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

FEDERAL AVIATION ADMINISTRATION NEW ENGLAND REGION (BURLINGTON, MASSACHUSETTS) Respondent	
and	Case No. 1-CA-70368
NATIONAL ASSOCIATION OF AIR TRAFFIC SPECIALISTS Charging Party	

Norma F. Roth
For the Respondent

James S. Ruckle, Jr., Esq.
For the Charging Party

Carol Waller Pope, Esq.
For the General Counsel, FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq., 92 Stat. 1191 (hereinafter referred to as the Statute) and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

Pursuant to a charge filed by the National Association of Air Traffic Specialists, herein called the Union or NAATS, against the Federal Aviation Administration, New England Region, Burlington, Massachusetts, herein called

Respondent and FAA New England, the General Counsel of the FLRA, by the Regional Director for Region I, of the FLRA, issued a Complaint, which was amended, alleging that Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute by failing and refusing to furnish requested information to the Union. Respondent filed an answer which denied it had violated the Statute.

A hearing in this matter was conducted before the undersigned in Boston, Massachusetts. Respondent, Charging Party and General Counsel of the FLRA were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence I make the following:

Findings of Fact

At all times material the Union has been the collective bargaining representative for a nationwide unit of Air Traffic Control Specialists employed by FAA,1/ including those employed at the Bridgeport Automated Flight Service Station (Bridgeport AFSS). At all times material FAA and the Union have been parties to a collective bargaining agreement which provides, inter alia, in Article 67 for a three step grievance procedure with arbitration at the request of the Union.

In 1985 a formal investigation was initiated by FAA into possible falsification of travel vouchers submitted for the period March 3 through May 3, 1984 involving the reassignment of employees and management/supervisors from other facilities to the Bridgeport AFSS. The matter was referred to the U.S. Attorney, who declined criminal prosecution in the Fall of 1986. FAA then commenced its investigation to determine whether any administrative violations had occurred.

On January 3, 1987, eight bargaining unit members received notice of proposed 45 day suspensions and five supervisors/managers received notice of proposed 60 day suspensions. On March 3, 1987 James Ruckle, Union Regional Counsel, responded on behalf of the unit members to the

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1/ Federal Aviation Administration.

proposed discipline. Decision letters were issued suspending the eight bargaining unit members for 30 days and the five supervisors/managers for 35 days, except one supervisor/ manager who was suspended for 12 days.

In March and April 1987, pursuant to Article 67 of the collective bargaining agreement, the Union filed eight individual grievances on behalf of the eight suspended employees. The grievances, which were initiated at Step 2 of the grievance procedure and are still pending arbitration, sought recision of the thirty day suspension the employees had received and served for alleged travel falsification. The alleged travel voucher falsification involved the relocation to the Bridgeport AFSS.

Ruckle submitted a written request dated March 24, 1987 to FAA New England's Labor Relations Manager Norma Roth, requesting, in part;

> "1) Copies of the proposal letters issued to each member of management and/or staff regarding allegations of voucher fraud.
>
> 2) Copies of the responses to the proposals from each member of management and/or staff regarding allegations of voucher fraud.
>
> 3) Copies of the decision letters issued to each member of management and/or staff regarding discipline for alleged voucher fraud.
>
> 4) A copy of the complete investigative file2/ compiled on each of the members of management and/or staff disciplined as a result of alleged voucher fraud."

Roth requested that she be advised of the specific purpose for each requested item. By letter dated May 14, 1987 Ruckle advised Roth: "I need the data for cross examination of Agency witnesses and to make any appropriate argument with regard to disparate treatment of bargaining unit employees. I also may need to call certain management/ staff personnel or witnesses on behalf of unit employees.

2/ The requested investigative files contain items such as travel vouchers and supporting documents, hotel receipts, witnesses' statements, investigative summaries, etc.

The information will allow me to determine which, if any, of these individuals I will need. "Ruckle pointed out in this letter that arbitrators often take into account disparate treatment between unit and non-unit employees. The letter also indicated that the union wanted the information in unsanitized form.

Ruckle's request for the unsanitized data was denied in a June 4, 1987 letter from Roth which stated:

> "The Agency does not dispute the fact that more severe penalties were imposed on supervisory personnel than bargaining unit members. In view of this, material requested for purposes of arguing disparate treatment is unnecessary since the disciplinary action for management and/or staff involved in travel voucher falsification was greater than that given to bargaining unit employees . . . .
>
> Additionally, under the circumstances the Agency is also of the opinion that the material requested, if granted, would constitute a clearly unwarranted invasion of the privacy rights of management . . ."

