

71 FLRA No. 48

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF THE CHIEF COUNSEL
(Respondent/Agency)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Charging Party/Union)

WA-CA-17-0280

DECISION AND ORDER

August 8, 2019

Before the Authority: Colleen Duffy Kiko, Chairman,
and Ernest DuBester and James T. Abbott, Members
(Chairman Kiko dissenting)

I. Statement of the Case

In this case, we find that the General Counsel (GC)'s complaint sufficiently notified the Agency that it was charged with violating the Federal Service Labor-Management Relations Statute (the Statute)¹ by failing to timely acknowledge and respond to the Union's information request, made pursuant to § 7114(b)(4), after about seven weeks. We also sustain Federal Labor Relations Authority (FLRA) Chief Administrative Law Judge David L. Welch's (the Judge) finding that the Agency violated the Statute by failing to respond to the information within a reasonable amount of time.

In the attached decision, the Judge found that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by failing to respond to the information request within a reasonable amount of time.

The Agency has filed exceptions to the Judge's decision, arguing, as relevant here, that the Judge erred when he found that: (1) there was no due process violation, and (2) the Agency violated § 7116(a)(1), (5), and (8) of the Statute. We find that the Agency was sufficiently notified of the matters of fact and law asserted in the GC's complaint and that the Agency failed to timely respond to the information request after approximately seven weeks; therefore, we

¹ 5 U.S.C. § 7114(b)(4).

deny the Agency's exceptions. We adopt the Judge's recommended decision and order to the extent consistent with our analysis below.

II. Background and Judge's Decision

As the attached Judge's decision sets forth the relevant facts in detail, we will only briefly summarize them here. This case arose while the Agency and Union were in the midst of negotiating a successor collective-bargaining agreement. They reached an impasse regarding several articles and initiated mediation-arbitration in 2016.

One of the debated articles in the successor agreement pertained to performance awards. The Union submitted an information request on February 22, 2017 to the Agency's chief counsel requesting information to help it prepare for the mediation-arbitration sessions scheduled for March and May of 2017. Article 37, Section 4 of the parties' existing agreement states that the Agency "will normally inform [the Union] within fifteen (15) days of receipt whether information requested under 5 U[.]S[.]C[.] § 7114(b)(4) will be supplied."² On March 16, 2017, the Union emailed the Agency's chief counsel a second time and reiterated its need for the evidence requested on February 22.³

The Union filed an unfair-labor-practice (ULP) charge against the Agency on April 10, 2017, and finally received the requested information on May 4, 2017. After an investigation, the GC issued a complaint on June 29, 2017 which alleged that the Agency violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by failing to acknowledge the information request from February 22, 2017 until April 12, 2017. After a hearing, the Judge issued a recommended decision on July 2, 2018.

The Judge found that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by failing to timely respond to the Union's information request. In reaching that conclusion, the Judge considered, but rejected the Agency's three arguments: (1) that the Agency's due process rights were violated, (2) that the Statute does not create a separate obligation to acknowledge an information request, and (3) that the Agency timely responded to the Union's information request.

² Judge's Decision at 2.

³ While the Agency did not respond to the information request until April 12, 2017, the Union received a "read receipt" indicating that the Agency's chief counsel opened the information request on February 22, 2017. *Id.* at 4.

The Judge found that the Agency had adequate notice of the GC's allegation that the Agency failed to timely respond to the information request. Based on the wording of the complaint and the ULP charge, he found that the complaint adequately informed the Agency that the complaint concerned its failure to respond timely.⁴ On this point, he found that the Agency's argument that "acknowledge" and "respond" have distinct meanings is a "distinction without a difference."⁵ The Judge also noted that the Agency's own prehearing disclosures asserted that the Agency had "timely responded to and acknowledged" the information request.⁶ Therefore, it was apparent that the Agency understood the GC's allegation regarding the failure to respond in a timely manner. Consequently, the Judge found that the Agency's due process rights were not violated.

On the central point of this case, the Judge determined that the Agency's failure to timely respond to the Union's two requests for seven weeks was unreasonable under the circumstances.⁷ He found that the parties' contract established an expectation that the Agency would respond to information requests within fifteen days and that the Agency could have fulfilled its obligation by a short and timely response, which it did not do.⁸ He also found that the Agency's arguments concerning its "post-charge conduct" were irrelevant in determining whether the Statute has been violated when it failed to respond in a timely manner.⁹ According to the Judge, even if the Agency's post-charge conduct was relevant, the seven week delay was unreasonable and the Agency's delay in responding to the information request harmed the Union.¹⁰ Therefore, he found that the Agency violated § 7116(a)(1), (5), and (8) of the Statute.

⁴ *Id.* at 9 (citing *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 787, 788 (2002) ("The test of full and fair litigation is 'whether the respondent knew what conduct was at issue and had a fair opportunity to present a defense.'")).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 11.

⁸ *Id.* at 10-11.

⁹ *Id.* at 12; see *U.S. DOJ, Exec. Office for Immigration Review, N.Y.C., N.Y.*, 61 FLRA 460, 467 (2006) (*DOJ*) ("While the [j]udge may have considered these events, it is clear that his finding of a statutory violation was based on the [r]espondent's activities prior to the filing of the charge on March 30, and the [j]udge used the [r]espondent's activities after that date only to construe the [r]espondent's pre-charge activities. Further, the [j]udge did not find that the post-charge activity was itself violative of the Statute. In addition, it is clear from the record that the [r]espondent's pre-charge activity is sufficient to sustain the complaint.").

¹⁰ Judge's Decision at 12.

The Agency filed exceptions to the decision on August 1, 2018 and supplemental exceptions on August 21, 2018, after being granted an extension of time. The GC filed an opposition on September 10, 2018.

III. Analysis and Conclusions

- A. The Judge did not err by concluding that there were no due process violations.

The Agency argues that the Judge erred in finding that both the Union's charge and the GC's Complaint provided it with an "adequate theory" of the GC's case.¹¹ While the Agency admits that "acknowledge" and "respond" have "similar definitions and could be used in the same manner to express similar acts,"¹² it contends that the GC did not assert that the timeliness of the Agency's response "was at issue" until the GC made its opening statement at the hearing.¹³

Certainly, "[a]n essential element of due process, and one imposed by law on administrative agencies such as the Authority, is the responsibility of ensuring that [all parties] in an unfair labor practice proceeding [are] adequately notified of the

¹¹ Exceptions at 2. The Agency also took exception to the Judge's exclusion of evidence concerning additional information requests that were made around the same time as the information request at issue here. *Id.* at 9. It contends that the excluded evidence was relevant to show that the Agency's reply to the information request was reasonable under the circumstances. *Id.* However, § 2423.31(b) of the Authority's Regulations establishes that "the determination of an Administrative Law Judge." *AFGE, Local 1345, Fort Carson, Colo.*, 53 FLRA 1789, 1796 (1998). Furthermore, the Agency must demonstrate that the exclusion of the evidence would have affected the "prima facie case." *Id.* at 1797. In the instant case, the record reveals that the Agency presented ample evidence to demonstrate that the Agency worked in a "small office with a busy workload." *Tr.* at 83; Judge's Decision at 9-10. The Judge excluded the evidence since it was "cumulative" and unduly repetitive. *Tr.* at 84-89; 5 C.F.R. § 2423.31(b) ("The Administrative Law Judge shall receive evidence and inquire fully into the relevant and material facts concerning the matters that are the subject of the hearing. The Administrative Law Judge may exclude any evidence that is immaterial, irrelevant, unduly repetitious, or customarily privileged. Rules of evidence shall not be strictly followed."). Therefore, we find no error in the Judge's decision to exclude the evidence.

¹² Exceptions at 2.

¹³ *Id.* at 2-3.

