

Office of Administrative Law Judges

WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF TRANSPORTATION FEDERAL
AVIATION ADMINISTRATION FORT WORTH, TEXAS
Respondent and NATIONAL AIR TRAFFIC CONTROLLERS
ASSOCIATION Charging Party

Case No. DA-CA-00261

Charles M. de Chateauvieux, Esquire Counsel for the Respondent Darrell Meachum, NATCA
Facility Representative For the Charging Party Shannon Wilson Rivers,
Esquire William D. Kirsner, Esquire Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that the United States Department of Transportation, Federal Aviation Administration, Fort Worth, Texas (the Respondent), failed to comply with section 7114(b)(4), and thereby violated section 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute), by denying the National Air Traffic Controllers Association (the Union), requests for information concerning investigation reports on a bargaining unit employee.

Respondent's Answer admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute. The Respondent admitted that the information was normally maintained, reasonably available, and did not constitute management guidance or advice related to collective bargaining. The Respondent denied that the information was necessary to the Union and also denied that the information was not prohibited from disclosure by law. Further, the Respondent alleged that the information was furnished to the employee on March 16, 2000 after the final disposition of the matter under investigation.

For the reasons explained below, I conclude that a preponderance of the evidence supports the alleged violation.

A hearing was held in Dallas, Texas. The parties were represented and

afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and the General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Union is the exclusive representative of a bargaining unit of employees appropriate for collective bargaining at Respondent's Fort Worth, Texas facility.

Employee Contacts Union

In September 1999, bargaining unit employee Terry Adamson contacted the Union for help in securing reports of investigations concerning him conducted by Respondent's Southwest Region Security and Compliance Division. Adamson had been the subject of several administrative investigations. He believed the reports contained inaccurate or incomplete information and wanted to review the documents to detect these deficiencies. Adamson was an area representative of the Union.

Adamson signed a release form and submitted it to the Union through Darrell Meachum, Facility Representative. The form authorized the Federal Aviation Administration to release to Meachum any and all information contained in Adamson's official personnel file, facility file, and medical file that might otherwise be prohibited under the Privacy Act. (Jt. Exh. 1).

Union Submits First Request

Meachum contacted Patricia Adams, Air Traffic Manager, for advice concerning how to make a Union request for information held by the Region. Adams advised him to address the request through her to the Civil Security Division. Meachum did so.

Meachum submitted the request on or about September 6, 1999. Adamson's release form was attached to the request. The Union requested any report of investigation concerning Adamson. The Union stated that it needed the information no later than October 6, 1999. Meachum asked to be contacted if the information could not be supplied because of "legal impediments, or if there are questions concerning the contents of this request" in order that he may be able to revise the request and obtain the information. Meachum requested that the information be sent to the Union's mailing address. (Jt. Exh. 2).

The Union's request stated that the information was needed in order to properly represent Adamson and to evaluate the actions and/or inactions of the Agency in complying with law, rule, regulation, and contractual requirements. The Union stated that the information would be used to determine if a grievance and/or other legal remedy was required to protect the rights of bargaining unit employees and/or the Union, and to determine correct assertions concerning litigation in the matter. The Union also stated that it had an obligation under the law to perform representational duties for bargaining unit employees, an obligation and a right to ensure compliance with the collective bargaining agreement, and to ensure that the Agency is applying its rules and regulations in a fair and equitable manner. (Jt. Exh. 2).

The Respondent did not respond to the Union's request for information in September, October, or November 1999.

Second Request

On December 22, 1999, Meachum submitted a second request for the information to Adams. Meachum referenced the September 6 request, the Respondent's failure to respond, and stated that the Union needed the information within five business days or it would seek relief in the proper forum. Meachum again requested that the information be sent to the Union at its mailing address. (Jt. Exh. 3).

Meachum hand-delivered the second request to the personal secretary of Adams and advised Adams that he had done so. Adams told Meachum that submission of a second request was not necessary because she had seen the completed report of investigation and the Civil Security Division was preparing to release the information to the Union. Meachum did not withdraw the second request for the information.

Respondent's December 29 Response

In response to the Union's December 22 request, Margaret Rendon, Assistant Air Traffic Manager, contacted the Civil Aviation Security Division to determine the status of the September 6 request which had been forwarded to them. She was advised that the reports would not be released until the matter was closed and the employing organization (the Air Traffic Division) had advised the Security Division of the disposition of the case. Rendon provided this information to Meachum in a conversation on or about December 29, 1999.

Adamson Contacted Directly

In early January 2000, an employee from Respondent's Regional Office contacted Adamson directly by telephone to verify his release form and home address.

Unfair Labor Practice Charge Filed

Meachum filed the Union's unfair labor practice charge on January 12, 2000.

