

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION BOSTON REGION
BOSTON, MASSACHUSETTS

Respondent

and

Case No. BN-CA-80498

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 1164

Charging Party

John Barrett, Esq. For the Respondent

Andrew F. Krall For the Charging Party

Nancy E. Chew, Esq. Richard D. Zaiger, Esq. For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ Chief Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135, herein called the Statute, and the Revised Rules and Regulations of the Federal Labor Relations Authority (FLRA or the Authority), 5 C.F.R. § 2423.1 *et seq.*

This proceeding was initiated by a charge, as amended, filed against the Social Security Administration, Boston Region, Boston, Massachusetts (SSA Boston Region or Respondent) by the American Federation of Government Employees, AFL-CIO, Local 1164 (AFGE Local 1164 or Union). The Regional Director of the Boston Region of the FLRA, on behalf of the General Counsel (GC) of the FLRA, issued a Complaint and Notice of Hearing in this case. The Complaint alleges that SSA Boston Region violated section 7116(a)(1), (5), and (8) of the Statute by failing and refusing to furnish AFGE Local 1164 requested sanitized information regarding the allocation, methodology, and usage of overtour⁽¹⁾ hours within the SSA Boston Region. SSA Boston Region filed an Answer denying the substantive allegations of the Complaint.⁽²⁾

A hearing was held in Boston, Massachusetts, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, and to introduce evidence. SSA Boston Region and the GC of the FLRA filed timely post-hearing briefs

which have been fully considered.

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

Findings of Fact

A. Background

American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive representative of a nationwide consolidated unit of Social Security Administration (SSA) employees appropriate for collective bargaining, including, *inter alia*, part-time employees in SSA Boston Region.

There are 74 field offices and six hearing offices within the SSA Boston Region, which encompasses the six New England states. AFGE Local 1164 represents, as an agent for AFGE, approximately 1400 employees throughout SSA Boston Region. Of these 1400 employees, roughly 100-200 are part-time employees.

Manuel Vaz has been at all times material the Regional Commissioner for SSA Boston Region. As Regional Commissioner Vaz is the top management official in the SSA Boston Region and oversees the operation of the Boston Region. Andrew Krall has been President of AFGE Local 1164 since 1994. His regular duties as the President involve a full range of labor-management issues.

B. Overtour Complaints

In mid-1998, Krall received an unusually high volume of complaints from the part-time employees represented by AFGE Local 1164 concerning overtour. Overtour is the ability of a part-time employee to work beyond his or her normal tour of duty. Overtour is similar to overtime for full-time employees; however, the major difference is that full-time

employees are paid time-and-a-half for overtime, whereas part-time employees are paid straight time for overtime.

The complaints Krall received in mid-1998 all concerned the availability of overtime. Employees alerted Krall that managers in some offices were telling their part-time employees that overtime was not available, while in other offices part-time employees were able to work as much overtime as they wished.

C. The Requests for Information and the Responses

In light of the complaints about the availability of overtime, Krall filed an information request with Regional Commissioner Vaz on June 12, 1998. Krall's June 12, 1998, letter requested the following information for the period October 1, 1997, through September 30, 1998:

(1) any and all records showing allocation of overtime from
Central Office to the Boston Region,

(2) any and all records showing intra-regional overtime
allocation or availability with breakouts, if appropriate,
for each area, district or individual office,

(3) any records evidencing the method used to allocate or
distribute overtime within the region . . . [examples
provided],

(4) with respect to (3), provide any data justifying the
actual allocation or distribution of overtime . . .
[examples provided],

(5) for the period 10/1/97 to present, please provide a
breakdown of the amount overtime usage for each part time
employee in the Boston Region. You may sanitize the data

with respect to name, but provide the office, grade and position for each employee.

This June 12, 1998 letter stated that Article 3 of the National Agreement (NA) requires that management treat all employees fairly and equitably in all aspects of personnel administration⁽³⁾ and that the Union's "particularized" need for this information was to determine whether this resource is being allocated in a fair and equitable manner. As an example, the letter inquired whether the funds were made available on a per capita or unlimited bases and stated that some office managers were refusing to authorize overtime. The letter stated that AFGE Local 1164 also wanted to determine if overtime is allocated based on workload considerations and further noted that employees in offices with comparable workloads did not have equal access to the resource. The letter stated that a grievance may be filed on behalf of impacted employees once the extent of any discrepancy is revealed.

Ms. Susan Sullivan, a Labor Relations Specialist for the SSA Boston Region, responded for Vaz. By letters dated June 25, 1998, and July 14, 1998, Sullivan responded to Krall that additional time was necessary before an answer could be provided. No substantive discussions regarding the information request occurred between the parties during this time.

