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

DEPARTMENT OF THE NAVY, UNITED STATES MARINE CORPS (MPL) WASHINGTON, D.C. and MARINE CORPS LOGISTICS BASE ALBANY, GEORGIA Respondent	
and	Case No. 4-CA-70121
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2317 Charging Party	
and	
DEPARTMENT OF THE NAVY, UNITED STATES MARINE CORPS MARINE CORPS BASE CAMP LEJEUNE, NORTH CAROLINA Respondent	
and	Case No. 4-CA-70189
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2065 Charging Party	

Robert J. Gilson
For the Respondents

Pamela Jackson, Esq.
For the General Counsel

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. Pursuant to charges filed by Locals 2317 and 2065 (herein the Union), a Consolidated Complaint and Notice of Hearing was issued on March 25, 1987 by the Regional Director, Region IV, Federal Labor Relations Authority, against Respondents.

The Complaint alleged, in substance, that Respondents violated Section 7116(a)(1), and (5) and (8) of the Statute by failing and refusing to furnish the Unions, upon request, with the names and home addresses of the bargaining unit employees represented by the Unions, as required by Section 7114(b)(4) of the Statute.

Respondents' Answer admitted: (a) the jurisdictional allegations; (b) that the Union requested the names and home addresses of bargaining unit employees; (c) that Respondents denied the Union's request for the information; (d) that the names and home addresses so requested are normally maintained by Respondents in the regular course of business; (e) that such information is reasonably available; and (f) that such information does not constitute guidance, advice, counsel or training for management officials or supervisors, relating to collective bargaining. Respondents assert that alternative means of communicating with employees are entirely adequate for the Union's purposes, that the information requested is not necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining, that the Privacy Act precludes disclosure of such data, and that the Union, in any event, waived its claimed right to such data in contract negotiations.1/

The facts herein, as well as all contentions raised by Respondents, save waiver, are substantially the same as were present in Farmers Home Administration Finance Office, St. Louis, Missouri, 23 FLRA 788 (1986), affirmed in U.S. Department of Agriculture, Farmers Home Finance Administration,

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1/ Respondents stipulated that Marine Corps Headquarters "advised the Command not to provide the home addresses . . . and, indeed, if an unfair labor practice was committed, it was largely committed by them."

St. Louis, Missouri v. FLRA, Nos. 86-2579, 87-1024 (8th Cir. Jan. 15, 1988). The Authority has held that the release of names and home addresses of bargaining unit employees to the exclusive representative of those employees is not prohibited by law, is necessary for unions to fulfill their duties under the Statute, and meets all of the other requirements established by Section 7114(b)(4). Further, it determined that the release of the information is required without regard to whether alternative means of communication are available. It therefore rejected in Farmers Home and later cases the argument that the release of the information sought by the Union herein is prohibited by law and is not necessary. See United States Department of Health and Human Services, Social Security Administration v. FLRA, Nos. 87-3513(L), 87-3514, 87-3515 (4th Cir. Nov. 25, 1987), affirming Department of Health and Human Services, Social Security Administration, 24 FLRA 543 (1986); United States Department of the Air Force, Scott Air Force Base, Illinois, Nos. 87-1143 and 87-1272 (7th Cir. January 27, 1988), affirming Department of the Air Force, Scott Air Force Base, Illinois, 24 FLRA 226; 22nd Combat Support Group (SAC), March Air Force Base, California, 30 FLRA No. 72 (1987); Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, New York Region, 24 FLRA 583 (1986).

Respondents' waiver defense is based on the bargaining history leading to the 1985 contract, which they assert culminated in an abandonment by the Union of its request for names and addresses in return for management's relinquishment of its right to confine Union distribution of literature to nonwork areas. As there was a quid pro quo for the Union's decision to drop its demand, management contends, a clear and unequivocal waiver of such claimed right occurred. General Counsel views such bargaining history as establishing no more than an unsuccessful effort to secure the contractual right to such information, unaccompanied by any statement or action clearly and unequivocally establishing that the Union thereby waived its statutory right to the data. General Counsel notes in this connection that the right assertedly waived was not at that time even recognized by the Authority, that the contract's language is silent as to any waiver, or exchange of one right for another, and that the contract does not even establish that the Union gained the right to distribute in nonwork areas, being silent respecting the locus of any distribution.

