

<p>UNITED STATES BORDER PATROL TUCSON SECTOR TUCSON, ARIZONA</p> <p style="text-align: center;">Respondent</p>	
<p style="text-align: center;">and</p> <p>NATIONAL BORDER PATROL COUNCIL AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2544, AFL-CIO</p> <p style="text-align: center;">Charging Party</p> <p style="text-align: center;">and</p> <p>IMMIGRATION AND NATURALIZATION SERVICE WESTERN REGIONAL OFFICE LAGUNA NIGUEL, CALIFORNIA</p> <p style="text-align: center;">Respondent</p> <p style="text-align: center;">and</p> <p>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2544, AFL-CIO</p> <p style="text-align: center;">Charging Party</p>	<p style="text-align: right;">Case Nos. SA-CA-20236 SF-CA-30308 SF-CA-31679</p>

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 31,**
1995, and addressed to:

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

ELI NASH, JR.
Administrative Law Judge

Dated: June 28, 1995
Washington, D.C.

MEMORANDUM

DATE: JUNE 28, 1995

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: UNITED STATES BORDER PATROL
TUCSON SECTOR
TUCSON, ARIZONA

Respondent

	and	Case Nos.	SA-
CA-20236			SF-
CA-30308			SF-
CA-31679			

NATIONAL BORDER PATROL COUNCIL
AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2544, AFL-CIO

Charging Party

and

IMMIGRATION AND NATURALIZATION
SERVICE, WESTERN REGIONAL OFFICE
LAGUNA NIGUEL, CALIFORNIA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2544, 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 is the transcript, exhibits and any briefs filed by the parties.

Enclosures

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

<p>UNITED STATES BORDER PATROL TUCSON SECTOR TUCSON, ARIZONA</p> <p style="text-align: center;">Respondent</p>	
<p style="text-align: center;">and</p> <p>NATIONAL BORDER PATROL COUNCIL AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2544, AFL-CIO</p> <p style="text-align: center;">Charging Party</p> <p style="text-align: center;">and</p> <p>IMMIGRATION AND NATURALIZATION SERVICE WESTERN REGIONAL OFFICE LAGUNA NIGUEL, CALIFORNIA</p> <p style="text-align: center;">Respondent</p> <p style="text-align: center;">and</p> <p>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2544, AFL-CIO</p> <p style="text-align: center;">Charging Party</p>	<p>Case Nos. SA-CA-20236 SF-CA-30308 SF-CA-31679</p>

James LoSasso
Thomas Michael O'Leary, Esq.
For the Respondent

John R. Pannozzo, Jr.
For the General Counsel

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On May 27, 1992, the Regional Director for the San Francisco Region of the Federal Labor Relations Authority (herein called the Authority), pursuant to a charge filed on January 23, 1992, by the National Border Patrol Council, American Federation of Government Employees, Local 2544, AFL-CIO (herein called the Union), issued a Complaint and Notice of Hearing in Case No. SA-CA-20236 which alleged that the United States Border Patrol, Tucson Sector, Tucson, Arizona (herein called Respondent USBP), committed an unfair labor practice within the meaning of section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (herein called the Statute). The Complaint alleges that on December 30, 1991 and January 14, 1992, Respondent USBP, through its acting chief patrol agent and chief patrol agent refused to furnish the Union with certain region wide data that was maintained at the Western Regional Office in Laguna Niguel, California and a proposed decision letter regarding a senior border patrol agent in the Tucson Sector.

On November 12, 1992, the parties stipulated the case to the Authority. In the Stipulation of Facts, the parties agreed that disciplinary and adverse actions are normally maintained at the Western Regional Office in Laguna Niguel, California for periods of two and four years, respectively; the disciplinary and adverse actions were not maintained at the individual facilities after completion; that the information can be retrieved and that it does not constitute guidance, advice, counsel or training for management officials. Based on the stipulated record, the Authority issued its decision in United States Border Patrol, Tucson Sector, Tucson, Arizona, 47 FLRA 684 (1993). The Authority determined that the Union was entitled to a single proposed decision letter involving one agent. On June 3, 1993, the General Counsel filed a Motion for Reconsideration on the basis that the Authority improperly limited its decision to a single proposed disciplinary letter and inadvertently failed to address the Union's broader request for region wide data, which was maintained at the Western Regional Office in Laguna Niguel. The proposed decision letter concerning the agent which was addressed by the Authority was provided by Respondent USBP to the Union after the

Authority's initial decision. Thereafter, on August 27, 1993, the Authority, in 48 FLRA 391 granted the Motion for Reconsideration and remanded the case to the Regional Director of the San Francisco Region for further processing.

