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

DEPARTMENT OF DEFENSE MAXWELL AIR FORCE BASE MAXWELL AIR FORCE BASE, GEORGIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 997, AFL-CIO Charging Party	Case No. 4-CA-80344

Godfrey E. Goff, Esquire
For the General Counsel

Major Phillip G. Tidmore, Esquire
For the Respondent

Mr. Clarence E. Lanthrip, Sr.
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that the Respondent violated sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (the Statute). The alleged unlawful conduct is the Respondent's refusal to furnish certain data requested by the Charging Party (the Union) which is required to be furnished under section 7114(b)(4) of the Statute.

A hearing was held on March 21, 1989, in Montgomery, Alabama. Based on the entire record and the briefs, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

When the Respondent abolished five GS-4 Licensed Practical Nurse (LPN) positions and established four GS-5 LPN positions, all of the nurses whose positions were abolished competed for the four new positions. Ola Jacobs, the nurse who was not selected, filed a grievance through the Union, the exclusive representative of employees in a bargaining unit that includes the LPN's. The Union had reason to believe that one of the factors in the selection process was the rating given to each of the candidates by an interview panel. Specifically, a Colonel Jones, representing the Respondent, stated in a letter to the Union that (as characterized by the Union's president in his testimony) "the ranking of the questions is what denied her consideration for the position she had applied for."

Union President Lanthrip requested an extension of time to present step 3 of the grievance and requested, at the same time, a copy of a "retention register" and of the interview panel's questions. The Respondent granted the request for an extension and provided the retention register. It denied the request for the interview questions, however, stating that they are part of the internal management decision-making process. Lanthrip renewed his request for the questions, explaining in his letter what Colonel Jones had told the Union about the selection process, and vigorously challenging the Respondent's use of the questions as a selection device. Lanthrip also requested the ratings of other candidates. The Respondent refused both of these requests. As to the interview questions, it stated that they were exempt from release under the Air Force Freedom of Information Act Program, AF Regulation 12-30,1/ and were confidential under a

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1/ The pertinent provisions of this Regulation are duplicated below:

> 10. Specific Policies on Withholding Records. Records or portions of records that fall in one or more of those

(Footnote 1 continued)

consent decree in a case called Smiley v. Orr.[2/] The refusal to provide the ratings of other individuals was not litigated in this case.

(Footnote 1 continued)

> exemptions listed in a through i below may be withheld from disclosure to the public. . . . Records that may be exempt from release are:
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> . . . . .
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> b. Those that contain rules, regulations, orders, manuals, directives, and instructions on the internal personnel rules or practices of the Air Force, if these records do not directly affect the general public, or if their disclosure would tend to allow persons to violate the law, or would hinder enforcement of the law. Examples include:
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> . . . . .
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> (2) Personnel and other administrative matters, such as examination questions and answers used in training courses or in determining candidates' qualifications for employment, entrance to duty, advancement, or promotion.

2/ Smiley v. Orr is an otherwise unidentified case which resulted in a consent decree, one page of which was introduced into evidence by the Respondent. The excerpt appears to continue a description of a selection process, referring at times to a selecting supervisor's recommendation. The Respondent relies on the following paragraph:

(d) Each unit commander shall establish a central file repository within the unit for all documentation generated during the selection and review process within the unit (hereinafter, "unit selection file"). Upon request by the EEO Administrator or the CCPO, the commander shall make these documents available for the CCPO's or the EEO Administrator's inspection. Save as they are expressly incorporated in the written approval by the unit commander described in paragraph 1 of this Section, all recommendations shall remain confidential and privileged.

Supplementing the explanation he gave to the Respondent for his request of the interview questions, Lanthrip testified that he needed them for the adequate prosecution of Ms. Jacobs' grievance. Former Labor Relations Officer Bettye Y. Johnson testified on behalf of the Respondent, however, that Jacobs' nonselection was not grievable.

Although denied in the Respondent's answer, there is no real dispute that the requested questions were reasonably available to the Respondent and normally maintained by it in the regular course of business.3/

Discussion and Conclusions

The disputed issues are whether the interview questions were necessary for the Union's pursuit of its function as exclusive bargaining representative and whether disclosure is prohibited by law. Given the Union's intention, if it went forward with Jacobs' grievance, to challenge the use of the interview questions, it is hardly debatable that it needed access to the questions in order to evaluate and prosecute the grievance. I conclude that the questions were "necessary" within the meaning of section 7114(b)(4)(B) of the Statute. Department of the Army, Headquarters, XVIII Airborne Corps, and Fort Bragg, Fort Bragg, North Carolina, 26 FLRA 407, 412, 430-431 (1987) (Fort Bragg).4/ Nor does

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3/ Bettye Johnson testified that the Respondent would not have retained the questions but for the consent decree in Smiley. Having in effect conceded that it maintained the questions, I believe it was the Respondent's burden to come forward with evidence that they were not "normally" maintained or not "in the regular course of business." This it has not done. There is no claim by the Respondent that the questions constitute "guidance, advice, counsel, or training" within the meaning of section 7114(b)(4)(C) of the Statute.

4/ A copy of the interview questions, indicated to be such during a discussion which inadvertently was conducted off-record, was introduced under seal as Joint Exhibit 1. I have not found it necessary to examine the questions in order to make the determination that they were "necessary" as that term is used in the Statute. Had I found it necessary to do so, I would have run the risk of substituting my opinion for that of the Union as to the value of its access to the questions in pursuing the grievance.

the assertion that the matter was not grievable warrant a different conclusion. Id. at 414. See also Health Care Financing Administration, 22 FLRA 437 (1986).5/

The Respondent maintains that disclosure of the questions is prohibited by the Privacy Act, 5 U.S.C. § 552a. Its argument in this respect is not easy to follow. It first asserts that the provisions of Air Force Regulation 12-30 quoted above (n. 1) are based on 5 U.S.C. § 552b(c)(2), which, according to the Respondent, is a specific exemption to the release of information under the Privacy Act. This is where the argument loses me. Section 552b is not part of the Privacy Act, but is a separate addition to Title 5, carrying the descriptive subtitle, "Open meetings." It is part of the "Government in the Sunshine Act." Section 552(c)(2) is an exception to the requirement of open meetings and disclosure to the public of information about agency meetings, specifically exempting information that is likely to "relate solely to the internal personnel rules and practices of an agency." The pertinent part of the Air Force Regulation itself makes no reference to personal privacy, which is the focus of the Privacy Act, and I am unable to see how the Regulation affects the Respondent's obligation under section 7114(b)(4) of the Statute. For the same reasons, I find inapposite the Respondent's reference to certain exemptions from the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552, which are based on personal privacy interests.

Finally, the Respondent contends that the questions are "confidential and privileged" under the Smiley v. Orr consent decree. See n. 2, supra. There are insufficient facts in the record concerning the parties, issues, and scope of Smiley to permit any conclusions about the decree's intent and force insofar as disclosure under section 7114(b)(4) of the Statute is involved. But assuming that the decree purports to cover disclosure under the Statute, and in the unlikely event that it is enforceable in this context, it is difficult to see how the "recommendations" made confidential and privileged by the decree could be read to include questions which were asked, not by a "selecting

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5/ The Respondent has neither asserted nor provided any basis for a finding that disclosure of questions to the Union would create an unfair advantage to some candidates or compromise their utility. See Fort Bragg, supra, at 413.

supervisor," but by an interviewing panel. This contention must be rejected.

I therefore conclude that the Union was entitled to the data requested and that the Respondent violated sections 7116 (a)(1), (5) and (8) of the Statute by refusing to furnish it. I recommend that the Authority issue the following Order:

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 Department of Defense, Maxwell Air Force Base, Maxwell Air Force Base, Alabama, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish, upon request by the American Federation of Government Employees, Local 997, AFL-CIO, the exclusive representative of its employees, a copy of interview questions requested by such representative in connection with the processing of a grievance.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of 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) Furnish to the American Federation of Government Employees, Local 997, AFL-CIO, the employees' exclusive representative, a copy of the interview questions requested by such representative in connection with the processing of a grievance.

(b) Post at its Maxwell Air Force Base facility 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 Commanding Officer 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

insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 4, Federal Labor Relations Authority, 1371 Peachtree St., N.E., Suite 736, Atlanta, GA 30367, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., November 8, 1989.

JESSE ETELSON
Administrative Law Judge

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 fail and refuse to furnish, upon request by the American Federation of Government Employees, Local 997, AFL-CIO, the exclusive representative of our employees, a copy of interview questions requested by such representative in connection with the processing of a grievance.

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

WE WILL furnish to the American Federation of Government Employees, Local 997, AFL-CIO, a copy of the interview questions it requested in connection with the processing of a grievance.

_____
(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 of the Federal Labor Relations Authority, Region 4, whose address is: 1371 Peachtree St., N.E., Suite 736, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.