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

NATIONAL PARK SERVICE NATIONAL CAPITAL REGION UNITED STATES PARK POLICE Respondent	
and	Case Nos. 3-CA-60168 3-CA-60182 3-CA-60183 3-CA-60288
POLICE ASSOCIATION OF THE DISTRICT OF COLUMBIA Charging Party	

Robert Kates, Esquire
Beatrice G. Chester, Esquire
For the Respondent

Joseph V. Kaplan, Esquire
For the Charging Party

Peter A. Sutton, Esquire
Saul Y. Schwartz, Esquire
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

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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)."

Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether recommendations of supervisors or managers, are disclosable under § 14(b)(4)(B) and/or (C) of the Statute. For reasons set forth hereinafter, I find that the information withheld was guidance, advice or counsel within the scope of collective bargaining and, therefore, exempt from disclosure pursuant to § 14(b)(4)(C). In addition, the information withheld was not necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining pursuant to § 14(b)(4)(B) and, accordingly, also exempt from disclosure thereunder.

This consolidated case involves four separate cases. The charge in Case No. 3-CA-60168 was filed on March 3, 1986 (G.C. Exh. 1(a)); the charge in Case No. 3-CA-60182 was filed on March 13, 1986 (G.C. Exh. 1(c)); the charge in Case No. 3-CA-60183 was filed on March 13, 1986 (G.C. Exh. 1(e)); and the charge in Case No. 3-CA-60288 was filed on May 6, 1986 (G.C. Exh. 1(g)). An Order Consolidating Cases and Complaint and Notice of Hearing issued in Case Nos. 3-CA-60168, 60182 and 60183 on May 23, 1986 (G.C. Exh. 1(i)); the Complaint and Notice of Hearing in Case No. 3-CA-60288 issued on June 16, 1986 (G.C. Exh. 1(j)); and Order Consolidating all four cases issued on June 18, 1986 (G.C. Exh. 1(l)). By Order dated August 4, 1986, the parties having entered into a stipulation of facts, the cases were transferred to the Authority (G.C. Exh. 1(n)); and on March 31, 1987, the Authority's decision issued (G.C. Exh. 1(o), 26 FLRA No. 53, 26 FLRA 441 (1987)). On appeal, the United States Court of Appeals for the District of Columbia Circuit, National Labor Relations Board Union, Local 6 v. FLRA and Police Association of the District of Columbia v. FLRA, 842 F.2d 483 (D.C. Cir. 1988), vacated the Authority's decision herein, as well as the Authority's decision in National Labor Relations Board and National Labor Relations Board Union, Local 6, 26 FLRA 108 (1987), and remanded for the Authority to reconsider its decisions consistently with the opinion of the court.2/

2/ The Authority had held that,

> ". . . the release of this information would interfere with management's deliberative process which is prohibited by section 7106 of the Statute. Accordingly, we conclude that release of the information is prohibited from disclosure under section 7114(b)(4)." (26 FLRA at 443)

(footnote continued)

The Authority, in its decision and order on remand in Case Nos. 3-CA-60168, 60182, 60183 and 60288, 32 FLRA 308 (1988), stated, in part, as following:

> "Consistent with the court's decision, we must determine whether the documents sought by the Union are 'necessary' within the meaning of section 7114(b)(4)(B), and/or whether they constitute 'guidance, advise, counsel, or training . . . relating to collective bargaining' under section 7114(b)(4)(C).
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> "In our view, the stipulated record does not provide us with sufficient evidence to rule on these issues. The resolution of these issues depends on facts concerning the content of the documents, which are not provided with the stipulation . . . Accordingly . . . we shall remand this case to the Regional Director for further processing. . . ." (32 FLRA at 310).

The Regional Director by Order dated June 8, 1988 (G.C. Exh. 1(q)) scheduled a hearing for August 30, 1988, pursuant to which a hearing was duly held on August 30, 1988, in Washington, D.C., before the undersigned. All parties were represented at the hearing, were afforded full opportunity

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2/ (footnote continued)

The Authority did not base its decision on § 14(b)(4)(C) or (B) of the Statute.