On July 15, 1994, the Regional Director for the San Francisco Region of the Authority, pursuant to a charge filed by the Union on December 15, 1992, issued a Complaint and Notice of Hearing in Case No. SF-CA-30308 alleging that Respondent USBP committed an unfair labor practice within the meaning of section 7116(a)(1), (5) and (8) of the Statute by refusing to furnish the Union with certain region wide data that was maintained at the Western Regional Office in Laguna Niguel.

Also on July 15, 1994, the Regional Director for the San Francisco Region of the Authority, pursuant to a charge filed by the Union on September 20, 1993, issued a Complaint and Notice of Hearing in Case No. SF-CA-31679 alleging that the Immigration and Naturalization Service, Western Regional Office, Laguna Niguel, California (herein called Respondent INS) committed an unfair labor practice within the meaning of section 7116(a)(1), (5) and (8) of the Statute by refusing to furnish the Union with certain region wide data that was maintained at the Western Regional Office in Laguna Niguel.

On July 22, 1994, the Acting Regional Director for the San Francisco Region of the Authority issued an Order Consolidating Cases in the above-matters.

A hearing on the Consolidated Complaint was held before the undersigned in Los Angeles, California. All parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Post hearing briefs were filed and have been duly considered.

Upon consideration of the entire record in this case, 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 nationwide consolidated unit of employees appropriate for collective bargaining, including employees at Respondent USBP's Tucson, Arizona facilities. The Union is an agent of American Federation of Government Employees for the purpose of representing unit employees who work for the United

States Border Patrol. Respondent's INS's Western Regional Office consists of the five Border Patrol sectors, which are as follows: Tucson, Yuma, El Centro, San Diego and Livermore, and INS District Offices located in the states of Nevada, Arizona and California. The Union represents the bargaining unit employees within the five Border Patrol sectors and the American Federation of Government Employees INS Council represents the employees located in the states of Nevada, Arizona and California.

Four of the five Border Patrol sectors maintain facilities along the United States-Mexico border. They are: Tucson, Yuma, El Centro and San Diego. The Tucson Sector border facilities are as follows: Douglas, Naco, Senoita, Nogales, Tucson and Ajo. Agent Robert Speer worked at the Douglas, Arizona facility. The Yuma Sector border facility is Yuma. The El Centro, California Sector border facility is in Calexico. The San Diego Sector border facilities are Imperial Beach, Brownfield and Chula Vista.¹

Michael Albon served as the local president from 1990 to January 1994 representing bargaining unit employees in grievance, arbitration and Merit Systems Protection Board (herein called MSPB) proceedings. The Union sought region wide data covering the five Border Patrol sectors in order to represent three employees Robert Speer, Donna LaRue and Mark E. Miller in proposed disciplinary actions against them. The Union responded to Respondent USBP's proposed adverse action and represented Speer at arbitration. With regard to both LaRue and Miller, the Union responded to Respondent USBP and INS's respective proposed disciplinary action, and filed second and third step grievances on their behalf. In all three cases, the Union was chosen by the respective employee as their representative. LaRue submitted written notification to Coffin that Albon was representing her in connection with the proposed reprimand. The Union would have accepted the requested data for all three matters in sanitized form.

A. Case No. SA-CA-20236

On October 18, 1991, Respondent USBP, through Coffin, issued a proposed ninety (90) day suspension, without pay, to Border Patrol Agent Robert Speer based on a noncompliance

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The Tucson Sector has a reputation for drug smuggling at border crossings. The San Diego Sector has a reputation for drug smuggling and severe alien crossing problems. The Livermore Sector is primarily concerned with problems associated with rural agriculture - farming and ranching. However, these various problems, which are experienced by the respective sectors, could occur in any of the five Border Patrol sectors. For example, alien crossings could take place anywhere along the United States-Mexico border, and four out of the five sectors have border facilities.

with standards, policies, regulations or instructions issued by the service and conduct unbecoming an officer.² Speer allegedly failed to prepare the proper immigration paperwork concerning two illegal, juvenile, female aliens prior to releasing them near the United States-Mexican border. Specifically, Speer failed to complete the Form 1-213 (record of deportable alien), Form 1-274 (request for voluntary departure to Mexico) and the Perez-Funez Advisement (State of Arizona injunction form). Furthermore, Speer allegedly failed to follow the Administrative Manual and the Border Patrol Handbook, used profanity and made suggestive sexual remarks toward the illegal, female aliens. The conduct that Speer was charged with could have occurred within any of the five Border Patrol sectors. It was therefore, possible for the Union to compare disciplinary and adverse actions taken against employees in other sectors, particularly, those sectors with border facilities.

