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

UNITED STATES DEPARTMENT OF THE ARMY HEADQUARTERS, FORT MONROE, VIRGINIA Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-11, SEIU, AFL-CIO Charging Party	Case No. WA-CA-00395

NOTICE OF TRANSMITTAL OF DECISION

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

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 22, 2001**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, NW., Suite 415
Washington, DC 20424

GARVIN LEE OLIVER
Administrative Law Judge

Dated: July 23, 2001
Washington, DC

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

MEMORANDUM DATE: July 23, 2001

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: UNITED STATES DEPARTMENT OF THE ARMY
HEADQUARTERS, FORT MONROE, VIRGINIA

Respondent

and Case No. WA-CA-00395

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES
LOCAL R4-11, SEIU, AFL-CIO

Charging Party

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

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges OALJ 01-51
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF THE ARMY HEADQUARTERS, FORT MONROE, VIRGINIA Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R4-11, SEIU, AFL-CIO Charging Party	Case No. WA-CA-00395

Harry J. Gruhala, Jr.
Bradley R. Hansen
Counsel for the Respondent

Tracy E. Levine
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The complaint, as amended, alleges that the United States Department of the Army, Headquarters, Fort Monroe, Virginia (the Respondent), violated section 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1), (5), and (8), by failing and refusing to provide the National Association of Government Employees, Local R4-11, SEIU, AFL-CIO (the Union), with certain requested information. The Respondent's answer denies that it violated the Statute as alleged in the amended complaint.

A hearing was held in Norfolk, Virginia. 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

A. Background

This case concerns the Respondent's study of commercial activities being performed by its Department of Public Works and Department of Logistics (DPW/DOL). Commercial activities involve products or services that can be performed by a private source. The study's purpose was to determine whether commercial activities performed by DPW/DOL should continue to be performed in-house or whether it would be cost effective to have these services performed via contract by a private source.

The Respondent's commercial activities studies are accomplished pursuant to government-wide OMB Circular No. A-76 (Circular A-76), and agency Army Regulation 5-20 (AR 5-20). The process required by these regulations begins with the drafting of a Performance Work Statement (PWS), which identifies certain characteristics of the work to be performed. Next the PWS is used to establish a streamlined, in-house organization, which is termed the "Most Efficient Organization" (MEO). The staffing pattern in the MEO serves as the baseline in-house cost estimate. The MEO thus determines the government's bid against which contractors must compete in vying to perform the commercial activity. As such, the MEO is sealed and safeguarded as a sensitive document until the procurement process is concluded, i.e., the contractors' bids are opened, cost comparisons are completed, and a tentative decision is reached regarding whether to contract out the commercial activity.

The Union is the exclusive representative of a unit of employees appropriate for collective bargaining at Respondent's Fort Monroe, Virginia facility. The Union requested a meeting with representatives of the Respondent for the purpose of discussing the DPW/DOL commercial activities study.

B. The Meeting and Subsequent Written Information Request

On March 13, 2000, a meeting was held to discuss the DPW/DOL commercial activities study. The Union officials who attended the meeting were Portia Wilson, President; David Walker, Executive Vice-President; and Willie Mae Bolden, Executive Secretary. Representatives of the Respondent were Colonel Edward Miller, Post Commander;

Lieutenant Colonel Robert Edwards, Director of Resource Management; Thelma Pankoke, Executive Assistant to the Post Commander; Barry Buchanan, Director of the Civilian Personnel Advisory Center; and Bill Mee, Commercial Activities Program Manager.

Certain matters about this meeting and its aftermath are not in dispute. During the meeting the Union representatives requested copies of two items of information, specifically the MEO and a Table of Distributions and Allowances (TDA)[1] for the DPW/DOL. Respondent's representatives refused to provide the MEO, noting its sensitivity and the fact that the commercial activities study was not yet complete. Shortly after the meeting, Colonel Miller, through Pankoke, offered to permit Union President Wilson to view the MEO. However, Wilson declined the offer because the Respondent would not permit Walker and Bolden to accompany her to view the MEO.[2] On March 24, 2000, the Union filed an information request pursuant to section 7114(b) of the Statute. (Jt. Exh. 1) On March 31, 2000, the Respondent agreed to provide certain information to the Union, but refused to produce the MEO, reasserting that it could not be compromised at this point. (Jt. Exh. 2).

