

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE DOVER AIR FORCE BASE, DELAWARE Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1709, AFL-CIO Charging Party	Case No. WA-CA-03-0468

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 23, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

ELI NASH
Chief Administrative Law Judge

Dated: July 22, 2004
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: July 22, 2004

TO: The Federal Labor Relations Authority

FROM: ELI NASH
Chief Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
DOVER AIR FORCE BASE, DELAWARE

Respondent

and

Case No. WA-CA-03-0468

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1709, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE DOVER AIR FORCE BASE, DELAWARE Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1709, AFL-CIO Charging Party	Case No. WA-CA-03-0468

Holly A. Yurasek, Esq.
Thomas F. Bianco, Esq.
For the General Counsel

Lawrence E. Lynch, Esq.
Captain Lisa Fill, Esq.
For the Respondent

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the American Federation of Government Employees, Local 1709, AFL-CIO (herein the union) against the U.S. Department of the Air Force, Dover Air Force Base, Delaware (herein called respondent), the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Washington Regional Office, issued a Complaint and Notice of Hearing alleging respondent violated section 7116(a)(1), (5) and (8) by failing to provide the union with information that it requested to

prepare to represent bargaining unit employee Barry Brown in connection with a grievance over his performance appraisal.¹

A hearing on the Complaint was conducted in Dover, Delaware, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings and Fact

The relevant facts are as follows:

Barry Brown's appraisal year ended on March 31, 2002. Sometime in April or May 2002, Brown initiated an informal grievance over his 2002 performance appraisal. Brown's immediate supervisor and appraising official Master Sergeant David O'Hara denied the grievance on May 9, 2002.

Thereafter, on May 22, 2002, the union, through Steward Gerald Charles, hand-delivered a formal grievance to management on Brown's behalf. The grievance alleged that Brown's performance appraisal was not fair or valid. It also alleged that the numerical scores on AF Form 860A, Part F, which was part of Brown's appraisal did not follow the guidelines set forth by the benchmarks and past appraisals. Such benchmarks are used to assess how a supervisor believes an employee will perform at the next higher grade. An agreement between the union and respondent requires an appraising official to consider all nine of the benchmarks.

Also on May 22, 2002, Charles submitted a request for information related to Brown's grievance to Major Kari A. Thyne. Thyne at that time was the Commander of the

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The allegation that the Union verbally renewed its May 22, 2002, information request during its September 23, 2002, October 1, 2002 and January 23, 2003, meetings with the respondent was withdrawn. Also, the allegation that respondent violated the Statute by failing to provide the Union a copy of David O'Hara's March 18, 2003, affidavit was withdrawn. Accordingly, it is unnecessary to consider the record evidence and respondent's defenses regarding those allegations in the instant decision.

Equipment Maintenance Squadron, where Brown worked. Charles asked for the following items:

- (1) Copy of [Brown's] first feedback
- (2) Copy of [Brown's] second feedback
- (3) Copies of any and all data that pertains to the ratings that [Brown] received [that] are consistent with the benchmarks for appraisal factors
- (4) Copies of any and all data to support [the] lower ratings [in Brown's 2002 appraisal] from [the] last three years.

The union explained that it needed the information to represent Brown in connection with his grievance. According to the union, it needed the information to assess the strengths and weaknesses of its case, as well as to determine how to proceed and argue the case.

On June 11, 2002, Thyne responded to the union's request by providing it with two documents. First a copy of Brown's first feedback and a copy of a Dover Form 446, Process Assessment Form. Thyne did not raise any anti-disclosure interests nor did she request any clarification of the request. Thyne's response to item 4 was that, "[no] other documents exist."

O'Hara's credited testimony is that he prepared a document entitled "Explanation of Rating Disparity for Mr. Barry Brown's 2002 Appraisal" (herein Explanation of Rating Disparity) sometime in March or April 2002 during the initial (informal) grievance process. O'Hara's document according to him, pertained to and supported the numerical ratings that he gave Brown in AF Form 860A, Part F. O'Hara also prepared a truncated version of the Explanation of Rating Disparity one week after preparing the full version. Both versions of the document were prepared for the use of Charlene Dubbles, a human resources specialist in respondent's Civilian Personnel Office, who sought O'Hara's rationale for lowering three of the nine ratings in Part F of Brown's performance appraisal for the year ending March 31, 2002.

