UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: March 18, 1999

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: HEALTH CARE FINANCING ADMINISTRATION

Respondent

and Case No. WA-CA-80383

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1923, 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 the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

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HEALTH CARE FINANCING ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO Charging Party	Case No. WA-CA-80383

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 **APRIL 19, 1999**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: March 18, 1999
Washington, DC

OALJ 99-21

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

HEALTH CARE FINANCING ADMINISTRATION Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1923, AFL-CIO Charging Party	Case No. WA-CA-80383

Thomas F. Bianco, Esq.
Beth I. Landes, Esq.
Justin B. Cutlip, Esq., on the Brief
For the General Counsel

James W. Weber, Senior Labor Relations Specialist
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

The Charging Party (the Union) asked the Respondent (HCFA) for certain information concerning the selection process HCFA used in filling a job vacancy in a bargaining unit position. Two unsuccessful applicants who were bargaining unit employees had sought the Union's assistance in contesting the results of the selection process. HCFA refused to provide the requested data and the Union filed an unfair labor practice charge. A complaint based on that charge alleges that HCFA had refused to comply with section 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute) and had thereby violated sections 7116 (a)(1), (5), and (8) of the Statute. At a pre-hearing conference, Co-counsel for the General Counsel indicated that the section 7116(a)(5) allegation would be withdrawn

and, in his opening statement at the hearing, did not mention such a violation. I treat it as having been withdrawn.

HCFA's answer admits, substantially, that the events described in the complaint occurred.[1] The answer denies that the requested data met certain of the criteria making it subject to disclosure under section 7114(b)(4) and denies that HCFA violated the Statute.

A hearing on the complaint was held in Washington, D.C., on December 2, 1998. Counsel for the General Counsel and for the HCFA filed post-hearing briefs.

Findings of Fact

A. Background

In October 1997, HCFA issued a "Recruitment Notice" for two GS-13 Public Affairs Specialist positions in its Press Office. The advertised positions were in the bargaining unit represented by the Union. Employees and non-employees were eligible to apply. Thus, this was an "external" or "outside" recruitment, as opposed to an "internal merit promotion," for which only HCFA employees or, in some cases, all Federal employees, are eligible. The Office of Personnel Management (OPM) delegated to HCFA the authority to conduct examinations and make selections for positions to be filled by external recruitment. Current HCFA employees are not entitled to any special consideration for selection in this process.

OPM guidelines provide that each agency that has been delegated this recruitment authority should establish its own procedure for reconsidering the applications of unsuccessful applicants who request such reconsideration. HCFA has established such a procedure. An applicant who believes she has not received the correct score is to contact the person whose name is on the announcement. That person is to arrange for a discussion of the applicant's rating. After this discussion, a still unsatisfied applicant is to submit a written request for reconsideration. That request goes to an individual other than the one who did the initial rating.

[1] Although it initially declined to admit that the Union had informed its representative that it would accept the requested data in "sanitized" form (purged of personal identifiers), HCFA later agreed not to contest this allegation.

American Federation of Government Employees, AFL-CIO, (AFGE) is the exclusive representative of a unit of HCFA employees appropriate for collective bargaining. The Union is AFGE's agent for representing certain bargaining unit employees. AFGE and HCFA are parties to a "Master Labor Agreement" (MLA) that contains articles on procedures for the resolution of grievances and on the subject of equal employment opportunity (EEO). The EEO article provides, among other things, that an employee with an EEO complaint may proceed either under the negotiated grievance procedure or under the statutory EEO procedure, but not both. The EEO article also provides that, before deciding to file a grievance, the employee "will be advised to consult with the Union," since only the Union and not the employee can invoke arbitration of the grievance.

HCFA has no agreement with either AFGE or the Union regarding the external recruitment process, including the procedure for reconsideration of applicant ratings.

B. The Information Requests and Subsequent Developments

Two bargaining unit employees who applied unsuccessfully for the advertised Public Affairs Specialist positions contacted Union Vice President Joseph P. Flynn with concerns about the reasons for their non-selection. One of them had failed to be placed on the "best-qualified list" (or "certificate of eligibles"). The other had been placed on the list (or certificate) but had not been selected for either of the positions. Both told Flynn that their experience and qualifications should have resulted in a different outcome. One of these applicants informed Flynn that he felt he had been discriminated against on the basis of race.