On November 6, 1991, Union Station Steward Kevin Nix, submitted a written reply to the proposed adverse action relating to Speer. The written reply stated, in part, that the two juveniles, illegal, female aliens escaped from Speer's custody, and therefore, the two aliens were not denied their rights to due process by Speer's inability to properly execute Forms 1-213, 1-274 and the Perez-Funez Advisement.

On December 10, 1991, Respondent, through Coffin, suspended Speer for thirty (30) calendar days, without pay, from December 23, 1991 to January 21, 1992. The suspension letter noted that Speer had not complied with standards, policies, regulations or instructions issued by the agency. The allegation relating to conduct unbecoming an officer was not sustained by the evidence. On December 16, 1991, the Union submitted an expedited arbitration request in connection with the thirty-day suspension pursuant to the negotiated agreement.

On December 28, 1991, acting as Speer's representative, the Union requested certain data from Respondent USBP, including the following region wide data:

1. A copy of all proposal and final decision letters relating to the charge of Non-Compliance with Standards, Policies, Regulations or Instructions issued by the Service, for the past five years, within the Western Region.

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Disciplinary actions include suspensions of fourteen (14) days or any lesser penalty, and adverse actions, include suspensions of fifteen (15) days or any greater penalty.

2. A copy of all proposal and final decision letters relating to disciplinary or adverse action resulting from the escape of an alien in custody, for the past five years, within the Western Region.

The Union requested the data in Item 1 because it wanted to determine whether Speer had been disparately treated in terms of the charge alleged and the penalty imposed by Respondent USBP. The Union wanted to compare the charges assessed and penalties imposed upon similarly situated employees and supervisors in other sectors. The proposal letters, it seems, provides more factual information regarding an alleged incident than do final decision letters. Thus, proposal letters could have assisted the Union in understanding the circumstances associated with the noncompliance charge.

The Union requested the data in Item 2 because it wanted to determine whether Speer had been disparately treated in terms of the charge alleged and the penalty imposed by Respondent USBP. Once again, the Union desired to compare the charges assessed and penalties imposed upon similarly situated employees and supervisors in other sectors. Further, the Union hoped to find out whether employees and supervisors, who allowed aliens to escape, were also charged with a noncompliance like Speer or was there some other charge assessed by Respondent USBP. Without the requested data, when it took the case to arbitration, the Union argued disparate treatment before the arbitrator, but lost.

The charge assessed by Respondent USBP against Speer, is significant because different charges contain a different range of penalties under the Department of Justice's Standard Schedule of Disciplinary Offenses and Penalties for Employees of the U.S. Department of Justice.

On December 30, 1991, Respondent USBP, through Coffin, denied the Union's data request on the basis that it was over broad in scope as to Items 1 and 2 and also irrelevant with regard to Item 2. Respondent USBP stated that "actions taken by other Sectors or Districts within Western Region are not material to the action under arbitration." On January 2, 1992, in response to the Union's data request Respondent USBP, through Sector Counsel Thomas Michael O'Leary, furnished the Union with one unsanitized, final decision letter that had been issued to Senior Border Patrol Agent Rodolfo Greene in the Tucson Sector involving noncompliance with policies and instructions issued by INS. Respondent USBP did not provide the Union with the notice of

proposed disciplinary action, dated November 30, 1988. The final decision letter did not state the circumstances that led to the noncompliance charge.

On January 5, 1992, the Union submitted another data request seeking the same information as the December 28, 1991 data request, except for the past four years instead of five. On January 14, 1992, Respondent USBP denied the Union's January 5, 1992 data request, stating, in part, as follows:

Your reduction in the time periods in request numbered 2 is noted. However, since the time period was not the sole basis of the denial of your requests, the decisions outlined in my December 30, 1991 letter remain.

Thereafter, on January 18, 1992, the Union, requested the November 30, 1988, proposed disciplinary letter issued to Greene. In addition, the Union noted that the information was relevant and necessary to the presentation of the Speer case at arbitration. On January 21, 1992, Chief Patrol Agent Ronald J. Dowdy denied the Union's request for the proposal letter in the Greene matter, stating that the proposal letter was not relevant to arbitration or other third party review. Dowdy also noted that the decision letter decides the facts as well as the appropriate penalty. As noted previously, the Greene proposal letter was provided by Respondent USBP to the Union after the Authority's decision in that case.

