DEPARTMENT OF THE AIR FORCE, WASHINGTON, D.C. AND AIR FORCE LOGISTICS COMMAND, WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case Nos. CH-CA-20193 CH-CA-20459 (49 FLRA No. 57)

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **JULY 24, 1995**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: June 23, 1995
Washington, DC

MEMORANDUM DATE: June 23, 1995

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE AIR FORCE, WASHINGTON, D.C. AND AIR FORCE LOGISTICS COMMAND, WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondents

and Case Nos. CH-CA-20193
CH-CA-20459
(49 FLRA No. 57)

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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 the transcript, exhibits, any briefs filed by the parties, and the record which was forwarded to this Office on March 24, 1995.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE, WASHINGTON, D. C. AND AIR FORCE LOGISTICS COMMAND, WRIGHT-PATTERSON AIR FORCE BASE, OHIO Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case Nos. CH-CA-20193 CH-CA-20459 (49 FLRA No. 57)

Major Phillip G. Tidmore
William P. Langley, Esq.
Counsel for the Respondents

Judith A. Ramey, Esq.
Counsel for the General Counsel

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION ON REMAND

Statement of the Case

On March 23, 1994, the Authority remanded this consolidated unfair labor practice case to the undersigned in order to provide the parties an opportunity to address whether the Union has established a "particularized need" for either or both of the Inspector General Reports it had requested in November 1991 and April 1992. The Authority found it appropriate to remand the case because, in National Park Service, National Capitol Region, United States Park Police, 48 FLRA 1151 (1993) (National Park Service), after issuance of my recommended decision herein, the Authority adopted the D.C. Circuit's decision in National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992)(NLRB

v. FLRA), stating that "an agency is not obligated to provide a union with requested documents containing advice, guidance, counsel, or training materials provided for management officials under section 7114(b)(4) of the Statute unless the union demonstrates a

particularized need, as set forth by the court [in NLRB v.FLRA], for such information."

On remand, the undersigned determined, in consultation with all parties, that a hearing was necessary to provide them an opportunity to address the "particularized need" issue. Accordingly, a hearing was scheduled for June 6, 1994, in San Antonio, Texas. Thereafter, Respondents filed a Motion for Change of Venue, urging that the hearing be held in Dayton, Ohio. The hearing was subsequently convened at that location on July 19, 1994.

The parties were afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed briefs dated August 19, 1994, addressing the issue on remand, which have been carefully considered.

Findings of Fact

The underlying facts are set forth in my initial decision and the Authority's decision. See 49 FLRA at 604-05; 612-16. They will be repeated here only to the extent necessary to frame the issue on remand.

In July 1989, a B-52 bomber exploded at Kelly Air Force Base (Kelly AFB), killing one bargaining unit employee and wounding several others. Respondent Air Force Logistics Command (AFLC)[1] and the Occupational Safety and Health Administration (OSHA) conducted accident investigations, and copies of their reports were given to the Union.

Thereafter, beginning in December 1990, a team under the direction of the AFLC's Inspector General (IG) conducted a review of safety procedures at five Air Logistics Centers, including Kelly AFB. After the review, the IG prepared a "Report of Process Effectiveness Review" (IG Report), containing a series of candid comments and recommendations to AFLC management. The Union subsequently requested a copy

[1] AFLC has been renamed the Air Force Materiel Command, but the Respondent will continue to be referred to as the AFLC in this decision on remand.

of the IG Report in order to "determine if grounds exist for submission of a grievance because of non-compliance with the report in addressing the citations cited by OSHA as well as others." Respondent replied that the IG Report was releasable only by the Secretary of the Air Force, and asked the Union to clarify why it needed the requested information. The Union did not respond.

In October 1991, AFLC's IG conducted a follow-up review of the safety programs at each of the Air Logistics Centers previously studied, and issued a "Report of Follow-Up Safety Program Integration, Process Effectiveness Review" (Follow-Up IG Report). The Union requested a copy of the Follow-Up IG Report, stating that it was needed "to assist us in developing proposals for the upcoming . . . negotiations . . . [and] to determine whether any employee or Union rights have been violated and if they have, so the Union can take appropriate remedial action. . . ." Respondent again replied that the request should be made to the Secretary of the Air Force, and also advised the Union that the Air Force likely would not release the Follow-Up IG Report because it was "guidance and advice" to management and the Union had not demonstrated a "particularized need" for the information.