Two other matters regarding this meeting are in dispute. First, the General Counsel through Wilson and Walker, claims that during the meeting the Union articulated reasons why it needed the requested information. In this regard, Wilson testified that during the meeting she referred to Circular A-76 and AR 5-20, and how those regulations implicate Equal Employment Opportunity (EEO) assessments and safety concerns. She also mentioned monitoring compliance with the parties' collective bargaining agreement. Finally, Wilson expressed concern about organizational structural changes that would be reflected in the TDA and pre-positioning of employees to protect them from any reductions-in-force. (Tr. 24-34). Walker agreed that these items were discussed. The Respondent, through Buchanan, denies that regulations or EEO impact were mentioned during the meeting. (Tr. 229-31).

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1/ A TDA describes the organizational structure for an agency's instrumentality, depicting items such as grades, job titles, and positions.

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2/ The Respondent refused to permit Walker and Bolden to view the MEO because Walker and Bolden occupied positions directly affected by the commercial activity study.

In resolving this issue, I credit the testimony of Wilson and Walker. Their testimony was offered during direct examination, was more comprehensive, and was not totally disputed by Buchanan's testimony. Additionally, all parties agreed that the MEO and TDA were requested during the meeting, it is logical that during the meeting the Union would offer its reasons for needing the requested information.

Second, the Respondent claims that during the meeting, Miller directed Edwards to provide the Union with the applicable TDA. Mee testified that on the following day in the presence of his assistant, he provided Walker with copies of the TDA and at this time also explained the TDA to Walker. (Tr. 169, 180-81). In contrast, Wilson testified that during the meeting the Respondent's representatives indicated that the TDA was not going to be released. (Tr. 34). Walker testified that he did not go to Mee's office and pick up the TDA on March 14 or at any time during that period. (Tr. 255).

The General Counsel argues that the Respondent's testimony on this point is not credible because the TDAs in the record reflect a June 27, 2000 preparation date. Also, the General Counsel notes that the Respondent has no signed copies of the TDA allegedly provided to the Union, notwithstanding the fact that this was customary between these parties. (Tr. 248). Further, the General Counsel points out that the Union requested the applicable TDA in its March 24 information request and the Respondent replied by stating that the TDA had no impact on employees status.

The Respondent explains through Mee that the preparation date merely reflects the date that his office ran the record copies of the TDA. (Tr. 170). However, Mee, while acknowledging that it was customary to keep copies of and require signatures for documents provided to the Union, offers no reason why he did not have a copy of the March 14 TDA or a record of Walker signing for it. The Respondent also explains that its response to the information request was not a refusal to provide the TDA because the TDA had already been given to the Union and adds that the letter's characterization of the TDA's function is accurate. The Respondent asserts that Walker is biased against the Respondent because of numerous complaints he has filed and because he lost his job as a result of the commercial activities determination. (Tr. 262-63). Finally, the Respondent notes that in a subsequent May 18 request for information involving the commercial activity study, the Union did not request the TDA.

The parties' versions of this dispute are irreconcilable and I am unable to determine whether the contradictory testimony of Mee or Walker is more credible on this point. However, considering the facts that are not in dispute, I conclude that the Respondent did not provide the TDA to the Union on March 14. In this regard, I find relevant the following facts: the Respondent failed to follow the customary practice of keeping copies of and requiring signatures for information provided;[3] the Union requested the TDA (that it had supposedly already been furnished on March 14) in its March 24 information request; and in its March 31 response, rather than stating that the TDA had already been provided, the Respondent questioned the Union's need for the TDA.

