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

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, BALTIMORE, MARYLAND, AND SOCIAL SECURITY ADMINISTRATION, NEW BEDFORD DISTRICT OFFICE, NEW BEDFORD, MASSACHUSETTS Respondent	
and	Case No. 1-CA-90013
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164, AFL-CIO Charging Party	

Peter F. Dow, Esquire
For the General Counsel, FLRA

Richard A. Matthews, Esquire
For the Respondent

Mr. Robert Marquis
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

This case concerns the Respondent's obligation to provide the Charging Party (the Union) with certain data it requested and includes the issue of what documents are reasonably encompassed by the Union's request.1/ The

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1/ Although technically there are two Respondents, the pleadings and the briefs treat them as one. I shall do likewise.

complaint alleges that the Respondent's refusal to furnish the data constitutes a refusal to bargain in violation of sections 7116(a)(1) and (5) of the Federal Service Labor-Management Statute, Chapter 71 of Title 5 of the U.S. Code (the Statute), and a failure or refusal to comply with the provisions of section 7114(b)(4) of the Statute, thus violating sections 7116(a)(1) and (8). The answer admits the jurisdictional allegations of the complaint, the Union's status as the exclusive representative, and the request for data, but denies various elements of the obligation to furnish the data.

A hearing was held on May 11, 1989, in Boston, Massachusetts. Based on the entire record and the briefs, I make the following findings of fact, conclusions, and recommendations.

Findings of Fact

Bargaining unit employee John Welles was supposed to receive a performance award consisting of a certificate and $750 at an awards ceremony in May 1988. When Francis Callagee, the district manager for the Respondent's New Bedford District, called out Welles' name as one of the awardees, Welles responded to the effect that Callagee could keep the award but give him the money.

Callagee put Welles' award away and continued with the ceremony. After the ceremony, Callagee asked Branch Manager John Fontes to make a written record of the incident and to send it to him. When Callagee got back to his own office, he phoned Operations Supervisor Frederick McCormick, who had also been present at the awards ceremony, and asked him to make and send him a note containing a brief statement of what he observed. He told McCormick that he wanted the note in case something came up in the future concerning the incident.

Callagee had supervisory authority over both Fontes and McCormick. He did not request either of them to make any recommendations in their notes, but just to report the facts as they saw them. Callagee also made a note to himself regarding the incident, in his calendar log. He received Fontes' and McCormick's notes a few days after the incident and put them in his office credenza.

Ten days later, on May 23, 1988, Callagee returned to the Respondent's Assistant Regional Commissioner for Management and Budget the check that had been issued for

presentation to Welles with the award certificate. Callagee stated in his covering letter that the employee had refused to accept the award. Callagee destroyed the certificate. The Management and Budget office forwarded the check to the U.S. Treasury on June 7, 1988, as an undeliverable Treasury check.2/

On September 7, Welles filed a contractual grievance over his failure to receive the money. In investigating the grievance, the Unions's representative, Robert Marquis, learned that there was a dispute over whether Welles had refused to accept the money. During a telephone discussion with Callagee, Callagee told Marquis that he had "memory joggers" from members of management which supported the position that Welles had refused the award. Callagee denied the grievance in writing, using the following language which summarizes his rationale: "The Performance Award and monetary award are one and the same. By refusing the Performance Award he, obviously, refused the award check."

Marquis wrote to Callagee on October 6, referring to their recent telephone conversation concerning the Welles grievance. He requested certain information under section 7114(b)(4) of the Statute: "any and all documentation relied on to support the decision to rescind Mr. Welles' cash award, including copies of the . . . 'memory joggers'" that Callagee had mentioned during their telephone conversation. Marquis stated that the data request was for the purpose of enabling the Union to "fully understand and discuss all issues relevant to the rescission of Mr. Welles' cash award."3/

Callagee responded to Marquis' request on October 11. In its brevity, his letter encapsulates the parties' disagreement over the issue leading eventually to the present litigation:

> The issue here seems to be lost. Your memo states "memory joggers . . . to justify your rescission of Mr. Welles' award" and "so that the Union may fully understand

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2/ All further dates are in 1988.