By letter dated August 4, 1998, Sullivan responded a third time. SSA Boston Region denied the information request for three reasons: failure to articulate particularized need; lack of a correlation between the information request and the section of the collective bargaining agreement cited by Krall in his June 12, 1998, request; and management of overtime allocations is a management right. However, Sullivan invited Krall to resubmit his request with what, in Respondent's view, would constitute particularized need.

No oral discussions between the parties occurred during this time frame regarding the information request; all exchanges were in writing. The Union did not at any time request to negotiate over overtime.

By letter dated September 14, 1998, Krall resubmitted his information request, citing a recent arbitrator's award which involved administrative leave which interpreted Article 3 of the NA in a manner which would permit a grievance of the type Krall proposed to file with respect to overtime. This letter reiterated how an overtime distribution discrepancy might lead to a grievance in accordance with Article 3, dependent upon what the information reveals.⁽⁴⁾

Sullivan responded a fourth and final time on September 29, 1998. Again the information request was denied by SSA Boston Region, setting forth similar grounds as in the denial of August 4, 1998, but also stating, as an additional defense, that some of the information requested is not maintained and available.

At least some of the requested information existed which would at least partially have satisfied each of the items requested in Krall's June 12, 1998, request.⁽⁵⁾ No discussions between the parties occurred during this time frame regarding the information request; all exchanges were in writing.

To date, AFGE Local 1164 has not received any of the requested information.

Discussion and Conclusions of Law

A. The Statute

Section 7114(b)(4) of the Statute provides that the duty to bargain in good faith includes, among other things, 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

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(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining

Section 7116(a) (1), (5) and (8) of the Statute provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency --

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

(8) to otherwise fail or refuse to comply with any provision of this chapter.

The General Counsel contends that the SSA Boston Region's refusal to provide the requested information was inconsistent with its obligations under Section 7114(b) (4) of the Statute and therefore violated Section

7116(a) (1), (5), and (8) of the Statute.

SSA Boston Region, at the hearing, amended its answer to admit that the information requested by AFGE Local 1164, does not constitute guidance, advise, counsel, training for management officials and supervisors relating to collective bargaining; that disclosure of the requested information is not prohibited by law; that the requested information is normally maintained; and that the requested information is reasonably available.

The only defense raised by SSA Boston Region is whether the requested information is necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

B. The Particularized Need For the Information

The facts in this case are not in dispute. On two occasions the AFGE Local 1164 requested information regarding the allocation, methodology, and usage of overtime hours for the Respondent's Boston Region. As the Union explained to the SSA Boston Region, the information was needed to determine if overtime hours were distributed and made available to part-time employees in a fair and equitable manner, as required by Article 3 of the NA.

AFGE Local 1164 further explained to SSA Boston Region that the Union had received numerous complaints from part-time employees regarding the availability of overtime, and the data provided pursuant to the information request would determine whether a Union or individual grievance is appropriate. Finally, the AFGE Local 1164 provided SSA Boston Region with a citation to the recent arbitrator's award which specifically interpreted Article 3 consistently with the Union's interpretation.

The facts of this case establish that the AFGE Local 1164 met the particularized need standard as required under *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 Union articulated, with specificity, why it needed the information, including the uses to which the information would be put and the connection between those uses and the Union's representational responsibilities under the Statute. *Id.* at 669.

Specifically, the AFGE Local 1164 requested information regarding the allocation, methodology, and usage of overtour hours throughout the Boston Region. Written communications establish that SSA Boston Region understood why the AFGE Local 1164 wanted the overtour information. SSA Boston Region understood that SSA Local 1164 wanted to verify that distribution and availability of overtour hours was being handled fairly and equitably, as provided for under Article 3 of the NA. AFGE Local 1164 stated: "Several people have raised questions about this matter. In some parts of the region, part timers seem to have unlimited access to this resource. Others have none." AFGE Local 1164 stated its intention of possibly filing grievances on behalf of impacted employees regarding a violation of Article 3 of the NA, should the information, once provided, reveal such violations of Article 3 with respect to the availability and allocation of overtour. In this regard AFGE Local 1164 provided the case citation to the recent arbitrator's decision which interpreted Article 3 of the NA after the SSA Boston Region attempted to deny the information based on the merits of any underlying grievance, even though AFGE Local 1164 was, arguably, under no obligation to provide such citation.

Article 3 of the NA contains broad provisions concerning fairness and equitable treatment of all employees regarding all aspects of personnel management. Overtour, inasmuch as it is analogous to overtime or administrative leave, is an aspect of personnel management. The Authority has long held that an Agency has an obligation to provide information normally maintained by it which concerns overtime and compensatory time, for use by the union in the investigation of employee concerns regarding pay matters. *Army and Air Force Exchange Service (AAFES), Lowry Air Force Base Exchange, Ft. Carson, Colorado*, 13 FLRA 392, 399 (1983) (AAFES). Overtour seems to fall within this holding.