C. The Commercial Activities Study Announcement and the Union's Second Written Information Request

On May 16, 2000, the Respondent announced to the workforce that the bids had been opened, the cost comparison had been completed, and a decision had been made to contract-out the DPW/DOL commercial activities. Two days later, the Union filed a second written information request under the Statute, again seeking, among other things, the MEO for DPW/DOL. On May 22, the Respondent responded to the Union's information request by stating that it was producing the requested data. In this correspondence, the Respondent noted that the Union had already been provided the MEO.

The parties disagree, however, as to when the Respondent furnished the MEO to the Union after the May 16 announcement. The General Counsel asserts that the Respondent did not furnish the Union with the MEO until June 23, 2000. The Respondent claims it furnished the MEO to the Union on or about May 16. In support of the General Counsel's position, Wilson testified that she was on medical leave during the period of April 17 and June 19, but when she returned and examined the information that was provided to her, the MEO was not included. Mee testified that Wilson returned from medical leave for the May 16 announcement and at that point he gave her the MEO. Mee also indicated that the Union was aware that copies of the MEO were available in the libraries on post. Finally, Mee testified that he delivered (Jt. Exh. 7) and its enclosures to the Union on May 22; however, he was unsure whether the MEO was included as an enclosure because it may have already been provided to the Union, and because at that time the MEO was a public document. (Tr. 177-79).

3/ Indeed, the parties signed acknowledging receipts of documents in this case. (Jt. Exh. 1, 2, 6, and 7).

In analyzing this factual dispute, I note a degree of uncertainty in the testimony of both Wilson and Mee. However, and again considering the facts that are not in dispute, I conclude that the Respondent did provide the MEO to the Union on or about May 16. In this regard, I find relevant the following facts: the Respondent had no reason to refuse to provide the MEO to the Union after May 16; the Respondent agreed in writing to furnish the MEO on May 22 and asserted that the MEO had already been furnished; and the Union delayed for approximately 30 days (May 22 until June 23) asserting that it did not have the MEO.4

In summary, I find that the Respondent did not provide the Union with either the TDA or MEO in response to the Union's information requests of March 13 and March 24. However, I find that on or about May 16, after the announcement concerning the commercial activity study, the Respondent did provide the MEO to the Union.

Discussion and Conclusions

The General Counsel contends that the Respondent violated section 7116(a)(1), (5), and (8) of the Statute by failing and refusing to furnish the Union with the TDA and the MEO for DPW/DOL, as required by section 7114(b)(4). The Respondent contends that the Union failed to establish a particularized need for the MEO and the TDA; that the MEO was neither normally maintained nor reasonably available; that disclosure of the MEO was prohibited by law; and that assuming it failed to provide the MEO and the TDA, the Union suffered no harm as a result of its failure to provide the information.

A. Statutory Requirements

As pertinent here, section 7114(b)(4) of the Statute requires an agency to furnish the exclusive representative data which is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; normally maintained by the agency in the regular course of business; reasonably available; and not prohibited by law from disclosure.

B. Particularized Need

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4/ I recognize that Union President Wilson was on medical leave until June 19, but Wilson testified that Vice-President Walker was acting as president during this period. (Tr. 59).

The Authority has ruled that when requesting information under section 7114(b)(4) of the Statute, a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union's representational responsibilities under the Statute." *IRS, Washington, DC and IRS, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 669 (1995)(*IRS, Kansas City*).

The Respondent asserts that the Union failed to establish a particularized need for the MEO and the TDA.5 I disagree. During the March 13 meeting, President Wilson offered several reasons why the Union needed the information. In this regard, Wilson specifically referenced government-wide and agency regulations and the requirement in these authorities that commercial activities studies contemplate EEO assessments and safety concerns. The Union also noted compliance with the parties' collective bargaining agreement. Finally, the Union expressed legitimate concerns about possible organizational changes that would be reflected in the TDA and the pre-positioning of employees in the event of any reductions-in-force. All of these potential uses involving the MEO and the TDA for DPW/DOL directly relate to the Union's representational responsibilities. Accordingly, I conclude that the Union established a particularized need for the MEO and the TDA.