The history was as follows. The Union began by requesting that it be furnished with the names and addresses

of bargaining unit employees. Management voiced its belief that the Privacy Act prohibited the release of such information. Its first counterproposal offered contractual recognition of the Union's right (already in fact exercised) to distribute literature in nonwork areas during the nonwork time of the representatives and the employees, provided it was "accurate and free of scurrilous material."

Much discussion and even heated argument ensued over management's right to censor or even define "scurrilous," as well as the meaning of "work area." The next Union proposal retained the provision for a semi-annual list of all employees and their addresses and added the right to distribute literature during nonwork time, without reference to work or nonwork area. Management's counter left the solicitation/distribution clause unchanged, but proposed to furnish semi-annually the names and work locations of all employees. Several Union negotiators indicated that they did not wish the addresses of employees who were unwilling to have their addresses disclosed. The Union's next proposal accepted management's offer to furnish all employee names and work locations semi-annually, with a monthly updating of new hires, and added a request that management furnish all employees with a card, together with a cover letter from the Union, on which employees could provide the Union with job information as well as home addresses and telephone numbers should they be willing to do so. Management responded by striking out the limitation on the distribution rule to nonwork areas, but retaining the requirement that the literature be accurate and free of scurrilous material. Finally, management dropped these last requirements, and the Union dropped its requests for the home addresses and for distribution of its information cards. Other unresolved matters went on through mediation/arbitration and agreement was finally reached some six months later.

The eventual settlement of the general dispute over the means of Union communication with its constituency was, of course, achieved only after much discussion. It is the uncontroverted testimony of management's chief negotiator that he made a final and successful effort to persuade the union to give up its persistent attempt to secure addresses and to settle for his offer to make available names and work location plus a rule permitting distribution of materials in work areas. He expressly pointed out that management would thereby be giving the Union a contract right which it did not have by law. Thus: "We'll allow you to do something that you cannot do by law. We'll allow you to distribute in a work area in return for not making home

addresses available. That will make home addresses irrelevant to you." The Union team indicated it would consider the proposal, caucused, and, in it next proposal, omitted any reference to home addresses.

A Union negotiator testified that there was no discussion "concerning the exchange of statutory rights for Article 6, Section 7 of the agreement" (the distribution rule) and that "(t)here was no waiver or anything such as that granted." He further said that he did not believe the Union had a statutory right - "nor was it ever expressed across the table from Management's side that we had a statutory right" to home addresses. Thus the only Union witness denies something management's witness did not claim - that there was an explicit exchange of claimed statutory rights, the Union giving up its "right" to addresses for management's giving up its right to prohibit distribution of literature in work areas. I thus see no conflict requiring a credibility resolution, but rather find both accounts true.

It is clearly Respondents' legal position that the Union put aside its request for home addresses - information it believed it was entitled to under law - as a quid pro quo for the Marines' willingness to give broader distribution rights than are required by law. It is, of course, also clear that management always took the position that the Union was not entitled to home addresses. Thus, there is no contention that rights were explicitly exchanged, but only that management yielded on its right to prevent work area distribution and that the Union dropped its demand for home addresses in return for this greater opportunity to communicate with employees at the work site. It argues, then, that the Union's conduct, considered against the backdrop of managements words which offered an exchange, show clearly and unequivocally that the Union waived its claimed right to the information.

General Counsel, as noted, contends that the evidence does not establish a quid pro quo, because the contract is silent on any such exchange and does not, by its terms, show that the Union gained the right to distribute literature in work areas. I reject the latter argument, finding it clear that elimination of the prior contract's language confining distribution to nonwork areas and the discussions concerning the problem, establish that the Union is now entitled to broader distribution rights. As to the former point, I have found that the Union responded to an explicit offer to so broaden its rights, in return for not making addresses available, by accepting the modified distribution rule and

by dropping without further explanation its request for addresses. Thus, it did not expressly assent to the proposed swap, and it certainly did not expressly waive its right to the data sought, but the combination of management's words and the Union's conduct convincingly demonstrates that an exchange took place. That is to say, this is not a case where a union simply failed to achieve a demand. Rather it is one where it accepted a palatable substitute clearly offered in return for abandonment of its own demand. Does such a history clearly establish - free from doubt or ambiguity - that the Union waived its right to the information sought?