Insofar as overtour is not specifically addressed elsewhere in the contract, it reasonably could be concluded that it falls within the purview Article 3. An arguable violation of Article 3 is grievable under the terms of the contract itself; therefore, AFGE Local 1164 met the particularized need standard because it "has a grievable complaint covering the information." *Department of the Air Force, Scott Air Force Base, Illinois v. FLRA*, 104 F.3d 1396, 1400 (D.C. Cir. 1997) (quoting *NLRB v. FLRA*, 952 F.2d 523, 532-33 (D.C. Cir. 1992)).

To establish particularized need, a union must respond to an agency's request for clarification and provide additional explanation as to why it needed the requested information. *Department of the Air Force, Washington, D.C.*, 52 FLRA 1000, 1007-08 (1997). The August 4, 1998, response by Sullivan requested clarification, which Krall provided in his September 14, 1998, follow-up request.

The data requested was necessary for AFGE Local 1164 to determine if it should continue to pursue the matter, and if so, to what extent a

grievance should be filed: on an individual basis, on an office/area basis, or on a regional basis. The requested information was critical to the Union's efforts to represent the affected part-time employees. The failure of SSA Boston Region to provide the requested information compromised the ability of AFGE Local 1164 to represent the part-time bargaining unit employees in a grievance and/or arbitration proceeding.

C. SSA Boston Region's Defenses

Once a union has met its burden of establishing a particularized need, the agency is responsible for asserting and establishing any countervailing interests. *IRS, Kansas City*, 50 FLRA at 670.

Management of overtour is not at issue here, but rather whether it is being distributed fairly and equitably, as required by the NA. Furthermore, the AFGE Local 1164 at no time requested to negotiate overtour. Thus AFGE Local 1164 was not interfering with a management right.⁽⁶⁾

The written responses of SSA Boston Region of August 4, 1998, and September 29, 1998, outlined four defenses: failure to articulate particularized need, that a management right was implicated, the merits of any underlying grievance did not warrant disclosure of the information, and the information was not maintained and available.

As discussed above I have concluded that AFGE Local 1164 demonstrated the requisite particularized need to justify receiving the requested information and was not interfering with any managements rights.

In *U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas*, 37 FLRA 1310, 1321 (1990) (*INS El Paso*), the Authority held:

Like questions of arbitrability, questions of whether the requested information was relevant in the grievance, or admissible as evidence in arbitration, are matters to be resolved in the grievance procedure. The information was requested in connection with the Union's investigation of a potential grievance concerning

performance appraisal and the information was necessary for the Union to determine whether to proceed with the grievance.

Furthermore, the Authority has consistently held that unions have a right to data "that is necessary to enable it to fulfill its representational functions, including data which assists in resolving potential grievances." *U. S. Department of the Air Force, 375th Mission Support Squadron, Scott Air Force Base, Illinois*, 51 FLRA 599, 613 (1995).

The argument by SSA Boston Region on the merits of any underlying potential grievance is not a valid basis for denying information properly requested under the Statute. *Id.* In its brief SSA Boston Region cites Article 33 of the NA, which deals with part-time employees. It does not mention overtures. SSA Boston Region argues that since part-time employees are mentioned in Article 33 of the NA, that requirements set forth in Article 3 of the NA would not apply to part-time employees. However I reject this argument because the interpretation and application to part-time employees of Article 3 by the Union is reasonable. It is up to the grievance procedure and arbitrator, if necessary, to resolve the possible differences in contract interpretation. See *INS El Paso*, 37 FLRA at 1321. The merits of the possible grievance, from an agency's point of view, are not a defense to union's right to the information.

Although unclear, it appears that SSA Boston Region raised at trial the defense that the information is not necessary because the request was too broad in scope. It did not make this argument in its brief.

The scope of the June 12, 1998, request was never raised by the SSA Boston Region to AFGE Local 1164 prior to the trial in this matter. However, at trial it appeared SSA Boston Region was arguing the scope of the request was inappropriate, both geographically and temporally. The written responses to the Union did not state, or even suggest, that the request was too broad in scope, relative either to the time frame for which the information was requested or to the fact it was requested on a Region-wide basis. The evidence further establishes that at no time relevant to the facts in this case were there oral communications between the Union and the Respondent relative to the substance of the information request. This entire defense was raised for the first time the day of the hearing.