‘matters of fact and law asserted.’”¹⁴ However, the sufficiency of a complaint is not judged on the basis of rigid pleading requirements.¹⁵

The GC’s complaint alleged that “[f]rom February 22, 2017 to April 12, 2017, the Respondent *failed to acknowledge* the Union’s request for information” and by doing so, violated § 7116(a)(1), (5), and (8) of the Statute.¹⁶ The record clearly supports the Judge’s conclusion that the Agency understood that timeliness was a central aspect of the GC’s case. Specifically, in its prehearing submissions, the Agency asserted that it had “*timely responded* to and *acknowledged* the request for information.”¹⁷ The Agency had the opportunity at the hearing to fully participate;¹⁸ however, as discussed further below the Agency failed to adequately show that its response was timely.¹⁹ Accordingly, we find that the Agency was afforded adequate notice, and we deny the Agency’s exception that it was denied due process.²⁰

B. The Judge’s decision did not create an affirmative duty to acknowledge receipt of an information request.

¹⁴ *AFGE, Local 2501 Memphis, Tenn.*, 51 FLRA 1657, 1660 (1996). Adequate notice is determined on a case-by-case basis and each case must be fully and fairly litigated. *Id.*; *SPORT Air Traffic Controllers Org.*, 70 FLRA 554, 557 (2018) (Member DuBester concurring) (*SPORT Air*). A case is fully and fairly litigated if all the parties understood (or objectively should have understood) the issues in dispute and had a reasonable opportunity to present relevant evidence. *Id.*

¹⁵ *Dep’t of Transp., FAA., Fort Worth, Tex.*, 55 FLRA 951, 956 (1999); *see also U.S. Dep’t of VA, VA Med. Ctr., Richmond, Va.*, 68 FLRA 882, 886 (2015).

¹⁶ GC’s Ex. 1(b) (emphasis added).

¹⁷ Agency’s Prehearing Disclosures at 1-2 (emphasis added).

¹⁸ *See DOD, U.S. Army Reserve Command, St. Louis, Mo.*, 55 FLRA 1309, 1315 (2000) (finding that the respondent had adequate notice and a fair opportunity to raise a defense when testimony and post-hearing briefs asserted the issues of fact and law); *U.S. DOJ, Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 391 (1999) (finding that the complaint provided adequate notice and its allegations were fully and fairly litigated when all the issues were presented at the hearing).

¹⁹ Judge’s Decision at 9-10.

²⁰ Member Abbott finds the instant case to be distinguishable from our recent decision in *DOD, Domestic Dependent Elementary & Secondary Schools, Fort Buchanan, Puerto Rico*. 71 FLRA 127, 131-32 (2019) (*DOD*) (Member DuBester dissenting). Unlike *DOD*, the GC’s failure to use the word “timely” does not go to the heart of the legal argument and we do not need to engage in “technical hair-splitting and artful pleading.” *U.S. Dep’t of the Navy, Navy Region Mid-Atl., Norfolk, Va.*, 70 FLRA 512, 515 (2018) (Member DuBester dissenting).

The Agency argues that it did not violate § 7116(a)(1), (5), and (8) of the Statute because there is not an affirmative duty for an agency to “[a]cknowledge [r]eceipt of an [i]nformation [r]equest.”²¹ As we stated earlier, the Agency has admitted that there is no legal distinction between “acknowledge” and “respond.”²² Furthermore, the Agency mischaracterizes the Judge’s findings. The Judge found that the Agency’s failure to respond to the Union’s information request for seven weeks was unreasonable under the circumstances.²³ We have previously held that agencies have a duty to respond to information requests in a timely manner and that an untimely response is a violation of the Statute.²⁴ Consequently, we deny the Agency’s exception that the Judge created an affirmative duty under the Statute to acknowledge receipt of an information request.

C. The Judge did not err by concluding that the Agency violated § 7116(a)(1), (5), and (8) of the Statute.

The Agency further argues that the Judge erred when he found that the Agency failed to timely respond to the information request.²⁵ The Agency also excepts to the Judge’s finding that the Agency’s untimely response to the information request harmed the Union since the Union timely filed its brief for the mediation-arbitration.²⁶

With regard to information requests made under § 7114(b)(4) of the Statute, the Authority has held that an agency has the responsibility to respond to the request in a timely manner and a separate duty to provide the requested documents.²⁷ Without a doubt, the unique and particular circumstances of each case are relevant in determining whether an agency responded to an information request in a reasonable period of time.²⁸

²¹ Supp. Exceptions at 6.

²² Exceptions at 2.

²³ Judge’s Decision at 10.

²⁴ *DOD Dependents Sch., Wash., D.C.*, 19 FLRA 790, 791 (1985), *remanded as to other matters sub nom. N. Germany Area Council, Overseas Educ. Ass’n v. FLRA*, 805 F.2d 1044 (D.C. Cir. 1986), *decision on remand*, 28 FLRA 202 (1987) (finding a violation for failing to respond for slightly more than two months).

²⁵ Supp. Exceptions at 14.

²⁶ *Id.* at 23.

²⁷ *See Dep’t of HHS, SSA N.Y. Region, N.Y.C., N.Y.*, 52 FLRA 1133, 1149-50 (1997) (finding that the agency violated the Statute when it failed to respond to an information request pursuant to § 7114(b)) (*SSA I*); *see also SSA, Balt., Md.*, 60 FLRA 674, 679 (2005) (“a failure to respond to . . . an information request is an independent violation of § 7116(a)(1) and (5) of the Statute”).

²⁸ *BOP, Lewisburg Penitentiary, Lewisburg, Pa.*, 11 FLRA 639, 642 (1983).

Here, the Union requested the information twice before filing this charge.²⁹ Providing a “read receipt” is not an adequate response and does not relieve the Agency of its obligation to respond to the request.³⁰ The Union needed the requested information so that it could file its pre-hearing brief for the mediation-arbitration.³¹ In *Department of Transportation, FAA, Fort Worth, Texas (FAA)*, the Authority found that a delay of slightly less than one month between a request and a response from the agency was unreasonable when the information requested was “crucial in making final preparations for [a] hearing.”³² Similar to *FAA*, the Agency knew that the mediation-arbitration sessions were forthcoming and that the Union needed the information in order to prepare,³³ and that the parties’ agreement established a 15-day response requirement.³⁴ And the Judge found that the Union was harmed by the Agency’s actions because the Union had to request an extension of time to file a pre-hearing brief for the mediation-arbitration.³⁵

The Judge’s findings are supported by the record.³⁶ Even though the Agency complained about the number and complexity of the requests made by the Union, those considerations do not outweigh the harm to the Union, which affected its ability to prepare for the mediation-arbitration.³⁷ Accordingly, we deny the Agency’s exception to the Judge’s conclusion that it failed to timely respond to the information request.

D. The Judge did not err when he found the Agency’s post-charge conduct to be irrelevant.

The Agency argues that the Judge erred as a matter of law when he ruled that the Agency’s post-charge conduct was irrelevant to whether it violated the Statute.³⁸ On this point, the Agency contends that “post-charge conduct in the context of information requests *is relevant* for determining whether the response or provision of the information is timely.”³⁹ We disagree. Generally, post-charge conduct is not relevant in

²⁹ Judge’s Decision at 11.

³⁰ See *SSA I*, 52 FLRA at 1149-50 (holding that the statute requires “an agency respond to a[n] information request, even if the response is to tell an exclusive representative that the agency does not maintain the information which the exclusive representative seeks”).

³¹ Judge’s Decision at 5.

³² 57 FLRA 604, 606-07 (2001) (*FAA*).

³³ *Id.*

³⁴ The Agency argues that the Judge’s decision should not have considered Article 37, § 4 of the parties’ agreement since the GC’s complaint only alleged a Statutory violation. Supp. Exceptions at 23. The Judge found that Article 37, § 4 of the parties’ agreement created an expectation that the Agency would notify the Union within fifteen days of whether it would respond and concluded that the approximately seven-week delay far exceeds this expectation. Judge’s Decision at 11. The Authority takes the surrounding circumstances and context of the information request into account when determining a violation of the Statute. See *FAA*, 57 FLRA at 606-07. Therefore, we deny the Agency’s exception to the Judge’s finding that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by failing to reasonably meet the expectations created by the parties’ agreement.