B. Case No. SF-CA-30308

Sometime around, November 24, 1992, a proposal of disciplinary action was issued to Radio Operator Donna LaRue. LaRue, a member of the bargaining unit, was charged with conduct that was disruptive to the workplace, and disrespect-ful conduct through the use of insulting and abusive language to or about others. LaRue's offense was allegedly placing derogatory remarks into the official radio log book and harassing a fellow employee through the use of vulgar language and remarks about his religion. The official radio log book is a daily record of the radio traffic and other events occurring within a sector during the normal workday. Each sector maintains an official radio log book. The conduct which LaRue was charged could have occurred within any of the five Border Patrol sectors. Furthermore, the Union hoped it could compare disciplinary actions taken against similarly situated employees, who worked in other sectors, with that of LaRue.

Around November 24, 1992, LaRue designated Albon as her representative in the matter. On November 25, 1992, the Union submitted a data request to Respondent USBP seeking "a copy of all proposal and final decision letters relating to like or similar charges for the past two years within the Western Region." The data request noted that the Union needed the information in order to carry out its representational responsibilities in responding to the proposed action. The Union requested the region wide data because it wanted to determine whether LaRue had been disparately treated by Respondent USBP in terms of the charge alleged and the penalties imposed in comparison to similarly situated employees. The Union again desired to see the proposal letters in hope that they would provide greater detail regarding the conduct leading up to the disciplinary action.

On December 4, 1992, Respondent USBP, responded to the data request by providing two sanitized proposed and two sanitized final decision letters concerning two Tucson Sector employees. In response to the region wide request, Respondent USBP stated in pertinent part that, "The Western Regional Office, ROLMR, policy is to furnish information pertaining to sector actions only. . . ." The Union's need to respond to the proposed disciplinary action, was never mentioned by Respondent USBP as a basis for denying the data request.

On December 10, 1992, the Union submitted a written reply to the proposed reprimand on behalf of LaRue. A final decision letter sustaining the reprimand issued on January 12, 1993. On February 15, 1993, the Union filed a step two grievance on behalf of LaRue which was denied by Respondent on March 3, 1993. A step three grievance on behalf of LaRue filed on March 13, 1993 was denied on April 5, 1993, by Respondent USBP. The official reprimand remains in LaRue's personnel file.

C. Case No. SF-CA-31679

On August 6, 1993, a proposal to officially reprimand was issued by Respondent USBP to Border Patrol Agent Mark E. Miller. Miller was charged with making false statements to his supervisors. In this regard, Miller allegedly twice went to his residence during a day in which he was scheduled to make a court appearance, but told his supervisor that he only went once. Miller later admitted to his supervisor that he had in fact gone to his residence on two separate occasions. Miller was represented by a Union steward from Phoenix, Arizona, Francis M. Moyer. The conduct with which Miller was charged could have occurred within any of the five Border Patrol sectors. Furthermore, the Union could

have compared the disciplinary actions taken against similarly situated employees, who worked in other sectors, with Miller's own.

The Union, submitted a data request to Respondent USBP, on August 12, 1993, seeking the following data:

"Copies of any and all proposals and/or final decisions for like or similar disciplinary actions issued within the Western Region of the Immigration and Naturalization Service for the past three (3) years."

The data request noted that the Union needed the information in order to carry out its representational responsibilities in responding to the proposed action. Albon, who spoke with Moyer prior to the submission of the data request, provided his input into the matter, instructed Moyer on how to request data and possibly forwarded to Moyer a copy of an information request. The Union requested the region wide data because it wanted to determine whether Miller had been disparately treated by Respondent USBP in terms of the charge alleged and the penalties imposed in comparison to similarly situated employees. Further, the Union wanted to see if there was possible racial discrimination against Miller, who is black. The Union again wished to see the proposal letters because they provided greater detail regarding the conduct which led to the disciplinary action.

On August 16, 1993, Respondent USBP, answered the Union's data request with regard to some items, but forwarded the region wide portion of the data request to Respondent INS's Western Region Labor Relations Specialist for a response. Respondents' August 16, 1993 letter also acknowledged that the Union was Miller's designated representative in the matter. The Union's need to respond to the proposed disciplinary action, was never mentioned by Respondent USBP as a basis for denying the data request. On August 17, 1993, the Union, submitted a written reply to the proposed reprimand on behalf of Miller.

On August 18, 1993, Respondent INS, through Labor Relations Specialist James P. LoSasso, denied the Union's data request with regard to Item 5. The information request was denied based on the following:

Western Regional Office, and each of the districts and sectors within, have a long standing policy and practice of not expanding the scope of disciplinary actions beyond the level from which these actions would be honored by providing cases

from that Sector only. . . . In summary, Western Region does not release region wide disciplinary cases to the various Sectors.

No other reason was provided by Respondent INS for denying the data request, including the Union's need to respond to the proposed disciplinary action.