3/ It is not clear whether, when Marquis wrote this letter, he had received Callagee's written denial of the grievance. If he had, he apparently contemplated pursuing the grievance further, which he later did.

and discuss all issues relevant to the rescission of Mr. Welles' cash award."

I did not rescind Mr. Welles' award. He refused to accept the award.

Frank Callagee

Marquis replied on October 13. Renewing his request for data "necessary for a full understanding of Mr. Welles' grievance," he responded thus to Callagee's characterization of the dispute:

> The Union does not intend to attempt to engage in guessing whatever words you think necessary in order to obtain data it is entitled to by federal statute. Nor does the Union intend to debate the semantics of refuse/rescind; that is a determination that will be resolved through the grievance process.
>
> In the event there was any previous misunderstanding on your part, I will reiterate the request: Please provide any and all information regarding Mr. Welles' nonreceipt of his award; the return of his award, and any and all information relied on to justify the return of his award, including the previously mentioned "memory joggers" made by you and other members of management, which you stated you relied on to justify the return of the award.

The correspondence on this issue ends with a memorandum from Callagee to Marquis which first sets forth the facts, as management saw them, surrounding the refusal incident. Then, in response to Marquis' reiterated request, Callagee made these observations:

> You ask for "specific data" that I relied on in making my decision . . . I made no decision. Mr. Welles refused his award and I returned the check. Mr. Welles made the decision; I just carried out his wishes.
>
> Given the preceding facts, there are no "memory joggers" that bear on the event. We

> noted who was there and jotted down the fact that John refused his award, on what date, etc., but these "memory joggers" are private notes and, as you know, are not required reading for anyone except the author.

The Union pursued Welles' grievance and has requested arbitration. It has not received any data pursuant to its information request.

In addition to the notes referred to in the correspondence as "memory joggers" and the two documents generated by the return of Welles' check, the record reveals the existence of one additional document arguably subject to the Union's request. That is an October 11 intra-agency memorandum requesting cancellation of the SF-50B, Notification of Personnel Action, memorializing Welles' award.

Discussion and Conclusions

A. The Data Request

The Respondent devotes a substantial part of its argument to the contention that the Union's request was deficient in that it was not framed so as to give the Respondent reasonable notice of what was being requested. The Respondent focuses on the fact that, in Callagee's view, he made no "decision" and did not rely on any documents to justify his returning Welles' check. This contention may have had some force had the parties' correspondence ended with Marquis' October 6 request and Callagee's response. But Marquis then gave Callagee the benefit of the Union's position on the problem arising from Callagee's strict construction of the October 6 request. Further, Marquis made it clear that his request included "all information regarding" the nonreceipt and return of Welles' award. Finally, although he was arguably incorrect in continuing to assert that Callagee stated he relied on the "memory joggers," Marquis explicitly included the "memory joggers" in the Union's request.

In fact, Callagee had no doubt about what "memory joggers" the Union had requested. He concluded, in his final response to Marquis, that they did not bear on the events in question because he had made no "decision." His reference to a "decision," a term Marquis used in his original request, ignored the second request, which, taking cognizance of Callagee's October 11 (first) response,

avoided the troublesome word, "decision," and substituted the broader language, "all information regarding Mr. Welles' non-receipt of his award; the return of his award, and . . . ."4/

It is only what comes after "and" that reintroduces the problematic notion of "information relied on." Therefore, even if "information relied on" could be read as excluding the "memory joggers" and any other documents that Callagee did not actually rely on to justify his return of the cash award, that part of the request only supplements the request for all information "regarding . . . ." This, as the record shows, includes the notes Callagee referred to as "memory joggers," his May 23 memorandum returning the check, the June 7 memorandum forwarding the check to the U.S. Treasury, and the October 11 memorandum requesting cancellation of the Form SF-50B.5/ The Union's description of the information sought in its October 13 request was adequate to invoke the Respondent's duty to furnish these documents if they are otherwise disclosable under section 7116(b)(4). See U.S. Department of Commerce, Bureau of the Census, 24 FLRA 630, 645 (1986).

