



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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DEPARTMENT OF VETERANS AFFAIRS
VA MEDICAL CENTER
RICHMOND, VA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2145, AFL-CIO

CHARGING PARTY

Case No. WA-CA-13-0280

Douglas J. Guerrin
For the General Counsel

Timothy M. O'Boyle
For the Respondent

Jennifer Marshall
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

For most of the last twelve years, the President of the American Federation of Government Employees (AFGE), Local 2145, AFL-CIO (Local 2145 or the Union) was a member of the Department of Veterans Affairs (VA), VA Medical Center, Richmond, Virginia's (the Agency's, the Respondent's, or the Medical Center's) Resource Management Committee (RMC), which makes staffing recommendations to the Medical Center Director. On the Tuesday before each monthly meeting, the Agency distributed RMC agendas and supporting documentation for members' review, and the Union recipients would sign a receipt for the documents. During two extended medical absences in 2010 and 2011, the Union President asked her Executive Vice President to serve as her substitute on the committee. When the Union President returned after her second absence, the Agency did not resume sending her the RMC materials, despite her requests. She filed a grievance protesting the failure to send committee materials to her, and when the grievance was denied, she filed an information request, seeking these documents under § 7114(b)(4) of the Federal Labor-

Management Relations Statute (the Statute). The Agency refused to give her the information, saying that because it had been sending the documents to the Executive Vice President in advance of the monthly meetings, it had no obligation to provide the documents again.

There are two main questions to resolve, one procedural and one substantive. Procedurally, the Agency insists that the Union's unfair labor practice charge (ULP) is barred, under § 7116(d) of the Statute, by its earlier-filed grievance. Because the grievance alleged that the Agency violated its own policy memorandum by failing to furnish the documents prior to the committee meetings, while the charge alleged the Agency violated the Statute by refusing the Union's subsequent information request, the legal theories in the two filings are different, and § 7116(d) is not applicable.

Substantively, I must determine whether the Agency was required to furnish the requested information to the Union. In its information request, the Union President clearly explained that neither she nor the Executive Vice President had been receiving RMC documents to which they were entitled under the Agency's policy memo; that the Union needed the documents, including the signed receipts, to determine whether the Agency was meeting its obligation under the policy; and that the documents would assist the Union in processing its grievance. On this basis, I find that the Union articulated a particularized need for the information. I also find that the Agency did not establish any valid grounds to refuse the information request. Even if the Agency had provided the committee materials to the Executive Vice President at the time of the meetings, it conceded that it had not sent the materials at that time to the President, and the former's receipt of the documents did not absolve the Agency from providing them subsequently to the latter.

STATEMENT OF THE CASE

This is a ULP proceeding under the Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135 and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On March 19, 2013, the Union, filed a ULP charge against the Respondent. GC Exs. 1(a), 1(b). After investigating the charge, the Regional Director of the FLRA's Washington Regional Office issued a Complaint and Notice of Hearing on July 18, 2013, on behalf of the FLRA's General Counsel (GC), alleging that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by failing to furnish the Union with information that it had requested. GC Ex. 1(c). The Respondent filed its Answer to the Complaint on August 8, 2013, denying that it violated the Statute. GC Ex. 1(d).

A hearing was held in this matter on September 17, 2013, in Richmond, Virginia. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and the Respondent filed post-hearing briefs, which I have fully considered.

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

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The AFGE is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide bargaining unit of employees of the VA. GC Ex. 1(c). The Union is an agent of the AFGE for the purpose of representing bargaining unit employees of the Respondent. The AFGE and the VA are parties to a collective bargaining agreement, known as the Master Agreement. *Id.*

About twelve years ago, the Agency created the RMC. Tr. 45. Medical Center Memorandum MCM-001-03, published on January 26, 2011, entitled Resource Management Committee, sets forth the purpose, policy, membership, responsibilities, and procedures to be followed by the RMC. Jt. Ex. 1; Tr. 18. According to MCM-001-03, the committee is:

responsible for the oversight and allocation of the Medical Center's fiscal and human resources and their related policies and procedures. The Resource Management Committee (RMC) exists to assist the Richmond Medical Center Director and the Strategic Management Resource Executive Board (SMREB) in planning and managing the Medical Center's financial and human resources.