Flynn submitted a request to Sharon Appleby, HCFA's Acting Director, Division of Legal and Technical Services, for Union access to the "promotion package" for audit, pursuant to a section in the MLA's grievance article. Appleby responded, denying the request and stating that the audit procedures in the MLA did not cover this type of recruitment notice.

On January 14, 1998, Flynn submitted a request to Appleby, "[p]ursuant to 5 U.S.C. 7114 b (4) of the Statute," for copies of the following documents: (1) the recruiting announcement (notice); (2) "the related KSA's, task examples, and any other rating and ranking criteria"; (3)

"the rating and ranking worksheet and scores of qualified applicants"; and (4) the applications of the top three applicants. This list of requested documents was followed by an explanation:

> This information is requested by the Union in connection with a potential grievance and is necessary for full and proper discussion of matters falling within the scope of collective bargaining. . . .

The information Flynn requested on January 14 was essentially the same material that he had asked to audit. At a meeting on February 9 to discuss a grievance the Union had filed over HCFA's refusal of the contractual audit request, a management representative mentioned a concern about privacy rights in some of the documents involved. Flynn responded that if such concerns were holding things up, management should sanitize the documents. There was no response from management at that time.

On March 25, 1998, Sharon Appleby responded to Flynn's section 7114(b)(4) data request. Her response states, in pertinent part:

> After reviewing your request, we are unable to identify your particularized need for the information requested, especially given that the nature of the information in question appears to be outside the scope of collective bargaining, as defined by [the Statute]. Additionally, you stated the information you are requesting is needed in connection with a potential grievance. However, 5 U.S.C. Chapter 71, 7121(c)(4) provides for a statutory exclusion which precludes the filing of this type of grievance. I must emphasize that in order to obtain the information you are requesting pursuant to 5 U.S.C. Chapter 71, 7114(b)(4), the governing case law indicates that it is necessary for you to demonstrate a particularized need for the information sought and how the release of such information is necessary for full and proper discussion, understanding, and negotiation of subjects that are within the scope of collective bargaining.
>
> For the above-mentioned reasons and absent your showing of a particularized need, there is no basis for granting your request at this time. The Agency will, of course, reconsider any

> subsequent request for information which identifies such a particularized need.

Vice President Flynn wrote back to Appleby on March 28 with the following explanation of the Union's particularized need:

> Please be advised that the information will establish that the Agency has misapplied and or violated established merit promotion policies and procedures in the rating and ranking of applications filed under recruitment announcement RN-97-039. The Union has been contacted by one or more bargaining unit employees who filed under this announcement and who contend that irregularities as previously described occurred.
>
> In addition one such unit employee has filed a complaint of discrimination and has been issued a Counseling Report. The Union is representing this employee and the information requested is necessary in order to make an informed election as to the appropriate appeal forum for filing formally.
>
> For all of the above reasons this information is necessary for the Union to meet its statutory representational obligations including but not limited to the duty of fair representation. [S] hould you have any questions feel free to contact me at EXT 6-7880.

Discussion and Conclusions

HCFA has abandoned several of its defenses or disputes with respect to the Union's request meeting the requirements of section 7114(b)(4). HCFA does not contest that it "normally maintains" these documents or that they are reasonably available, and does not assert that they constitute "guidance, advice, counsel, or training" or that their disclosure is prohibited by law. It asserts, however, that the General Counsel has failed to demonstrate (1) that the documents were "necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining," and (2) that the Union explained to HCFA, with sufficient particularity, why it needed them. *See Internal Revenue Service, Washington, D.C.*

and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA 661, 669-71 (1995) (*IRS*).[2]

The main thrust of HCFA's case is that the Union has no role, within the "scope of collective bargaining," in the attempts by the two bargaining unit employees to seek review of the selection process for the positions for which they applied. HCFA emphasizes the difference between an internal merit promotion, in which process the Union has an MLA-recognized role, and an external recruitment, in connection with which the Union has no role as a collective bargaining representative.

With respect at least to the EEO matter, however, the Union does have a recognized role. It may represent a grievant in such a matter, as the grievant's collective bargaining representative, if the grievant decides to proceed under the negotiated grievance procedure.[3] Such a grievance might be precluded, however, if the external recruitment process used here falls under section 7121(c)(4) of the Statute as an "examination, certification, or appointment."

Section 7121 contains the Statute's provisions requiring collective bargaining agreements to provide procedures for the settlement of grievances. Subsections (a) and (b) prescribe certain specifications to which all "negotiated grievance procedure[s]" must conform. Subsection (c) states that:

> The preceding subsections of this section shall not apply with respect to any grievance concerning
>
> * * * *
>
> (4) any examination, certification, or appointment[.]
>
> * * * *

Were subsection (c)(4) applicable here, it would be necessary to explore the effect of the phrase, "[t]he

[2] HCFA does not assert the defense that, even if the Union has established and articulated a "particularized need," the agency has a "countervailing interest" (*i.e.* an interest in withholding disclosure) that outweighs the union's demonstration of particularized need. *Id.* at 671.

[3] I find irrelevant, therefore, HCFA's contention that the Union official's role in a *statutory* EEO complaint procedure would be that of the employee's personal representative.

preceding subsections of this section shall not apply," in (c)(4)'s parent subsection, 7121(c).[4] However, for the following reason, such an excursion is unnecessary.

The Authority holds that the terms, "examination," "appointment," and "certification", as used in subsection (c)(4), apply only to the extent that such actions affect an individual's initial entry into Federal service and do not apply to such actions with respect to their effect on current Federal employees. Therefore, subsection (c)(4) does not preclude a Federal employee's grievance over the selection process by which a position was filled pursuant to a posted vacancy announcement. *National Federation of Federal Employees, Local 1636 and U.S. Department of Defense, National Guard Bureau, Albuquerque, New Mexico*, 48 FLRA 511 (1993) (*NGB Albuquerque*). This imaginative application of the "initial entry" doctrine controls here. *See also U.S. Department of Defense Dependents Schools, Kaiserslautern, Germany and Overseas Education Association*, 51 FLRA 210, 212-14 (1995) (a grievant's "reappointment" was not connected with her initial appointment to Federal service; her grievance is therefore not precluded by section 7121(c)(4)).

HCFA concedes that the question of whether a matter is grievable as a matter of contract interpretation is for an arbitrator to decide, and therefore that, as a general matter, an agency cannot deny a union's request for information because it believes the matter to be nongrievable. It argues, rather, that this matter is nongrievable by operation of law, pursuant to section 7121 (c)(4). However, *NGB Albuquerque* makes that argument untenable.

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[4] Early Authority *dictum*, apparently still unquestioned, purports to find legislative history showing that section 7121 is intended to place limits on the matters that the union and management may agree to submit to their "negotiated grievance procedure." *American Federation of Government Employees, AFL-CIO, Local 3669 and Veterans Administration Medical Center, Minneapolis, Minnesota*, 3 FLRA 311, 313-14 (1980). In *National Council of Field Labor Locals of the American Federation of Government Employees, AFL-CIO and United States Department of Labor*, 4 FLRA 376, 381 (1980), the Authority portrays section 7121(c)(4) as a provision containing examples of matters that, "by operation of law [were] excluded from coverage by a negotiated grievance procedure." However, I am unable to find any explanation for how the section 7121(c) phrase, "[t]he preceding subsections of this section shall not apply . . . ." became an exclusion "by operation of law."

In response to Appleby's letter suggesting the need for the Union to show its "particularized need" for the documents requested, Flynn explained that, with respect to the employee who had filed a discrimination complaint, the information requested "is necessary in order to make an informed election as to the appropriate forum for filing formally." Thus, the Union was informing HCFA, in effect, that it needed the information in order to help the employee decide whether to proceed by way of the negotiated grievance procedure or through the EEO complaint procedure. If, with the aid of the Union's advice, the employee chose the negotiated grievance procedure, such choice presumably would have been made with the understanding that the Union would represent the employee, as his exclusive bargaining representative. Whether the employee chose that course or not, the Union would have been acting as the exclusive representative in advising the employee, a role expressly recognized in the MLA's EEO article.