³⁵ Judge’s Decision at 12.

³⁶ *SPORT Air*, 70 FLRA at 556 (“In assessing challenges to a judge’s factual findings, the Authority determines whether the preponderance of the record evidence supports those findings.”). Member Abbott again notes, as he did in *SPORT Air*, that he does not agree that the Authority should apply a preponderant review of administrative law judge (ALJ) determinations and that arbitrators and regional directors should not be accorded greater deference than ALJs. *Id.* at 556 n.15. This case, however, does not turn on what standard is applied, and the result would be the same whether the preponderant or substantial evidence standard is applied. Therefore, in order to avoid an impasse between the Members, he joins with Member DuBester and agrees that the record supports the Judge’s findings. Member Abbott explained in *AFGE, National Joint Council of Food Inspection Locals, AFL-CIO*, that factual determinations made by administrative law judges of the Authority should be reviewed using the deferential “substantial evidence” standard. 71 FLRA 69, 72 (2019) (Concurring Opinion of Member Abbott). However, he again notes that his colleagues have failed to address why they accord a greater degree of deference to arbitrators and regional directors than to highly-experienced administrative law judges who have extensive experience in, and adjudicate only, unfair-labor-practice complaints arising under § 7116 of the Statute. *Id.* at 73. The Authority owes a reasoned explanation to the federal labor-management relations community why this dichotomous result, which has yet to be explained by the Authority, should continue. See *Exp.-Imp. Bank of the U.S.*, 71 FLRA 248, 255 n.80 (2019) (Member DuBester dissenting).

³⁷ *FAA*, 57 FLRA at 606-07 (finding that a slightly less than one-month delay in responding to an information request is untimely when the requested information was not provided until the day of the hearing).

³⁸ Supp. Exceptions at 14-17 (citing *SPORT Air*, 70 FLRA at 570; *SSA*, 68 FLRA 693, 695 (2015); *NTEU*, 53 FLRA 1541, 1555 (1998); *BEP, Wash., D.C.*, 44 FLRA 575, 581 (1992)).

³⁹ *Id.* at 15 (emphasis added).

ULP cases.⁴⁰ Here, what is relevant is that the Agency failed to respond to the Union's request for approximately seven weeks and, as noted above, that delay impacted the Union's ability to prepare for the mediation-arbitration.⁴¹ Even if the Agency's arguments concerning its post-charge conduct were relevant, it does not demonstrate why the pre-charge delay was reasonable under the circumstances.⁴² Accordingly, we deny the Agency's exception to the Judge's finding that post-charge conduct is not relevant to a violation of the Statute in the instant case.

IV. Order

Pursuant to § 2423.41(c) of the Authority's Regulations and § 7118 of the Statute, the Department of the Treasury, Internal Revenue Service, Office of Chief Counsel, shall:

1. Cease and desist from:

a. Failing and refusing to timely respond to information requests submitted by the National Treasury Employees Union pursuant to § 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 them by the Statute.

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

a. Post at its facilities where bargaining unit employees 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 Associate Chief Counsel, Finance and Management, 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.

b. Disseminate a copy of the signed Notice through the Agency's email system to all bargaining unit employees.

c. Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, a report regarding what compliance actions have been taken.

⁴⁰ *DOJ*, 61 FLRA at 467 (“[P]ost-charge conduct is irrelevant in determining whether or not the Statute has been violated.”).

⁴¹ *Supra* Parts III.A-D.

⁴² Because the Agency did not provide all the data in the information request until May 4, 2017, the Union was forced to file an extension of time for filing its pre-hearing brief. Judge's Decision at 5.

Chairman Kiko, dissenting:

Unlike the majority, I would find that the Judge erred in his determination that the Agency committed an unfair labor practice (ULP), and I would set aside the Judge's recommended decision and order. Accordingly, I dissent.

Section 7114(b)(4) of the Statute requires an agency to furnish the exclusive representative of its employees, upon request, with information that is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.¹ When an agency receives a § 7114(b)(4) information request, it must timely furnish the requested information;² seek clarification about the request, if necessary;³ deny the request, in full or in part, providing any countervailing anti-disclosure interests;⁴ or timely inform the Union that the requested information does not exist.⁵

The issue in this case is not whether the Agency failed to respond to the Union's information request – it is undisputed that the Agency furnished *all* of the information that the Union requested. The issue is whether the Agency failed to furnish that information “in a timely manner *under the circumstances.*”⁶ The circumstances of this case are as follows:

The Agency's Labor and Employee Relations Office (Labor Office) has a staff of only five employees⁷ and is responsible for handling grievances, managing employee discipline, answering managers' questions regarding the meaning of collective-bargaining agreements, responding to the Union's information requests,⁸ and, in the context of this case, preparing for, and participating in, a mediation-arbitration to resolve a bargaining impasse.⁹ When the Union submitted the February 22, 2017 request at issue, the Labor Office was “extremely busy” “dealing with a separate bargaining issue, an official time issue, a ULP charge, a national

grievance, and other information requests.”¹⁰ And, both before and after the Union submitted the February 22 request, the Union submitted *multiple* other requests to the Labor Office.¹¹

Regarding the content of the February 22 request, the Director of the Labor Office testified that it was “very complex,”¹² concerned “700 plus employees,”¹³ and would be “difficult to gather[and] difficult to provide.”¹⁴ It included thirteen individual requests for information, some of which contained multiple subparts.¹⁵ For example, just one of the thirteen requests asked the Agency to furnish an “Excel spreadsheet” containing the following information: employee's unique identifier; award amount; organizational component; grade; series; position title; division counsel or associate office; post of duty at the time of the award; race and national origin code; gender; age by the following categories: (a) whether the employee was under 40 or turned 40 in that calendar year, (b) over 40, (c) 50, (d) over 50, (e) 60, (f) or 60 in the year reported; the type of award received (“e.g., Sustained Superior Performance Awards, Special Act Awards, Quick Hit Awards, etc.”); applicable time period on which the award is based; and performance score.¹⁶ This request required the Agency to gather, input, and provide the aforementioned information for *all* awards that the Agency conferred on bargaining-unit employees.

Despite the workload of the Labor Office and the complexity of the Union's information request, the Agency began furnishing the requested information to the Union within only eight weeks, and furnished all of the information within ten.¹⁷

The Judge *did not* consider any of the above circumstances in his analysis,¹⁸ and, in fact, he *excluded* evidence showing that the Agency's Labor Office “had difficulty responding to the Union's February 22” request because it was “busy” with other information

¹ 5 U.S.C. § 7114(b)(4).

² *BOP, Lewisburg Penitentiary, Lewisburg, Pa.*, 11 FLRA 639, 642 (1983) (*BOP*).

³ *See U.S. Dep't of the Air Force, Materiel Command, Kirtland Air Force Base, Albuquerque, N.M.*, 60 FLRA 791, 794-95 (2005).

⁴ *Dep't of the Air Force, Wash., D.C.*, 52 FLRA 1000, 1006 (1997).

⁵ *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326-27 (1987).

⁶ *See, e.g., BOP*, 11 FLRA at 642 (emphasis added).

⁷ Judge's Decision at 3.

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.* at 3 (citing Tr. at 67-69, 72-73, 100-01).

¹¹ *Id.* at 6 (excluding evidence showing that the Labor Office was handling multiple information requests because the Agency had already “prove[n] [that] point”); Tr. at 100-01 (referring to other Union-submitted information requests); Agency Ex. 11 (referencing a “new information request” dated May 3, 2017); Agency Ex. 16 (referring to other information requests dated April 4 and April 11, 2017).