Respondent's March 2 Response to the Union

In view of the unfair labor practice charge, Respondent, on or about March 2, 2000, "to close the loop," sent its first written response to the Union's request for information. In the letter, Respondent referenced Meachum's December 29, 1999, conversation with Rendon, indicated that the report of investigation requested on Adamson could not be released at that time, and advised the Union that there was an agency policy which prohibited the release of the report of investigation until the disposition of the case. In addition, Respondent's letter indicated, for the first time, that the Union had not shown a particularized need for the information as the Respondent had taken no action against Adamson based on the report. The Respondent did not assert that the Privacy Act prohibited disclosure of the information to the Union. (Jt. Exh. 4).

Information Supplied to Adamson

Donald Kerr, Supervisor of the Investigations Section, Investigations and Internal Security Branch, Civil Aviation Security Division, testified that the investigation of Adamson was completed on March 15, 2000 when the Security Division was advised of the action taken on the basis of the investigation. At that time, the reports of investigation could be released according to agency policy. Until the Respondent made a decision on what action, if any, would be taken on the basis of the investigation, the matter was considered an open investigation and data

could still be in the process of being requested and gathered. The data gathered include records of interviews, signed statements, police and other record reviews, and copies of relevant documents. Until final action is taken, the data contained in the reports of investigation are, according to Kerr, protected from disclosure by the Privacy Act.

On or about March 16, 2000, Adamson received a package from the Civil Aviation Security Division which contained four reports of investigation. The package was sent to Adamson's home address.

Rendon testified that since Adamson was an area representative of the Union, "I guess they were, then, provided to the Union." (Tr. 86).

Respondent never provided the information directly to the Union or told the Union that the information it had requested could only be released directly to the employee, Adamson. Adamson gave Meachum a copy of the information he had received after ascertaining that the Union had not received a copy.

Discussion and Conclusions

Section 7114(b)(4) of the Statute provides that an agency has the duty to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

The Respondent admitted in its Answer that the information was normally maintained, reasonably available, and did not constitute management guidance or advice related to collective bargaining. Section 7114(b)(4) also requires agencies to provide only information that is necessary. Since the Respondent maintains that it furnished the information to the Union as soon as possible on March 16, 2000, when the investigation was completed, it is unnecessary to determine whether it was "necessary" for the Respondent to do so⁽¹⁾; that is, whether the Union articulated its need with requisite particularity and provided sufficient information for the Respondent to make a reasoned judgment concerning its disclosure. *See Internal Revenue Service, Washington, DC and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661 (1995). In any event, the Respondent only advised the Union that it had not shown a particularized need for the information on March 16, 2000, after the unfair labor practice charge had been filed, and in order "to close the loop." The time to seek clarification about the reasons the Union needed the information was at or near the time of the request and not months later, after the processing of an unfair labor practice charge.

The remaining issues are whether the Respondent violated the Statute by its three month delay in responding at all to the Union's request, by its six month delay in furnishing the information, and by furnishing the information directly to Adamson.

Respondent's Three Month Delay in Responding to the Request was Unreasonable

A timely reply to a union's request for information under section 7114(b)(4) is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining. *U.S. Department of Justice, Office of Justice Programs*, 45 FLRA 1022, 1026-27 (1992) (*Justice Programs*). See also *Social Security Administration, Baltimore, Maryland and Social Security Administration, Area II, Boston Region, Boston, Massachusetts*, 39 FLRA 650, 656 (1991); *U.S. Department of the Treasury, United States Customs Service, Southwest Region, Houston, Texas*, 43 FLRA 1362 (1992). The Respondent's failure to respond to the request at all for three months was unreasonable in the circumstances of this case and violated section 7116(a)(1), (5), and (8) of the Statute. *Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas*, 43 FLRA 697 (1991).

Respondent Furnished the Information in a Reasonable Amount of Time Under the Circumstances

I conclude that it was reasonable for the Respondent to furnish the information on March 16, 2000. The Respondent provided the information on March 16, 2000 after the investigation was complete and the Respondent had taken final action on the investigation (on March 15, 2000). Prior to that time, the record reflects that the Respondent's important interests in safeguarding the investigation and privacy information outweighed the Union's interests in the information. As set out above, until the Respondent made a decision on what action, if any, would be taken on the basis of the investigation, the matter was considered an open investigation and data could still be in the process of being requested by the Air Traffic Division and gathered by the Security Division. The data gathered include records of interviews, signed statements, police and other record reviews, and copies of relevant documents. Until final action is taken, the data contained in the reports of investigation are, according to the undisputed testimony of Donald Kerr, Supervisor of the Investigations Section, Investigations and Internal Security Branch, Civil Aviation Security Division, protected from disclosure by the Privacy Act.