B. The Obligation to Furnish the Data Requested

Section 7114(b)(4) requires an agency to furnish an exclusive representative upon request, subject to certain

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4/ In an introductory section of his October 13 (second) request letter, Marquis mentioned data Callagee relied on in making a decision on the grievance. This, of course, is not the same as a decision to return the award. Marquis was clearly referring to their telephone conversation concerning the grievance It was during that conversation that Callagee told him he would not give Welles the money which was the subject of the grievance because Welles refused the award, and that Callagee knew it because he had the "memory joggers." Whether or not Callagee made a "decision" to return the check, he plainly made a decision to deny the grievance and explicitly relied on the "memory joggers" in making that decision. Therefore, even if Marquis' reference to a decision could be read into the actual request for information that followed, Callagee's denial that he made a decision did not address the decision to which Marquis referred.

5/ I therefore reject the Respondent's ancillary contention that the data requested does not exist.

exclusions, data which it normally maintains in the regular course of business and which is reasonably available and necessary for the representative to carry out its collective bargaining responsibilities, including its obligations in connection with the processing of an employee grievance. U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 26 FLRA 19, 25-27 (1987).

At the outset, there is a substantial issue as to whether the supervisors' notes, or "memory joggers," are "normally maintained in the regular course of business." There is no serious contest over the maintenance in the regular course of business of the May 23, the June 7, and the October 11 official memoranda which constitute the paperwork undoing Welles' award, and I find that these three official memoranda were normally maintained in the regular course of business. Cf. U.S. Army Reserve, supra, at 26 (witnesses statements maintained as part of agency's personnel administration function).

Concerning the supervisors' notes, the Respondent makes various arguments contesting their being "normally maintained . . ." within the meaning of section 7114(b)(4). The issue is novel. Although the Authority has had occasion to pass on whether certain data was so maintained, it has never defined the statutory term so as to identify what proof, beyond the fact that a document or other datum is actually maintained by an agency, is required to show that it is "normally" maintained and maintained "in the regular course of business."

Some decisions, where the issue of the meaning of the term was not the main focus of the case, have accepted as sufficient a showing that the information existed within the agency. See, e.g., United States Department of the Treasury, Internal Revenue Service, and United States Department of the Treasury, Internal Revenue Service, Houston District, 20 FLRA 51, 69 n. 21 (1985); United States Department of Defense, Departments of the Army and the Air Force, Headquarters, Army and Air Force Exchange Service, Dallas, Texas, 19 FLRA 652, 667 (1985). Accord: United States Department of Justice, United States Immigration and Naturalization Service, El Paso District Office, El Paso, Texas, Case Nos. 6-CA-70304, 6-CA-70305 (1989), ALJ Decision Reports, No. 79, slip op. at 14 (Dec. 14, 1988). On the other hand, the Authority has held that documents were not maintained in the regular course of business where they were not available to management in general, where access to them was restricted to the immediate supervisors of the employees

involved and they were treated as confidential and the personal property of the immediate supervisors, and where the immediate supervisors were free to retain or discard the documents after putting them to the use for which they were compiled. U.S. Food and Drug Administration and U.S. Food and Drug Administration, Region VII, Kansas City, Missouri, 19 FLRA 555, 557-58 (1985).

It is not easy to determine which characteristics of the documents in Food and Drug Administration, if less than all those mentioned by the Authority, were decisive in that case. The fact that the documents could be discarded when they were no longer needed appears to be relevant only as evidence that the immediate supervisors controlled their retention. Likewise, their nonavailability to "management in general" appears mainly to emphasize the autonomy of the supervisors over their use. In the instant case, the Respondent emphasizes what it regards as the private or personal nature of the notes, and I shall discuss that below. But, putting that issue aside, I see no indication in Authority case law that the General Counsel's prima facie case on the allegation of "normally maintained by the agency in the regular course of business" goes beyond proving that the agency actually maintains the requested data. Nor does the legislative history appear to shed any light on this. To the extent that there is no controlling authority on the issue of burden of proof, I think it sensible to so limit the General Counsel's burden at the prima facie stage, as the normality of its maintenance of the data and the facts that might be probative of whether its maintenance is in the regular course of business are uniquely within the knowledge of the agency.6/

6/ I have considered the possibility that the drafters of the statutory language, "normally maintained by the agency in the regular course of business," had in mind a labor relations counterpart to the hearsay exception in the law of evidence for records kept in the regular course of business. The party seeking to establish the applicability of that exception must come forward with the proof that it applies. But unlike the situation in a section 7114(b)(4) case, the party seeking to introduce a document into evidence is ordinarily either the party which maintains the record or one which has had prior access to it and to its custodian. See generally McCormick, Evidence sections 304-312 (3d ed. 1984).