Thereafter, on September 1, 1993, Respondent USBP, issued a final decision letter that sustained the reprimand. On September 17, 1993, the Union filed a step two grievance on behalf of Miller and on the same day, amended the step two grievance. Respondent USBP denied the step two grievance on October 4, 1993. On October 13, 1993, the Union filed a step three grievance on behalf of Miller which was denied by Respondent on November 10, 1993. The Union invoked arbitration on behalf of Miller on November 24, 1993.

D. Decision-Making Process

The data requests in all three cases were made pursuant to section 7114(b)(4) of the Statute. The employees within the five Border Patrol sectors are all subject to the same penalties associated with violative conduct, disciplinary actions, adverse actions, Administrative Manual provisions, Border Patrol Manual, negotiated agreement, Federal Personnel Manual, Justice Department Standards of Conduct, Central and Regional Office policy memoranda and immigration forms.

Albon could represent employees in other sectors if designated by the National Border Patrol Council. Further, Albon has represented employees at all stages of disciplinary proceedings. All three employees in this consolidated matter designated the Union as their representative.

Western Region maintains all of the disciplinary and adverse action files for the regional employees. The files are kept in alphabetical order and the labor relations staff has access to all proposed and final decision letters within the five Border Patrol sectors. The Western Regional Office policy, for the six years preceding this hearing, has been not to provide region wide data to the Union in disciplinary matters. Respondent INS's rationale for not providing region wide data is predicated on EEOC and MSPB case law, which supposedly states that for purposes of analyzing

disparate treatment claims only comparisons between employees who share common supervision are required.

In normal situations for the respective sectors, the deputy patrol agent proposes employee discipline, and the chief patrol agent serves as the deciding officials except for reprimands. The chief patrol agent is completely autonomous within his sector and has final decision authority with regard to discipline. The proposing and deciding sector officials can exercise their discretion regarding application of Justice Department standard schedule of disciplinary offenses and penalties. There is a wide range of penalties that can be assessed in connection with a particular type of conduct. The same offense in the respective sectors could result in a different charge or penalty depending on the facts, the seriousness of the offense, the range of penalties, whether it is repeat conduct and if there are mitigating factors. Similar types of violative conduct within the respective sectors could lead to different charges being made against an employee, a different application of mitigating factors thereby, resulting in the imposition of a different penalty.

A regional labor relations staff member reviews disciplinary actions. The Labor Relations Office at Western Region conducts a technical review of draft proposal letters. If the proposal letter is procedurally and technically correct, the labor relations specialist will return the letter to the sector with a recommendation that it be issued. Prior to the issuance of a final decision letter, the case is discussed with the labor relations specialist from the Western Regional Office, who serves as an advisor.

The labor relations specialist is supposed to ensure that there is consistency in discipline throughout the Western Region. However, the sectors are not required to accept the disciplinary recommendations from the Western Regional Office. Frequently, the Western Regional Office is forced to defend a sector decision at arbitration or MSPB that it recommended against. There are differences of opinion between sector management and the Western Regional Office regarding the nature of the charge and the appropriate penalty to be assessed. Moreover, there are differences of opinion among the respective sectors in terms of charges, mitigating factors and assessed penalties.

This subjective decision-making process is further complicated by the fact that certain offenses can result in a charge that was outside the Department of Justice standard schedule of disciplinary offenses and penalties. For example, various types of criminal conduct, such as murder,

rape and abuse of an alien, are so unique in nature that they can only be explained through a narrative proposal. Respondents' witness, Thomas Feeney, equated mental and sexual abuse in the context of on-the-job criminal behavior. Thus, while Speer, who was originally accused of making obscene gestures and suggestive sexual remarks to the illegal female aliens, was not charged criminally in connection with the performance of his duties, it has been suggested that he could have been.

The conduct of which Speer was accused, could have taken place in any of the border facilities. The misconduct of which LaRue and Miller were accused, could also have taken place within any of the five Border Patrol sectors. Even though the respective sectors are autonomous, they are all required to observe the same statutory, regulatory and collective bargaining procedures in connection with disciplinary actions. Despite the autonomy, it is my view that the use of region wide evidence could be valuable in swaying a deciding official in a third party proceeding. Furthermore, it would undoubtedly assist an exclusive representative in assessing its response to proposed disciplinary actions for obviously, if there is a certain consistency amongst the sectors, it might be persuaded by the data received to proceed no further with the matter.

The data requests that were submitted by the Union in the three cases all contained the following language: "If this request is denied, in whole or in part, please inform me, in writing, of the . . . specific statutory, regulatory, or contractual citations on which that decision is based."

