FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 16-21

FEDERAL EMERGENCY MANAGEMENT AGENCY RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 4060, AFL-CIO CHARGING PARTY	Case No. WA-CA-15-0472

Sarah J. Kurfis
For the General Counsel

Shayla N.M. Sipp
For the Respondent

Freda McDonald
For the Union

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On September 2, 2015, the American Federation of Government Employees, Local 4060, AFL-CIO (Union) filed an unfair labor practice (ULP) charge against the Federal Emergency Management Agency (Respondent or Agency). (G.C. Ex. 4). On December 22, 2015, the Acting Regional Director of the Washington Region of the FLRA issued a Complaint and Notice of Hearing alleging that by refusing to give the Union information it requested, the Respondent failed to comply with the requirements of § 7114(b)(4) of the Statute, and thereby violated § 7116(a)(1), (5), and (8) of the Statute.

(G.C. Ex. 5). The Respondent timely filed an Answer in which it admitted certain allegations, but denied violating the Statute.[1] (G.C. Ex. 6). (The General Counsel amended the complaint on February 25, 2016, and on March 2, 2016.) (G.C. Exs. 7 & 11).

On March 3, 2016, the General Counsel filed a Motion for Summary Judgment and included Exhibits 1 through 12. (G.C. Exs. 1-12). The Respondent filed an Opposition to the General Counsel's Motion for Summary Judgment and included Exhibits A through L. (R. Exs. A-L).

Motions for summary judgment filed under § 2423.27 of the Authority's Rules and Regulations are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no "genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

The Respondent argues that there is a genuine issue of material fact, because the Union "did not articulate a particularized need," and because the Union "did not engage in clarifications when requested by the Respondent. . . ." (R. Mem. in Opp'n of G.C.'s MSJ at 3). With regard to the first point, there is no dispute as to the substance of the Union's request and the Agency's denial, and the record is sufficient to resolve the legal question of whether the requested information is "necessary" within the meaning of § 7114(b)(4) of the Statute. *U.S. Dep't of the Treasury, IRS*, 64 FLRA 972, 978 (2010). With regard to the second point, there is no genuine dispute as to material facts concerning the Union's response to the Agency's requests for clarification. (*See* Mem. in Supp. of G.C.'s MSJ at 6; R. Mem. in Opp'n of G.C.'s MSJ at 6-8). I note in this regard that the Respondent argues in the alternative that it is entitled to judgment as a matter of law. (R.'s Opp'n to the G.C.'s MSJ). Based on the record, I have determined that summary judgment is appropriate. As such, the hearing in this matter is cancelled. I find that by refusing to give the Union the information it requested, the Respondent failed to comply with the requirements of § 7114(b)(4) of the Statute, and thereby violated § 7116(a)(1), (5), and (8) of the Statute.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (G.C. Exs. 5 & 6). The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a bargaining unit of employees appropriate for collective bargaining at the Respondent. The Union is an agent of AFGE for the purpose of representing unit of employees employed at the Respondent. (G.C. Ex. 7; *see also* G.C. Ex. 6).

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[1] Among other things, the Respondent admitted that the requested information was normally maintained by the Respondent; was reasonably available; did not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and that disclosure of the requested information was not prohibited by law. (G.C. Exs. 5 & 6).

On June 17, 2015,[2] Freda McDonald, the Union's Chief Steward (G.C. Ex. 3), filed a Step 1 grievance alleging the Agency engaged in improper procedures in connection with the Agency's failure to select the grievant for a budget analyst position announced in FEMA-CT-15-SA-44634MP (Budget Analyst, GS-13) (the job announcement). (G.C. Ex. 8). In the Step 1 grievance, McDonald asserted:

> 1. None of the minority female staff that were detailed into the various positions which were later filled under this announcement were selected. . . .
>
> 2. [N]one of the female staff have received negative feedback concerning their details. . . .
>
> 3. There were 7 individuals selected for an announcement with 5 openings.
>
> 4. There are some questions about the qualifications of the selectees versus the announcement qualifications. They do not meet them based on the information I've received; however, the information is all verbal, but easy to verify.

