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

DEPARTMENT OF THE AIR FORCE, SCOTT AIR FORCE BASE, ILLINOIS Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R7-23, SEIU, AFL-CIO Charging Party	Case No. 5-CA-80069

Susanne S. Matlin, Esq., and
Sharon Bauer, Esq.
For the General Counsel

Major Steven E. Sherwood, Esq.
For the Respondent

Donna Dann, Esq.
For the Charging Party

Before: JESSE ETELSON
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 U.S. Code, 5 U.S.C. § 7101, et seq., (the Statute).

Upon an unfair labor practice charge filed by the National Association of Government Employees, Local R7-23, SEIU, AFL-CIO, (the Union) against the Department of the Air

Force, Scott Air Force Base, Illinois, (the Respondent), the General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director for Region V, issued a Complaint and Notice of Hearing on January 29, 1988. The Complaint alleges that the Respondent violated Section 7116(a)(1), (5) and (8) of the Statute by refusing to provide the Union with documentation concerning disciplinary action taken against a supervisor who allegedly used physical force against an employee.

A hearing was held on May 10, 1988, in St. Louis, Missouri. All parties were permitted to present their positions, to call, examine, and cross-examine witnesses, and to introduce evidence bearing on the issues presented. The General Counsel and the Respondent submitted post-hearing briefs.

On the basis of the entire record, the briefs, and my evaluation of the evidence, I make the following findings of fact, conclusions and recommendations:

Findings of Fact

The Union is the exclusive representative of a unit of non-supervisory employees of the Respondent. The Respondent and the Union are parties to a collective-bargaining agreement which, as required by section 7121 of the Statute, contains a negotiated grievance procedure. The agreement defines a grievance covered by the negotiated procedure as "a request by any employee . . ., the Union or the Employer for appropriate relief in a matter of concern or dissatisfaction which is subject to the control of the Union or the Employer."1/ The agreement specifically provides that questions as to the grievability or arbitrability of a particular matter be referred to an arbitrator selected under the procedures specified by the agreement.2/

1/ There is no contention that any of the contractual exclusions from the grievance procedure, which by and large reflect the exclusions listed in section 7121(c) of the Statute, apply to the grievance with which this case is concerned.

2/ Joint Exhibit 1: Article XXI Section 2, subsection d; Article XXII Section 9.

A bargaining unit employee submitted a grievance concerning the alleged use of physical force against him by his supervisor. The grievant alleged that this was unfair and improper treatment and contributed to an unsafe work environment. He requested as a remedy that the supervisor be examined regarding his medical fitness to supervise employees and that he receive appropriate discipline for his alleged misconduct. The Union processed the grievance through each step of the negotiated grievance procedure up to and including the selection of an arbitrator. In its response to the third and final pre-arbitration step of the negotiated procedure, the Respondent denied the grievance. Its explanation, in part, was that "[a]ppropriate action has been taken regarding the supervisor involved in this grievance."

The information request that gives rise to this unfair labor practice proceeding was made by Mark B. Clevenger, Assistant General Counsel of the National Association of Government Employees, the parent body of the Union. Mr. Clevenger prefaced his request by stating that the information "is needed in order to prepare the case for arbitration, specifically in regards to the remedial actions requested." The information requested was "all documentation concerning any disciplinary action taken against" Supervisor Valentine "as referenced in" the paragraph of the third-step decision which stated that appropriate action had been taken regarding the supervisor. In the Respondent's answer to Mr. Clevenger's request, it asked him to be more specific about the reason the requested data was needed. Clevenger replied by stating, in pertinent part:

> We need this information to determine if the requested remedy of disciplinary action against the supervisor was in fact taken, and what that action was. Upon our review of this information, we may well conclude that no further action is warranted in this case. In other words, we need this to assess the need to pursue arbitration.

The Respondent ultimately wrote to Clevenger that it declined to provide the information because the data requested was not "sanitized" -- it identified the disciplined supervisor by name. The unfair labor practice charge and complaint followed. By agreement of the Union and the Respondent, the arbitration proceeding is being held in abeyance pending the outcome of this case.