Dubbles testified that she was called by Thyne², who said that she had a grievance. Thyne was the first step grievance official in the Brown matter. Although Dubbles

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Thyne did not testify.

states that she talked with O'Hara "during the time we were evaluating [Brown's] grievance" and that O'Hara prepared the Explanation of Rating Disparity in order to provide her with his rationale for his rating, it is not clear when these conversations occurred. Dubbles did not directly contradict O'Hara's testimony, however. Based on the record as a whole, it is clear that the Explanation of Rating Disparity was prepared prior to the filing of the Brown grievance on May 22, 2002 and that it was received in respondent's Civilian Personnel Office in plenty of time to allow respondent to use it to evaluate Brown's first step grievance filed on May 22, 2002. Furthermore, based on the testimony of Dubbles, it is found that the Explanation of Rating Disparity was a part of Brown's grievance file on June 11, 2002, when respondent answered the union's request for information. Finally, the instant record supports a finding that the union did not learn of the existence of this document until April 7, 2003, when respondent's counsel introduced it at the arbitration hearing over Brown's grievance.

Analysis and Conclusions

This case involves the narrow issue of whether respondent's claim that the Explanation of Ratings Disparity prepared by O'Hara was exempt from disclosure under section 7114(b)(4)(c) of the Statute and, thereby, justified its failure to furnish this information to the union in a timely manner.

Respondent's argument that the document prepared by O'Hara was not created in the regular course of business lacks merit. It is fundamental that an agency's regular course of business includes addressing employee complaints, even through litigation where necessary. Also, respondent presented no evidence with regard to whether the information was reasonably available or whether the union stated a particularized need for the information. Accordingly, it is found that the information was created in the regular course of business, that it was reasonably available and that the information was necessary under section 7114(b)(4) of the Statute.

The respondent acknowledges the duty under section 7114(b)(4) to provide information that would enable a union to process a grievance or to determine whether or not to file a grievance. *American Federation of Government Employees,*

Local 1345 v FLRA, 793 F.2d 1360, 1364 (D.C. Cir. 1986).³
In this case, however, the respondent claims that the Explanation of Ratings Disparity is exempt from disclosure under section 7114(b)(4)(c) since it is "guidance, advice, counsel, or training for management officials relating to the collective bargaining process." *National Labor Relations Board v FLRA*, 952 F. 2d 523, 531 (D.C. Cir. 1992).

The General Counsel, on the other hand, maintains that nonstrategic factual data about the subject of collective bargaining, such as found in this matter, is not exempt from disclosure under section 7114(b)(4)(c). **Department of Health and Human Services, Washington, D.C.**, 49 FLRA 61, 68 (1994). Accordingly, the General Counsel argues that a human resources specialist's request that a supervisor create a factual document about the rationale for a performance rating that he has given, does not raise the document to the level of advice, counsel or guidance on how to handle the employees' grievance under the Statute. The General Counsel specifically points out that the document in this case neither addresses the Brown grievance nor contains strategic advice on how to proceed with the grievance. Moreover, it was not an attempt to interpret the collective bargaining agreement. Accordingly, it is found that the Explanation of Rating Disparity does not constitute "guidance, advice, counsel or training for management officials relating to the collective bargaining process", within the meaning of 7114(b)(4)(c) of the Statute.

Respondent also claims that the union was merely seeking information relied upon to rate Brown. Respondent insists that the document was created after Brown's appraisal was final, had been informally grieved and it could not have been put to any legitimate use by the Union during the grievance process. The record supports the view that the document was in existence when the union made its May 22, 2002 request for information.

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Although recognizing that this case represents present Authority law, respondent takes the position that section 7114(b)(4) should be restricted in application to requests for data made in connection with actual negotiations under the obligation to collectively bargain. This viewpoint is rejected. It has long been established that a union's information request must be evaluated "in the context of the full range of the union's responsibilities in both the negotiation and administration of a labor agreement." *American Federation of Government Employees, Local 1345 v. FLRA*, 793 F.2d 1360 (D.C. Cir. 1986).

