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

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, WASHINGTON, D.C. and INTERNAL REVENUE SERVICE, CHICAGO, ILLINOIS DISTRICT Respondent	
and	Case No. 5-CA-60265
NATIONAL TREASURY EMPLOYEES UNION and NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 10 Charging Party	

Denise Jarrett Dow, Esq.
For the Respondent

John F. Gallagher, Esq.
For the General Counsel

Martin P. Barr, Esq.
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101, et seq. (herein called the Statute). It was instituted by the Regional Director of Region V based upon an unfair labor practice charge filed on May 22, 1986 by the National Treasury Employees Union and National Treasury Employees Union, Chapter 10 (herein called the Union),

against the Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Chicago, Illinois District (herein called the Respondent). The Complaint alleged, in essence, that Respondent violated section 7116(a)(1), (5) and (8) of the Statute by its failure to provide penalty documents necessary for it to represent a bargaining unit employee in a proposed removal action.

Respondent's Answer denied the commission of any unfair labor practices.

A hearing was held before the undersigned, in Chicago, Illinois at which the parties were represented by counsel and afforded full opportunity to adduce evidence, and to call, examine and cross-examine witnesses and to argue orally. Timely briefs were filed by the Respondent and the General Counsel and have been duly considered.1/

Upon consideration of the entire record 2/ in this case, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendation.

Findings of Fact

At all times material herein, the Union has been the exclusive representative of Respondent's professional and non-professional employees, including those located in the Chicago District Office, involved herein.

At all times material herein, Michael Peacher, was a steward for the Union's Chapter 10, who processed the employee grievance in this matter.

On or about March 25, 1986, Respondent proposed to remove a bargaining unit employee for making false and derogatory comments in anonymous typewritten letters about

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1/ Respondent's uncontested motion to amend transcript is granted. The amendments are attached as appendix "A".

2/ Originally the instant case was part of a Consolidated Complaint. However, Cases Nos. 5-CA-60253 and 5-CA-60603 were disposed of by the Regional Office prior to the hearing in this matter.

another employee who was a Group Manager. Pursuant to Article 39 of the Master Labor Agreement, titled Adverse Actions, an employee has the right to present evidence on his behalf via an oral and/or written presentation prior to Respondent's issuance of its final decision.

The employee involved herein designated the Union as his representative and, as already noted, was represented by Steward Michael Peacher. Peacher made several information requests in order to assist the employee in preparation for the oral and written replies.

In a letter written May 4, 1986, Peacher requested, pursuant to section 7114(b)(4) of the Statute, "One copy of all recordation, manually or electronically stored, of any and all material pertaining to the selection of the appropriate penalty in the [proposed terminated employee's] case" (hereinafter called penalty documents). In his letter, Peacher explained that the information was being sought in connection with the proposed termination of the employee and specifically stated:

> I am in the process of developing arguments challenging the severity of the propsed (sic) penalty and I hope to pursuade (sic) the oral reply officer that genuine issues of justice and equity are present in the . . . [employee's] case and that the proposed action is inappropriate. (sic)
>
> However, I am unable to locate a single document in the evidence file that pertains to the selection of the penalty, including the recommendations from . . . [the employee's] Group Manager and his Branch Chief.
>
> The selection of an appropriate penalty is a distinct element of the agency's decision, and therefore properly within its burden of proof, just as its burden includes proof that the alleged misconduct actually occurred and that such misconduct affects the efficiency of the Service.

The specific penalty documents requested were those produced by the employee's supervisory chain of command. In those documents, the supervisors reviewed the facts of the

case, considered any mitigating factors including those set forth in Article 39, Section 1 F of the Master Labor Agreement and recommended a specific penalty. Peacher also was requesting any documents produced by the Employee Relations Specialist in the Labor Management Office of the Civilian Personnel Branch. That specialist reviews the facts and recommendation to assure that the penalty ultimately imposed, if any, is consistent with similar cases processed by Respondent.

Peacher testified that he requested the penalty documents in order to determine whether Respondent's investigation supported the allegations made against the employee, and, assuming the allegations were supported, whether Respondent had imposed the appropriate penalty. In considering the appropriate penalty, Respondent is required to consider mitigating and other factors including those outlined in Article 39, Section 1 F of the Master Labor Agreement. Thus, Peacher's request for the documents was to assist the Union in determining whether it should pursue the matter through binding arbitration, if that were necessary.

The record shows that three penalty documents exist: (1) a document authored by a Mr. Novack, the employee's second line supervisor and signed by one Mr. Monaco, the employee's third line supervisor, (2) a document which indicates that Mr. Novack was the author of the Monaco document above and, (3) a document, which was identified as a buck slip, in which Ms. Valentino, the Employee Relations Officer, indicated that she agreed with the Monaco document.

The Monaco document was two pages in length. It contained a statement of the facts of the case, discussed seven of the factors in Article 39, Section 1 F of the Master Labor Agreement and gave a recommended penalty. All of the documents are maintained in the files of the Activity's Civilian Personnel Office.

In its May 15, 1986 response, Respondent refused to provide the penalty documents because the requested information is exempt under 5 U.S.C. 7114(b)(4)(C). Further, Respondent claimed the documents were exempt pursuant to the general governmental privilege for intra-agency advice and opinion.