Jt. Ex. 1 at 1. Jennifer Marshall has been the President of Local 2145 for fifteen years. Tr. 15. She testified that the RMC makes decisions on requests for creating and filling bargaining unit and non-bargaining unit positions at the Medical Center and approves new functional statements (position descriptions) for classification. Tr. 16, 42-43, 45. Attachment A of MCM-001-03 lists the RMC membership, which includes the Associate Director as Chair; the Chief of Staff as Co-Chair; the Assistant Director; the Service Chief-Administrative; the Service Chief-Clinical; the Service Chief-Patient Care Services; the Chief of Fiscal Service; the Chief of Human Resources Management (HRM); and an AFGE Officer, either the President or Executive Vice President.¹ Jt. Ex. 1; Tr. 17. The RMC meets eleven times a year. Tr. 17.

Section 5(c) of MCM-001-03 provides that, "[t]he HR Manager will prepare and forward copies of the agenda and supporting documentation to all committee members the Tuesday before the scheduled RMC meeting to provide them an opportunity to review and become familiar with the requests." Jt. Ex. 1 at 4. Before March 2010, hard copies of these materials were hand-delivered to Marshall by someone in the Human Resources Department, on the Tuesday before each RMC meeting. Tr. 19, 43, 56, 58-59, 73, 80. Sometime in 2011, the Agency switched from providing hard copies to distributing them electronically. Tr. 73-74, 80, 84.

¹ According to Marshall, Attachment A of MCM-001-03 was modified in March 2010 to include the Executive Vice President, as well as the President, as a member of the RMC, to ensure that the Union had a voting presence at meetings when Marshall was unavailable. Tr. 19-20.

The amount of material distributed to RMC members varies greatly from meeting to meeting, but packages generally consist of a two-page justification with two additional pages. Functional statements are sometimes included, as well as statistical data and other written materials. If the committee has to review a large number of applications, members may receive as many as 300 to 400 pages of documents. Tr. 56-57, 76.

As the President of Local 2145, Marshall has served as the Union representative to the RMC for the twelve years that the RMC has been in existence, with the exception of a period from March to September of 2010, when she was on extended sick leave for a head injury, and another period of extended sick leave from March to September 2011. Tr. 19, 42, 45-46, 55, 60. During that time, Charles Jackson, the Union's Executive Vice President, stood in for her and served as the Union representative on the RMC. Tr. 20. Jackson retired from his position at the VA in February 2012, but continued to serve as a Union officer and work at the Union office about one hour a week. Tr. 20. Marshall testified that, after she returned to work in September 2010, she made a request to Jane Beard, then the Acting Human Resources Officer, to return her to the RMC email list. Tr. 21. At that time, Beard was responsible for drafting agendas, organizing meetings, and assuring that minutes were completed and published for RMC meetings. Tr. 71. Beard did not respond to Marshall's request. Tr. 54. Marshall testified that she has continuously been a member of the RMC, and she argues that she should have been placed back on the committee's email list, but that the Agency has refused to do so since September 2010. Tr. 19-21, 51.

Marshall has made several additional requests to Beard, by e-mail, for reinstatement to the RMC e-mail list. Those requests also have gone unanswered. Tr. 54, 56, 68. Beard testified that she recalls having received an email message from Marshall, perhaps in January 2013, asking to be returned to the RMC email list. Beard asserts that she did not have the authority to modify the list. By that time, she was no longer the Acting Human Resources Officer, and had returned to her former position of Deputy Human Resources Officer. Changes to the list had to be made by the Medical Center Associate Director, Dave Budinger. Beard stated that she informed Valencia Moore, the Human Resources Manager, of Marshall's request, and assumed Moore and Budinger would address the situation. Tr. 81-83.

To Marshall's knowledge, from the time she returned from her first extended illness in September 2010 to the present, the Union has received no notice of RMC meetings. Tr. 52-54. She does not know if Jackson continued to attend these meetings after she returned to work, but she believes he attended them sporadically. Tr. 44, 47, 55. Beard could recall Jackson attending only one RMC meeting between February 2011 and February 2013. Tr. 72. Sometime in 2011, a "computer glitch" resulted in a large number of Jackson's emails being deleted and lost. Tr. 48-49. Jackson subsequently advised Marshall that although he was receiving notices of RMC meeting, he was not receiving any of the supporting documents. Tr. 49, 58, 63-64. An email message from the Agency information technology (IT) staff, dated September 21, 2011, lists all members of the RMC. Jackson's name appears there, but Marshall's does not. R. Ex. 1. Marshall testified that, as of the date of the hearing, she has not been included on the RMC mailing list, but Jackson's name remains. Tr. 64.