¹² Judge's Decision at 4 (quoting Tr. at 58).

¹³ Tr. at 101.

¹⁴ Judge's Decision at 4 (quoting Tr. at 58).

¹⁵ Joint Ex. 1.

¹⁶ *Id.*

¹⁷ Judge's Decision at 5.

¹⁸ *See id.* at 10-12

requests.¹⁹ Instead, the Judge focused on whether the Agency timely “acknowledg[ed]” the Union’s request *before* it furnished the information – stating that the Agency’s “obligation to respond to a request [was] independent of its obligation to provide requested information.”²⁰ And the Judge found that the Agency violated the Statute because, among other things, “it would have taken just a few minutes” for the Agency to email the Union that “[it] had received the request.”²¹ However, neither the Statute nor Authority precedent requires agencies to acknowledge the existence of an information request before providing an official response. Nevertheless, the majority endorses the Judge’s error, holding that, in addition to furnishing requested information, agencies have a “separate duty” to timely acknowledge § 7114(b)(4) requests.²²

Moreover, while the majority relies²³ on *Department of Transportation, FAA, Fort Worth, Texas (FAA)*²⁴ to conclude that the Agency failed to timely furnish the information, that case is inapposite. In *FAA*, the union requested any information upon which the agency intended to rely at an upcoming arbitration hearing.²⁶ The agency waited until the day of the hearing to provide the union with some of the requested information,²⁶ and the Authority concluded that furnishing the information at that point was untimely.⁴³ Similarly, here, the Union informed the Agency that it “need[ed] th[e] information in advance of the May” 15, 2017 mediation-arbitration.²⁸ But, unlike the agency in *FAA*, the Agency furnished the requested information *well before the hearing date*. In this regard, it is undisputed that the Agency provided some of the requested information on April 21, 2017²⁹ – more than *three weeks* before the May 15 mediation-arbitration –

and the rest on May 4 – *eleven days* before the mediation-arbitration.³⁰

Given the circumstances of the case – and considering that the Agency furnished all of the information to the Union *before* the May mediation-arbitration – I would conclude that the Agency timely furnished the requested information and set aside the Judge’s recommended decision.

¹⁹ *Id.* at 6. The Judge also declined to consider, as part of his analysis, that the Agency actually furnished, or discussed with the Union, the requested information on April 12, April 21, May 2, May 3, and May 4, 2017. *See* Judge’s Decision at 5, 12. According to the Judge, because those responses occurred after the Union filed the charge, it was “irrelevant in determining whether the Statute has been violated.” *Id.* at 12. While some post-charge evidence may be irrelevant in determining whether the Statute has been violated, *see NTEU*, 53 FLRA 1541, 1555 (1998), the Authority has never applied that precedent in an information-request case.

²⁰ Judge’s Decision at 11.

²¹ *Id.* at 10.

²² Majority at 5.

²³ *Id.* at 6-7.

²⁴ 57 FLRA 604 (2001).

²⁶ *Id.* at 604.

²⁶ *Id.* at 606-07.

⁴³ *Id.*

²⁸ Judge’s Decision at 4; Joint Ex. 2.

²⁹ Judge’s Decision at 5.

³⁰ *Id.*

Office of Administrative Law Judges

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
OFFICE OF CHIEF COUNSEL

RESPONDENT

AND

NATIONAL TREASURY EMPLOYEES UNION

CHARGING PARTY

Case No. WA-CA-17-0280

Douglas A. Edwards
For the General Counsel

Kathleen F. Garman
For the Respondent

Anna Gnadt
For the Charging Party

Before: DAVID L. WELCH
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case entails an unfair labor practice under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On April 10, 2017, the National Treasury Employees Union (the Union or NTEU) filed an unfair labor practice (ULP) charge against the Department of the Treasury, Internal Revenue Service, Office of Chief Counsel (the Agency or Respondent). GC Ex. 1(a). In its charge, the Union alleged that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by “delaying and refusing to respond to [the Union’s] information request” GC Ex. 1(a).

After investigating the charge, the Regional Director of the FLRA’s Washington Region issued a Complaint and Notice of Hearing on June 29, 2017, on behalf of the General Counsel (GC). As relevant here, the GC alleged in the complaint: “From February 22, 2017, to April 12, 2017, the Respondent failed to acknowledge the Union’s request

for information” GC Ex. 1(b) at 2.¹ As such, the GC argued, the Agency “failed and refused to comply with [§] 7114(b)(4) of the Statute[.]” and thus violated § 7116(a)(1), (5) and (8) of the Statute. *Id.*

The Respondent filed its Answer to the Complaint on July 20. The Respondent admitted that from February 22 to April 12, it “failed to acknowledge to the Union that it had received the Union’s” information request, but denied violating the Statute. GC Ex. 1(c) at 3-4.

In its prehearing disclosures, the GC alleged that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute “when it failed to respond to [the Union’s] information request from February 22 to April 12, 2017.” GC Prehrng Disclosure. The Respondent countered in its prehearing disclosures that it “timely responded to and acknowledged the request for information submitted by the [Union]” Resp. Prehrng Disclosure. Similarly, Counsel for the GC asserted in his opening statement that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by “failing to timely respond” to the Union’s February 22 information request. Tr. 8. And Counsel for the Respondent countered in her opening statement that the Agency was “acknowledging the information request” when it “responded to the Union” on April 12. Tr. 11, 13; *see also* Resp. Br. at 24.

A hearing was held on October 4, 2017, in Washington, D.C. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The GC and Respondent filed post-hearing briefs, which I have reviewed, analyzed and considered. Based on my consideration of the entire record, including my observations of the witnesses and their demeanor, I find that the Agency 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. The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of units of employees at the Respondent. GC Exs. 1(b) & 1(c).

For the period relevant to this dispute, the Union and the Agency were parties to a 2011 Collective Bargaining Agreement (the CBA). Tr. 18. Article 37, Section 4 of the CBA, which pertains to information requests, states that the Agency “will normally inform NTEU within fifteen (15) days of

¹ Hereafter all dates are in 2017, unless otherwise noted.

receipt whether information requested under 5 USC § 7114(b)(4) will be supplied.” Jt. Ex. 4. Article 14 of the CBA pertains to performance awards. *Id.* Article 14, Section 1(d) of the CBA requires the Agency, at the Union’s request, to annually publicize the names of bargaining unit employees who receive awards on the Agency’s intranet. *Id.* Article 14, Section 1(e) of the CBA requires the Agency to provide the Union information about awards, including the names of recipients and the amount each recipient received, each year. *Id.*

Susan Nieser is the Director of Labor and Employee Relations for the Agency, which has “about 2,000 employees,” including “about 1,300 . . . bargaining unit employees . . .” Tr. 59. Nieser oversees a staff of five employees. Tr. 55-56. Nieser’s office is responsible for representing the Agency in negotiations and for handling information requests from the Union. Tr. 56, 67-68. Her office also handles grievances, manages employee discipline, and answers managers’ questions regarding the meaning of the CBA. *See* Tr. 67.

Towards the end of 2014, the Agency and the Union started bargaining over a successor agreement (the successor agreement) to the 2011 CBA. The parties bargained throughout 2015 and continued to bargain, with the help of mediators from the Federal Mediation and Conciliation Service, in 2016. Tr. 69. By December 2016, the parties reached an impasse on about eleven articles, including an article concerning performance awards (the awards article). *See* Tr. 18-19, 70-71. The Federal Service Impasses Panel ordered the parties to binding mediation-arbitration with a mediator-arbitrator.² Tr. 18-19.