(G.C. Ex. 8).

On July 1, Shalini Benson, Acting Director, Budget, denied the Union's Step 1 grievance on behalf of the Agency. (R. Ex. C). In doing so, Benson asserted that the grievance "contained no relevant evidence to support the Grievant's allegations that the Agency violated any policies or procedures." (*Id.*). Benson further asserted that "a review of the hiring process for this job posting revealed nothing improper," and that "we followed all policies and laws related to hiring." (*Id.*).

On July 7, McDonald appealed the denial by filing a Step 2 grievance. McDonald effectively reiterated her initial allegations and added that the grievant was as qualified, if not more qualified, than several selectees. (G.C. Ex. 9).

On July 14, Thomas Lowry, Deputy Chief Financial Officer, denied the Union's Step 2 grievance on behalf of the Agency. (R. Ex. E). Like Benson, Lowry asserted that the Union "failed to provide any relevant evidence to support [its] allegations." (*Id.*). Lowry also noted that the Union claimed that one selectee stated during his interview with the Agency that he was unqualified for the position. Lowry asserted that the Union's claim was based on "an unidentified source" and was meritless. (*Id.*).

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[2] Hereafter, all dates are 2015, unless otherwise noted.

On July 20, McDonald filed a Step 3 grievance in the matter. There, McDonald asserted that the Union's claims were based in part on "information we received concerning comments by the selectees during the interview process. When someone indicates that their application i[s] untrue to the selection panel and is still selected, we naturally have a problem." (G.C. Ex. 10).

On August 7, Edward Johnson, Chief Financial Officer, denied the Union's Step 3 grievance on behalf of the Agency. Like the Agency's previous denials, Johnson asserted that the grievance contained "no verifiable or substantive evidence to support the Union's allegations . . . ." (R. Ex. G). Johnson stated that the Union was instead relying on "unspecified 'information' . . . allegedly received from an unspecified source concerning vague comments made by the 'selectees during the interview process.'" (*Id.*). Johnson added that he found no evidence that a selectee stated that his application was "untrue." (*Id.*).

After being told three times that the Union lacked information to support its claims, McDonald submitted an information request to Patricia Silva, an Employee/Labor Relations Specialist at the Agency, on August 11. McDonald requested the following information:

> 1. Names [of] individuals selected under [the job announcement]. (e.g., offer letter or copy of selection decision).
>
> 2. Copies of the Selectee's applications.
>
> 3. Copies of any rankings that were done.
>
> 4. The number of applicants (covered under Article 20 of the CBA[)].
>
> 5. Copy of [the job announcement].
>
> 6. Names of individuals on the selection panel and selecting official. (e.g., offer letter or copy of selection decision or panel appointment).

(G.C. Ex. 1).

With regard to the Union's need for the requested information, McDonald stated:

> As you know, [the Union] has filed a grievance concerning the selection decision on this announcement for one of our members. This information is needed for that case and to provide adequate representation for our member. Based on our knowledge of the situation and comments made by one of the selectees during the selection process provided by a third party that wishes at this time to remain nameless out of concern for his career, we believe the

> above information will help us confirm (or may rule-out) the information we received. This information will allow the Local to determine if all policies were followed and if this grievance should move forward.

(*Id.*).

McDonald closed with a request that the information be provided to the Union no later than August 24. (*Id.*).

Silva responded on August 25. (G.C. Ex. 2). Citing contractual requirements, Silva provided the names of the selectees and the number of applicants. However, she refused to provide all other information requested by the Union. (*Id.*). Silva denied the rest of the request because the Union "fail[ed] to show with any specificity the nexus between the information requested and its use in determining if 'all policies were followed' and/or 'to confirm (or rule out) information received.'" (*Id.* at 2). Silva closed by stating, "If you have any questions regarding this response, please feel free to contact me . . . ." (*Id.*).