Discussion and Conclusions

These three cases were consolidated for hearing because the Union sought in each case to obtain region wide data concerning employee disciplinary and adverse action proposals and final decision letters in connection with the respective disciplinary matters. The data was requested solely to represent three employees who had designated the Union to represent them in their respective disciplinary

matters.³ Thus, the issue in each case is the same with only the nature of the action differing.

In 48 FLRA NO. 35, the Authority remanded SA-CA-20236 to the San Francisco Regional Director for resolution of the issues surrounding “whether the requested information is necessary within the meaning of section 7114(b)(4).” Finding that the parties’ stipulation on which it based its decision in 47 FLRA 684 was insufficient to make a determination in the case “because the parties do not agree, and the record does not disclose, what information is in dispute.” In that matter, the record now discloses that the Union sought region wide data from Respondent as follows:

1. A copy of all proposal and final decision letters relating to the charge of Non-Compliance with Standards, Policies, Regulations or Instructions issued by the Service, for the past five years, within the Western Region.
2. A copy of all proposal and final decision letters relating to disciplinary or adverse action resulting from the escape of an alien in custody, for the past five years, within the Western Region.

The data requested by the exclusive representative in the Speer case, as well as in the other cases, herein exists in the disciplinary and adverse action files maintained by the Western Region. In addition, the requests were not, as Respondent seems to conclude in its brief, for the entire disciplinary file of any Western Region employee. It is also clear from the record that the Union sought only the action and proposal letters involving disciplinary action for employee conduct similar to that for which action letters issued to the three individuals it represented. Finally, it is noted that the requested information was maintained by the Respondent in the regular course of business. In this regard, Respondents’ admitted that copies of disciplinary and adverse action letters are maintained by the Western Region. These letters, as well as counseling letters, closed without action letters, clearance letters and letters of reprimand are kept in individual employee files. In this case, the documents are normally maintained

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In its brief, Respondent argues that it had no duty to provide the information in Case Nos. 30308 and 31679, since at the time those requests were made the Union was not the exclusive representative of either LaRue or Miller. This concern was resolved long ago by the Authority in National Treasury Employees Unions, Chapter 237, 32 FLRA 62 (1988) where it found that a union is entitled to information concerning disciplinary and adverse actions even where it is only designated as the personal representative of the employees involved as its representational function is in the public interest. Here the Union, at the time of the data requests, had been designated to represent both LaRue and Miller. Consequently, Respondents’ speculation that there was “no vested separate entitlement” allowing the Union to obtain the requested data, is rejected.

and reasonably available.⁴ Moreover, no evidence was presented to show that it would have been unduly burdensome for the Respondent to provide the Union with all the requested data.

In SF-CA-30308 the Union requested, "A copy of all proposal and final decision letters relating to like or similar charges for the past two years within the Western Region." The Union submitted that the information was needed to carry out its representational responsibilities in responding to the proposed action against employee LaRue who was issued a proposed reprimand on November 24, 1992. The Union's request for information was submitted on November 25, 1992. A decision letter was issued in the matter on January 12, 1993.

In SF-CA-31679 the Union requested, "Copies of any and all proposals and/or final decision for like or similar disciplinary action issued within the Western Region of the Immigration and Naturalization Service for the past three (3) years." The Union noted that it needed the requested data in order to carry out its representational responsibilities in responding to a proposed action. A proposal to reprimand employee Mark Miller was issued on August 6, 1993, and the Union's request for information was submitted on August 12, 1993. Respondents' decision letter was issued on September 1, 1993.

In all three cases, the Union clearly had grievable matters covering the data. In fact, there is no question that all of the employees involved in the data requests had "grievances" as broadly defined. Additionally, the Union had a contractual and statutory obligation to represent these three employees.⁵

Section 7114(b)(4) of the Statute obligates an agency to furnish to the union, to the extent not prohibited by law, data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining, and; which does not constitute guidance, counsel or training for management officials or supervisors, relating to collective bargaining. Respondent admits that the requested data does

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It has never been disputed that the requested information was "normally maintained by and reasonably available" or that it "does not constitute guidance, advice, counsel, or training for management officials or supervisors relating to collective bargaining." In fact, it appears that the parties stipulated the above. Furthermore, Respondent did not challenge the above in its answer or at the hearing. However, it appears not to have initially challenged that the disclosure of the information is prohibited by law, an issue it now seeks to raise, either.

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See, Article 31, Section B and Article 32, and Article 33 of the collective bargaining agreement, all of which deal with representation and the grievance and arbitration procedures established by the parties.

not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining. Accordingly, the requested data met all the Statutory criteria and, therefore an obligation to provide the requested data exists.

Here again, an agency challenges the exclusive representative's need for certain information contending, no "particularized need" for the information was established for the requested data. In its remand of 20206, the Authority at least examined the stipulation of the parties and sought only to clarify "whether the requested information is necessary within the meaning of section 7114(b)(4)." After its review of the record there it made no mention of "particularized need," nor did it remand the matter for a determination in that regard. It seems reasonable to assume that it did not intend to apply such a standard in the case, where adverse action and discipline data was the only information sought. In any event, it is abundantly clear that the "particularized need" standard is applied only when certain conditions are present, which do not exist in this case. Thus, there is no hint, even by Respondent, that the requested documents represented intra management communications. Since intra management documents, as described in 7114(C), was not a part of the data requested, the undersigned rejects Respondents' argument concerning the necessity to show a "particularized need". In these circumstances, it is found that the Union was not required to state a particularized need for the information that it sought in this matter, at any stage of the proceedings.

The General Counsel argues that the Union is entitled to the requested data region wide and that Respondents should be estopped from making certain arguments. The General Counsel also maintains that Respondent's claim that the data requests should be judged by MSPB or EEOC standards are erroneous.⁶ Furthermore, it contends that the particularized need standard asserted by Respondent applies only to information requests which constitute guidance, advice, counsel or training provided for management or supervisors related to collective bargaining and that is admittedly not the case here.⁷ In a sum, the General Counsel argues that Respondent should be collaterally

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The Authority's position on the issue of whether precedent of MSPB and EEOC are governing in proceedings before it is clearly set out in several cases. See Twin Cities, infra; Salt Lake City, infra. Based on those holdings, Respondents' position is rejected.

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In agreement with the General Counsel, it is found that the particularized need standard is not applicable to the instant matter. See, National Park Service, National Capitol Region, United States Park Police, 48 FLRA 1151, 1161-1164 (1993); United States Customs Service, Region IV, Miami, Florida, 48 FLRA 1239, 1242-1243 (1993).

estopped from raising the Privacy Act,⁸ “particularized need” or the MSPB-EEOC case law defenses.

With respect to the General Counsel’s collateral estoppel approach to the case, it is noted that there is no mutuality of parties or issues, and therefore, it must be found that collateral estoppel is not applicable here. What is obvious, however, is that many of the issues raised by Respondents’ here have been already considered and resolved, on more than one occasion, by the Authority. Clearly, the issue of whether information requested to assist an exclusive representative in responding to proposed disciplinary actions has been found necessary under section 7114(b)(4) in at least one of Respondent’s regional offices.⁹ Similarly, a review of the case law in the area reveals that the Authority has required agencies to provide region wide data the exclusive representative.¹⁰ The rationale of those cases being, such data is necessary for the Union to carry out its representational functions under the Statute. Respondents’ do not distinguish this matter either factually or legally from those previous decisions in which the Authority has already decided that the agency should supply the data. This failure to differentiate, leaves me with little choice, after studying existing case law to apply it to these matters. Furthermore, the Authority has found it appropriate, in cases where disparate treatment is at issue, for the exclusive representative to seek such region wide data to determine whether a proposed or final

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It is worthy of note that in this case, the Union has not made a request for unsanitized data, but has indicated that the data could be provided in a sanitized format. When the request is for data in the sanitized format i.e. without identifiers such as names, addresses, social security or employee numbers, it is unnecessary to reach the Privacy Act issue raised here. See, U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 37 FLRA 1310 (1990); Maxwell Air Force Base, Georgia, 36 FLRA 110 (1990). Accordingly, it is unnecessary for the undersigned to address whether the disclosure of the information requested is prohibited by law.

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U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Inspector General, Washington, D.C. and Office of Professional Responsibility, Washington, D.C., 46 FLRA 1526, 1529-36 (1993), petition for review filed sub nom. U.S. Department of Justice, Washington, D.C. and U.S. Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota and Office of Inspector General, Washington, D.C. and Office of Professional Responsibility, Washington, D.C. FLRA, No. 93-1284 (D.C. Cir. April 26, 1993).

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U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Salt Lake City, Utah, 40 FLRA 303, 311 (1991), petition for review withdrawn. Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Salt Lake City District, Salt Lake City, Utah v. FLRA; No. 91-1287 (D.C. Cir. 1992); Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Detroit District, Detroit, Michigan, 43 FLRA 1378, 1391 (1992).

decision is consistent with penalties imposed on other employees for similar misconduct. I am bound to follow existing Authority precedent, therefore, I am constrained to find that the defenses offered by Respondent in this case, lack merit.