On January 30, 2013, Marshall filed a second step grievance, alleging that the Agency failed to comply with MCM-001-03, Section 5(c), by failing to provide the Union with agendas and supporting documentation in advance of scheduled RMC meetings. Jt. Ex. 3; Tr. 22. Beard denied the grievance by letter dated February 14, 2013, arguing that the grievance lacked merit because the Agency was providing these documents to Executive Vice President Jackson. Jt. Ex. 4; Tr. 22-23. That day, the Union advanced the grievance to the third step. Jt. Ex. 5; Tr. 23. Arbitration has been invoked, and it was awaiting arbitration at the time of the hearing in this case. Tr. 23.²

On February 15, 2013, Marshall submitted an information request to Budinger, asking for two years of agendas and supporting documentation that had been sent to RMC members on the Tuesday before each meeting. Jt. Ex. 6 at 1, 2. She referenced the January 30 grievance the Union had filed regarding notice of RMC meetings, and she argued that the Agency had wrongly denied the Union's grievance by claiming that the supporting documents had been furnished to Jackson. Jackson, she said, denied receiving notices of the meetings or supporting documentation, and she expressed concern that "the agency is circumventing this President when it has been a past practice to send these items to the president of this local." *Id.* at 1; Tr. 29-30. She explained the Union's particularized need for the information as follows:

- 1) The information is needed in order to determine if HRM staff has complied with the RMC provisions as asserted by Jane Beard, Deputy Human Resources Officer.
- 2) The information is needed in order to assist the Union with regard to the advancement 3rd step grievance filed on this matter.
- 3) The information or lack thereof will be utilized to present the merits of the Union filed grievance.
- 4) The information produced or lack thereof will demonstrate that the agency has failed to comply with MCM-001-03 provisions as stated above.
- 5) The Union requires this information for review and in support of the Union filed 3rd Step Grievance and/or a 3rd party review based on evidence, merit review and order of resolutions requested by the Union.

² On October 22, 2012, the Union filed two grievances on behalf of bargaining unit employee Rhonda Barnes-Bell, seeking a current, accurate position description and a temporary promotion for completing duties that should be classified at a higher level. Jt. Ex. 2; Tr. 23-24. Marshall testified that Barnes-Bell was adversely affected by the Agency's failure to provide the Union with timely copies of the RMC agendas and supporting documents, because the RNC would have had to approve her position description and possibly a desk audit for reclassification of her position. Tr. 24-29.

Jt. Ex. 6 at 2. In closing, Marshall asserted that the requested information was “normally maintained by the Agency,” and that the Agency had a “duty to respond, whether affirmative or negative to requests.” *Id.*

On March 18, 2013, Agency Representative James Kielhack, a Human Resources Specialist, responded to Marshall’s request. In a brief letter dated March 4, 2013, he denied the request because it was “redundant,” explaining that the documents sought by the Union had been forwarded to Jackson, “in accordance with the scheduled RMC meetings.” Jt. Ex. 7 at 2. He stated, “once the Agency has responded to a request for data and provided the requested information[,] it is under no obligation to continually re-supply it based upon repetitive or duplicative requests.” *Id.*; Tr. 36, 87. Kielhack’s response contains a lengthy section beneath his signature, which he referred to as “boilerplate,” something he includes with every answer to a Union information request. Tr. 90-91. He admitted that, although the boilerplate section makes general reference to particularized need, his reply did not specify that the Union’s request failed to articulate a particularized need, nor did it assert that the information was not maintained electronically or reasonably available. Tr. 93.

Marshall testified that the Union had never previously submitted a request under § 7114(b)(4) of the Statute for this information. Tr. 37. Kielhack admitted that the Agency had never furnished these materials in response to a prior information request. Tr. 91. He said that he did not speak with Marshall, either before or after he answered the request. Nonetheless, he claimed that he knew the Union had the information because he had talked to Beard, who told him that she had forwarded electronic versions of RMC agendas and supporting documentation to all RMC members, and that Jackson was included on the list of recipients. Tr. 87-89. To date, the Union has not received any of the documents it requested through its request for RMC agendas and supporting documents. Tr. 37.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that the Respondent committed a ULP under § 7116(a)(1), (5), and (8) of the Statute by refusing to furnish the Union with the information it requested. GC Ex. 1(c); GC Br. at 12-13. The GC argues that the Union’s request met all of the requirements of the Statute. First, the evidence and the record support a finding that the Respondent has and maintains the information. GC Br. at 5. Beard herself testified that the Agency continues to store the RMC meeting agendas and supporting documents. Tr. 76-77. The GC contends further that the evidence demonstrates the information is reasonably available. The Agency never claimed to Marshall that the information no longer existed or was too difficult to access. While an agency is not required to furnish information that doesn’t exist, it is obligated to advise its union of that fact at the time of its reply. *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 325-27 (1987). Finally, the GC observes that the Respondent admitted in its Answer to the Complaint that the requested information did not constitute guidance, advice, counsel, or training, and no law prohibited its disclosure. *Id.*; GC Ex. 1(d).