Discussion and Conclusions

A. The Information Requested

It is not uncommon in cases involving information requests that the parties lack a mutual understanding of exactly what information the union seeks and what information that is available would satisfy its legitimate needs. This understanding gap is natural, given the nature of the dispute, but is not inevitable. One is struck, in this case, although it involves a rather limited scope of inquiry on the Union's part, with the parties' failure to focus on precisely what information is the subject of the dispute. This failure not only contributed to the necessity to engage in litigation in order to resolve the dispute; it leaves some doubt even after review of the record and the briefs as to the extent of the information the Union requested.

At first blush, the Union's formal request, although it singles out the discipline of one supervisor based on one incident, seems broad in the sense that it covers "all documentation concerning" such discipline. Thus, the request could be read to encompass the Respondent's entire file on the incident leading to consideration of disciplinary action. That file might include witnesses' statements, a letter of proposed discipline, and other materials in addition to direct written evidence of the discipline. However, this expansive interpretation of the request is undercut by the Union's explanation, in response to the Respondent's inquiry, that in order to determine whether to pursue arbitration, the Union needed to know whether "the requested remedy of disciplinary action was taken, and what that action was."3/ This explanation necessarily reflects not only on the reason the information is needed but also on the nature of the information requested. In this light, the request for "all documentation concerning" disciplinary action taken against the supervisor connotes the specific, "dictionary" meaning of the word "documentation" -- the corroboration of a statement with documents -- rather than the broader meaning.

3/ I do not agree with the Respondent's contention that this response precludes the General Counsel from arguing that the information requested was also needed to aid the Union in preparing the case for arbitration. This need was stated in the Union's original request, and was not clearly abandoned in the response letter.

This narrower interpretation of the request accords with the more persuasive testimony regarding the Union's intention in making the request. Thus, Union President Denton testified that, at his request, Union counsel Clevenger sent a letter to Respondent's personnel office inquiring as to "whether or not any discipline had been taken against Mr. Valentine." Mr. Clevenger testified that such an inquiry suggested itself because of the statement, in Respondent's Step 3 grievance decision, that appropriate action had been taken regarding Valentine. In Clevengers words:4/

> We wanted to find out exactly what the action was, what type of disciplinary action, and that is why we asked for all documentation concerning that action.

Later, Clevenger testified that he also had use for any proposed notice of reprimand that may have been in the disciplinary file, which "sets out the facts and tells what witnesses there might have been . . ." and which would aid him in preparing the case for arbitration by corroborating factual matters.5/ I have no doubt that such material would be of assistance to counsel in preparing for arbitration. However, this testimony cannot be used to convert the original request into something that it was not.6/

In summary, I find that the most reasonable interpretation of the information request is that Respondent provide the Union with all documents that show what, if any, disciplinary action was administered to Mr. Valentine. That information, the record shows, would be reported in full in any "final decision letter" issued by management to the individual to be affected. Such a letter, if issued to

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4/ Transcript of Hearing at 58.

5/ Id. at 68-69.

6/ I am equally unpersuaded by the testimony Respondent's counsel elicited from Union President Denton on cross-examination, that the request for "all documentation" would include a proposed disciplinary action letter and might include statements of witnesses. I believe that counsel's question took Mr. Denton by surprise, that his answer was speculative, and that he did not intend to contradict his previous testimony that the information requested was whether or not discipline had been taken.

Valentine, would also contain a reiteration of the underlying facts and a reference to the consideration given to any response by Valentine to any earlier notice of proposed discipline. Based on the analysis above, I shall treat the Union's request as one for the final decision letter, or its equivalent, only.7/

Although the Respondent may have read the request more broadly, it is not in a position to argue that its confusion relieved it of any obligation it might otherwise have had to provide the data included under my narrow interpretation. Aside from seeking clarification of the Union's need for the information, Respondent made no attempt that is reflected in the record to ascertain what would satisfy the Union's asserted need.