The Respondent seeks to analogize "normally maintained . . . in the regular course of business" to maintenance within a "system of records" as defined by the Privacy Act, 5 U.S.C. Section 552a, thus giving a union access only to data that is disclosable to an individual requestor under that statute. This line of argument has no merit, as the access granted to individuals under the Privacy Act serves a totally different purpose from that arising under section 7114(b)(4) of the Statute.

The Respondent relies principally on the private and personal nature of the notes in question, including the note Callagee wrote to himself. It argues that these "memory joggers" were the property of the individuals who wrote them, or of Mr. Callagee, and not of the agency.7/ The facts do not support this contention. Clearly, the notes that Branch Manager Fontes and Supervisor McCormick prepared at the request of their superior, Callagee, and turned over to him, were written in the course of their employment and were maintained by Callagee in his official capacity. Callagee's own note was written and maintained for reasons of agency business. Although no one else in management may have known of the existence of these notes, it is unreasonable to presume that Callagee would have had the right to withhold them from his superiors on request. In sum, I find that the data in question was normally maintained by the agency in the regular course of business.

7/ It is not independently contended that release of the data is prohibited by law or that the data constitutes "guidance, advice, counsel, or training" as defined in section 7114(b)(4)(C). In any event I find that neither of these limitations on disclosure apply. As found above, the notes were stated by their authors to contain nothing except recollections of the objective facts comprising the event.

The Respondent successfully objected to the admission of the notes into evidence, and they are in a rejected exhibits file. Now, in his brief, Counsel for the Respondent invites me to examine these notes, and goes so far as to quote in its entirety Callagee's brief note to himself. Refusal of information cases seem to engender a special brand of paradox.

The Respondent does not dispute that the data in question is "reasonably available," which it manifestly is. The Respondent does question in part, although somewhat obliquely, the allegation that the data is "necessary" for the Union's use in pursuing Welles' grievance. The dispute on this issue appears to be limited to the supervisors' notes, or "memory joggers."8/ This is a troublesome issue in light of the distinction drawn by the Authority between different kinds of statements in the possession of an agency.

In U.S.Department of Labor, Office of the Assistant Secretary for Administration and Management, 26 FLRA 943 (1987) (hereafter "DOL case"), the Authority held that the Union had demonstrated the necessity of its obtaining the tapes or transcripts of certain interviews conducted by the agency as part of its investigation of alleged misconduct by an employee. When that employee was disciplined, he filed a grievance and the union requested the tapes or transcripts to enable it to represent the grievant adequately and to determine whether a settlement of the grievance could be negotiated. The Authority noted that the statements were taken and considered by the agency prior to taking the disciplinary action. The Authority therefore found that the union needed this data "to realistically assess the strength or weakness of the employee's position and to attempt to cast doubt on the credibility of the agency officials' accusations." Id. at 950.

In finding the witness statements to be "necessary" in the DOL case, the Authority contrasted them from witness statements it had not found to be necessary in U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 26 FLRA 19 (1987)("Army Reserve"). Army Reserve involved a request for statements obtained by an agency after a particular disciplinary action had been completed, when the agency was preparing for an arbitration hearing concerning the discipline. There, the Authority found that the witness statements were not "necessary" within the meaning of section 7114(b)(4), for the union's understanding of the basis for the action, for the processing of the grievance, or for the union to effectively represent the employee. The Authority reasoned that the

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8/ I find the May 23, June 7, and October 11 official memoranda to be "necessary." As these memoranda were introduced into evidence without objection, they are still part of this case largely only in a technical sense.

union already knew the specific factual basis for the action and had processed the grievance to the arbitration stage. In those circumstances the Authority did not think that the union's ability to fulfill its statutory obligation "was necessarily dependent on access to the particular witness statements" which it sought. Id. at 28. The Authority also relied on the analogous situation of parties to unfair labor practice cases, where information such as the identity of witnesses is not exchanged until just prior to the opening of the hearing. Id.

