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

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| DEPARTMENT OF THE AIR FORCE, SACRAMENTO AIR LOGISTICS CENTER, McCLELLAN AIR FORCE BASE, CALIFORNIA<br><br>Respondent | |
| and | Case No. 9-CA-80341 |
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1857, AFL-CIO<br><br>Charging Party | |

Bruce P. Waggoner, Esq.
For Respondent

Susan E. Jelen, Esq.
For General Counsel of FLRA

Tony Roberts
For Charging Party

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. § 7101 et seq., (hereinafter called the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

American Federation of Government Employees, Local 1857, AFL-CIO, herein called AFGE Local 1857, filed herein a Charge, First Amended Charge and Second Amended against Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, herein called McClellan AFB. Pursuant to the foregoing the General Counsel

of the FLRA, by the Regional Director of Region IX, issued a Complaint and Notice of Hearing alleging that McClellan AFB violated Sections 7116(a)(1), (5) and (8) of the Statute by failing to provide AFGE Local 1857 with a requested document. McClellan filed a timely answer denying it had violated the Statute.

A hearing was held before the undersigned in Sacramento, California. McClellan AFB, AFGE Local 1857, 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 and my evaluation of the evidence, I make the following:

## Findings of Fact

There is no dispute as to the basic facts in this case.

At all material times the American Federation of Government Employees, AFL-CIO, herein called AFGE, has been certified as the exclusive representative for an appropriate consolidated nationwide unit of employees of the Air Force Logistics Command, herein called AFLC, including non-supervisory employees at McClellan AFB who are paid from appropriated funds and are serviced by the Civilian Personnel Office. At all times material AFGE Local 1857 has been an affiliate of AFGE and its agent for the purposes of representing unit employees at McClellan AFB.

A Notice of Proposed Reprimand was issued on December 18, 1987, to Mr. Charles Standfield, a bargaining unit employee of McClellan AFB. The proposed discipline was signed by Standfield's first level supervisor, Joseph McGruder. Standfield worked in MADTA, a division within the directorate of maintenance. Standfield's second level supervisor was Charles Wall and his third level supervisor was Richard Jeffrey, Chief of the Plant Management Division.

Standfield was represented in the proposed discipline by AFGE Local 1857 Senior Steward Casterdarrlyn Rhodes. Under the discipline procedure Standfield and his representative had the right to make oral and/or written reply to the proposed discipline. Once the final decision was made regarding the proposed action and the final notice of discipline was issued a grievance could be filed contesting the final decision. The grievance procedure included arbitration, if requested.

The response to the proposed discipline was to be filed with Wall, but because Wall retired, Jeffrey became the deciding official in the proposed discipline. In December 1987, AFGE Local 1857 filed its written response to the proposed discipline. On January 7, 1988, Rhodes and Standfield met with Jeffrey for the oral response to the proposed discipline. Rhodes asked Jeffrey to remove himself as the deciding official on the proposal because Jeffrey had allegedly already approved the decision to discipline Standfield and therefore the proceedings were not fair. Jeffrey did not respond and did issue a decision that upheld the proposed reprimand of Standfield.

Upon receipt of the decision to reprimand Standfield, AFGE Local 1857 filed a grievance on Standfield's behalf. The grievance was processed through the stages of the grievance procedure and was eventually submitted for arbitration. An arbitration hearing was held and the arbitrator sustained the grievance and Standfield's reprimand was removed.

During preparation for the arbitration Rhodes and Chief Steward Tony Roberts determined a copy of the discipline coordination sheet was needed to present the grievance. By letter dated April 14, 1988, AFGE Local 1857 requested it be furnished a copy of the discipline coordination sheet for Standfield's proposed discipline pursuant to Section 7114(b)(4) of the Statute. This letter requested a copy of the coordination sheet "Showing names and dates of management officials who, by signature, coordinated on the proposed discipline (reprimand) . . ." The letter went on to state the information was needed for a full and proper discussion, understanding and processing of the grievance and that it was also needed for pursuing the union's representational duties in connection with the case and its submission for arbitration.

By letter dated April 22, 1988, McClellan AFB refused to furnish the requested discipline coordination sheet because it was an "internal management document" and because it did not have any bearing on the grievance.