C. Normally Maintained and Reasonably Available

"In determining whether information is 'normally maintained' by an agency, the Authority examines whether the information is within the control of the agency." *U.S. Department of Justice, Office of the Inspector General, Washington, DC and U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas*, 45 FLRA 1355, 1358 (1992). Although asserting that the MEO was not normally maintained, the Respondent does not claim that the MEO was not under its control. The testimony and evidence indicate that the MEO was at all relevant times, under the Respondent's control. I thus conclude that the MEO was normally maintained by the Respondent.

The Authority has explained that the phrase "reasonably available" in the context of section 7114(b)(4) means an

5/ Notwithstanding its assertion that it provided the TDA to the Union, the Respondent contends that the Union failed to establish a particularized need for the TDA.

agency only need to provide information that is accessible without the necessity of going to excessive means in order to retrieve the data. *Department of Health and Human Services, Social Security Administration*, 36 FLRA 943, 950 (1990). Although claiming that the MEO is not reasonably available, the Respondent offered no testimony or evidence indicating that it would be time-consuming or oppressive to retrieve and furnish the requested information to the Union. Indeed, the Respondent offered to permit Union President Wilson to view the MEO. I conclude that the Respondent failed to establish that the MEO requested by the Union was not reasonably available. Rather, I find that the MEO was reasonably available.[6]

D. Prohibited by Law

The Respondent asserts that, prior to its May 16 Commercial Activities Study Announcement, release of the MEO was prohibited by several "laws" including AR 5-20, Circular A-76, and provisions of the Procurement Integrity Act (41 U.S.C. § 423) and its implementing regulation (the Federal Acquisition Regulation, 48 C.F.R. Part 3).[7] The General Counsel contends that the Respondent's agency regulation is not a "law" and that none of the other provisions on which the Respondent relies specifically prohibits disclosure of the MEO in this case.

In a previous case involving the release of an MEO, the Authority concluded that the term "law" in section 7114(b)(4) includes "regulations having the force and effect of law." *Department of Defense, U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky*, 43 FLRA 476, 493 (1991)(*Fort Knox*). Although Circular A-76 had previously been determined to be a law under this test,[8] in *Fort Knox* the Authority was unable to conclude whether AR 5-20 is a regulation having the force and effect of law because neither party presented argument on this point. *Id.* Here, in contrast, the Respondent's contention in its post-hearing brief that AR 5-20 satisfies the Authority's criteria is persuasive and not rebutted by the General Counsel.

6/ The Respondent concedes that the TDA was normally maintained and reasonably available.

7/ The Respondent does not argue that any of these authorities, or any other law, precludes the release of the TDA.

8/ *National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service*, 42 FLRA 377, 391 (1991).

Accordingly, I conclude that AR 5-20 is a law for purposes of section 7114(b)(4).

I agree with the Respondent that, prior to the May 16 announcement, release of the MEO was prohibited by law. Specifically, AR 5-20, ¶ 4-6b.(2) provides that in response to information requests, the agency "will not release any information that reveals the in-house cost estimate or from which the in-house estimate could be readily derived before the cost comparison. . . This includes . . . the MEO." Circular A-76, Chapter 3, ¶ F.1., in a section titled "Safeguarding the MEO," provides that "[t]he Management Plan and the MEO are considered procurement sensitive documents until a tentative decision is reached, e.g., at bid opening and completion of the cost comparison form." Further, I find that disclosure of the MEO is prohibited under 41 U.S.C. § 423(b)(3) and unlike the situation in *Fort Knox*, the Respondent's refusal to turn over the MEO here clearly occurred "during the conduct of any Federal agency procurement of property or services." *Fort Knox*, 43 FLRA at 490-91.