Citing *IRS, Wash., D.C. & IRS, Kansas City Serv. Ctr., Kan. City, Mo.*, 50 FLRA 661, 669-70 (1995) (*IRS Kansas*), the GC argues that the Union's request established a particularized need for the information. First, the Union explained that it had filed a grievance over the Agency's failure to comply with MCM-001-03 the previous day; and the information it requested was necessary for the Union to carry out its representational responsibility of processing that and other grievances. GC Br. at 8; Jt. Ex. 6. The Union further described why it needed the information (to assess whether the Agency was complying with the MCM), how it would use the information (to determine whether and how to proceed with the grievance), and how its use of the information would relate to its representational responsibilities (filing and pursuing grievances is a primary responsibility of Union representatives). GC Br. at 10.

The GC contends that the Respondent failed to raise any non-disclosure interest at the time it answered the Union's request, thereby waiving non-disclosure interests as a defense. *Id.* at 6. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 808, 813 (2002) (*Forrest City*). Rather, the GC argues that the Respondent's witness admitted that he simply included boilerplate language about the requirement of particularized need at the end of its response. Tr. 90-91.

The GC argues that there no legal basis in the Respondent's argument that the Union's request was redundant, or that it was not obligated to furnish the information it had already provided to Jackson. The GC asserts that the Union had never before submitted a request for this information, and there is no case law holding that a union may obtain information only once. GC Br. at 11-12.

Respondent

The Respondent asserts that it did not violate the Statute, because the Union did not establish that the information requested was necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. The Respondent also asks that an adverse inference be drawn from the GC's failure to present testimony from Union Executive Vice President Charles Jackson. R. Br. at 3.

Respondent argues that the Union's five reasons for seeking the information amounted to a single rationale – to support its grievance regarding the RMC agendas and supporting documents, and to show that it never received those documents. *Id.* at 6-7. The Agency contends, however, that the Union never explained how these thousands of pages of documents were required to address the grievance. It argues further that the Union's intent to prove that it never received the documents was not sufficient to show particularized need. *Id.* at 7.

The Respondent notes that Marshall waited two years before making this information request and never attended RMC meetings during that period, undermining the Union's argument that the information was necessary. *Id.* at 8-9. Further, the Respondent argues that it had already provided the requested information to Jackson by email at the time of the meetings. *Id.* at 8. It asserts that the fact that the Union filed a ULP charge, rather than

responding to the Agency's legitimate anti-disclosure interest (that it had already provided the information), should be considered in determining whether a particularized need had been established. *Id.* at 9; see *U.S. Dep't of the Air Force, Air Force Materiel Command, Kirtland Air Force Base, Albuquerque, N.M.*, 60 FLRA 791, 794-95 (2005).

ANALYSIS AND CONCLUSIONS

1. The ULP charge was not barred by the Union's earlier-filed grievance

In the final paragraph of its Answer to the Complaint, the Respondent argues that, "the subject matter of this Complaint – the Charging Party's request for Resource Management Committee minutes – is the subject matter of a grievance previously filed by the Charging Party." Apparently, the Respondent intended to argue that the charge at issue in this case is barred under § 7116(d) of the Statute by an earlier-filed grievance. However, the Respondent did not specify the grievance to which it referred, or raise this argument at the hearing or in its post-hearing brief. There is no indication of the Respondent's exact basis for this defense, or whether Respondent wished to continue to pursue it, but it would appear that the argument is based on the Union's January 30, 2013 grievance. *Jt. Ex. 3*. Nonetheless, I find that the charge in this case is not barred by the filing of the Union's January 30 grievance, if that is, in fact, the grievance to which the Respondent referred.

Whether a grievance is barred by an earlier-filed ULP charge, or vice versa, requires examining whether the grievance involves the same "issues" – that is, whether the grievance arose out of the same factual predicate as the ULP and whether the legal theory advanced in support of the grievance and the ULP is substantially similar. When both tests are met, § 7116(d) bars the subsequent action. See *U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord AFB, Wash.*, 63 FLRA 677, 680-81 (2009); *OLAM Southwest Air Def. Sector (TAC), Point Arena Air Force Sta., Point Arena, Cal.*, 51 FLRA 797, 801-02 (1996) and cases cited therein. The Authority has held that a ULP charge alleging a statutory violation does not bar a subsequent grievance alleging a contract violation. For example, the Authority found that a ULP charge alleging a violation of the statutory duty to bargain does not bar a subsequent grievance alleging a violation of a contractual duty to bargain. See *Ass'n of Civilian Technicians*, 55 FLRA 474, 475 (1999) (*ACT*).