The General Counsel believes that the information would have allowed the union to realistically consider the strengths and weaknesses of Brown's grievance, and to take appropriate action on the grievance. Thus, the General Counsel suggests that had the union been provided with the information in a timely fashion, it might not have proceeded to arbitration on the matter. There is ample evidence in the record to support this position. Furthermore, the General Counsel urges that since respondent needed the document to process Brown's grievance at each step of the grievance procedure, and at the arbitration, it is certainly reasonable to conclude that the union had no lesser need for the information. Since it has been concluded that the document was not guidance, advice or counsel, it is found that the information should have been furnished to the union. I agree.

Respondent's argument that the Explanation of Rating Disparity is not responsive to the union's request is due some consideration. Seemingly, respondent focuses on item 4 of the union's request for information. In item 4, the union requested information "to support [Brown's] lower ratings from [the] last three years." The May 22, 2002, letter from the union put the respondent on notice that it sought both information created both before and after Brown's appraisal. A look at the first two items that specifically requested information created in the months prior to Brown's appraisal (feedbacks). The last two items were not as narrow, requesting "any and all data" and could reasonably have been read as encompassing any information that had been developed prior to the May 22, 2002 information request. At the time O'Hara created the document, the parties were still processing the grievance, albeit only at the informal stage. Consequently, the respondent had all the information it needed to gauge its obligation to provide the requested information, and would not be relieved of its obligation to provide the information simply because the union had not requested specific information that it did not even know was contained in Brown's grievance file. Accordingly, it is concluded that the union's request for "any and all data" included the Explanation of Rating Disparity.

The record conclusively shows that the Explanation of Rating Disparity was in existence at the time the union made its request for information on May 22, 2002. Respondent does not address the issue of timeliness, but relies on its reasoning that the Explanation of Rating Disparity was not responsive to the union's May 22, 2002, request. A stand that has already been found to lack merit. Clearly, O'Hara prepared the document at the request of Dubbles in March or

April 2002 and the document was prepared to assist respondent's first step grievance official in deciding whether O'Hara had considered the benchmarks when appraising Brown. The Authority has held that information requested by a union pursuant to section 7114(b)(4) must be furnished in a timely manner under the surrounding circumstances. **Federal Aviation Administration, Fort Worth**, 57 FLRA, 604, 606 (2001); **Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pennsylvania**, 11 FLRA 639, 642 (1983). This document was in respondent's possession even before the first step grievance was filed on May 22, 2002. It was not supplied to the union until well after the union had filed a grievance on Brown's behalf that had been denied at the informal step of the grievance procedure. Accordingly, it is concluded that respondent failed to furnish the Explanation of Rating Disparity to the union in a timely manner.

Based on the foregoing, it is concluded that respondent was required by section 7114(b)(4) of the Statute to furnish the Explanation of Rating Disparity to the union and, therefore, it is found that the failure to timely furnish the union with a copy of the Explanation of Rating Disparity constitutes a violation of section 7116(a)(1), (5), and (8) of the Statute.

Accordingly, it is therefore recommended that the Authority adopt the following Order:

Order

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of the Air Force, Dover Air Force Base, Delaware, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish, in a timely manner the American Federation of Government Employees, Local 1709, AFL-CIO, with a copy of the "Explanation of Rating Disparity for Mr. Barry Brown's 2002 Appraisal" which it requested on May 22, 2002, to represent Barry Brown in his grievance regarding his appraisal for the appraisal year ending on March 31, 2002.

(b) In any like or related manner, interfering with, restraining or coercing its 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 Federal Service Labor-Management Relations Statute:

(a) Post wherever bargaining unit employees represented by the American Federation of Government Employees, Local 1709, AFL-CIO, are located, 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 Commanding Officer at Dover Air Force Base, 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.

(b) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 22, 2004.

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Eli Nash
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 U.S. Department of the Air Force, Dover Air Force Base, Dover Delaware, 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 NOT fail or refuse to furnish, in a timely manner the American Federation of Government Employees, Local 1709, AFL-CIO, with a copy of the "Explanation of Rating Disparity for Mr. Barry Brown's 2002 Appraisal" which it requested on May 22, 2002, to represent Barry Brown in his grievance regarding his appraisal for the appraisal year ending on March 31, 2002.

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.

(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 its provisions, they may communicate directly with the Regional Director, Washington Region, Federal Labor Relations Authority, whose address is: 800 K Street, NW, Suite 210, Washington, DC 20001-8000, and whose telephone number is: 202-482-6702.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. WA-CA-03-0468, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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DATED: July 22, 2004
Washington, DC