By letter dated May 6, 1988, AFGE Local 1857 renewed its request for the discipline coordination sheet because the union wasn't sure if McClellan AFB's April 22 letter was a rejection of the request.

By letter dated May 10, 1988 McClellan AFB repeated its refusal to provide the requested discipline coordination sheet.

During this time period, most likely on or about April 21, 1988, Tim Harvey, a McClellan supervisory employee relations specialist, telephoned Tony Roberts to discuss the union's request. Roberts explained that AFGE Local 1857 needed the discipline coordination sheet to support the union's theory there had been predetermination in the discipline procedure because the deciding officials in the proposed discipline procedure had already participated in the coordination of the proposed discipline prior to the proposed action being issued to the employee.

McClellan AFB never furnished AFGE Local 1857 with a copy of the discipline coordination sheet. The discipline coordination sheet for Standfield's proposed discipline was signed by an employee relations specialist on December 3, 1987; by Harvey on December 4, 1987; by Chauncy Williams of the Judge Advocate Generals Office on December 9, 1987; by Wall on December 11, 1987; and by Jeffrey on December 11, 1987.

The letter of proposed discipline was issued to Standfield on December 18, 1987. At the bottom of the discipline coordination sheet is a preprinted sentence that stated "I have reviewed the _____ 1/ letter and agree that it is appropriate on merit and is procedurally correct.", which was then signed on December 4, 1987, by G. W. Baddly. At the top of the sheet it stated that the subject was "Notice of Proposed Reprimand" and that it was to:

> "Charles E. Standfield
> Forklift Operator, WG-6
> MADTA"

There are no other comments or notations on the Standfield discipline coordination sheet.

At McClellan AFB, prior to the issuance of any proposed discipline of a civilian employee, the proposed discipline file was covered by a discipline coordination sheet which was circulated among several supervisors and management officials. The purpose of the discipline coordination sheet was to designate the various offices which must coordinate the particular action, but in every case the Base Civilian Personnel Office and the Base Legal Office are included.

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1/ This space was filled in with "Notice of Proposed Reprimand."

The discipline coordination sheet also provides space where the signers can write comments about problems which that individual might have with the particular proposed discipline. The officials listed on the discipline coordination sheet have significant influence on possible changes in the proposed discipline or whether the proposed discipline is imposed. The Judge Advocate General must review all such proposed discipline for legal sufficiency. There might be comments and recommendations on the discipline coordination sheet by the Judge Advocate General's representative, or by various offices that deal with drug and alcohol abuse. There are no such comments on the Standfield's discipline coordination sheet and in fact there are no comments. In Standfield's case the fact that all officials signed the discipline coordination sheet without comment indicates no problems were evident to the signatory management officials.

Discussion and Conclusions of Law

Section 7114(b)(4) of the Statute requires an agency to provide, upon request of the exclusive representative of employees and to the extent not prohibited by law, data which is normally maintained by the agency in the regular course of business; which is reasonably available and necessary for full and proper discussion of subjects within the scope of collective bargaining; and which does not constitute guidance, advice or counsel relating to collective bargaining.

There is no dispute in the subject case that AFGE Local 1857 requested a copy of Standfield's discipline coordination sheet and that the discipline coordination sheet was normally maintained and reasonably available.

McClellan AFB contends, however, that the discipline coordination sheet was not necessary for a full and proper discussion of subjects within the scope of collective bargaining. The FLRA has held that the Section 7114(b)(4) obligation to provide information includes information requested by a union in connection with representation of an employee concerning a disciplinary action and with the processing of grievances. U.S. Equal Employment Opportunity Commission, Washington, D.C., 20 FLRA 357 (1985), hereinafter referred to as EEOC; Veterans Administration, Washington, D.C. and Veterans Administration Regional Office, Buffalo, New York, 28 FLRA 260 (1987), hereinafter referred to as VA; and Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, 30 FLRA 127 (1987), hereinafter referred to as NOAA.