Here, the facts underlying the January 30, 2013 RMC grievance and the present ULP charge are related, but not identical. Both concern the provision of agendas and supporting documents for RMC meetings. However, in the grievance, the Union alleges that, by failing to furnish these documents, the Agency violated its own internal policy memorandum, MCM-001-03. The Agency's alleged violation of MCM-001-03 occurred on an ongoing basis, from at least 2011 through 2013. The remedy sought in the grievance was a prospective one: that the Agency comply with MCM-001-03 and provide Marshall with meeting notices and supporting documents, on an ongoing basis, the Tuesday before every meeting. It does not ask for the prior two years of agendas and supporting documents. *Jt. Ex. 3*. The ULP charge in this case alleges that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by refusing to comply with an information request filed by the Union *subsequent to* its grievance. Although the information request cites the MCM, it was made

under § 7114(b)(4) of the Statute. Jt. Ex. 6. The ULP charge was based not on the Agency's alleged failure to provide timely RMC meeting notices between 2011 and 2013, but on the Agency's refusal to provide those documents in February 2013. While the grievance and the ULP charge were certainly part of the same ongoing dispute between the parties, each sought to vindicate somewhat different interests and pursued different claims. Accordingly, because the grievance and the ULP charge advance different legal theories, I find that this ULP charge was not barred by the RMC grievance. *ACT*, 55 FLRA at 475.

2. Under § 7114(b)(4), the Union was entitled to the agendas, receipts of meeting notices, and supporting documents for the RMC meetings

Section 7114(b)(4) of the Statute requires an agency, upon request and "to the extent not prohibited by law," to provide a union with data that is: (1) normally maintained by the agency; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (4) not guidance, advice, counsel, or training to management. 5 U.S.C. § 7114(b)(4); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Fort Dix, N.J.*, 64 FLRA 106, 108 (2009) (*Ft. Dix*). In its brief, the Respondent claims only that the Union failed to establish a particularized need for the requested information. R. Br. at 4-9.

In order for a union to demonstrate that requested information is "necessary" within the meaning of § 7114(b)(4) of the Statute, a union must establish a "particularized need" by articulating, with specificity, why it needs the requested information, including how the union will use the information, and how the union's use of the information relates to the union's representational responsibilities under the Statute. *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495 (2014) (*FCI Ray Brook*). The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be useful or relevant to a union. Instead, a union must establish that the requested information is required in order for the union to adequately represent its members. *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 978 (2010) (*IRS*). A union must articulate its interests in disclosure of the information at or near the time of the request, not for the first time at a ULP hearing. *U.S. Dep't of the Air Force, Randolph Air Force Base, San Antonio, Tex.*, 60 FLRA 261, 263 (2004) (*Randolph AFB*). However, in reviewing a union's information request, circumstances surrounding the request, like other relevant evidence, are appropriate to consider in evaluating the overall sufficiency of the request. *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195, 1207 n.12 (1997) (*USP Marion*).

The Authority has found that a union establishes a particularized need where it shows that it needs the information: (1) to assess whether to file a grievance; (2) in connection with a pending grievance; (3) to determine how to support and pursue a grievance; or (4) to assess whether to arbitrate or settle a pending grievance. *FCI Ray Brook*, 68 FLRA at 496. The Authority has also held that a union's citation to specific collective bargaining agreement provisions served to notify the agency that the requested information was necessary for the union to administer and enforce the agreement. *Id.*

The union's explanation of need must permit an agency to make a reasoned judgment as to whether the Statute requires the agency to furnish the information and, thus, must be more than a conclusory assertion. *Id.* It is not enough for a union to say only that information is needed to: "prepare" a grievance, *IRS*, 64 FLRA at 979-80; "pursue possible grievances and . . . [equal employment opportunity] complaints," *Dep't of Health & Human Servs., Soc. Sec. Admin., N.Y. Region, N.Y.C., N.Y.*, 52 FLRA 1133, 1148 (1997); or "determine whether any employee or [u]nion rights have been violated and if they have . . . take appropriate remedial action through . . . negotiated grievance procedures," *Dep't of the Air Force, Wash., D.C.*, 52 FLRA 1000, 1009 (1997). The Authority has held that an assertion that the requested information is necessary to "assist in developing proposals for . . . negotiations" is a "conclusory or bare assertion that is insufficient to establish particularized need." *IRS*, 64 FLRA at 979.

Nevertheless, a union's request may contain a certain level of ambiguity. A request need not be so specific as to reveal a union's strategies. *FCI Ray Brook*, 68 FLRA at 496. Also, in many cases, a union will not be aware of the contents of a requested document, and the degree of specificity required of a union must take that into account. *IRS Kansas*, 50 FLRA at 670 n.13 (1995).