B. Respondent's Statutory Duty

1. Applicable Principles and Preliminary Conclusions

7/ The contents of the letter that go beyond a statement of the discipline imposed would appear to be sufficiently related to such statement as to be fairly encompassed by the Union's request. I note, in this connection, that no party has attempted to distinguish among parts of the letter with respect to the Union's need for the information or any of the defenses available to the Respondent.

Were the information request deemed to include the notice of proposed discipline, witness statements, and other materials, it would not necessarily have been overbroad (see U.S. Department of Commerce, Bureau of the Census, 24 FLRA 630, 632, 645-46 (1986)), but would have raised substantial questions, regarding the Respondent's duty to produce, on which the Authority has not ruled definitively. As to recommendations for discipline, see National Park Service, National Capital Region, United States Park Police, 32 FLRA 308 (1988) (accepting remand of National Labor Relations Board Union, Local 6 v. FLRA, 842 F.2d 483 (D.C. Cir. 1988) but without indicating whether the Authority accepted the court's view of the substantive issue decided). As to witnesses' statements, compare U.S. Department of Labor, Office of the Assistant Secretary for Administration and Management, 26 FLRA 943, 949-950 (1987) with U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 26 FLRA 19, 26-29 (1987).

Under section 7114(b)(4) of the Statute,8/ an agency is required to furnish an exclusive representative of its employees, upon request and to the extent not prohibited by law, information that is reasonably available and necessary for the union effectively to carry out its representational functions and responsibilities, including its obligation in connection with the processing of an employee grievance. This includes information needed both for evaluation of a grievance for the purpose of deciding whether to pursue it and for preparing to represent the grievant. U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 26 FLRA 19, 27-28 (1987).

It cannot seriously be disputed that the information is being sought here for purposes that are potentially within these categories of necessity. Moreover, notwithstanding Respondent's contention to the contrary, the Union informed it that it seeks the information for the evaluation and preparation of the grievance.9/

8/ Section 7114(b)(4) of the Statute requires an agency to furnish an exclusive 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.

9/ Further, it is admitted that the information requested is normally maintained by Respondent in the regular course of business and does not constitute guidance, advice, counsel, or training for management officials or supervisors, relating to collective bargaining.

Based on the Union's persuasive representations, there is little room for doubt that the information requested, although it concerns the discipline of a supervisor, is "necessary," within the meaning of section 7114(b)(4). See Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 28 FLRA 202 (1987). Respondent contends, however, that the information is not necessary for any legitimate purpose because the arbitrator cannot grant the relief the grievant seeks, and that release of the information is prohibited by the Privacy Act. I shall treat these contentions in sequence.

2. Arbitrability of the Grievance

The Respondent does not mount a frontal attack on the arbitrability of the grievance. Indeed, while it consistently has maintained that one aspect of the relief sought -- the discipline of the supervisor as a management official -- is "not within the purview of the union," the Respondent entertained the grievance and agreed to submit it to arbitration. In doing so, the Respondent did no more than it was compelled to do under the broad definition of a grievance in the contract, under the specific contractual language referring grievability and arbitrability to the arbitrator, and under applicable Authority precedent. Health Care Financing Administration, 22 FLRA 437 (1986); Headquarters, Department of the Army, Washington, D.C. and U.S. Army Training Center Engineer and Fort Leonard Wood, Fort Leonard Wood, Missouri, 22 FLRA 647, 649-650 (1986).10/

The Respondent puts a different spin on the question of arbitrability, however, by contending that the subject about which the Union has sought information -- the discipline of a supervisor -- is beyond the power of the arbitrator. The Respondent urges that, as a result, there is no legitimate purpose for which the requested information is necessary. This line of argument must fail for several reasons.

10/ In these decisions the Authority implicitly reads section 7121(a)(1) of the Statute as compelling a different approach from that followed in the private sector, where, the Supreme Court has now made clear, the question of arbitrability is for the courts to decide in the first instance. AT&T Technologies v. Communications Workers, 475 U.S. 643, 649-651 (1986).

First, the Authority has held that an arbitrator may have authority in an appropriate case to remedy an act of misconduct toward an employee by ordering that discipline be taken against the offending supervisor. Veterans Administration Hospital, Fort Howard, Maryland and Maryland Nurses Association, Fort Howard Chapter, 11 FLRA 10 (1983). Second, and consistent with the Authority's treatment of questions of arbitrability in general, the asserted lack of authority in the arbitrator does not permit a preemptive refusal to follow the procedures applicable in all arbitration cases. The negotiated procedure must proceed to the arbitration stage. Once the arbitrator has made her or his award, the employer may except both as to its substance and even, at that stage, as to the arbitrability of the grievance. See, e.g., Headquarters, 97th Combat Support Group (SAC), Blytheville Air Force Base, Arkansas and American Federation of Government Employees, AFL-CIO, Local 2840, 22 FLRA 656 (1986).11/ Third, even assuming that the arbitrator lacks authority to compel discipline, it does not follow that he or she will be unable to fashion an appropriate award.12/ Thus, the Union still needs the information to assess the wisdom of proceeding with an arbitration hearing and to prepare its case. In short, the Respondent has not rebutted the General Counsel's prima facie showing that the information is necessary.

3. The Privacy Act Defense

The Privacy Act, 5 U.S.C. § 552a, prohibits a Federal agency from disclosing certain information concerning individuals, without their consent. Exceptions to this prohibition include disclosure that is required by the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and for a "routine use" as defined in the Privacy Act. The Respondent

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11/ But cf. U.S. Small Business Administration, 32 FLRA 847, 852-854 (1988) (grievance involving question of bargaining unit status should be held in abeyance pending the filing of a clarifications of unit petition.)

12/ The underlying grievance must be distinguished from the particular remedy sought. Thus, this case is unlike Director of Administration, Headquarters, U.S. Air Force, 17 FLRA 372, 375 (1985), where the Authority declined to require the parties to proceed to arbitration over an issue (termination of a probationary employee) that was, as a matter of law, not cognizable under any grievance procedure negotiated under the Statute.

contends that disclosure of the requested information concerning disciplinary action taken against its supervisor is prohibited by the Privacy Act.

The Authority has held that both the FOIA exception to the Privacy Act, found at 5 U.S.C. § 552a(b)(2), and the "routine use" exception, found at 5 U.S.C. § 552a(b)(3), are applicable to union requests for information made pursuant to section 7114(b)(4) of the Statute. Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA 788 (1986), enforced in part and remanded sub. nom. U.S. Department of Agriculture and Farmers Home Administration Finance Office, St. Louis, Missouri v. FLRA, 836 F.2d 1139 (8th Cir. 1988). The FOIA exception requires a balancing of the competing interests of the public, in promoting collective bargaining through disclosure to the union, against employees' privacy interests. In contrast, Farmers Home treats the "routine use" exception as permitting disclosure under section 7114(b)(4) of the Statute in any case where the requested information is found to be "necessary" within the meaning of section 7114(b)(4). Id. at 793-794. This distinction strongly suggests, to say the least, that the "routine use" exception comes into play as soon as the requisite necessity is established and without further weighing of competing interests. See, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Omaha District, Omaha, Nebraska, 25 FLRA 181, 186 (1987). Under that rationale, I must conclusively reject the Respondent's Privacy Act defense.

However, without expressly abandoning the separate "routine use" rationale, the Authority has appeared in more recent cases to be disinclined to invoke it; it has relied solely on the FOIA exception, and has applied the balancing test. See Tidewater Virginia Federal Employees Metal Trades Council AFL-CIO, 31 FLRA 131, 143-144 (1988); Merit Systems Protection Board Professional Association, 30 FLRA 852, 856-858 (1988); Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 25 FLRA 1060, 1062-1063 (1987). Cf. Rolla Research Center, U.S. Bureau of Mines, Rolla, Missouri, 29 FLRA 107, 113, 146-148 (1987) (Administrative law judge rejected Privacy Act defense based on FOIA and "routine use" exceptions. Authority, in affirming, relied only on FOIA balancing test.) The Authority has gone even further to cause doubt regarding the continued viability of the "routine use" branch of the Farmers Home rationale. Thus, it has foregone the opportunity to use it in cases where application of the balancing test favored the individual employees' privacy interest and resulted in a finding that certain disclosures were contrary to the Privacy Act. Department of Defense, Office of Dependents Schools, 28 FLRA 871, 883

(1987); American Federation of Government Employees, Local 12, AFL-CIO, 26 FLRA 273, 277-279 (1987). I conclude, therefore, that notwithstanding the precedential authority of Farmers Home, it behooves me to engage in the more judgmental task of balancing the competing interests to determine the applicability of the FOIA exception.

This case is unusual in that the distinction between a sanitized and a non-sanitized record as the subject of the request is blurred. The Union is not seeking the identity of the individual whose personnel record is sought, as it already knows his identity. It also knows that, according to the Respondent, some action has been taken regarding the supervisor in question. Essentially the only missing information the revelation of which would impinge on the individual's privacy interest is the nature of the personnel action.13/

The public interest in giving the Union the benefit of this limited information, for the reasons cited above in finding that the information is necessary, and especially because it might result in bringing the grievance to a satisfactory conclusion without further proceedings, is substantial. Given this, it would be difficult to find that disclosure would constitute, in the language of the applicable FOIA exemption, a "clearly unwarranted invasion of personal privacy." See AAFES, supra, 25 FLRA at 1062; National Treasury Employees Union, Chapter 237, 32 FLRA 62, 68-72 (1988).

Correspondingly, the individual's privacy interest, while substantial, is not threatened so much by a clarification of what action has been taken against him as by the fact that his name is already associated in the minds of union officials and at least some employees with the incident that gave rise to the grievance. Dissemination of the disclosed information is unlikely to go, and should not go, beyond those persons directly concerned with the grievance-arbitration proceeding. This, too, militates in favor of disclosure. U.S. Equal Employment Opportunity Commission, Washington, D.C., 20 FLRA 357, 362 (1985); AAFES, supra, at 1063. 14/

13/ Should it turn out that the "action" taken was nominal, the stigmatizing effect of revealing it and the accompanying legitimate interest in suppressing it are somewhat abated.

14/ The Respondent has requested that, in the event disclosure is ordered, a "strict protective order," running

(footnote continued)

I therefore conclude that the Union was entitled to the information requested and that the Respondent violated Sections 7114(a)(1), (5), and (8) of the Statue by refusing to provide 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 Department of the Air Force, Scott Air Force Base, Illinois shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the final decision letter, requested by National Association of Government Employees, Local R7-23, SEIU, AFL-CIO, the employees' exclusive representative, concerning the supervisor whose conduct on or about March 6, 1987, is the subject of a grievance.

(b) In any like or related manner interfering with, restraining or coercing its 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 upon request of National Association of Government Employees, Local R7-23, SEIU, AFL-CIO, the requested final decision letter.

14/ (Footnote continued)

against the Union, should accompany it. I have been cited no instance, nor am I aware of any, where the Authority has sanctioned such a protective order. Of equal importance, I am not satisfied as to how to enforce such an order. Cf. Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, 30 FLRA 127, 155 (1987). It should be sufficient, instead, to remind the Union, as in EEOC and AAFES, supra, of the expectation that this sensitive information, released for a limited purpose, will not be disseminated beyond those with a demonstrated need to share it for that purpose.

(b) Post at its facilities at the Scott Air Force Base copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt, the forms will be signed by a senior official of the Department of the Air Force, Scott Air Force Base, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

Issued, Washington, D.C., September 21, 1988

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the final decision letter requested by National Association of Government Employees, Local R7-23, SEIU, AFL-CIO, the employees' exclusive representative.

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

WE WILL, furnish upon request of National Association of Government Employees, Local R7-23, SEIU, AFL-CIO, the requested final decision letter.

_____

(Agency or Activity)

Dated: _____ By: _____

(Signature)

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 V, whose address is: 175 W. Jackson Boulevard, Suite 1359-A, Chicago, IL 60604, and whose telephone number is: (312) 353-6306.