I conclude that the discipline coordination sheet was data necessary for AFGE Local 1857 to adequately represent Standfield in his grievance and for the union to determine which arguments on behalf of Standfield were appropriate and whether to proceed to arbitration. This document would have assisted AFGE Local 1857 in determining, and then arguing in a grievance and arbitration, that Jeffrey had been involved in processing and approving the proposed discipline and therefore, arguably, was not an appropriate official too whom to appeal the appropriateness of the proposed discipline. McClellan AFB argues the discipline coordination sheet was not necessary because AFGE Local 1857 was able to elicit the information at the arbitration hearing by questioning Jeffrey. This contention is rejected. AFGE 1857 could reasonably use the requested document to evaluate and determine whether to proceed to arbitration and what arguments to make. The union should be able to determine how it wishes to proceed and establish its case rather than have that determined by McClellan AFB. The union should not be compelled by McClellan AFB to have the union's case solely based on the testimony of one of McClellan's managers. Accordingly, I conclude that the discipline coordination sheet constitutes data necessary for full and proper discussion of subjects within the scope of collective bargaining within the meaning of Section 7114(b)(4) of the Statute. See NOAA, supra.

McClellan also contends that it is not compelled by Section 7114(b)(4) of the Statute to provide the discipline coordination sheet to AFGE Local 1857 because such sheet might contain comments concerning any alcohol or drug problems that might affect the employee. Therefore such document should not be provided because of Privacy Act limitations, citing 42 USC 290 dd-3. Such contention is rejected because the document in question in fact contained no such information and therefore providing the document to the union would have revealed no such information. Of course each particular case must be judged on its own facts and any document that contains information protected by the Privacy Act either must be appropriately sanitized or not provided if sanitization is not possible or practical.2/

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2/ Of course where a union is representing a grievant, as in the subject case, the grievant could waive his Privacy Act protections and permit the activity to provide the document to the union.

In NOAA, supra, the FLRA found that a document from the agency labor relations officer concerning options relative to an alleged altercation and recommending no discipline, constituted guidance, advice and counsel within the meaning of Section 7114(b)(4) of the Statute. In the same case the FLRA concluded that memoranda that merely restate the facts of a matter are not such guidance, advice and counsel. See also the decision of the Administrative Law Judge in National Labor Relations Board, 2-CA-50471, OALJ-89-131 (1989), hereinafter called NLRB III.

The Air Force Regulations that provide for the coordination of disciplinary actions, Air Force regulation 40-750 (A) 7, requires coordination of proposed disciplinary actions including initial review by the civilian personnel office for merit and procedures and circulation to other staff members, including at least such coordination with the judge advocate and its signatures for legal sufficiency. McClellan AFB includes in the circulation of the discipline coordination sheet managers within the Directorate in which the disciplined employee works. The persons to whom the discipline coordination sheet is circulated may write comments about their views of the appropriateness, legal adequacy, etc., of the proposed discipline, or, if they approve with no comment necessary, they may merely sign and date the discipline coordination sheet. The signatures on the discipline coordination sheet by the judge advocate's representative, the civilian personnel office and the directorate managers, with no comments, indicate each's general approval of the proposed discipline.

McClellan AFB argues, in the light of NOAA, supra, that because the discipline coordination sheet might contain comments or statements that might constitute guidance, advice or counsel relating to collective bargaining, within the meaning of Section 7114(b)(4) of the Statute, it therefore is not be available to AFGE Local 1857. I reject this argument because Standfield's discipline coordination sheet, in fact, contained no comments or statements at all. Thus, there were actually no comments on the discipline coordination sheet which constituted guidance, advice or counsel within the meaning of Section 7114(b)(4) of the Statute. McClellan was not privileged to withhold the document because of guidance, advice or counsel which was not, in fact, present on the document but which potentially might be on such a document. Rather, in those situations when such privileged information is actually present, McClellan AFB can sanitize the discipline coordination sheet and remove such privileged information. However, when no such guidance, advise or counsel is present, as here, then the statutory privilege to withhold such information, necessarily does not attach.

It could be argued that the presence of the signature, and date, with no comments, constitutes guidance, advice or counsel, because it indicates general approval of the proposed discipline by each signer. This argument was more implied than expressly argued by McClellan AFB. I conclude a signature and date alone do not constitute guidance, advice, counsel or training within the meaning of Section 7114(b)(4) of the Statute. The presence of the signature, with no comments, signifying approval of the proposed discipline does not really tell or advise the agency of anything additional and does not constitute or reflect written deliberations, a thought process or philosophy which is privileged from disclosure. See NLRB III, supra. Rather the signatures are part of the proposed discipline procedure which indicate the proposed discipline can be forwarded to the next stage for review. These signatures, without comments, therefore, do not establish the privilege that protects the document from disclosure to the union under Section 7114(b)(4) of the Statute. See NOAA, supra.