On September 2, Silva had a phone conversation with McDonald to "discuss clarifying" the information request. (R. Ex. K). Silva sought clarification "because . . . McDonald had submitted several [information requests] that were very similar in the information that she was requesting. It was my hope that Ms. McDonald would clarify the instant [request] and all of the other [requests] with our discussion." (*Id.*). According to Silva, McDonald replied that she needed to review the request in this case before she could discuss it. (*Id.*).

The Union also filed the ULP charge in this case on September 2. (G.C. Ex. 4). (It is unclear whether the phone conversation occurred prior to the filing of the charge.) (*See id.*). The next day, the Union invoked arbitration upon the denied grievance. (G.C. Ex. 12).

On September 9, Silva sent McDonald an email "to try to arrange a time that we could discuss the [information request] for purposes of clarification." (R. Ex. K at 2). According to Silva, McDonald replied that she still had not reviewed the Union's request. (*Id.*,
Attach. 1).

On September 11, Silva sent McDonald an email offering her an "opportunity to clarify" the information requests the Union had recently submitted. (*Id.*). McDonald wrote back stating that she wanted the FLRA to resolve the issue. (*Id.*, Attach. 1).

On September 29, Silva learned that the Union had filed the ULP charge in this case. (*Id.*).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel asserts that the Union established a particularized need for the requested information. (Mem. in Supp. of G.C.'s MSJ at 5). In this regard, the General

Counsel argues that the Union stated that: (1) the request pertained to the grievance concerning the job announcement; (2) it needed the information to confirm or rule out information it had received about the selection process; and (3) it needed the information to determine whether the grievance should move forward. *Id.* Further, the General Counsel argues that the Respondent did not request clarification until September 2, 2015, the day the Union filed the ULP charge in this case. (*Id.* at 6). The General Counsel argues that because the Union established a particularized need for the requested information, and because the Respondent failed to establish a countervailing interest against disclosure, the Respondent's failure to provide the requested information violated § 7116(a)(1), (5), and (8) of the Statute. (*Id.*). With respect to remedy, the General Counsel asks that the Agency be ordered to provide the requested information and that the Chief Component Human Capital Officer sign the notice that must be posted. (*Id.*, App. A).

Respondent

The Respondent argues that it did not violate the Statute and asserts that the Union failed to establish a particularized need for the requested information. (R. Mem. in Opp'n of G.C.'s MSJ at 10). In this regard, the Respondent argues that the fact that the Union referenced a pending grievance in its request is not enough to demonstrate that the Union needed the requested information. (*Id.* at 11-12). Further, the Respondent argues that the Union "failed to articulate which [Agency] policies were at issue." (*Id.* at 11). The Respondent also contends that the Union "failed to even articulate the subject of the information [it] desired to verify or the substance of the comments or the grievance." (*Id.*).

In addition, the Respondent maintains that the Union failed to respond to its requests for clarification. (*Id.* at 13). While the Respondent acknowledges that Silva did not request clarification until September 2, 2015, the same day that the Union filed the ULP charge, Respondent argues that subsequent requests for clarification were not disingenuous, because Silva did not know the Union had filed a ULP charge until after she had asked the Union for clarification. (*Id.* at 12).

ANALYSIS AND CONCLUSIONS

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. DOJ, Fed. BOP, FCI Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495 (2015) (*Ray Brook*). The union's explanation must be more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the Statute requires the agency to furnish the information. (*Id.* at 495-96). Further, the union must articulate its interests in disclosure of the information at or near the time of the request. *U.S. Dep't of the Air Force, Randolph AFB, San Antonio, Tex.*, 60 FLRA 261, 263 (2004).