As appropriate under the circumstances of each case, the agency must either furnish the information, ask for clarification of the request, identify its countervailing or other anti-disclosure interests, or inform the union that the information requested does not exist or is not maintained by the agency. *See, e.g., Fed. Aviation Admin.*, 55 FLRA 254, 260 (1999) (*FAA*); *U.S. Dep't of Justice, Immigration & Naturalization Serv., N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472-73 (1996), *pet. for review denied*, 144 F.3d 90 (D.C. Cir. 1988); *Soc. Sec. Admin., Balt., Md.*, 39 FLRA 650, 656 (1991). Like the union, an agency must explain its anti-disclosure interests in more than a conclusory way, and it must raise these interests at or near the time of the union's request. *Soc. Sec. Admin.*, 64 FLRA 293, 295-96 (2009).

a. The Union established a particularized need for the requested information

There is no dispute that Marshall was a named member of the RMC and that, since March 2010 when she went on extended sick leave, she had not received any of the agendas or supporting materials that were supposed to be sent to all RMC members to enable them to prepare for meetings. Jt. Ex. 1. In order to correct this problem, Marshall filed a grievance. Jt. Ex. 3. In denying the grievance on behalf of the Agency, Beard stated, "All data and information was and is currently being sent via e-mail to Charles Jackson Executive Vice President, AFGE Local 2145." Jt. Ex. 4 at 2. In addition to elevating the grievance to the next step, Marshall then filed an information request under § 7114(b)(4) of the Statute, stating, "I am concerned why the agency is circumventing this President when it has been a past practice to send these items to the president of this local." Jt. Ex. 6 at 1.

At the heart of both the Union's grievance and its information request are its contentions, first, that the Agency was required to send meeting notices, agendas, and supporting documents to Marshall, not Jackson, and second, that the Agency had not even been sending the documents to Jackson. The information request addresses both of these

issues. Marshall said that she needed the documents in order to determine whether the Agency was meeting its obligation under the MCM to furnish her, as an RMC member, with the documents. *Id.* at 1, 2. Additionally, she responded to Beard's earlier assertion that the Agency had been sending the required documents every month to Jackson, noting that Jackson has been retired since 2012 and that Jackson "asserts that the agency's statement is false." *Id.* at 1. In order to determine whether Beard was correct in claiming that she had been sending the documents to Jackson, or whether Jackson was correct in denying that assertion, Marshall specifically asked for the meeting notices and supporting documents in two formats: the electronic copy of email notices to Jackson and the signed receipts of hard-copy notices. *Id.* She explained that HRM had historically required a Union official to sign receipts of notices sent to them, and obtaining those receipts in this case would help to verify whether Jackson had indeed received them. *Id.* And since Marshall also claimed that the Agency was required to send copies of the meeting notices and supporting documents to her, the receipts would have clarified whether the Agency had done so.

Under these circumstances, I find that the Union asked for information that was necessary within the meaning of the Statute, as the information was needed to evaluate the merits of its grievance (which had been elevated to the third step just the previous day), and to determine whether Agency officials had complied with the requirements of MCM-001-03. See *FCI Ray Brook*, 68 FLRA at 496; *IRS*, 64 FLRA at 978-79.

The circumstances surrounding the request further clarify the Union's particularized need for the information. Both Marshall and Beard testified that Marshall asked Beard to return her to the RMC distribution list. Marshall asserts, and the Agency does not dispute, that the Agency never complied with that request. Tr. 22, 54, 56. Thus, the evidence shows that the Agency knew that Marshall had not been receiving the RMC information since March 2010, and that, as a member of the RMC, she wanted to receive it. Similarly, the Agency knew that Jackson denied having received meeting notices and supporting documents. The responsible Agency officials were aware of the context in which Marshall made her request, which further supports the Union's particularized need.

At the time the Agency responded to the information request, it did not argue that the Union failed to demonstrate a particularized need. Jt. Ex. 7. While a portion of the Agency's denial letter refers to particularized need, Kielhack conceded at the hearing that this paragraph didn't apply specifically to the information request at hand. Tr. 90-91. The first time the Respondent argued that the Union failed to show particularized need was in its Answer to the Complaint, in which it simply denied, without further explanation, that the information requested by the Union was "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining under the Statute." GC Ex. 1(d). In its post-hearing brief, the Respondent justified its position by asserting that Marshall sought the RMC documents "*only in order to prove that she had never received them.*" R. Br. at 7. This accurately describes one of the Union's two justifications for the information: the Union is, in fact, seeking proof that the Agency had not been sending Marshall the materials that RMC members were supposed to get. In arguing that the Union's justification is inadequate, the Respondent overlooks the fact that the MCM entitles named members of the RMC, including Marshall, to RMC agendas and related