On January 19, Anna Gnad, a National Negotiator for the NTEU (Tr. 17), sent Nieser an email asking that the Agency publish on the Agency’s intranet a list of bargaining unit employees who received performance awards in 2016 as required under Article 14, Section 1(d) of the CBA. Gnad also asked Nieser to send her a copy of the list, because she can’t access the Agency’s intranet. *See* Tr. 76. Gnad sent Nieser a follow-up email on February 16, and another follow-up email on February 22. Resp. Ex. 7 at 1-2.

Also, in January and February, the parties worked to schedule mediation-arbitration sessions with the mediator-arbitrator. Tr. 19, 23, 72. Ultimately, mediation-arbitration sessions were scheduled for March 13-17 and May 15-17. Tr. 19.

² At the time of the hearing, the parties had finished negotiations on a successor agreement to the CBA, and were in the process of submitting the successor agreement to the Agency for agency-head review. Tr. 18.

Anticipating that there would be discussions about the awards articles during the mediation-arbitration sessions, Gnad, who represented the Union at the mediation-arbitration sessions (*see* Tr. 18, 23), determined that she would need information from the Agency concerning performance awards distributed in December 2016, so that she could “make decisions about proposals and how to proceed . . .” Tr. 21-22.

Therefore, on February 22, Gnad sent Nieser an information request (I refer to this at times as simply the information request), via email. Tr. 20; Jt. Ex. 1. Gnad’s request listed thirteen numbered items. These items included requests pertaining to the Agency’s awards budget, awards policies, and IRS communications to bargaining unit employees regarding awards.³ Jt. Ex. 1. In asking for this information, Gnad stated: “Pursuant to Article 37, Section 4 of the parties’ 2011 CBA, you should notify NTEU within fifteen (15) days of receipt of this request whether you will supply the requested information.” *Id.*

Minutes after the information request was sent, but before Nieser opened it (*see* Jt. Ex. 1; Resp. Ex. 7; Tr. 22), Nieser sent Gnad an email responding to Gnad’s January 19 email (and her February 16 and 22 follow-up emails). Nieser advised that the names of the awards recipients was up on the Agency’s intranet, as required under Article 14, Section 1(d) of the CBA. Resp. Ex. 7 at 1. Nieser also separately emailed Gnad a list of awards recipients. *See* Tr. 76.

About ten minutes after Gnad sent the email containing the information request, Gnad received a “read receipt” indicating that Nieser had opened the email.⁴ Tr. 22.

During the day of February 22, Nieser and Gnad communicated with each other about various matters, but did not discuss the information request. *See id.* In this connection, Nieser was asked at the hearing whether she initially “responded” to the Union’s information request, and she answered, “No, I did not. It’s not my practice to send an acknowledgement.” Tr. 101.

Nieser believed she read the information request on February 22 or 23. Tr. 57. She believed that some

³ The relevant portions of the information request are set forth in the appendix to this decision.

⁴ Gnad testified in this regard that she “received a ‘read receipt’ at about 10:52 a.m. from the email that [she] sent.” Tr. 22. Based on this statement, and the Respondent’s discussion of the “read receipt” (*see* Resp. Br. at 14), I interpret Gnad’s testimony as indicating that the email system automatically notified her when Nieser opened the email.

aspects of the request could be answered easily, “with a single number,” while other aspects of the request were “very complex, difficult to gather, difficult to provide.” Tr. 58. Nieser testified that her office was “extremely busy” when it received the Union’s information request, as it was dealing with a separate bargaining issue, an official time issue, a ULP charge, a national grievance, and other information requests, in addition to negotiations over the successor agreement. Tr. 67-69, 72-73, 100-01.

On March 10, Nieser sent Gnadl an email providing information regarding the bargaining unit “performance awards with dollar amounts paid out at the end of calendar 2016.” Nieser provided the information “[i]n accordance with Article 14, Section 1([e])” of the CBA, and not as a response to the Union’s February 22, information request. Resp. Ex. 8; *see also* GC Ex. 1(c); Tr. 26, 78-79.

The first mediation-arbitration session took place as scheduled, on March 13-17. *See* Tr. 22-23. As the session began, Gnadl still had not received a response from the Agency to the information request. *See* Tr. 26. Thus, on March 16, Gnadl sent Nieser a follow-up email, stating: “Please advise me when you will be responding to this information request . . . NTEU needs this information in advance of the May . . . med-arb with sufficient time to enable us to prepare our evidence.” Jt. Ex. 2 (emphasis omitted). Gnadl asked that Nieser provide the requested information by March 31. *Id.*

Nieser did not respond to the email. Tr. 102. Asked to explain why, Nieser testified: “I have to tell you that we were working on mediation. That very week we were doing 5 days of back-to-back mediation to resolve our articles. That was the priority that week.” *Id.*

On March 17, the mediator-arbitrator directed the parties to summarize their positions on the awards article in prehearing briefs that would be submitted on May 5. *See* Tr. 23.

March 31, the deadline set by Gnadl on March 16, came and went without a response from Nieser. Gnadl “gave it a little more time” and then filed the ULP charge in this case, on April 10. Tr. 24. Gnadl filed the ULP charge at this time because she knew that the mediation-arbitration was “looming” and because the ULP charge would “[get Nieser] to respond,” a tactic Gnadl had relied on in the past. Tr. 24-25.

Nieser responded for the first time to the Union’s information request, in an April 12 email to Gnadl. Jt. Ex. 3; Tr. 26, 103. Nieser told Gnadl that she had received the ULP charge and that the Agency would be able to provide Gnadl a more detailed response on or

around April 21. Jt. Ex. 3. On April 21, Nieser provided some of the information the Union requested. Tr. 26. The rest of the requested information was submitted to the Union by May 4.⁵ *See id.*; Resp. Ex. 11.

Fearing that she would not be able to meet the May 5, deadline for submitting her prehearing brief to the mediator-arbitrator, Gnadl asked for and received an extension, which allowed her to submit the brief by May 8. *See* Tr. 27.

A number of issues were elaborated on at the hearing. Nieser described the way her office handles information requests generally, stating: “[W]e look at them, make a decision about whether we can give that information or not, and then start to work on it, with the goal [of] responding to the request, because that’s what the Statute says.” Tr. 56-57. Nieser added that employees in her office try to read incoming information requests “within a day or two or certainly within a week of receiving the request.” Tr. 56. Asked generally whether her office acknowledges receipt of an information request, Nieser testified: “No, that is not our practice.” Tr. 57.

With respect to the requested information, Nieser asserted that she provided Gnadl some of the information sought in the Union’s information request on February 22 (which Nieser sent to Gnadl prior to opening Gnadl’s email containing the Union’s information request) and on March 10. Nieser indicated that she provided this information in order to fulfill the requirements of Article 14 of the CBA, rather than in response to the Union’s information request. *See* Tr. 75-76, 79-80; Resp. Ex. 7, Resp. Ex. 8; *see also* GC Ex. 1(c).

Gnadl testified that there had been difficulties in the past obtaining information from the Agency. Tr. 32. Specifically, Gnadl stated:

In 2012, my predecessor had filed an awards information request, and when I took over in October of 2012 I was following up on that. And my contact was Ms. Nieser, and it took approximately a year to get that information. I have had to file either a ULP or a grievance every year since that time in order to obtain awards information that I requested either

⁵ Nieser provided most of the balance of what Gnadl requested May 2 and May 3. On May 3, Gnadl claimed that additional information remained missing; Nieser construed this as a new information request. On May 4, Nieser sent Gnadl an email containing this information. Resp. Ex. 11.

under the Statute or that I've been entitled to under our – Article 14 of our contract.

Id.

Finally, objections regarding two of the Respondent's exhibits introduced were sustained. First, the Respondent attempted to introduce an exhibit labeled Respondent Exhibit 9, an April 4, information request from Gnad to Nieser seeking certain information pertaining to awards paid in December 2015, i.e., information that was not sought in the Union's February 22, information request. As the exhibit pertained to information unrelated to the Union's February 22, request, and as the exhibit was submitted to prove a point already made – that the Respondent was busy and therefore had difficulty responding to the Union's February 22, information request in a timely manner – I found the exhibit to offer first irrelevant and, secondly, cumulative evidence and, therefore, sustained the GC objection. Tr. 84-89.