Similarly, I reject any argument that requiring McClellan AFB to turn over the discipline coordination sheet to the union would somehow violate an attorney/client privilege or attorney work product privilege. Without reaching whether any attorney/client privilege is present, there were no comments or statements by the judge advocate general's office, and thus I find no privilege can be raised.

It could be argued that even though the discipline coordination sheet included no guidance, advice or counsel, it need not be provided because, under Section 7106 of the Statute, it would have improperly injected the AFGE Local 1857 into management's internal deliberative process concerning management's right to discipline employees under Section 7106(a)(2)(A) of the Statute. The FLRA made such a finding and analysis concerning a document involving a management decision with respect to a part-time work assignment. National Labor Relations Board, 26 FLRA 108 (1987), hereinafter called NLRB I. The Court of Appeals for the District of Columbia remanded this case to FLRA because the court concluded that Section 7106 of the Statute does not forbid the disclosure of such information and, thus, there is no such bar to the disclosure of such information under Section 7114(b)(4) of the Statute and that the FLRA had to decide whether the disclosure of the memorandum in question was otherwise barred by Section 7114(b)(4) of the Statute. National Labor Relations Board Union, Local 6 v. FLRA, 842 F.2d 483 (D.C. Cir. 1988), hereinafter called NLRBU Local 6. The FLRA accepted this remand without

reservation or limitation and, in turn, remanded the case so a finding can be made by an administrative law judge as to whether the memorandum constituted guidance, advice, counsel or training. National Labor Relations Board, 32 FLRA 305 (1988), hereinafter called NLRB II.3/ The FLRA in no other case had concluded that information was protected from disclosure to a union because the information was, in effect, protected by management's rights set forth in Section 7106(a)(2) of the Statute. Accordingly, because the FLRA accepted the D.C. Circuit Court of Appeals' remand in NLRBU Local 6, supra, with no comments or reservations, NLRB II, supra, and in the absence of any other FLRA case to contrary, I conclude the FLRA accepted the DC Circuit Court of Appeals analysis and conclusion that Section 7106(a)(2) of the Statute does not establish a privilege to withhold information from a union. Accordingly, I conclude that McClellan AFB had no privilege under Section 7106(a)(2) of Statute to withhold the discipline coordination sheet in the subject case.

In light of all of the foregoing I conclude that the Standfield's discipline coordination sheet did not constitute guidance, advice, counsel or training for management officials or supervisors under Section 7114(b)(4)(C) of the Statute and McClellan's failure and refusal to provide this document constituted a failure to comply with its obligation under Section 7114(b)(4) of the Statute and hence was violative of Section 7116(a)(1)(5) and (8) of the Statute.

Having concluded that McClellan violated Section 7116(a)(1)(5) and (8) of the Statute it is recommended 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, Sacramento Air Logistics Center, McClellan Air Force Base, California, shall:

1. Cease and desist from:

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3/ The Administrative Law Judge in NLRB III, supra, concluded the memorandum was not guidance, advice, counsel or training, except for its last sentence and its footnote, which he indicated should be deleted when the document is provided to the union.

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 1857, AFL-CIO, the exclusive representative of a consolidated nationwide unit of certain employees, a copy of the December 1987 discipline coordination sheet concerning Charles Standfield.

(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 the American Federation of Government Employees, Local 1857, AFL-CIO, the exclusive representative of a consolidated nationwide unit of certain employees, a copy of the December 1987 discipline coordination sheet concerning Charles Standfield.

(b) Post at its McClellan Air Force Base, California facilities, 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, 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 IX, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103, 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., November 15, 1989

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 and refuse to furnish the American Federation of Government Employees, Local 1857, AFL-CIO, the exclusive representative of a consolidated nationwide unit of certain employees, a copy of the December 1987 discipline coordination sheet concerning Charles Standfield.

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, upon request, to the American Federation of Government Employees, Local 1857, AFL-CIO, the exclusive representative of a consolidated nationwide unit of certain employees, a copy of the December 1987 discipline coordination sheet concerning Charles Standfield.

_____
(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 IX, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 995-5000.