Positions of the Parties on Remand

On remand, the parties essentially repeated the same positions they took at the initial hearing in this case. Paul Palacio, the Union's former president, again testified on behalf of the General Counsel that the Union needed the requested IG Reports in order to prepare bargaining proposals to strengthen the existing "Health and Safety" provisions in the parties' collective bargaining agreement (Article 25). That is, Palacio testified that access to the safety deficiencies identified by the IG would enable the Union to target those areas with specific proposals instead of taking a "shotgun" approach. The General Counsel's post-hearing brief again emphasizes the Union's joint responsibility--along with management--under Article 25 of the parties' agreement to promote the health and safety of unit employees; the importance of the IG Reports in enabling the Union to determine whether the safety violations identified by OSHA had been corrected, or whether grievances should be filed to force the Respondent to implement the IG's recommendations designed to achieve those results; and the significance of the IG Reports in enabling the Union to formulate effective safety proposals to augment Article 25 of the parties' agreement. The General Counsel candidly admits that the circumstances of this case probably do not

fall within the examples of "particularized need" identified by the D.C. Circuit in NLRB v. FLRA, but contends that the Union nevertheless has established such a need for the requested information.

Respondent again presented the testimony of Lieutenant Colonel Gregory McKillop, on behalf of the Inspector General, that the IG Report and the Follow-Up IG Report at issue in this case should remain privileged because the purpose of such inspection reports--to enable Air Force leaders to deliberate and make decisions about how to correct deficiencies and improve the Air Force--would be compromised if the reports were made public. More specifically, McKillop testified that the value of IG inspections and reports rests on free and frank interviews of individuals who are assured that their comments will remain confidential, and that making such reports public would inhibit their candor and prevent the acquisition of objective and complete information.2 Additionally, McKillop stated that IG reports contain a lot of critical self analysis which is helpful in correcting deficiencies internally, but which would disappear if such reports were made public. In light of these important countervailing considerations, the Respondent contends that the Union has failed to establish a "particularized need" for the IG Report and the Follow-Up IG Report in this case.

Discussion and Legal Conclusions

The Authority found, and it is undisputed, that the IG Report and the Follow-Up IG Report requested by the Union in this case both constitute managerial guidance, advice, and counsel. Thus, the reports were prepared for use by management officials in making decisions concerning safety processes at five Air Logistics Centers, and in assessing whether previous recommendations by the IG for improving safety had been accomplished. As previously described, the reports contain both assessments of current safety operations, including identified deficiencies, and opinions

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The authority for assuring inspection witnesses that their testimony will remain within the Air Force is Air Force Regulations (AFR) 123-1, which provides that unclassified inspection reports are "privileged" documents with controlled distribution. They are marked "For Official Use Only," which means that persons who need such reports in order to perform their jobs may have access to them, but that "persons or agencies outside the Air Force" cannot have them even in part "without the express approval of the Secretary of the Air Force."

and recommendations to management for improving such operations.

Accordingly, consistent with the Authority's decision in National Park Service, the Union is not entitled to receive the requested reports under section 7114(b)(4) of the Statute unless it has established a "particularized need" for them. While the General Counsel concedes that the Union's request "probably" does not fall within the two examples of "particularized need" identified by the D.C. Circuit in NLRB v. FLRA, the parties nevertheless disagree whether the Union has made the requisite showing. For the reasons set forth below, and based on the entire record in this case, I conclude that the Union has not established a particularized need for the requested reports, and that the Respondent therefore did not violate section 7116(a)(1) and (5) of the Statute by refusing to furnish a copy of them to the Union.

In National Park Service, the Authority discussed the D.C. Circuit's decision in NLRB v. FLRA, as pertinent here, as follows:

> The court set forth two examples of instances where a union could establish a particularized need for management guidance, advice, counsel, or training. In particular, the court held that a union may establish a particularized need for information "where the union has a grievable complaint covering the information[]" and/or where "the disputed document creates a grievable action." [952 F.2d] at 532, 533 (emphasis omitted). With respect to the former example, the court stated that, if a collective bargaining agreement contained a procedure requiring an agency to create documents containing intramanagement recommendations, then "the recommendations should normally be disclosed to the union, assuming the union could grieve the agency's failure to follow the procedure." Id. at 533. As for the latter example, the court hypothesized a situation where a lower-level supervisor confirmed in writing a counseling session regarding an employee's performance and an applicable collective bargaining agreement provided that such counseling was used to determine subsequent action by higher-level supervisors. The court stated that, in such a situation, a union would have a "strong and valid claim" to disclosure of the confirming memorandum under section 7114(b)(4) of the Statute because

> the union would need such memorandum "to determine whether the employee must be protected against the accumulation of negative evaluations in his or her personnel file. . . ." Id. However, the court held that documents "that are strictly 'intramanagement' normally will not be discoverable under [section] 7114(b)(4)(B)." Id. at n.6.