The distinctions drawn by the Authority between the witness statements in the DOL case and those in Army Reserve are difficult to apply to the facts of the instant case. The supervisors' notes in question here were not obtained specifically to prepare for an arbitration hearing, although arguably District Manager Callagee anticipated an arbitration hearing when he sought his supervisors' statements "in case something comes up in the future" (Tr. 68). It appears that the statements, including Callagee's note to himself, were made prior to the action being grieved -- the return of Welles' check -- although arguably the act of refusing to give the check to Welles began even before the awards ceremony ended. Finally, while Callagee insists that he did not rely on the statements as a basis for taking any action, it is at least arguable that, if they confirmed his recollection of the event, he relied on their support when he decided what final action to take with respect to the award check.

I am forced to conclude that attempting to follow the trail of these ambiguous circumstances is ultimately futile and diverts attention from the task of determining whether the notes are "necessary." One thing the DOL and Army Reserve decisions make clear is that the Authority interprets "necessary" as a term of art. Strict necessity is not required, but, on the other hand, policy considerations that do not really affect how much the union needs the data come into play and may defeat the union's right to obtain it. It would appear, for example, that policy reasons rather than a strictly factual analysis of need dictated the Authority's refusal to order the disclosure of statements obtained in preparation for arbitration. The Authority acknowledges in Army Reserve that the arbitrator might properly order disclosure, thus implying that a finding of necessity in fact would be entirely plausible. 26 FLRA at 28-29.

I conclude that the statements in question here were not obtained in preparation for arbitration within the meaning of the Army Reserve decision. Using the Authority's analogy to an unfair labor practice proceeding, I see the supervisors' notes as being more akin to documents providing background to the crucial events, which might be subject to subpoena, than they are to the kinds of documents that are exchanged just prior to the hearing.9/ Having so concluded, I must make my own determination of necessity.

I find that the Union has a compelling interest in determining the basis for Callagee's statement that he had "memory joggers" to support his position that Welles refused the award. That interest is sufficient to make those notes "necessary" as the term is used in section 7114(b)(4). As in the DOL case, having this information would enable the Union "to realistically assess the strength or weakness of the employee's position." It would also aid the Union in being able "to cast doubt on the credibility" (26 FLRA at 950) of these management officials if their testimony varied significantly from their contemporaneous statements. If there are competing policy considerations, I do not find any that relate to the factor of necessity.

The General Counsel having established each of the elements that qualify the data in question for mandatory disclosure under section 7114(b)(4), I conclude 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 Health and Human Services, Social security Administration, Baltimore, Maryland, and Social Security Administration, New Bedford District Office, New Bradford, Massachusetts, shall:

9/ I do not rely on the fact that the Respondent did produce these notes pursuant to a subpoena. That the Respondent chose to comply with rather than contest the subpoena should not prejudice its position on this issue.

1. Cease and desist from:

(a) Failing and refusing to furnish upon request by American Federation of Government Employees, Local 1164, AFL-CIO, the exclusive representatives of its employees, data requested by the exclusive representative in connection with the processing of a grievance, to which it is entitled under the Statute.

(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 American Federation of Government Employees, Local 1164, AFL-CIO, the data it requested.

(b) Post at its New Bedford, Massachusetts, District Office, 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 District Manager 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 I, 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, D.C., February 23, 1990.

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 American Federation of Government Employees, Local 1164, AFL-CIO, the exclusive representatives of our employees, data requested by the exclusive representative in connection with the processing of a grievance, to which it is entitled under the Statute.

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 American Federation of Government Employees, Local 1164, AFL-CIO, the data it requested.

_____
(Agency/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 I, whose address is: 10 Causeway Street, Room 1017, Boston, Massachusetts 02222-1046, and whose telephone number is: (617) 565-7280.