Additionally, the Respondent moved to introduce into evidence a settlement agreement, labeled as Respondent Exhibit 15, for the purpose to prove that the Union knew as early as November 2016, that awards would be paid in December 2016, and that the Union waited until February of the following year to submit an information request about the December 2016 awards. Because we are concerned only with actions taken after the information request at issue was submitted, the GC's objection, on the grounds of irrelevance, was granted. Tr. 108-11.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel argues that an agency violates § 7116(a)(1), (5) and (8) of the Statute by failing to respond to an information request in a reasonable amount of time. In this regard, the GC asserts that applicable case law support a six-week or a two-month delay in responding to information requests have been held by the Authority to violate the Statute, *see* GC Br. at 8-9, 11 (citing *Dep't of Justice, U.S. INS, U.S. Border Patrol, El Paso, Tex.*, 43 FLRA 697, 710 (1991) (*INS*), *rev'd on other grounds sub nom. Dep't of Justice v. FLRA*, 991 F.2d 285 (5th Cir. 1993); *Dep't of Def., Dependents Sch., Wash., D.C.*, 19 FLRA 790, 791 (1985)). The GC submits that an agency must timely respond to an information request, even if it is only to say that the requested information does not exist. GC Br. at 9 (citing *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 327 (1987)). Further, the GC contends that an agency can violate the Statute by failing to timely respond to an information request, even when the agency

ultimately provides the union the information it requested. GC Br. at 9 (citing *U.S. Dep't of the Treasury, U.S. Customs Serv., Sw. Region, Hous., Tex.*, 43 FLRA 1362, 1374-75 (1992)). The GC adds that an agency's timely response to an information request under § 7114(b)(4) of the Statute is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining." *Id.* (quoting *Soc. Sec. Admin., Balt., Md.*, 60 FLRA 674, 679 (2005) (*SSA*)).

Applying these principles to the facts of the case, the GC contends that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by failing to respond to the Union's information request, from the time the request was submitted on February 22, to the time the Union filed the ULP charge in this case, on April 10, a period of more than six weeks. *See id.* at 9-10. The GC maintains that the Respondent's failure to respond to the Union's information request during this period was especially unreasonable, because the CBA provides that the Agency normally will respond to an information request within fifteen days, and because Gnad sent Nieser a communication, in following up the earlier request, on March 16, just over three weeks after sending the initial request for information. *See id.* at 6, 9-11.

Respondent

The Respondent asserts that the General Counsel violated the Respondent's "due process rights" by changing its theory of the case after issuing the complaint. Specifically, the Respondent argues that the GC alleged in the complaint that the Respondent failed to "acknowledge" the Union's information request. But, the Respondent continues, the GC alleged at the hearing that the Respondent failed to "timely respond" to the Union's information request. Resp. Br. at 16-17. The Respondent argues that it "lacked notice" of the theory announced at the hearing, leaving the Respondent "unable to properly prepare for the issue at hearing and present all relevant evidence." *Id.* at 17.

In making this argument, the Respondent acknowledges that the GC alleged in its prehearing submissions that the Agency "failed to respond" to the information request. However, the Respondent contends that the GC still "made no mention of the issue of timeliness." *Id.* at 18. Additionally, the Respondent acknowledges that it stated in its prehearing disclosure, "Respondent will argue that it timely responded to and acknowledged the request for information." *Id.* at 18 n.11. But the Respondent urges that this reference to timeliness was made "in the context of the acknowledgement of the request" and "does not indicate that [the Respondent] understood

the issue at hearing would be the timeliness of the response . . .” *Id.*

Relatedly, the Respondent argues that the question of timeliness was not fully and fairly litigated, because the Respondent was prevented from presenting evidence regarding the other work Nieser’s office was dealing with when the Union submitted its February 22, information request. *Id.* at 22-23. The Respondent adds that if it had known the GC’s theory of the case, then it would have submitted the actual data it provided the Union to show the “breadth and complexity” of the requested information. *Id.* at 23.

Turning to substantive matters, the Respondent admits that it did not “acknowledge” the Union’s information request until April 12, but argues that it did not violate the Statute. *See id.* at 12 n.9, 31; Tr. 11-13.

In this regard, the Respondent asserts that § 7114(b)(4) of the Statute does not require an agency to “acknowledge” a union’s information request. *Id.* at 9. The Respondent also contends that while the administrative law judge in *Food & Drug Admin., Mid-Atl. Region, Phila., Pa.*, 48 FLRA 424, 433-34, 440 (1993) (*FDA*), found an agency violated the Statute by failing to “acknowledge” receipt of the union’s information request, the Authority upheld the judge’s decision “on the basis of the failure of the agency to respond to the union, not on the basis of the agency’s failing to acknowledge receipt of the information request.” Resp. Br. at 12 n.9.

The Respondent adds that even if an agency was required to acknowledge receipt of an information request, the Respondent satisfied that requirement, as a “[r]ead receipt” indicated to Gnadit that Nieser had opened the email containing the information request. Resp. Br. at 14.

Furthermore, the Respondent contends that any delay in responding to the Union’s information request was reasonable under the circumstances, given the significant amount of work it took to obtain and process the requested data, and given the many other obligations Nieser faced at the time the Union submitted the request. *See id.* at 24-32. In addition, the Respondent argues that it ultimately met its obligations to “respond to and provide” the requested information in a timely manner. *Id.* at 24 (emphasis omitted & capitalization removed). Specifically, the Respondent contends that it took “only seven weeks” to respond to the request, and “only ten weeks” to provide most of the requested information. *Id.* The Respondent asserts in this regard that in *U.S. Dep’t of Justice, Fed. BOP, FCI, Fort Dix, N.J.*, 64 FLRA 106, 110 (2009) (*Fort Dix*), the Authority found that a three-week delay was not

untimely, and that in *Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pa.*, 11 FLRA 639, 641-42 (1983) (*BOP*), the Authority found that a two-month delay was not untimely. Resp. Br. at 25.

Finally, the Respondent contends that the Union was not harmed by any delay on the Respondent’s part. *Id.* at 38.

ANALYSIS AND CONCLUSIONS

Preliminary Matter: The Respondent’s “Due Process” Argument Is Unfounded

Due process requires that every respondent in a ULP proceeding be adequately notified of the matters of fact and law asserted in order to have a meaningful opportunity to litigate the underlying issue. *U.S. Dep’t of Justice, Fed. BOP of Prisons, FCI, Forrest City, Ark.*, 57 FLRA 787, 788 (2002) (*FCI*). The purpose of a complaint is to notify the respondent of the “specific claims” against it. *Dep’t of Transp., FAA, Fort Worth, Tex.*, 55 FLRA 951, 956 (1999) (*FAA*). The Authority will dismiss a complaint when a respondent was not adequately notified of the allegations against it. *Sport Air Traffic Controllers Org.*, 70 FLRA 554, 557 (2018) (*SATCO*). The notice must afford the respondent a meaningful opportunity to litigate the issues. *Id.* In this regard, the Authority has stated that a respondent lacked notice when “[n]either the charge nor the complaint” referred to the alleged act that ultimately became the dispositive issue before the administrative law judge. *AFGE, Local 2501, Memphis, Tenn.*, 51 FLRA 1657, 1661 (1996).

Where a complaint is silent or ambiguous about specific issues that are later raised at the hearing, the Authority may still consider and dispose of those issues if the record reflects that they were fully and fairly litigated. *SATCO*, 70 FLRA at 557; *see also FAA*, 55 FLRA at 956 (“[A] judge may find a violation of the Statute even where that violation is not the exact violation alleged in the complaint.”). The Authority has interpreted “fully and fairly litigated” to mean that all parties understood (or objectively should have understood) the issues in dispute and had a reasonable opportunity to present relevant evidence. *SATCO*, 70 FLRA at 557.