The Authority recently said the following in connection with claimed waivers of statutory rights.2/

> The second category of waiver, clear and unmistakable waiver as evidenced by bargaining history, concerns subject matters which were discussed in contract negotiations but which were not specifically covered in the resulting contract. In this category, waiver may be found, based on a case-by-case analysis of the facts and circumstances of each case, where the subject matter of the proposal offered by the union during mid-term negotiations was fully discussed and explored by the parties at the bargaining table. For example, where a union sought to bargain over a subject matter but later withdrew its proposal in exchange for another provision, a waiver of the union's right to bargain over the subject matter which was withdrawn would be found. (Emphasis mine.)

That case involved the right of a union to require midterm negotiations over matters which were not contained in the collective bargaining agreement. Thus, as in the instant case, the question was whether the union had waived its statutory right to bargain over its proposals either expressly or by its conduct in the negotiations which led to the agreement. The Authority concluded in that case that no

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2/ Internal Revenue Service, 29 FLRA 162, 167.

waiver had occurred, where the evidence showed only that the union had submitted proposals during precontract negotiations which were, for unexplained reasons, not included in the collective bargaining agreement.

Withdrawal of a contract proposal, or failure to pursue a demand do not of themselves indicate waiver. Rather, the evidence must show that the parties "fully discussed," or "consciously explored" the subject matter at issue, and that the union "consciously yielded" or "knowingly relinquished" its right to raise the matter for whatever term the contract sets such matters at rest. Where, as here, statutory rights as opposed to some mere contractual gain is involved, waivers will not be lightly inferred but must be very clear.

These principles are easier to state than to apply. Here there undoubtedly was "full" (and prolonged) discussion of the Union's desire for home addresses as well as the entire related subject of alternative methods for communicating with unit employees. For whatever it means, the subject was "consciously explored" again at considerable length. But "consciously yielded" or "knowingly relinquished" are something else. In the private sector this has really required an explicit relinquishment,3/ or at least, a very clear and specific yielding on the disputed issue.4/

Here, the Union never agreed that management had the right to refuse to disclose home addresses. But it did by its silence, give every appearance that it had no real

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3/ See, e.g. Timken Roller Bearing Co. v. N.L.R.B., 325 F.2d 746, 751 (CCA-6, 1963) The Court observed that the union might have surrendered its statutory right to the wage information unsuccessfully sought as a contract term, as a part of the bargaining agreement, but that such a relinquishment had to be in "clear and unmistakable language." It did not even discuss a trade-off. It noted only that failure to include the right sought in the contract would constitute a waiver when that right was a creature of contract (as, say, 10¢ more per hour) and thus "failure to include it in the agreement necessarily results in failure to acquire it."

4/ See, e.g. The Press Company, Inc., 121 NLRB 976, 979. The discussion therein of Spiedel Corporation suggests that a waiver may be found where a union's silence in the face of an employer's assertions indicates acquiescence in that position, in all the circumstances.

practical use for such data given management's willingness to provide access to its work areas. Management's offer to provide the kind of access not required by law was expressly made as a quid pro quo to the Union's abandonment of its persistent pursuit of home address. However, it was not cast as an exchange of rights, as such. Rather, management said that its offer of a distribution rule more generous than the law required it to give would afford the Union less expensive and more effective access to employees, thus rendering home addresses "irrelevant." And its offer to do so was expressly contingent upon the Union's dropping its demand for addresses. While the Union used no words indicating it would relinquish its statutory right to addresses, it responded to the offer by omitting the demand in its next counterproposal, while accepting the other half of the loaf. Such conduct in my judgment clearly and unambiguously demonstrates that the Union accepted both ends the trade-off offered by management. It uttered no words suggesting that its acceptances of greater distribution rights would not affect its right under the Statute to secure home addresses. In such circumstances I conclude that the Union took the bitter with the sweet, and waived its right to home addresses so long as its contract foreclosed bringing up new matter. As in Spiedel, supra, its very silence in the face of the contingent offer it accepted shows clearly in the circumstances that it agreed to, or acquiesced in, the trade-off envisioned by management's offer.

Based on the foregoing, it is concluded that Respondent's refusal and failure to furnish the Union herein with the names and home addresses of bargaining unit employees was not violative of Section 7116(a)(1)(5) and (8) of the Statute.

Accordingly, it is recommended that the Authority issue the following:

ORDER

The Complaint is dismissed.

Issued, Washington, D.C., August 2, 1988.

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge