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

DEPARTMENT OF COMMERCE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION NATIONAL WEATHER SERVICE SILVER SPRING, MARYLAND Respondent	
and	Case No. 9-CA-70061
NATIONAL WEATHER SERVICE EMPLOYEES ORGANIZATION, MEBA, AFL-CIO Charging Party	

Bruce I. Waxman, Esq.
For the Respondent

Stefanie Arthur, Esq.
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This 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.,1/ and the Final Rules and Regulations issued thereafter, 5 C.F.R. § 2423.1, et seq., concerns the refusal of Respondent to furnish a list of the names and duty status of all bargaining unit employees in the Western Region who received commendable or outstanding ratings during the 1985-1986 rating period.

1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7114 (b)(4) will be referred to, simply, as "§ 14(b)(4)".

This case was initiated by a charge (G.C. Exh. 1(a)) filed on November 18, 1986, which alleged violations of §§ 16(a)(1), (5) and (8) of the Statute; and by a First Amended charge (G.C. Exh. 1(c)) filed on December 22, 1986, which also alleged violations of §§ 16(a)(1), (5) and (8) of the Statute. The Complaint and Notice of Hearing (G.C. Exh. 1(e)) issued on March 6, 1987; alleged violations of §§ 16(a)(1), (5) and (8) of the Statute; and set the hearing for April 21, 1987, pursuant to which a hearing was duly held on April 21, 1987, in San Francisco, California, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument, which each party waived. At the close of the hearing, May 21, 1987, was fixed as the date for mailing post-hearing briefs. Respondent and General Counsel each timely mailed a brief, received on May 26, 1987, which have been carefully considered. Upon the basis of the entire record2/, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. At all times material, the National Weather Service Employees Organization, MEBA, AFL-CIO, (Union), has been recognized by Respondent as the exclusive representative of a nationwide unit of professional and nonprofessional employees of the National Weather Service, NOAA, Department of Commerce, excluding management officials, supervisors and employees described in §§ 12(b)(2), (3), (4), (6) and (7) as well as employees represented in other exclusively recognized units (G.C. Exh. 2).

2. At all times material, Mr. Alan Olson was Regional Chairman of the Western Region of the Union (Tr. 21). Mr. Harry Hassel was Acting Regional Director of Respondent and was succeeded in that position by Mr. Thomas H. Grayson (G.C. Exhs. 12a and 17). At all times material, Mr. James Mark Fair was Chief of Meteorological Services for the

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2/ Respondent filed with his brief a Motion to Correct Transcript, which was subsequently revised by an Errata filed on June 15, 1987. As revised, such motion is granted. In addition, certain of the proposed corrections result in other minor corrections which are hereby made. The transcript is hereby corrected as set forth in the Appendix hereto.

Western Region of the National Weather Service and Acting Deputy Regional Director (Tr. 160A).

3. At all times material, the U.S. Department of Commerce had in effect a Performance Appraisal System. Under this system, employees were given ratings of outstanding, commendable, fully successful, marginal and unsuccessful. The ratings were used in making personnel decisions on training, rewarding, reassigning, promoting, reducing in grade, retaining and removing employees, and granting within-grade increases (G.C. Exh. 17).

4. On July 9, 1986, Mr. Olson wrote to Mr. Hassel requesting: (1) the names of any employees in the Western Region who will receive any kind of award in 1986, his current duty station, and the type of award; and (2) the name of any employee in the Western Region who received a rating of commendable or outstanding for the last rating period and his current duty station (G.C. Exhs. 12a and 12b).

5. On August 5, 1986, Mr. Fair replied, requesting that Mr. Olson inform him as to the relevance and necessity of the requested data, and stating: (1) that he must balance the intrusion into the privacy of all employees, under the Privacy Act, against the union's need for the information; and (2) that the requests were anticipatory, since 1986 had not ended, and were overly broad, since they reach beyond the bargaining unit (G.C. Exh. 13).

6. On August 13, 1986, Mr. Olson wrote to Mr. Fair to limit his request to data relating to bargaining unit employees for the 1985-86 rating period. Mr. Olson stated this, ". . . will begin my monitoring of the Western Region's rating/award patterns" which is necessary because the current Performance Appraisal system leaves many questions in the minds of the employees as to the equitability, consistency and administration of the program. Mr. Olson also stated, ". . . many employees do not know what is truly required of them to reach or attain a higher performance rating. Knowledge of a fellow employee's achievements and attainment of such a level of performance will serve as a positive goal . . . to emulate." (G.C. Exh. 14a).

7. On September 12, 1986, Mr. Fair wrote to Mr. Olson that no basis had been shown to demonstrate that the requested information was relevant and necessary to the conduct of labor-management relations, and reiterated his request for clarification. (G.C. Exh. 15).

8. On September 29, 1986, Mr. Olson replied, restating his prior reasons and adding:

> "Such monitoring of the program could give rise to the ability to identify and solve problems before they become subjects for grievances or other actions as well as provide the documentation necessary to spot possible abuse or discrimination in the administration of the program.
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> "In short, the requests will be used to better represent the bargaining unit in understanding the program, succeeding in the program, measuring one's abilities by example and protecting the bargaining unit from inequities, inconsistencies and improper administration of the program." (G.C. Exh. 16).