48 FLRA at 1155-56.

With respect to the first example of a particularized need set forth above, there has been no reference herein to a provision in the collective bargaining agreement between the parties which requires the Respondent to create documents containing intramanagement recommendations. The General Counsel has referred to Article 25 of the parties' agreement on several occasions. That lengthy provision, entitled "Health and Safety," does not contain a procedure requiring the creation of management reports, much less intramanagement recommendations. It does provide (in section 25.14) that the Respondent will conduct safety and health inspections or surveys as required to maintain a safe and healthful workplace, and that the Union can designate a representative to accompany the employer's inspector whenever a worksite inspection occurs. It also provides (in section 25.15) that when the employer conducts an industrial accident investigation involving or impacting upon bargaining unit employees, the Union has the right to meet with management's official(s) in charge of the investigation and provide recommendations or information concerning the matter under investigation. However, neither provision specifies that reports--containing intramanagement recommendations or not--will be prepared. Accordingly, the Union cannot establish a particularized need for the IG Report and/or the Follow-Up IG Report under the court's first example in the circumstances of this case.

Similarly, I conclude that the disputed documents do not create a grievable action within the meaning of the court's second example in NLRB v. FLRA, and therefore the Union has not established a particularized need for the information on that basis either. As previously stated, the Union sought a copy of the IG Report in order to "determine if grounds exist for submission of a grievance because of non-compliance with the report in addressing the citations cited by OSHA as well as others." It appears that the Union thought it had a need for the IG Report because the Respondent's failure to comply with the IG's recommendations for correcting the safety deficiencies cited by OSHA would constitute the basis for a grievable action. The fallacy of

this reasoning is that the Respondent had no obligation to comply with the IG's recommendations in correcting the violations identified by OSHA. The record indicates, as I have previously found (49 FLRA at 614-15), that the IG Report set forth possible solutions for the responsible management officials to consider in correcting deficiencies in the programs and processes reviewed by the IG team. These possible solutions were generally set forth in the form of opinions and recommenda-tions rather than mandates. Indeed, AFR 123-1 specifically provides that "recommendations contained in an IG Report do not represent an approved Air Force position until final action is taken by the responsible Air Force agency." Thus, the responsible management officials at AFLC could have chosen to disregard the possible solutions recommended by the IG in his Report and instead to select other solutions to correct whatever deficiencies were identified by OSHA or during the IG's independent investigation. Accordingly, the Union's underlying assumption that the Respondent's noncompliance with the IG's recommendations would create a grievable action is simply erroneous.

Of course, this is not to say that the Respondent had no enforceable obligation to correct safety deficiencies noted by OSHA, the IG, or its own investigations. Indeed, Article 25 of the parties' agreement is replete with provisions which require the Respondent to create and maintain the safest possible workplace in cooperation with the Union. Therefore, the Union was entitled to know what actions, if any, the Respondent took to correct known safety problems. It had the right to obtain this information by asking the Respondent for documentation of the corrective measures taken in response to OSHA's citations and AFLC's own investigation report. The Union had copies of these documents and thus knew what information to request. Additionally, the Union could have discussed these matters with the Respondent at the periodic meetings of the "Safety and Health Committee" established by contract at each subordinate AFLC activity.[3] If the Union failed to obtain

[3] Section 25.03 of the parties' agreement, which creates such local safety and health committees, further provides that the Union has two permanent members thereon and a technical advisor as needed, and that the purpose of such committees is (in part) to consider occupational safety and health matters brought to their attention and make recommendations to the commander of the subordinate AFLC activity. By contract, such committees are to meet at least quarterly, but may be convened more frequently by mutual agreement if serious safety matters arise between scheduled meetings.

the information sought through these channels or the information furnished to the Union demonstrated that the Respondent had failed to correct the safety deficiencies in question, the Union could take appropriate action either under the parties' negotiated grievance procedure or the unfair labor practice procedures of the Statute. While the Union might find the IG's opinions and recommendations helpful in pursuing these remedial avenues, it had no particularized need for such information and could well proceed without it.

With respect to the Follow-Up IG Report, the Union additionally requested this information "to assist us in developing proposals for the upcoming Master Labor Agreement (MLA) negotiations." The General Counsel takes the position that the Union had a significant role to play under Article 25 of the MLA in terms of targeting known health and safety program deficiencies and taking corrective action, and wanted to strengthen that role during the upcoming negotiations, but could not do so without access to the IG Reports. More specifically, the General Counsel asserts that without the IG Reports the Union would be unable to assess whether existing contractual conditions had been satisfied or were adequate to address actual current health and safety conditions. Given the great importance of health and safety issues to the Union and the bargaining unit employees it represents, the General Counsel contends that the Union has established a particularized need for the IG Reports.