Also on May 15, 1986, the Union presented its oral reply to the proposed termination. Thereafter on May 27, 1986, the Union submitted its written reply.

Subsequent to the written reply, the Union and Respondent held further discussions on the proposed termination. On August 8, 1986, Respondent reduced the proposed termination to a 15-day suspension pursuant to an agreement reached with the Union. However, in that agreement, the Union reserved the right to reopen the case based upon any additional evidence subsequently secured, including the penalty documents at issue herein.

At no time did Respondent ask the Union to clarify what documents it wanted or to clarify why the Union wanted the documents. Respondent never claimed that the documents were too burdensome to produce or that the documents did not exist.

Conclusion

In National Park Service, National Capitol Region, United States Park Police and Police Association of the District of Columbia, 26 FLRA 441 (1987), decided after the hearing in this matter, the Authority specifically addressed the question of whether release of documents or portions of documents containing recommendations, concurrences, or opinions concerning disputed disciplinary actions would interfere with management's deliberative process and be prohibited by section 7106 of the Statute. The Authority found in the cited case that release of the disputed information would interject the Union into and give it access to management's internal decision making process involving decisions to take certain actions reserved to it under section 7106 of the Statute.3/ Furthermore, the Authority found that disputed decisions to impose disciplinary action are exercises of a management right. The Authority however, made it clear that section 7114(b)(4) cases would be determined on a case-by-case basis and that an agency is not obliged under section 7114(b)(4) to furnish information

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3/ Section 7106(a)(2)(A) reads, in pertinent part, as follows:

> To hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees. . . .

which would interfere with management's deliberative process concerning the exercise of a management right under section 7106. This case is square with the above-cited decision. Here the facts establish that the penalty documents sought by the Charging Party constituted a management predecisional analysis of the penalty to be imposed in the case and as such are part of of management's deliberative process.

In addition to its argument concerning whether the requested documents constitute guidance related to "collective bargaining" the Charging Party asserts that the penalty documents involved in this case are not exempt from the broad disclosure obligation of section 7114(b)(4). In support of its position the Charging Party asserts the deliberative process is in no way harmed by disclosure of the documents sought. It argues that the Respondent, in order to sustain its decision regarding the instant employees' suspension, must provide evidence during litigation, in this case arbitration, that the penalty is appropriate and that withholding the information until litigation is contrary to the intent and spirit of the Statute; that there is no harm to the Agency's decision making process; and, finally that the privilege, even if there is one, does not extend to factual material contained in the recommendation. EPA v. Mink, 410 U.S. 73, 86-87, 89 (1973).

Both the General Counsel and the Charging Party rely on American Federation of Government Employees, AFL-CIO, Local 3483, 13 FLRA 446 (1983) in maintaining that the penalty recommendation in this case is not exempted from disclosure under section 7114(b)(4)(C).4/ Their argument that it does not concern information which management needs for negotiations now lacks merit since the Authority specifically concluded that the release of information concerning the deliberative process of a section 7106 right is prohibited under section 7114(b)(4). The Charging Party also argues that even if the penalty document requested by it falls

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4/ Section 7114(b)(4)(C) reads as follows:

> Which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. . . .

within the deliberative process privilege such protection does not extend to the factual portion of the document. See EPA v. Mink, supra; National Courier Association v. Board of Governors, 516 F.2d 1299, 1241-42) D.C. Cir. 1975); American Federation of Government Employees v. U.S. Department of Commerce (D.D.C. 1986).

Seemingly, National Park Service, supra, finds that the protection of management's deliberative process, overcomes any of the reasons for revealing the information cited by the General Counsel and Charging Party. Thus, the Authority saw no need to strike a balance, as it does in other section 7114(b)(4) situations, but found the protection of the deliberative process where a management right, such as disciplining an employee, is involved to be of paramount importance. Moreover, the Charging Party never requested summaries of or the factual information relied on by Respondent to formulate a penalty in this case, but requested the entire document or documents. Without such a request initially, it is to no avail to argue, in brief, that the facts contained in the penalty documents should now be supplied.5/

In any event, the penalty documents in this case are clearly a recommendation arising out of management's deliberative process concerning a disputed disciplinary action or the penalty for that particular infraction. They also contain management's deliberative process as to the penalty for that particular infraction. Accordingly, based on the Authority's decision in National Park Service, supra, I am compelled to find that the Respondent was not obligated under section 7114(b)(4) of the Statute to furnish the requested documents, since to do so would constitute an interference with management's deliberative process concerning the exercise of a management right under section 7106.

5/ Based on the above, it appears unnecessary to decide whether the documents involved constitute guidance or advice provided by management officials, related to collective bargaining, which was vigorously argued by all parties involved. Nor is it necessary, in my opinion, to decide whether the penalty documents were relevant and necessary to determine whether mitigating factors had been considered by Respondent in formulating the penalty in this matter.

Accordingly, it is found that Respondent did not fail to comply with section 7114(b)(4) in violation of section 7116(a)(1), (5) and (8) of the Statute.

It is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 5-CA-60265 be, and it hereby is, dismissed.

ELI NASH, JR.
Administrative Law Judge

Dated: November 16, 1987
Washington, D.C.