9. On November 4, 1986, Mr. Grayson, Acting Regional Director, replied to Mr. Olson stating that: (1) the names and duty stations of all employees receiving awards would be published and that an advance copy would be provided to the Union; and (2) the names of employees who received commendable or outstanding ratings would be denied. In support of this action, Mr. Grayson stated that he had, ". . . weighed your non-specific need . . . against employee right to privacy. I am, therefore, denying your request at this time." Mr. Grayson further pointed out that all negotiations have been conducted at the national level and were concluded; that there were no pending grievances related to this information; that there is no requirement that ratings be uniform or equitable; and that "monitoring" is a vague term which he did not understand as applied to the request.

10. Mr. Olson testified that in November, 1986, Mr. Fair offered to provide a sanitized copy of all appraisals (Tr. 123, 135-136, 138). Mr. Fair testified that in the spring of 1986 he also offered a sanitized copy of the appraisals of all employees in the Western Region who received commendable and outstanding ratings with numbers substituted for names. He further stated he would show the employee's position, its location and the rating assigned to that position with only the employee's name removed (Tr. 165).

11. By letter dated March 27, 1986, to Mr. Fair, Mr. Olson set forth, ". . . the promised list of identifiable

problem areas . . . ." of the performance appraisal system (G.C. Exh. 5). Subsequently, on May 15, 1986, Mr. Olson filed a grievance over his rating (G.C. Exh. 7a). The grounds for his grievance were set forth and elaborated on by supplemental documents on May 22, 1986 (G.C. Exh. 7b) and on May 31, 1986 (G.C. Exh. 7c). Mr. Olson's grievance was denied at the first step on June 20, 1986 (G.C. Exh. 8); and the second step on September 4, 1986 (G.C. Exh. 10). Arbitration was invoked on September 12, 1986 (G.C. Exh. 11), but was withdrawn because, "the Union decided to not continue into arbitration . . . ." (Tr. 58).

12. In response to Mr. Olson's grievance, Respondent stated, inter alia, that, "You are correct that focal point duties are assigned as a management right . . . It follows that the right to assign duties carries with it the right to evaluate the performance of those duties . . . ." (G.C. Exh. 8); that, "Performance plans for like employees at WSO Medford are similar. They are not identical . . . Focal point duties are different and require different amounts of time to accomplish. In the appraisal the proper weighing must be used depending on the time required to perform the duties and the importance of the work . . . ." (G.C. Exh. 8); that, "Your statement that the employee's performance is compared to the standard is absolutely correct. It is the inference you make that this also means that the employee is compared to other employees that is the root cause, in my opinion, of your misunderstanding regarding the rating system. Your rating concerning missing the 'window' for the radar report was based on the comparison of your performance to the element of data acquisition, not to the performance of others. In other words, this rating was because you repeatedly missed the 'window' not because your missed it more than others . . . ." (G.C. Exh. 8); and that, "We have followed relevant regulations, both in letter and spirit . . . " (G.C. Exh. 8) (to like effect, see G.C. Exh. 10).

13. Mr. Olson testified initially that he intended to direct monitoring to the inter-relation between awards and ratings of commendable or outstanding and that he needed the names of employees who received commendable and outstanding ratings because of the deterioration of labor relations in general (Tr. 68-70). Later, Mr. Olson testified that, while not the purpose of the request, the information could have been used in connection with grievances (Tr. 133-134), that, "The whole idea of setting up a monitoring system is to provide the ability of the Union . . . to look at the way the system is being administered and to represent the bargaining unit in the effect of the administration." (Tr. 134).

14. Although Mr. Olson testified that he told Mr. Fair that he, Olson, could, ". . . get sanitized copies of everything [i.e., all appraisals for all 600 employees] . . . I didn't think that was an equitable or essential way to do the monitoring . . . I thought it was too bulky, too -- just not an efficient way to do things." (Tr. 135), Mr. Olson stated that sanitized appraisals would be of great value (Tr. 120). Later, Mr. Olson asserted that sanitized appraisals, ". . . would not give me the information that I felt where most of our abuses is being occurring: i.e., in that certain people are getting certain ratings and denying others; and that also goes on into awards." (Tr. 135); however, the record gives no justification for his assertion.

Conclusions

Was unsanitized data necessary and would disclosure conflict with the Privacy Act?

Although the Authority, prompted by the Courts3/, has become more liberal in determining what a union must show to

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3/ The Court of Appeals for the District of Columbia Circuit, in American Federation of Government Employees, AFL-CIO, (AAFES, Fort Carson), infra, held that, even where the union did not know the identities of, and was not asked to represent, two dismissed employees,

> ". . . information concerning the dismissal of unit employees is clearly 'necessary for full and proper discussion, understanding, and negotiation of subjects with (sic in) the scope of collective bargaining' under the terms of the Labor Statute." (793 F.2d at 1361),

and the Court of Appeals for the Second Circuit in American Federation of Government Employees, AFL-CIO, (HHS), infra, held that the Authority gave,

> ". . . two grudging a reading of the union's communications. Under the circumstances . . . the union's reference in each request to Article 24 of the collective bargaining agreement and to section 7103(a)(9) of the Labor Statute put the agency on notice that the requests were related to an existing or a potential grievance." (811 F.2d at 774).

establish the "necessity" of data under § 14(b)(4), Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado 17 FLRA 624 (1985), rev'd and remanded sub nom. American Federation of Government Employees, AFL-CIO, Local 1345 v. FLRA, 793 F.2d 1360 (D.C. Cir. 1986), decision on remand, 25 FLRA 1060 (1987); Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, New York Region, 21 FLRA 253 (1986), rev'd sub nom., American Federation of Government Employees, AFL-CIO v. FLRA, 811 F.2d 769 (2nd Cir. 1987), and has held that a generalized complaint of discrimination is enough to require the furnishing of names and minority status of all bargaining unit employees in order that the union could determine whether to file grievances over allegations of institutional racism (the union was also preparing for upcoming negotiations), U.S. Army Corps of Engineers, Kansas City District, Kansas City, Missouri, 22 FLRA 667 (1986); request for an IG Report to police the contract and to assess its impact on possible grievances, Defense Mapping Agency, Washington, D.C. and Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 24 FLRA 154 (1986), there remains the question whether disclosure would conflict with the Privacy Act. cf. Andrews v. Veterans Administration of the United States of America, 838 F.2d 418 (10th Cir. 1988). As the Authority stated in its decision on remand in Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, supra,

> "The Privacy Act generally prohibits the disclosure of personal information about Federal employees without their consent. Section (b)(2) of the Privacy Act, 5 U.S.C. §552a(b)(2), provides that the prohibition against disclosure is not applicable if disclosure of the information is required under the Freedom of Information Act (FOIA), 5 U.S.C.§ 552. Exemption (b)(6) of FOIA, 5 U.S.C. § 552 (b)(6), pertinently provides that information contained in personnel files may be withheld if disclosure of the information would constitute a 'clearly unwarranted invasion of personal privacy.' . . . to determine whether requested information falls within exemption (b)(6), it is necessary to strike a balance between an individual's right to privacy and the public interests in having the information disclosed. In striking this balance in cases under

> section 7114(b)(4) . . . in view of the congressional findings in section 7101 that collective bargaining is in the public interest and safeguards that interest, release of information which is necessary for a union to perform its statutory representational functions promotes important public interests." (25 FLRA at 1062).

In this case, the Union had represented, inter alia, that it needed the unsanitized appraisals of all employees given commendable and outstanding ratings to monitor the rating program in order to determine its fairness; to evaluate grievances; and to determine whether to file grievances. In Veterans Administration Central Office, Washington, D.C. and Veterans Administration Regional Office, Denver, Colorado, 25 FLRA 633 (1987), which, essentially like the present case, involved a request for the names of employees who had received outstanding or highly satisfactory performance ratings (VA had provided only a sanitized list), the Authority ordered production of the data and stated that the union could not verify from sanitized data whether employees had satisfied awards requirements and whether awards had been distributed in a fair manner. However, unlike Bureau of Alcohol, Tobacco and Firearms, National Office, Washington, D.C. (ATF), 18 FLRA 611 (1985), where the Authority noted that,

> ". . . since the names of the individual applicants will not be linked to their promotion evaluation forms, it is unlikely that their identities will become known even if the data which the Authority has determined to be necessary is disclosed [footnote omitted]. Further, the Authority notes that the necessary data requested would only be used by the Union to process a grievance and there is no indication in the record that any of the information would become generally known." (18 FLRA at 615) (Emphasis supplied),

the Union here informed Respondent that it intended to disseminate the appraisals to serve as positive goals to emulate (G.C. Exhs. 14a and 14b) and to measure one's abilities by example (G.C. Exh. 16). Here, the Union's intended general circulation of appraisals is the direct converse of the union's "limited circulation" in ATF, supra;

the direct converse of the union's sole use of the necessary data to process a grievance in ATF, supra; and contrary to the absence of ". . . indication of widespread circulation . . . ." Veterans Administration Central Office, Washington, D.C. and Veterans Administration Regional Office, Denver, Colorado, 25 FLRA 633, 637 (1987). Accordingly, while the Union has shown a need for the appraisals4/, compared to their intended broad circulation, disclosure of unsanitized data would have resulted in a clearly unwarranted invasion of privacy. Celmins v. United States Department of the Treasury, Internal Revenue Service, 457 F. Supp. 13, 17 (D.D.C. 1977). As Respondent offered to provide the appraisals requested with only the names removed, the refusal to provide unsanitized appraisals did not violate §§ 16(a)(1), (5) or (8) of the Statute since to have done so would, under the circumstances of this case, have constituted a clearly unwarranted invasion of privacy. Accordingly, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 9-CA-70061 be, and the same is hereby, dismissed.

William B Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 9, 1988
Washington, D.C.

4/ In view of Mr. Olson's admission that sanitized appraisals would be of great value, it would appear that unsanitized appraisals, while desirable and benefical, were not essential or critical to the Union.