Respondent Did Not Furnish the Information to the Union

Contrary to the position of the Respondent, I do not conclude that the information was provided directly to the Union on March 16, 2000 after it was considered appropriate to do so. The Union never received the data requested by the Union through Darrell Meachum, Facility Representative, and there is no evidence that Meachum delegated Adamson or any other Union representative to represent the Union in connection with the request for information. *Food and Drug Administration, Mid-Atlantic Region, Philadelphia, Pennsylvania*, 48 FLRA 424, 439 (1993). And, although Adamson was a Union area representative, the letter of transmittal of the reports of investigation made no reference to his capacity as a Union official. The letter stated that the information was being provided in response to "your Privacy Act request of September 6, 1999[.]" (Jt. Exh. 5). Adamson never requested the information on his own. His release form authorizing Meachum of the Union to obtain the information was dated September 1, 1999, not September 6, 1999, the date of the Union's request. The fact that the information was provided to Adamson in his individual capacity was confirmed by Donald Kerr, Supervisor of the Investigations Section, who testified that it is the policy of the Division, based on the Division's interpretation of the Privacy Act, to release a report of investigation *only* to the subject of the investigation at the appropriate time.

The Authority has held that the Privacy Act does not preclude release of information concerning an employee when the information is sought by a union as the employee's representative. *Justice Programs*, 45 FLRA at 1026; *Federal Employees Metal Trades Council and U.S. Department of the*

Navy, Mare Island Naval Shipyard, Vallejo, California, 38 FLRA 1410, 1423 (1991). In such circumstances, the union's access to the relevant records would not be a clearly unwarranted invasion of personal privacy. *Id.* Moreover, here the employee specifically authorized the release of Privacy Act information to the Union. Accordingly, I find that the Respondent violated section 7116(a)(1), (5), and (8) of the Statute by not furnishing the information directly to the Union as requested.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the **United States Department of Transportation, Federal Aviation Administration, Fort Worth, Texas**, shall:

1. Cease and desist from:

(a) Failing to respond in a timely manner to information requests submitted by the **National Air Traffic Controllers Association** pursuant to section 7114(b)(4) of the Federal Service Labor-Management Relations Statute.

(b) Furnishing reports of investigations requested by the National Air Traffic Controllers Association pursuant to section 7114(b)(4) of the Statute only to a bargaining unit employee **when the bargaining unit employee, the subject of the investigation, has specifically authorized release of the information to the National Air Traffic Controllers Association**.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Respond in a timely manner to information requests submitted by the **National Air Traffic Controllers Association** and provide the requested information for representational purposes in accordance with section 7114(b)(4) of the Federal Service Labor-Management Relations Statute.

(b) Post at its Fort Worth, Texas facilities where bargaining unit employees represented by the **National Air Traffic Controllers Association**, 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 Air Traffic Division Manager, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that

such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, July 9, 2001.

GARVIN LEE OLIVER

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 United States Department of Transportation, Federal Aviation Administration, Fort Worth, Texas, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to respond in a timely manner to information requests submitted by the National Air Traffic Controllers Association pursuant to section 7114(b)(4) of the Federal Service Labor-Management Relations Statute.

WE WILL NOT furnish only to a bargaining unit employee reports of investigation requested by the National Air Traffic Controllers Association pursuant to section 7114(b)(4) of the Federal Service Labor-Management Relations Statute when the bargaining unit employee, the subject of the investigation, has specifically authorized release of the information to the National Air Traffic Controllers Association.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL respond in a timely manner to information requests submitted by the National Air Traffic Controllers Association and we will provide the information requested for representational purposes in accordance with section 7114(b)(4) of Federal Service Labor-Management Relations Statute.

(Respondent/Activity)

Date: _____ By: _____

(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is:

525 S. Griffin Street, Suite 926, Dallas, TX 75202, and whose telephone number is: (214)767-4996.

1. If it were deemed necessary to do so, and in order to avoid the possible necessity of a remand, I would find that the Union provided sufficient information for the Respondent to make a reasoned judgment concerning disclosure. The Union's request enclosed Adamson's authorization and requested the release to the Union of "any and all information . . . that might otherwise be prohibited under the Privacy Act." The Union stated that the information was needed in order to properly represent Adamson and to evaluate the actions and/or inactions of the Agency in complying with law, rule, regulation, and contractual requirements. The Union stated that the information would be used to determine if a grievance and/or other legal remedy was required to protect the rights of a bargaining unit employees and/or the Union, and to determine "correct assertions" concerning litigation in the matter. The Union also stated that it had an obligation under the law to perform representational duties bargaining unit employees, an obligation and a right to ensure compliance with the collective bargaining agreement, and to ensure that the Agency is applying its rules and regulations in a fair and equitable manner. *See Health Care Financing Administration*, 56 FLRA 503, 506-07 (2000).