Even assuming that preparation for negotiations could constitute a basis for establishing a union's particularized need for requested information under certain circumstances,[4] in my judgment the Union did not establish a particularized need for the IG Reports in order to prepare for negotiations in this case. As previously found, the Union could have sought information directly from the Respondent concerning the steps taken to correct the safety deficiencies identified by OSHA and in the AFLC's own internal safety

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I note that, in remanding the instant proceeding, the Authority did not address what circumstances, in addition to the two examples set forth by the D.C. Circuit in NLRB v. FLRA, may establish such need. 49 FLRA at 609. See also National Park Service, 48 FLRA at 1165, n.13.

report, both of which were in the Union's possession,[5] and then formulated proposals based on the Respondent's answers. Additionally, the Union could have discussed its health and safety concerns with the Respondent at the bilateral local committee meetings established under the parties' negotiated agreement for that purpose, and then used the information obtained from such meetings to formulate bargaining proposals. Moreover, the Union could have prepared bargaining proposals in coordination with its own safety experts. While some of those proposals might duplicate efforts already taken by the Respondent to correct known safety deficiencies, or might be impractical for some reason unknown to the Union, such matters could be addressed in formal negotiations concerning Article 25. In short, while access to the IG Reports in question doubtless would have been helpful to the Union in preparing safety proposals for negotiation, I cannot conclude that the Union has demonstrated a particularized need for such information in the circumstances of this case.

In reaching the foregoing conclusion, I have carefully considered the Respondent's countervailing interests against disclosure of the IG Report and the Follow-Up IG Report. As the Authority quoted in adopting the D.C. Circuit's analysis in NLRB v. FLRA, "[a] statute that requires 'necessity' implicitly recognizes countervailing interests," and "the requisite strength of the union's 'need' will depend on the intensity of countervailing interests." National Park Service, 48 FLRA at 1154, quoting NLRB v. FLRA, 952 F.2d at 531. As the Authority further recognized (48 FLRA at 1155), the court in NLRB v. FLRA (952 F.2d at 532) also noted that "management often has a legitimate interest in preserving for itself, alone, information on 'guidance,' 'advice,' 'counsel,' or training provided for management officials" and that while such interest "is most weighty with respect to matters relating to the *process* of collective bargaining, . . . the interest also exists . . . in connection with all such information pertaining to subjects within the scope of collective bargaining." Accordingly, an "employer's interest in protecting the sanctity of information on 'guidance,' 'advice,' 'counsel' or 'training' for management officials must be weighed against a union claim of necessity under

[5] It appears that the Union also had a copy of the report prepared by the General Accounting Office which summarized the IG's Reports generally, but it is unclear from the record whether the Union obtained a copy of that report before the parties started negotiations. Such negotiations had not been concluded at the time of the hearing on remand in this case.

§ 7114(b)(4)(B)." 952 F.2d at 532.

In this case, the Respondent has strong countervailing interests against disclosure of the IG Reports. Thus, as Lt. Col. McKillop testified, the purpose of inspection reports such as the ones involved herein is to enable the leaders of the Air Force to deliberate and make decisions about how to correct deficiencies and thereby improve the Air Force. The reports best serve that purpose if the employees interviewed by the IG's inspectors provide free and frank information. Releasing the interviewees' testimony to the public would inhibit them from providing the free and candid information needed by management if deficiencies are to be discovered and corrected. Additionally, the IG Reports contain a significant amount of critical self-analysis which could be expected to diminish in the future if such reports were released to the public. Therefore, weighing these considerations against the Union's "need" for the reports, I conclude that a particularized need has not been demonstrated.[6]

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

ORDER

The Complaints in Case Nos. CH-CA-20193 and CH-CA-20459 are dismissed.

Issued: June 23, 1995, Washington, DC

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[6] In reaching this conclusion, I recognize that the circumstances of this case differ from those involved in the three cases before the court in NLRB v. FLRA. Thus, as the General Counsel points out, the reports here were prepared in part on the basis of interviews with bargaining unit employees; were distributed to a number of components within the Air Force which had a job-related need for them; and were thorough, comprehensive treatments of health and safety matters of great importance to all bargaining unit employees rather than more narrowly focused. However, I find that these differences, even if considered cumulatively, do not compel a contrary conclusion in this case. Of course, I do not pass upon whether such factors might justify the finding of a particularized need in other circumstances.

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GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case Nos. CH-CA-20193 and CH-CA-20459, (49 FLRA No. 57), were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Major Phillip G. Tidmore
William P. Langley, Esq.
Air Force Legal Services Agency
Central Labor Law Office
1501 Wilson Boulevard
Arlington, VA 22209

Judith A. Ramey, Esq.
Counsel for the General Counsel
Chicago Region
Federal Labor Relations Authority
55 West Monroe, Suite 1150
Chicago, IL 60603-9729

Paul D. Palacio, President
American Federation of Government
Employees, Council 214
806 W. Thea Avenue
San Antonio, TX 78225

Major David L. Frishberg
General Litigation Division
United States Air Force
AFLSA/CLLO
1501 Wilson Boulevard
Arlington, VA 22209-2403

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: June 23, 1995
Washington, DC