Both the ULP charge and the complaint provided the Respondent adequate notice of the GC’s theory of the case. In the ULP charge, the Union alleged that the Respondent violated § 7116(a)(1), (5) and (8) by “delaying and refusing to respond” to the information request. GC Ex. 1(a) at 4. In the complaint, the GC alleged that the Respondent “failed to acknowledge the Union’s request for information” within a certain amount of time,

specifically, “[f]rom February 22 . . . to April 12,” and that the Respondent thereby violated §§ 7114(b)(4) and 7116(a)(1), (5) and (8) of the Statute. GC Ex. 1(b). Given this wording, especially when read in context with the ULP charge, it is apparent to the undersigned that the allegation in the complaint adequately notified the Respondent of the facts and law that were being asserted. *See FCI*, 57 FLRA at 788. This appears to be apparent despite the fact that the complaint alleged that the Respondent failed to “acknowledge,” rather than “respond to,” the Union’s request. The words “acknowledge” and “respond” have very similar meanings and should have been understood to mean essentially the same thing. *See New Oxford Am. Dictionary* (3d ed. 2010) (defining “acknowledge” as to “show that one has noticed or recognized (someone) by making a gesture or greeting,” and defining “respond” as to “act or behave in reaction to someone or something”). The two terms, in the context of this litigation, appear to be a distinction without a difference. Furthermore, as the Respondent tacitly admits, the Authority has indicated that, in the context of information requests, an agency’s failure to “acknowledge” or “reply” to a union’s information request is the same as an agency’s failure to “respond” to such requests. *See FDA*, 48 FLRA at 433-34, 440 (agency’s violation of § 7116(a)(1), (5) and (8) alleged and found, where the complaint alleged a failure to “respond,” the administrative law judge found a failure to “acknowledge” or “reply,” and the Authority found a failure to “reply”).

Furthermore, it is apparent that the Respondent understood the GC’s theory of the case. In its prehearing disclosures, the Respondent asserted that it “timely responded to and acknowledged” the Union’s information request. Respondent Prehearing Disclosures. Any remaining confusion should have been resolved by the GC’s prehearing disclosures, in which the GC alleged that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by “fail[ing] to respond” to the Union’s information request “from February 22 to April 12.” GC Prehearing Disclosure.

Moreover, the issue of the Agency’s response to the Union’s information request was fully and fairly litigated at the hearing. In his opening statement, the GC’s counsel asserted that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute by “failing to timely respond” to the Union’s information request. Tr. 8. The Respondent’s counsel understood this claim and countered that the Agency did indeed “acknowledg[e] the information request” when it “responded to the Union” on April 12. Tr. 11, 13. Further, the Respondent’s counsel had the opportunity to contest the GC’s claims, and admirably did so, throughout the hearing. For example, Respondent’s

counsel was able to ask Nieser whether she initially responded to the Union’s information request. Tr. 101. Accordingly, the Respondent understood the issue in dispute and had a reasonable opportunity to present relevant evidence. Finally, because the Respondent had already established the breadth and complexity of the Union’s request, the Respondent suffered no prejudice by not introducing the actual data it eventually provided to the Union. *See* Tr. 58. The record has ample evidence to support this contention by the Agency.

For all of these reasons, I find the Respondent’s due process argument to be lacking.

Respondent Violated the Statute by Failing to Timely Respond to the Union’s Information Request

Section 7114(b)(4) of the Statute requires an agency to respond to a union’s information request, even if the response is that the requested information does not exist. *SSA*, 60 FLRA at 679 (citing *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326-27 (2987)). An agency must respond to an information request in a timely manner, even if the request does not meet the statutory criteria listed in § 7114(b)(4) of the Statute, and it is an independent violation of § 7116(a)(1), (5) and (8) of the Statute for an agency to fail to respond. *See Dep’t of HHS, SSA, N.Y. Region, N.Y., N.Y.*, 52 FLRA 1133, 1149-50 (1997) (*SSA II*). A timely reply to a union’s information request under § 7114(b)(4) “is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining.” *Id.* In determining whether an agency’s response to a union’s information request was timely, the Authority considers whether the delay was reasonable under the circumstances. *See Fort Dix*, 64 FLRA at 110. In this regard, the Authority has found an agency’s six-week delay in responding to a union’s information request to have violated the Statute. *INS*, 43 FLRA at 710.

The Respondent effectively admits that it failed to “acknowledge” (i.e., respond to) the Union’s information request from February 22 through April 10, when the Union filed the ULP charge in the case at bar. *See* GC Ex. 1(c); Resp. Br. at 24; Tr. 11, 13, 101. The remaining issue, then, is whether the Agency’s failure to respond to the Union’s information request for more than six weeks was reasonable under the circumstances. For the reasons cited below, the undersigned respectfully concludes the answer is in the negative.

First, it would not have taken much time for Nieser (or another Agency official) to fulfill the Agency’s obligation to provide the Union a timely response. Indeed, it would have taken just a few minutes for Nieser

to write Gnadl an email stating, for example, that the Agency had received the request and was working on obtaining the information. And because information requests are usually read “within a day or two or certainly within a week” of receiving them (Tr. 56), Nieser should have been able to respond in some manner to Gnadl sooner than after the filing the ULP, even in light of her other work obligations.

Second, the parties established an expectation, set forth in Article 37, Section 4 of the CBA that the Agency normally would respond to information requests within fifteen days. This expectation – one that Nieser, as the Director of Labor and Employee Relations, clearly was aware of – is significant evidence that it would be reasonable to expect the Agency to respond to information requests in about two weeks, and that the Agency’s delay of more than six weeks, roughly three times the expected response period, was therefore unreasonable.

Third, about three weeks after sending the initial request, Gnadl sent Nieser a follow-up email asking her to respond to the Union’s information request. The fact that evidence proves Nieser received this follow-up email lends credence to the conclusion that Nieser’s failure to respond was not the result of inadvertence or exigent circumstances arising from when the initial request was received.

As for Nieser’s stated reason for not responding to the March 16, 2017, specifically, that she was too preoccupied with the March mediation-arbitration session to respond (Tr. 102), this reasoning lacks validity, both because it would have taken Nieser a very short amount of time to respond to Gnadl’s follow-up email, and because replying to such emails was one of Nieser’s primary responsibilities as the Agency’s Director of Labor and Employee Relations. *See* Tr. 56. That Gnadl was present at these mediation-arbitration sessions, and that the mediation-arbitration sessions pertained to issues encompassed by the Union’s information request, sheds an unfavorable light upon Nieser’s failure to respond to the follow-up email expeditiously.

Fourth, the Respondent has failed to provide a justification for its failure to timely respond to the Union’s information request. When asked why she did not respond to the Union’s information request, Nieser only responded by saying the Agency had a “practice” of not acknowledging, i.e., responding to, information requests. *See* Tr. 57, 101. But unfortunately, Nieser never explained why the Agency followed such practice. The absence of any reason further supports the conclusion that the Agency’s delay was unreasonable.

Furthermore, the Respondent’s arguments to the contrary are unavailing. The Respondent suggests that it satisfied its obligation to respond to the information request because in fulfilling its duties under Article 14 of the CBA, the Agency provided the Union information that also happened to be covered by the Union’s information request. *See* Tr. 75-76. It may be that the Agency provided the Union a portion of such information as the evidence is not clear. *See* Resp. Ex. 8. However, in either event the Agency provided this information without referencing the February 22 information request, and thus provided no indication that the information should constitute a response to that request. *See* Resp. Br. at 24, Resp. Ex. 7; Tr. 79-80, 101. As such, and as the Respondent’s obligation to respond to a request is independent of its obligation to provide requested information, *see SSA II*, 52 FLRA at 1149-50, the Respondent’s argument lacks merit.