The Authority has found that a union establishes a particularized need where the union states that it needs 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. *Ray Brook*, 68 FLRA at 496. The Authority has stated that the need for information to assess whether to arbitrate a pending grievance was evident because of the financial commitment a union must make when it decides to arbitrate a grievance. *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 66 FLRA 669, 672 (2012) (*Marion*). The Authority also has emphasized that such information is necessary because arbitration can function properly only when the grievance procedures leading to it are able to sift out unmeritorious grievances. (*Id.*).

A union's request for information need not be so specific as to reveal its strategies. *Ray Brook*, 68 FLRA at 496. And the Authority has specifically rejected claims that a union failed to articulate its need with requisite specificity when the union's information request referenced a specific agency action and specified that the union needed the information to assess: (1) whether the agency violated established polices; and (2) whether to file a grievance, even though the union did not explain exactly how the information would enable it to determine whether to file a grievance. (*Id.*). In addition, the Authority has found particularized need established where, for example, the union stated that it was requesting information to determine if complaints by employees about a current policy were true and correct and to represent the employees in any rightful charges against the agency. *U.S. Dep't of the Army, Army Corps of Engr's, Portland Dist., Portland, Or.*, 60 FLRA 413, 415 (2004) (*Army Corps*).

In considering whether a union has established a particularized need for requested information, it is appropriate to consider circumstances surrounding the information request, like other relevant evidence, in evaluating the overall sufficiency of the request. *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 52 FLRA 1195, 1207 n.12 (1997).

As appropriate under the circumstances of each case, the agency must either furnish the requested 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. The agency must explain its anti-disclosure interests in more than a conclusory way, and the agency must raise these interests at or near the time of the union's request. *See Soc. Sec. Admin.*, 64 FLRA 293, 295-96 (2009) (*SSA*). When an agency "reasonably requests clarification" of a union's information request, the union's failure to respond to the request is "taken into account" in determining whether the union has established a particularized need for the information. (*Id.* at 297); *see also U.S. Dep't of the Treasury, IRS, Wash., D.C.*, 51 FLRA 1391, 1396 (1996) (*IRS*) declining to find agency's requests for clarification were disingenuous or unreasonable).

Here, McDonald provided several reasons for needing the requested information, and the reasons she cited have been recognized by the Authority as reasons that can establish particularized need. In this regard, McDonald explained that the Union needed the information to determine if the Agency was following policies related to the selection process. *U.S. Dep't of Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill.*, 66 FLRA at 672. Further, McDonald indicated that the Union needed the requested

information to evaluate the accuracy of information the Union possessed regarding the selection process, including information concerning comments allegedly made by one of the selectees during that process. *U.S. Dep't of the Army, Army Corps of Engr's, Portland Dist., Portland, Or.*, 60 FLRA at 415. This reason is especially significant since it is responsive to the Agency's earlier claim that the Union's grievance was based on information from an unreliable source. (*See* R. Exs. E & G).

In addition, McDonald showed the Agency how the Union would use the requested information, and how the Union's use of the information related to the Union's representational responsibilities. Specifically, McDonald stated that the request was being made in connection with a pending grievance concerning the Agency's job announcement and its subsequent selection process. *Marion*, 66 FLRA at 672. Further, McDonald stated that the Union would use the information to determine whether the grievance "should move forward," i.e., go on to arbitration. (*Id.*). Finally, McDonald indicated that the Union would use the requested information to represent the grievant in the grievance and arbitration process.

I conclude that by providing several specific reasons for needing the requested information, and by explaining in detail how it would use the information in connection with its representational responsibilities, the Union said enough for the Agency to make a reasoned judgment as to whether the Agency was required to furnish the requested information under the Statute.

The Respondent's arguments to the contrary are not persuasive. The Respondent contends that the Union failed to state the specific policies that it believed the Agency was violating, but it is obvious that the Union was referring to policies related to the selection process, policies that the Agency itself referred to when denying the Union's grievance. (R. Ex. C). As for the Respondent's claim that the Union failed to articulate "the subject of the information [it] desired to verify or the substance of the comments," it is apparent that the Union was seeking information pertaining to comments the Union believed were made during the selection process regarding a selectee's qualifications. (R. Exs. E & G; GC Exs. 1 & 10). Further, McDonald asserted that the Union's information regarding the comments was sensitive, and it is reasonable to conclude that requiring the Union to say more about its source would essentially require the Union to reveal its strategies concerning the grievance. *Ray Brook*, 68 FLRA at 496.

