subsequent grievance after the final decision.

(b) Failing and refusing to reply to requests for information from the National Border Patrol Council, AFGE, Local 2544, 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.

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

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

(a) Furnish the National Border Patrol Council, AFGE, Local 2544, with items three through five requested on April 9, 1996, and the information requested on June 9, 1996, or explain what portion of that information does not exist either because it was never prepared or because it was destroyed during the pendency of the requests.

(b) Reply in a timely and proper manner to requests for information made by the National Border Patrol Council, AFGE, Local 2544, pursuant to the Statute by following this procedure;

(1) Respond in writing within ten (10) work days after the receipt of a data request by addressing the following issues:

-- whether the specific data requested exists;

-- whether or not it will be provided as requested;

-- whether clarification from Local 2544 is required;

-- whether or not the release of the information is precluded by law, and, if so, a statement of the reason(s);

-- whether INS has any countervailing interests in non-disclosure; and

-- offer to and/or initiate a meeting and/or a telephone conference if it would assist in resolving any issue arising from the request.

(c) Post at its facilities at the Border Patrol, Tucson Sector, Tucson, Arizona, 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 Chief Patrol Agent 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 ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, DC, July 16, 1997.

GARVIN LEE OLIVER

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Immigration and Naturalization Service, Border Patrol, Tucson Sector, Tucson, Arizona violated the Federal Service Labor-Management Relations Statute and has order us to post and abide by this Notice:

We hereby notify bargaining unit employees that:

WE WILL NOT fail and refuse to furnish the National

Border Patrol Council, AFGE, Local 2544, the exclusive representative of certain of our employees, with items three through five requested on April 9, 1996, and the information requested on June 9, 1996, and we will not fail to inform the Union whether or not certain information exists or has been destroyed during the pendency of the requests.

WE WILL NOT fail or refuse to reply to requests for information from the National Border Patrol Council, AFGE, Local 2544, 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 furnish the National Border Patrol Council, AFGE, Local 2544, with items three through five requested on April 9, 1996, and the information requested on June 9, 1996, and we will inform the Union whether or not certain information exists or has been destroyed during the pendency of the requests.

WE WILL reply in a timely and proper manner to requests for information made by the National Border Patrol Council, AFGE, Local 2544, in accordance with the procedure and standard established by the Federal Labor Relations Authority.

_____

(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, Denver Regional Office, Federal Labor Relations Authority, whose address is:

1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581 and whose telephone number is: (303) 844-5224.

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