information. With the documents, including the receipts of notices, Marshall could demonstrate that the Agency prepared the documents, that others were getting them, and that she was not. The Respondent also states that the Union sought the information "to support its grievance claiming that the Union did not receive the RMC agendas and related documents before each RMC meeting." *Id.* Again, the Agency is correct, and this assertion supports the Union's particularized need. *FCI Ray Brook*, 68 FLRA, at 496. But, as noted above, the Union was also seeking to prove that the Agency had not been sending the materials to Jackson, and the receipts would help to show that as well.

When the Agency responded to the Union's information request, its only argument was that the request was "redundant," in other words, the Agency had previously provided the information to Jackson and was "under no obligation to continually re-supply it based upon repetitive or duplicative requests." Jt. Ex. 7 at 2. At the hearing, the Respondent offered a single string of email messages, dated September 21, 2011, which listed Jackson as a member of the RMC mail group. R. Ex. 1. Otherwise, it provided no evidence to support its repeated claims that Jackson was receiving these documents "on a regular and recurring basis." R. Br. at 2, 4, 8. In fact, Marshall testified, and the Respondent did not dispute, that there was a period of time when a "computer glitch" caused a large number of Jackson's emails, including notices for RMC meetings, to be deleted. Tr. 48-49. Marshall also stated several times that Jackson may have received the agendas, but he did not get supporting documents. Tr. 58, 64. Thus, it is unclear whether Jackson received many of the RMC agendas and supporting documents sought by the Union. The only way to ascertain the facts was to obtain the electronic mailing notices on a monthly basis, as well as the hard copy receipts that Union officials signed when they received documents. That is what Marshall sought in the information request, and the Agency's assertion that this was "redundant" did not meet that need at all.

Moreover, regardless of whether the Agency sent meeting notices to Jackson between 2011 and 2013, the focus of the Union's information request and grievance was Marshall's assertion that she was a member of the RMC; that she was entitled to receive the monthly notices and supporting documents; and that the Agency had not been sending them to her. In the specific circumstances of this case, the Agency's redundancy argument is unpersuasive. Jackson had been retired from the Agency for over a year, and he came to the Union office infrequently. His computer usage had been interrupted when he retired, and the computer "glitch" caused additional email to be lost. Even if the Agency had been sending RMC notices and documents to Jackson, that was of little help to Marshall, who testified that Jackson claimed not to have the documents. Insisting that the Union already had the information it sought defies the reality of the situation, and I would be encouraging the Agency to be uncooperative if I accepted that justification here. In any event, the Authority has rejected an agency's argument that the union had already received the information as a justification for denying a request. *IRS, Austin Dist. Office, Austin, Tex.*, 51 FLRA 1166, 1178 (1996); *U.S. Dep't of the Navy, Puget Sound Naval Shipyard, Bremerton, Wash.*, 38 FLRA 3, 7 (1990) (finding that nothing in the language of § 7114(b) or its legislative history indicates that Congress intended a union's right to information to be dependent on whether the information is reasonably available from an alternative source).

In this context, I do not believe that the GC's decision not to call Jackson as a witness warrants drawing an adverse inference against the GC. Respondent reasons that if Jackson had testified, he would have confirmed that he indeed received the RMC documents, and that the information request therefore was redundant. But, as I have explained, the Union argued that even if Jackson had received the documents at the time of the meetings, the Agency was also required to send copies to Marshall. I have further concluded that the Agency was required to comply with the information request and send copies of the meeting notice receipts, agendas, and supporting documents to Marshall in February 2013, regardless of whether Jackson had received copies between 2010 and 2012. Therefore, resolving the factual dispute as to whether Jackson had originally received the documents is immaterial to a determination of whether the Union established its particularized need for the documents at the time of the information request.

In summary, I conclude that the Union has articulated a sufficient particularized need for the RMC agendas, email receipts of hearing notices, and supporting documentation. Marshall, as a member of the RMC, is entitled to the documents that are to be distributed to all members. Because the Union had filed a grievance over this issue, and sought to support the grievance with the documents it requested and with evidence of who may have received the documents, the Union demonstrated its particularized need.

b. The Agency has failed to demonstrate that it had any other legitimate anti-disclosure interests

The Respondent attempted to argue at the hearing that the information was not reasonably available or normally maintained by the Agency. The Agency is precluded from raising these arguments now, because it failed to do so when it denied the request. *Forrest City*, 57 FLRA at 812 (finding that the agency could not raise, for the first time at hearing, an argument that the information sought by the union was not available in an agency database); *FAA*, 55 FLRA at 260 (agency must articulate non-disclosure interests in response to information request and not for the first time at the ULP hearing).