Accordingly, it is found that Respondent's failure to provide data on a region wide basis, concerning action proposal and final decision letters relating to disciplinary actions which were necessary for the exclusive representative to carry out its representational functions in each of three cases each constituted separate violations of section 7116(a)(1), (5) and (8) of the Statute. Therefore, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the United States Border Patrol, Tucson Sector, Tucson, Arizona and Immigration and Naturalization Service, Western Regional Office, Laguna Niguel, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Border Patrol Council, American Federation of Government Employees, Local 2544, AFL-CIO, the exclusive representative of its employees, necessary and relevant information which was requested in connection with the processing of certain grievances.

(b) 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) Upon request, furnish to the National Border Patrol Council, American Federation of Government Employees, Local 2544, AFL-CIO, sanitized copies of all proposal and final decision letters relating to the charge of Non-Compliance with Standards, Policies, Regulations or Instructions; all proposal and final decision letters relating to disciplinary or adverse action resulting from the escape of an alien in custody; copies of any and all proposals and/or final decision for like or similar disciplinary action issued with the Western Region; copies of all proposal and final decision letters relating to like or similar charges for the past two years within the Western Region.

(b) Upon request, furnish to the National Border Patrol Council, American Federation of Government Employees, Local 2544, AFL-CIO copies of any and all region wide, proposed and final decision letters on discipline involving specifically identified infractions for the last three years within the Western Region, which information is necessary and relevant to the Union's representation of a unit employee in a proposed reprimand or grievance under the negotiated grievance procedure.

(c) Post at its facilities in the Immigration and Naturalization Service, Western Regional Office, Laguna Niguel, California, copies of the attached notice regarding Case No. SF-CA-31679 on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Director of the Administrative Center 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.

(d) Post at all its facilities in the United States Border Patrol, Tucson Sector, Tucson, Arizona copies of the attached notice regarding Case Nos. SA-CA-20236 and SF-CA-30308 on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Chief Patrol Agent, Tucson Sector 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco 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 herewith.

Issued, Washington, DC, June 28, 1995

ELI NASH, JR.
Administrative Law Judge

(Attachment A)

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the National Border Patrol Council, American Federation of Government Employees, Local 2544, AFL-CIO, the exclusive representative of certain of our employees, Non-Compliance with Standards, Policies, Regulations or Instructions and all proposal and final decision letters relating to disciplinary or adverse action resulting from the escape of an alien in custody; copies of any and all proposals and/or final decision for like or similar disciplinary action issued with the Western Region; copy of all proposal and final decision letters relating to like or similar charges for the past two years within the Western Region.

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, upon request of the National Border Patrol Council, American Federation of Government Employees, Local 2544, AFL-CIO, the exclusive representative of certain of our employees, furnish it with Non-Compliance with Standards, Policies, Regulations or Instructions and all proposal and final decision letters relating to disciplinary or adverse action resulting from the escape of an alien in custody; copies of any and all proposals and/or final decision for like or similar disciplinary action issued with the Western Region; copy of all proposal and final decision letters relating to like or similar charges for the past two years within the Western Region.

(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 of the Federal Labor Relations Authority, San Francisco Region, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is (415) 744-4000.

(Attachment B)

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish to the National Border Patrol Council, American Federation of Government Employees, Local 2544, AFL-CIO the agent of the exclusive representative, the National Border Patrol Council, American Federation of Government Employees, AFL-CIO, copies of any and all region wide, proposed and final decision letters on discipline which information is necessary and relevant to unit employees in a proposed reprimands or grievances under the negotiated grievance procedure.

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

(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.

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If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Region, 901 Market Street, Suite 220, San Francisco, California 94103-1791, and whose telephone number is (415) 744-4000.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, JR., Administrative Law Judge, in Case Nos. SA-CA-20236 , SF-CA-30308 and SF-CA-31679, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. James LoSasso,
Regional Labor Relations Officer
United States Department of Justice
Immigration and Naturalization Service
24000 Avila Road
P.O. Box 30070, ROLMR
Laguna Niguel, CA 92677-8070

Mr. Thomas Michael O'Leary
United States Border Patrol
Tucson Sector
1970 West Ajo Way
Tucson, AZ 95713

John R. Pannozzo, Jr.
Federal Labor Relations Authority
901 Market Street, Suite 22
San Francisco, CA 94103-1791

REGULAR MAIL:

Michael C. Albon, Local President
National Border Patrol Council
American Federation of Government
Employees, Local 2455, AFL-CIO
1964 Placita Tampico
Tucson, AZ 85704

Mr. Robert S. Coffin
U.S. Border Patrol
1970 W. Ajo Way
Tucson, AZ 85713

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

Dated: June 28, 1995
Washington, DC