The Authority has held that "an agency denying a request for information under section 7114(b) (4) must assert and establish any

countervailing anti-disclosure interests." *IRS, Kansas City*, 50 FLRA at 670. The Authority's rationale for requiring a union and an agency to articulate and exchange their respective interests is to facilitate communication and early resolution of a dispute, and effectuate the purposes and policies of the Statute. *Id.* at 670-71. Had the SSA Boston Region raised this issue in a timely manner, as required under *IRS, Kansas City*, AFGE Local 1164 would have had the opportunity to either present its reasoning for the scope of the request, or to reach a suitable compromise.

Because SSA Boston Region did not articulate its concerns over the scope of the request prior to hearing, it is precluded from being raised as a defense to furnishing the information. *See id.*

In any event, the scope of the request is appropriate on its face. In *U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 52 FLRA 1323 (1997) (*Twin Cities III*); *U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 51 FLRA 1467, 1474-76 (1996) (*Twin Cities II*), the agency requested general clarification of the union's need for some requested information. The Union was responsive to the request, but the agency never specifically raised concerns regarding the temporal and geographic scope of the union's request. *Twin Cities III*, 52 FLRA at 1330. Although particularized need includes the scope of the request, when it is not properly and specifically raised for clarification by an agency prior to the hearing, and the union has demonstrated its responsiveness to other requests for clarification by the Respondent, the testimony offered at trial regarding the scope of a request can be considered in determining its appropriateness. *Id.*

In the subject case AFGE Local 1164 represents a Region-wide unit, with the part-time employees it represents distributed in offices throughout SSA Boston Region. To receive information on less than a regional basis would be meaningless to a grievance whose intent is to determine the fairness and equity of the distribution of overtime hours among part-time employees of the SSA Boston Region. I also find that a request for information regarding one fiscal year is not excessive or unreasonable on its face. ⁽⁸⁾

In light of all of the foregoing, I conclude that AFGE Local 1164 properly requested the information, showing a particularized need, and was entitled to it and that SSA Boston Region did not meet its obligations set forth in section 7114(b)(4) of the Statute when it refused to furnish the requested information. Accordingly, I conclude SSA Boston Region violated section 7116(a)(1), (5) and (8) of the Statute.

D. Remedy

Having concluded that SSA Boston Region violated section 7116(a)(1), (5) and (8) of the Statute, I recommend the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Social Security Administration, Boston Region, Boston, Massachusetts, shall:

1. Cease and desist from:

(a) Failing and refusing, upon request, to supply AFGE Local 1164 information, as required by law, including information regarding the allocation, distribution, and usage of overtime hours for the Boston Region.

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

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

(a) Provide AFGE Local 1164 the information requested in its June 12, 1998, information request concerning distribution of overtime.

(b) Post at its facilities throughout the Boston Region 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 Regional Commissioner, Social Security Administration, Boston Region, Boston, Massachusetts, 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.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, within 30 days from the date of this Order, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110, in writing, as to what steps have been taken to comply.

Issued, Washington, D.C., March 5, 1999

SAMUEL A. CHAITOVITZ

Chief 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 Social Security Administration, Boston Region, Boston, Massachusetts violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

We hereby notify our employees that:

WE WILL provide the American Federation of Government Employees, AFL-CIO, Local 1164, with the information requested in its June 12, 1998 information request concerning overtime distribution.

WE WILL NOT fail and refuse to supply information, as required by law, requested by American Federation of Government Employees, AFL-CIO, Local 1164, including information regarding the allocation, distribution, and usage of overtime hours for the Boston Region.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the rights assured by the Statute.

(Agency)

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, Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, Massachusetts 02110, and whose telephone number is: (617) 424-5730.

1. Overtour hours refer to hours worked by part-time workers in excess of their regular part time schedule, similar to overtime hours worked by full-time employees.
2. SSA Boston Region amended its Answer at the hearing so that its denial was limited to a denial that the requested information is necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of bargaining.
3. The current NA between AFGE and SSA was effective March 5, 1996. The contract states at Article 3-Employee Rights, Section 2-Personal Rights, Paragraph A:

All employees shall be treated fairly and equitably in all aspects of personnel management, without regard to political affiliation, race, color, religion, national origin, sex, marital status, age or disabling condition, and with proper regard and protection of their privacy and constitutional rights.

4. Even though the merit of an underlying grievance is not a valid reason to deny information, Krall felt that providing the case citation to the arbitrator's award might convince the SSA Boston Region to provide the requested information.

5. SSA Boston Region does not deny the existence of the requested information.

6. Although both written responses by the SSA Boston Region indicate that disclosure of the information involves a management right, the SSA Boston Region did not argue this at hearing or in its brief.⁽⁷⁾

7. The Respondent also failed to raise this as a defense at the Prehearing Conference, as well.

8. In its brief SSA Boston Region attacks the *bona fide* nature of the request for data. It offers no evidence to support this allegation. I thus reject it.