Additionally, in *IRS, Kansas City*, the Authority explained that "[a]n agency denying a request for information under section 7114(b)(4) must assert and establish any countervailing anti-disclosure interests." *IRS, Kansas City*, 50 FLRA at 670. Here, even if I were to conclude that release of the MEO was not specifically prohibited by the authorities discussed in the preceding paragraph, I would nevertheless find that the Respondent has articulated sufficient anti-disclosure interests to justify its refusal to release the MEO until the procurement process was completed. In reaching this alternative conclusion, I have taken into account the sensitive nature of the MEO, the integrity of the procurement process, and the testimony of Mr. Kevin Hoffman and Ms. Abra Smith regarding these matters. (Tr. 69-135, 163-211).

E. Harm to the Union

Finally, the Respondent argues that the Union suffered no harm as a result of any failure by the Respondent to furnish the TDA[9] in this case. The Respondent cites no Authority precedent supporting the argument that this is a defense to the complaint and I am aware of no such precedent. As relevant here, the Respondent's failure to

9/ The Respondent makes the same argument concerning the MEO. However, I have already determined that release of the MEO was prohibited by law, so the MEO will not be discussed further.

provide the TDA, which was necessary, reasonably available, normally maintained, and not prohibited by law from disclosure, is inconsistent with the Respondent's obligations under section 7114(b)(4) of the Statute. As such, regardless of what the Union might have done with the TDA had it been timely provided, the Respondent's conduct violated the Statute.

F. Remedy

Having found that the Respondent violated section 7116 (a)(1), (5), and (8) of the Statute in the circumstances of this case, the final issue is how to remedy this unfair labor practice. The General Counsel acknowledges that the Union now has the TDA, so the Respondent need not be ordered to provide it. The General Counsel argues that the Respondent should be ordered to cease and desist from this type of violation in the future and to post appropriate notices signed by the Post Commander who is the "highest official of the activity responsible for the violation." *U.S. Department of Transportation, Federal Aviation Administration, Standiford Air Traffic Control Tower, Louisville, Kentucky*, 53 FLRA 312, 322 (1997).

The General Counsel's proposed remedy is appropriate. Accordingly, I shall recommend a cease and desist order and a Notice, signed by the Post Commander. However, because the Union already has the TDA, I will not order that it be provided.

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-
Management Relations Statute, the United States Department of the Army, Headquarters, Fort Monroe, Virginia, shall:

1. Cease and desist from:

(a) Failing and refusing to provide the National Association of Government Employees, Local R4-11, SEIU, AFL-CIO, with the Table of Distributions and Allowances for the Directorate of Public Works/Directorate of Logistics requested by the Union on March 13 and March 24, 2000.

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

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

(a) Post at its facilities in Fort Monroe, Virginia, where bargaining unit employees represented by the National
Association of Government Employees, Local R4-11, SEIU, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Post Commander of Fort Monroe, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

3. The allegation that the Respondent failed to comply with section 7114(b)(4) of the Statute and violated section 7116(a)(1), (5), and (8) of the Statute by refusing to provide the National Association of Government Employees, Local R4-11, SEIU, AFL-CIO, with the Most Efficient Organization Report for the Department of Public Works and Department of Logistics since on or about March 31, 2000, is DISMISSED.

Issued, Washington, DC, July 23, 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 the Army, Headquarters, Fort Monroe, Virginia, 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 and refuse to furnish the National Association of Government Employees, Local R4-11, SEIU, AFL-CIO, exclusive representative of our employees, with the Table of Distributions and Allowances for the Directorate of Public Works/Directorate of Logistics requested by the Union on March 13 and March 24, 2000.

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.

_____
__

(Respondent/Activity)

Dated: _____ 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, Washington Regional Office, Federal Labor Relations Authority, whose address is:

800 "K" Street, N.W., Suite 910, Washington, DC 20001, and whose telephone number is: (202)482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. WA-CA-00395, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT NOS: **CERTIFIED**

Tracy Levine, Esquire P168-060-320
Federal Labor Relations Authority
800 "K" Street, NW, Suite 910
Washington, DC 20001

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Kenneth Lyons, President
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_____

CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JULY 23, 2001
WASHINGTON, DC