A union's need for information that will assist it in determining whether to file a grievance satisfies the Authority's "particularized need" standard. *United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas*, 51 FLRA 768, 774-76 (1996). The Union's need in the instant case is commensurate, notwithstanding that the employee was to make the actual decision on how to proceed in the first instance. The Union's need for the requested data for the purpose of advising the employee was as great and as "particularized" a need as the Union would have had for the purpose of making the grievance determination and, in my view, satisfies the Authority's standard. Moreover, the Union adequately articulated that need by stating that the information was necessary "in order to make an informed election . . . ."

The Union's statement specified its need, including the use to which the information will be put, and gave HCFA a clear enough indication that such use was connected with what the Union regarded as its statutory representational responsibilities. *See Id.* at 774. HCFA disagreed with the Union's implicit assertion that the specified use was connected with the Union's representational responsibilities, its disagreement arising from its position that an EEO complaint about an "external recruitment" was nongrievable. This disagreement does not, however, negate the fact that the Union's statement was sufficient to inform HCFA that the Union claimed such a connection with its contractually-recognized responsibility of advising the employee with respect to a potential EEO grievance. I conclude that the Union's statement was sufficient to permit

HCFA to make a reasoned judgment as to whether the information was required to be disclosed under the Statute. *See IRS*, 50 FLRA at 670. I conclude further that it was otherwise sufficiently specific to satisfy the Authority's standard for articulating the "particularized need."

My ultimate conclusion, then, is that the Union was entitled to the data it requested in order to fulfill its representational responsibilities in connection with the EEO matter, and that HCFA has unlawfully failed and refused to furnish it. Having so concluded, I find it unnecessary to decide whether the Union was also entitled to the data in connection with the other employee's attempt to seek review of the selection process. I therefore find that HCFA has violated sections 7116(a)(1) and (8) of the Statute and recommend that the Authority issue the following Order.[5]

ORDER

Pursuant to section 2423.41 of the Authority's Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Health Care Financing Administration shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 1923, AFL-CIO, the agent of the exclusive representative of certain of its employees, copies of: (1) Vacancy Announcement RN-97-039; (2) the related knowledge, skills, and abilities, task samples and any other rating and ranking criteria; (3) the sanitized rating and ranking worksheet and scores of qualified applicants; and (4) the sanitized applications of the top three applicants.

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[5] In addition to the traditional remedies for such a violation, Counsel for the General Counsel request that HCFA be ordered to refrain from alleging the defense of untimeliness of any grievance in connection with the disputed vacancy announcement, as long as the grievance is timely filed from the date the Union receives the requested information. Counsel present this request solely by including such a provision in a proposed order attached to their post-hearing brief. While there may be some merit to this novel remedy, Counsel did not announce in the course of pre-hearing disclosure that they intended to seek it, nor have they presented any argument for its imposition. I find it inappropriate, therefore, to entertain the request.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured by the Statute.

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

(a) Furnish the American Federation of Government Employees, Local 1923, AFL-CIO, copies of (1) Vacancy Announcement RN-97-039; (2) the related knowledge, skills, and abilities, task samples and any other rating and ranking criteria; (3) the sanitized rating and ranking worksheet and scores of qualified applicants; and (4) the sanitized applications of the top three applicants.

(b) Post at its facilities where employees represented by the American Federation of Government Employees, Local 1923, 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 Administrator, Health Care Financing Administration, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued, Washington, D.C., March 18, 1999

_____

JESSE ETELSON
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 Health Care Financing Administration violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 1923, AFL-CIO, copies of (1) Vacancy Announcement RN-97-039; (2) the related knowledge, skills, and abilities, task samples and any other rating and ranking criteria; (3) the sanitized rating and ranking worksheet and scores of qualified applicants; and (4) the sanitized applications of the top three applicants.

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 furnish the American Federation of Government Employees, Local 1923, AFL-CIO, copies of (1) Vacancy Announcement RN-97-039; (2) the related knowledge, skills, and abilities, task samples and any other rating and ranking criteria; (3) the sanitized rating and ranking worksheet and scores of qualified applicants; and (4) the sanitized applications of the top three applicants.

_____

(Agency or 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, D.C. 20001, and whose telephone number is (202) 482-6700.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON , Administrative Law Judge, in Case No. WA-CA-80383, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: March 18, 1999
        Washington, DC