In early August 1987 Ruckle advised Roth telephonically that he still wanted the information but would accept it in sanitized form. By letter dated August 17, 1987 Ruckle advised Roth, ". . . I will accept copies of all material pertaining to alleged voucher fraud by management and/or staff in a sanitized form. This is the material previously requested by me which you denied due to privacy considerations."

By letter dated September 22, 1987 Roth responded to Ruckle's request stating, that even in sanitized form the identity of individual managers would not be protected, that the Agency did not believe the Union's ability to fulfill its obligation is dependent on access to the requested information, that the requested material is not relevant or necessary for the Union to fulfill its duties and, ". . . after careful consideration, and, on balance, the Agency determined that because of the extent of the personal information on management people, and in view of the Union's stated purposes, disclosure would constitute a clearly unwarranted invasion of the privacy of management and staff personnel . . ."

Respondent denied the requested data because the release of the requested documents in sanitized form would lead to discovery of the identity of the management employees involved. The identities of the management officials who were disciplined for travel voucher falsification were already widely known by employees at the Bridgeport AFSS.

On January 6, 1988 Respondent, sua sponte, released to the Union the requested documents for one of the management officials that has been disciplined for travel voucher falsification because Respondent determined that there was a potential disparate treatment argument that could be made in that one case because the management official received a 12 day suspension, a lesser penalty than any of the bargaining unit employees.

Discussion and Conclusions

Section 7114(b) of the Statute provides in relevant part as follows:

> "(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation--
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> * * * * *
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining;

The FLRA has held that, pursuant to Section 7114(b) of the Statute, agency management is required to furnish an exclusive representative with necessary information, to the extent not prohibited by law, which would enable the union to effectively carry out its representation obligations. See, U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, 26 FLRA 943 (1987) and Internal Revenue Service, National Office, 21 FLRA 646 (1986).

The most relevant case, and the one that I conclude is dispositive of he subject case, is Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 28 FLRA 202 (1987), hereinafter called the DODDS Case. In the DODDS Case, supra, the union sought information concerning the discipline of management officials and supervisors for making false statements. The union wanted the information to establish whether the unit employee was being treated differently for the same similar conduct. The FLRA found that the information was necessary for the union to effectively develop and present its argument in the disciplinary proceeding. The FLRA noted that the information was particularly necessary because there was evidence of a number of relevant situations in which management officials were alleged to have made false statements. The FLRA finally held that the information requested was necessary within the meaning of Section 7114(b)(4) of the Statute. In so holding the FLRA noted the union was willing to accept the information in sanitized form and that there was no allegation that providing the information in sanitized form was prohibited by the Privacy Act, 5 U.S.C. § 552(a). DODDS Case, supra at 205.

I conclude that the subject case is controlled by the holding in DODDS Case, supra and that NAATS was entitled to the requested sanitized information concerning the managers and/or staff.

Thus the NAATS was in the process of preparing for arbitration on behalf of unit employees who had been disciplined for travel voucher fraud. In presenting such matters to an arbitrator disparate treatment between managers/staff and employees is a matter that could be considered. Arbitrators regularly consider such disparate treatment as relevant in determining whether a unit employee was disciplined for just cause. North Germany Area Council, Overseas Education Association v. FLRA, 805 F 2d 1044 (D.C.

Cir. 1986), hereinafter called the DODDS Court of Appeals Case. Accordingly I conclude that information requested by NAATS was necessary within the meaning of Section 7114(b)(4) of the Statute for the Union to effectively represent unit employees in the arbitration procedure.

Respondent facility recognized the right of the Union to this information when it provided the requested information with respect to one manager/staff member which Respondent concluded did involve disparate treatment because the manager in question received a lesser penalty than the unit employees. However this determination of disparate treatment is not for Respondent to make, rather it is up to NAATS to examine the information and determine, in its judgement, whether there was disparate treatment and to present the information to the arbitrator and try to convince the arbitrator that there had been disparate treatment.3/ In this regard Respondent oversimplifies disparate treatment. Respondent decided that there was no disparate treatment because, with the one exception of the manager whose information was provided, the managers did not receive lesser penalties for voucher falsification than did the unit employees. Respondent contends that I should therefore conclude there was no disparate treatment. Respondent, however, misses the mark because the penalty must be compared to the quality and quantity of misconduct to determine if there was disparate treatment. Thus, NAATS needed to examine not only the magnitude of the penalties awarded to the managers but also the precise nature of their misconduct; that would require an analysis of the falsifications, the number of different incidents, the amounts of money involved, etc. After such a detailed analysis, it is up to the parties to persuade the arbitrator whether there had been disparate treatment; it is not a determination to be made solely by Respondent or for that matter by me.4/ Further, after such an analysis of the information NAATS would be able to question Respondent's

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3/ Of course if NAATS, after examining the requested information, determines there was no disparate treatment, it could decide not to further pursue the arbitration procedure.