The Respondent contends that Gnadl received a “read receipt” when Nieser opened the email containing the Union’s information request, and that this satisfied the Agency’s obligation to respond to the information request. *See* Resp. Br. at 14. I respectfully disagree. The fact that Nieser opened the email, which triggered the “read receipt,” did not tell Gnadl what the Agency’s position was regarding the Union’s information request. Moreover, an automatically generated “read receipt” is far from the person-to-person dialogue envisioned by § 7114(b)(4) of the Statute. *See SSA II*, 52 FLRA at 1149-50. Accordingly, I find the “read receipt” did not satisfy the Respondent’s statutory obligation to respond to the Union’s information request.

The Respondent argues that it responded to the Union’s information request on April 12, 2017, and that it subsequently provided the Union the requested information. However, as helpful as this provision was, these events occurred 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) (*Immigration Review*). And even if the Respondent’s post-charge conduct were relevant, the Respondent has failed to demonstrate that its delay of more than six weeks was reasonable under the circumstances.

The Respondent cites *BOP* for the proposition that a two-month delay can be reasonable, and it suggests, based on *BOP*, that the Respondent’s more-than-six-week delay was reasonable under the circumstances of the case at bar. But in *BOP*, the Authority found that the Agency’s delay was justified because it provided some of the requested information immediately and worked diligently to find the rest. 11 FLRA at 641-42. By contrast, and as analyzed herein,

there is no indication that Nieser acted diligently to respond to the Union's information request. Indeed, she did not even respond to the Union's information request until after the Union filed the ULP charge. For these reasons, *BOP* is distinguishable, and the Respondent's reliance on it is misplaced.

The Respondent also cites *Fort Dix* to support its claim that it responded to the Union's request in a reasonable amount of time. But in *Fort Dix*, the agency caused a delay of only three weeks. 64 FLRA at 110. Because the delay in our case is roughly twice that long, *Fort Dix* is distinguishable, and the Respondent's reliance on it is also misplaced.

The Respondent argues that its delay did not harm the Union, based on the fact that it ultimately responded to the Union and subsequently provided the requested information. But again, these actions are irrelevant because they occurred after the ULP charge was filed. *Immigration Review*, 61 FLRA at 467. Moreover, a violation is established by proving that the agency failed to timely respond to a union's information request; whether the union was harmed is not a necessary element of the violation. *See SSA II*, 52 FLRA at 1149-50. And even if harm to the Union was a relevant consideration, the record reveals that the Union was harmed by the Agency's delay, because it required Gnad to ask the mediator-arbitrator for an extension to file her post-hearing brief. And the delay was necessary in order to adequately prepare for pending issues directly related to her earlier information request to the Agency. It is self-serving for the Agency to argue that their delay in providing relevant information to an adversary in the midst of a pending mediation-arbitration proceeding was not harmful. For these reasons, the Respondent's argument is unfounded.

Based on the foregoing, the undersigned respectfully finds that the Respondent violated § 7116(a)(1), (5) and (8) of the Statute.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Department of the Treasury, Internal Revenue Service, Office of Chief Counsel, shall:

1. Cease and desist from:
 - (a) Failing and refusing to timely respond to information requests submitted by the

National Treasury Employees Union pursuant to § 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 their rights assured by the Statute.

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

(a) Post at its facilities where bargaining unit employees 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 Associate Chief Counsel, Finance and Management, 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.

(b) Disseminate a copy of the signed Notice through the Agency's email system to all bargaining unit employees.

(c) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, Federal Labor Relations Authority, in writing, within thirty (30) days of the date of this Order, a report regarding what compliance actions have been taken.

Issued, Washington, D.C., July 2, 2018

DAVID L. WELCH
Chief Administrative Law Judge

APPENDIX

As relevant here, the Union's February 22, 2017, information request states:

1. A copy of the Office of Chief Counsel actual awards budget and expenditures for FY 16 awards, separately identifying the total awards budget for the Office as a whole, and the total awards budget allocated for employee awards in each separate Associate Office/Division.

2. Identify the total amount actually spent by the Office as a whole for FY 16 awards, and separately identify the total amount actually spent by the Office as for each type of award given (e.g., Sustained Superior Performance Awards, Special Act Awards, Quick Hit Awards, etc.).

3. For each separate Associate Office/Division, identify the amount actually spent to pay FY 16 awards as a whole, and separately identify the amount actually spent for each type of award given (e.g., Sustained Superior Performance Awards, Special Act Awards, Quick Hit Awards, etc.).

4. For each type of award (e.g., Sustained Superior Performance Awards, Special Act Awards, Quick Hit Awards, etc.) identify the amount spent by each Associate Office/Division to pay FY 16 awards to bargaining unit employees only.

5. For the FY 16 awards budget, identify the total amount of employee salaries upon which the awards budget was based, identifying whether it excludes SES employees, and separately identify the total bargaining unit salary upon which the award budget was based.

6. Identify the total number of employees in each Associate Office/Division at the time awards were paid in December 2016.

7. Identify the total number of bargaining unit employees in each Associate Office/Division at the time awards were paid in December 2016.

8. Provide copies of all IRS Office of Chief Counsel awards policies in effect at the time FY 16 awards were paid in December 2016.

9. Provide copies of all IRS communications to bargaining unit employees concerning the payment of awards under Article 14 of the 2011 CBA for FY 2016.

10. Identify all awards provided to bargaining unit employees in December 2016 that contains the following information, in a searchable/sortable Excel spreadsheet format:

- a. employee's unique identifier
- b. award amount (See Article 14, Section 1E)
- c. and organizational component (See Article 14, Section 1E)
- d. Grade
- e. Series
- f. Position Title
- g. Division Counsel or Associate Office
- h. Post of Duty (POD) at the time s/he received the award
- i. Race and national origin code
- j. Gender
- k. Age by the following categories: (1) Whether the employee was under 40 or turned 40 in that calendar year, 40+, 50, 50+, 60, or 60+ in the year reported.
- l. the type of award received (e.g., Sustained Superior Performance Awards, Special Act Awards, Quick Hit Awards, etc.).
- m. applicable time period on which the award is based (e.g., June 1, 2014-May 31, 2016), and

n. Performance Score (or identification that the system has no performance score on record for that year).

received awards, including any data collected concerning why employees did not receive awards.

Jt. Ex. 1.

NTEU requests that this information be produced in Excel Spreadsheet format so that it may be searched and sorted.

11. For employees who achieved an “excellent” or “exceeds fully successful” rating or above but who were not provided an award, identify the following information in a searchable/sortable Excel spreadsheet format (NTEU understands that this information shall only include the organizational component and annual rating of record for such employees but not those employees’ names. (See Article 14, Section 1E). However, NTEU requests that Counsel use a numeric identifier in lieu of an employee’s name and that Counsel also use the same numeric identifier it used for each employee in the awards information provided to NTEU for prior years

- a. Employee unique identifier
- b. Organizational component (Associate Office/Division)
- c. Annual rating of record
- d. Reason the employee did not receive an award

NTEU requests that this information be produced in Excel Spreadsheet format so that it may be searched and sorted.

12. A copy of any award distribution information or guidance provided to Counsel managers in each Associate Office/Division concerning the identification of recipients and/or payment of awards in December 2016.

13. Copies of any studies (formal or informal) conducted by, or at the request of, Chief Counsel or data collected which analyze/measure the number/percentage of employees who

**NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the Department of the Treasury, Internal Revenue Service, Office of Chief Counsel, 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 NOT fail or refuse to negotiate in good faith with the National Treasury Employees Union (the Union) and will not fail or refuse to timely respond to information requests that the Union submits pursuant to § 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.

(Agency/Respondent)

Date: _____ 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 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 Floor, Washington, D.C. 20424-0001, and whose telephone number is: (202) 357-6029.