Even if these arguments had been raised timely, I find them unpersuasive. Respondent's counsel made numerous references to the "thousands" of documents that they would have had to deliver to the Union, but did not support those assertions with evidence that the documents were unavailable or too burdensome to produce. The Statute requires an agency to provide data that is reasonably available. *Randolph AFB*, 60 FLRA at 272. Consistent with this requirement, an agency is not required to provide data that is available only through "extreme" or "excessive" means. *Id.* Determining whether extreme or excessive means are required to retrieve available data requires case-by-case analysis of relevant facts and circumstances. *Id.* Such facts and circumstances include the efforts required to make the documents available, including costs and displacement of the agency's workforce. *See Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1255 n.9 (2000).

The Authority has found information to be reasonably available when, for example, retrieval would have taken 150 hours and cost \$1,500, *U.S. Dep't of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 37 FLRA 987,

993-94 (1990), or taken three weeks to accomplish, *Dep't of Health & Human Servs., Soc. Sec. Admin.*, 36 FLRA 943, 950-51 (1990). The Authority has also found information to be reasonably available where the agency provided no evidence that obtaining the requested information would be costly, time consuming, or difficult. *Dep't of the Navy, Naval Submarine Base, New London, Conn.*, 27 FLRA 785, 796-97 (1987).

The evidence adduced at the hearing revealed that the information is normally maintained by the Agency and is reasonably available. *See Randolph AFB*, 60 FLRA at 272. Kielhack testified that it as his "understanding" that the documents are not stored electronically and that, in order to provide them to the Union, someone would have to copy or scan them and then send them. Tr. 93. He admitted, however, that he did not make this assertion in his response to the Union. *Id.* Even if he had offered this explanation in his response, I find Kielhack's testimony unconvincing and implausible. Beard testified more definitively that the RMC agendas and supporting documents for the period of March 2011 to March 2013 are kept, both electronically and in locked drawers in the Human Resources office. Tr. 76-77. All witnesses agreed that the Agency had originally sent the committee documents to RMC members by email. In light of these facts, it defies credibility that the previously-mailed documents cannot be easily retrieved and emailed again. The Agency has offered no credible evidence that providing them to the Union, either in electronic or paper format, would require extreme or excessive means.

The Respondent admitted in its Answer to the Complaint that the information the Union sought was not guidance, advice, counsel, or training to management officials or supervisors related to collective bargaining, which is protected from disclosure under § 7114(b)(4)C).

In summary, I find that the Agency failed to timely raise any legitimate anti-disclosure interests that would have precluded it from providing the information to the Union.

In order to remedy the ULP, the Respondent will be ordered to furnish the requested information to the Union and to post a notice, signed by the director of the Medical Center, to employees regarding its ULP. In accordance with the Authority's recent decision that ULP notices should, as a matter of course, be posted on bulletin boards and distributed to employees electronically, I will order both methods of dissemination. *See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Statute it is hereby ordered that the Respondent shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the Union with copies of all RMC agendas and supporting documentation for the period from February 15, 2011 to February 15, 2013, and copies of all receipts signed by, or on behalf of, Charles Jackson for those documents during that period.

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

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

(a) Furnish the Union with copies of all RMC agendas and supporting documentation for the period of February 15, 2011 to February 15, 2013, and copies of all receipts signed by, or on behalf of, Charles Jackson for those documents during that period.

(b) Post at its facilities copies of the attached Notice on forms to be furnished by the FLRA. Upon receipt of such forms, they shall be signed by the Director, VA Medical Center, Richmond, Virginia, and shall be posted and maintained for sixty (60) days thereafter, in conspicuous places, including 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) In addition to physical posting of the paper Notice, the Notice shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, customarily used to communicate with employees. This Notice shall be sent on the same day that the paper Notice is posted.

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Washington Regional Office, FLRA, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., September 30, 2015



RICHARD A. PEARSON
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 Department of Veterans Affairs, VA Medical Center, Richmond, Virginia, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL furnish the American Federation of Government Employees, Local 2145, AFL-CIO (the Union) copies of all Resource Management Committee agendas and supporting documentation for the period of February 15, 2011 to February 15, 2013, and copies of all receipts signed by, or on behalf of, Charles Jackson for those documents during that period.

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

(Agency/Respondent)

Dated: _____

By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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, Washington Regional Office, Federal Labor Relations Authority, whose address is: 1400 K Street, NW., 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029.