4/ In this regard I note that the managers' proposed penalties were reduced proportionately more than the unit employees' penalties and this might be considered by an arbitrator as being evidence of disparate treatment.

officials as to any quantitative or qualitative difference in the treatment of unit employees as compared to managers. Of course, if the information reveals that managers were the supervisors of any of the unit employees, NAATS could decide to call such supervisors to determine whether such managers advised the unit employees to fill out vouchers in a certain way.

Respondent urges the undersigned to conclude that although the FLRA decisions concerning a union's right to information involved use of the information in grievances and subsequent arbitrations, the right should not be extended to information requested by a union solely for use in an arbitration when it had not been raised in the earlier stages of the grievance process. In short Respondent contends that because disparate treatment had not been raised during the initial steps of the grievance, the Union has no right to information bearing on disparate treatment at the arbitration phase. The FLRA held in U.S. Department of Labor, Office of the Assistant Secretary, for Administration and Management, 26 FLRA 109 (1987) that the union was entitled to certain transcripts and tapes of witnesses statements when the union invoked arbitration. The FLRA concluded that the information was necessary within the meaning of Section 7114(b)(4) of the Statute for the union to effectively represent the employee in the grievance arbitration procedure. I conclude that the information requested by NAATS in the subject case was similarly necessary for it to effectively represent the employees in the grievance arbitration procedure. Respondent argues that the requested information was, in effect, an "afterthought". I find this argument irrelevant. Whether an "afterthought" or not, NAATS was entitled to the information in order to examine disparate treatment and to effectively present the matter before an arbitrator, who can examine not only whether the employees should have been disciplined, but also the appropriateness of the magnitude of the discipline. It would not serve the purposes of the Statute to conclude that issues not raised during the informal steps of the grievance procedure can not be raised during arbitration and I therefore reject such an argument.

Finally, Respondent contends that the requested information, in sanitized form, should not be provided to NAATS because to do so is prohibited by the Privacy Act, 5 U.S.C. 552. Respondent recognized that disclosure of identifiable records is not prohibited by law in all circumstances; a balancing of conflicting interests must be made. In striking the balance I conclude that the requested

information should have been provided to NAATS and that the disclosure would not have violated the Privacy Act. Thus, as described above, the information was necessary for NAATS to represent the employees, the information was to be provided in sanitized form, there is no showing that there would be widespread circulation of the information, and the actual identities of the disciplined supervisors/managers was in fact widely known at the Bridgeport facility. In this regard because of the small number of supervisors/ managers involved, I note that the actual identity of the individuals involved could be ascertained from the requested information, even in sanitized form. However, all reasonable steps had been taken to protect their identity and when balanced against NAATS obligation and right to represent the disciplined unit employees, I conclude the Privacy Act does not preclude the production of the information.

Accordingly, I conclude Respondent was obligated by Section 7114(b)(4) of the Statute to provide NAATS with the requested information, and Respondent's refusal to provide that information constituted a violation of Section 7116(a)(1)(5) and (8) of the Statute. DODDS Case, supra.

Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, Federal Aviation Administration, New England Region (Burlington, Massachusetts), shall:

1. Cease and desist from:

(a) Failing and refusing to furnish National Association of Air Traffic Specialists, the employees' exclusive representative, all requested documents, in sanitized form, relating to disciplinary actions against management employees in 1987 based upon allegations of travel voucher falsification.

(b) In any like or related manner, interfering with, restraining, or coercing 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) Furnish the National Association of Air Traffic Specialists all requested documents, in sanitized form, relating to disciplinary actions against management employees in 1987 based upon allegations of travel voucher falsification.

(b) Post at all its facilities where unit employees 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 an appropriate official, and shall be posted and maintained for 60 consecutive days thereafter excluding holidays and vacations, 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 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, Federal Labor Relations Authority, Room 1017, 10 Causeway Street, Boston, Massachusetts, 02222-1046, in writing, within 30 days from the date of this Order as to what steps have been taken in comply herewith.

Issued: December 15, 1988, Washington, D.C.

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
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 or refuse to furnish the National Association of Air Traffic Specialists, the employees' exclusive representative, all requested documents, in sanitized form, relating to disciplinary actions against management employees during 1987 based upon travel voucher falsifications.

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

WE WILL furnish the National Association of Air Traffic Specialists all documents, in sanitized form, relating to disciplinary actions against management employees during 1987, based upon travel voucher falsifications.

_____
(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: Room 1017, 10 Causeway Street, Boston, MA 02222-1046, and whose telephone number is: (617) 565-7280.

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