The Respondent also argues that the Union failed to respond to Silva's requests for clarification. But it is apparent that Silva's requests were unnecessary and unreasonable, if not disingenuous. This is evident in the Respondent's denial of the Union's request. There, Silva did not ask the Union for clarification or even express confusion with regard to the Union's request. (Silva's offer to answer any questions regarding the Agency's response does not constitute a request for clarification.) *See Army Corps*, 60 FLRA at 415-16. If Silva was in fact confused, she should have asked for clarification when responding to the request, or shortly thereafter. *See SSA*, 64 FLRA at 295-96. Instead, Silva waited more than three weeks to ask McDonald for clarification. Further, the reason Silva gave for wanting clarification ("McDonald had submitted several [information requests] that were very similar") is vague and does not express any actual confusion as to what the Union was

seeking. Waiting so long to ask for clarification when the request was patently clear, was unreasonable if not disingenuous and the Union was not at fault for failing to respond to such a belated and insincere request. A request for clarification post denial cannot justify a denial that should have never been issued. (*See id.* at 297); *IRS*, 51 FLRA at 1396.

As for Silva's subsequent emails regarding clarification, those emails were sent after the Union filed the ULP charge, and post-charge conduct is irrelevant in determining whether the Statute has been violated. *U.S. DOJ, Exec. Office for Immigration Review, N.Y., N.Y.*, 61 FLRA 460, 467 (2006). However, I note that they are vague (in one, Silva stated she wanted to meet with McDonald "for purposes of clarification") and further indicate that Silva was not actually confused as to what the Union was asking for and was only attempting to manufacture a problem that did not exist to justify her inaction. (R. Ex. K).

Based on the foregoing, I find that the Respondent failed to comply with the requirements of § 7114(b)(4) of the Statute, and violated § 7116(a)(1), (5), and (8) of the Statute, by refusing to give the Union the information it requested.

With respect to who should sign the notice, the Authority typically directs the posting of a notice to be signed by the highest official of the activity responsible for the violation. *U.S. Dep't of Veterans Affairs*, 56 FLRA 696, 699 (2000). Given that the denial was made by Silva, an Agency Employee/Labor Relations Specialist, I agree with the General Counsel that it would be appropriate to require the Agency's Chief Component Human Capital Officer to sign the notice as they should be made aware of the improper denial issued in response to the Union's legitimate request for information.

Accordingly, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment.

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is ordered that the Federal Emergency Management Agency, shall:

1. Cease and desist from:

(a) Failing and refusing to provide the American Federation of Government Employees, Local 4060, AFL-CIO (Union) information it requested under § 7114(b)(4) of the Statute.

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

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

(a) Provide the Union with the requested information not yet provided.

(b) Post at facilities where bargaining unit employees represented by the Union 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 Agency's Chief Component Human Capital Officer, and shall be posted and maintained for sixty (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) In addition to physical posting of paper notices, Notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Region, 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., April 4, 2016

CHARLES R. CENTER
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 Federal Emergency Management Agency, violated the Federal Service Labor-Management Relations Statute (Statute) and ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide the American Federation of Government Employees, Local 4060, AFL-CIO (Union) with certain information it requested on August 11, 2015.

WE RECOGNIZE our obligation to comply with § 7114(b)(4) of the Statute.

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

WE WILL promptly provide the Union with certain information it requested on August 11, 2015.

_____
(Agency/Activity)

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 Region, Federal Labor Relations Authority, whose address is: 1400 K Street, N.W., 2nd Flr., Washington, D.C., 20424, and whose telephone number is: (202) 357-6011.