The Court of Appeals held, in part, that,

> ". . . nothing in § 7106 contains any language concerning the disclosure or prohibition of disclosure of anything . . .
>
> ". . . Nothing in § 7114, § 7106 or in the legislative history of either suggest that disclosure of any of the data sought here is 'prohibited by law.'
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> "It may well be that the management rights section relied on by the Authority does render the documents sought non-disclosable under § 7114(b)(4)(C). . . It may be that the documents are not disclosable under § 7114(b)(4)(B). . . ." (842 F. 2d at 486-487).

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 conclusion of the hearing, September 30, 1988, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on timely motion of Respondent, to which the other parties did not object, for good cause shown, to October 21, 1988. Respondent and General Counsel each filed an excellent brief, received on October 21, 1988, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

The parties have stipulated the facts. There are two stipulations - Joint Exhibit 1 and Joint Exhibit 2. Attached to Joint 1 were exhibits 1(a) through 10, each designated as Joint Exhibits, e.g., Joint Exhibits 2(a) and 2(b), etc. Reference is made in Joint Exhibit 2 to the exhibits attached to Joint Exhibit 1 as, for example, Jt. Exh. No. 3. To avoid confusion, I have re-designated the exhibits attached to Joint Exhibit 1 by inserting a "1" before the number of the attached exhibit to make them Joint Exhibits 1-1(a) through 1-10.

Each case involved a similar, but separate, denial of information requested by the Police Association of the District of Columbia (hereinafter referred to as the "Union"). Case Nos. 3-CA-60168 and 3-CA-60182 involved discipline; and Case Nos. 3-CA-60183 and 3-CA-60288 involved administrative leave (sick leave).

1. Case No. 3-CA-60168 involved unit employee Vincent J. Russo (Jt. Exh. 2, par. 8). In its letter of January 22, 1986, the Union had noted, in part, as follows:

> "In looking over the documents given to the union by management the Police Association of D.C. finds that the memos passed up the chain of command recommending the administrative action on this case have been omitted. In order to properly present this grievance, the union requests these memos. . . ." (Jt. Exh.1-3).

Respondent furnished all information requested except documents, or portions of documents, containing recommendations, opinions of supervisors/management or concurrences regarding the nature of disciplinary action, if any, to be taken (Jt. Exh. 2, pars. 12, 15).

2. The information which Respondent refused to furnish the Union was supplied to the undersigned for examination in camera.3/ I marked the documents as Respondent Exhibit 1 through 4; described each document, or the portion of the document, that Respondent had withheld; and placed them in a sealed envelope to be part of the record but not to be inspected by the parties (Tr. 16-22).

3. The information not furnished the Union in Case No. 3-CA-60168 was a letter dated October 22, 1985, from Lieutenant James I. Rodney to Commander, Field Offices Division, through the Commander, New York Field Office (Res. Exh. 3). The letter set forth Lieutenant Rodney's recommendations, a concurrence, and the action of the Commander, Field Offices Division.

4. Case No. 3-CA-60182 involved unit employee John P. Farrell. In his letter of January 31, 1986, Mr. Farrell's representative had requested,

> ". . . all memo's, tapes, documents used in formulating this disciplinary action. . . ." (Jt. Exh.1-4)

Respondent by letter dated March 5, 1986, stated,

> "Enclosed are all documents . . . with the exception of a memorandum dated January 24, 1986, from Field Commander Lieutenant Jerry Jones to Commander, West District. This

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3/ Strictly speaking, enforcement of subpoenas is by the United States District Courts (§ 32(b) of the Statute, 5 U.S.C. § 7132(b); 5 C.F.R. § 2429.7(f)), a procedure seldom, if ever, exercised. Regularly, subpoenas are "enforced", if need be, by Administrative Law Judges by sanction, e.g., to strike testimony elicited by the party refusing to produce concerning the documents it had refused to produce and/or by the drawing of adverse inferences, etc. Subpoenas for production at the hearing of the same information as the subject of the unfair labor practice should be quashed, or revoked (5 C.F.R. 2429.7(e), except to the extent the information is necessary to decide the unfair labor practice. Here, the subpoena sought, "All documents containing recommendations, opinions or supervisors/management or concurrences. . . ." The actual recommendation or opinion was not material to determination of the unfair labor practice and, as the subpoena stated, the information sought was recommendation, opinions or concurrences.

> memorandum contains the recommendation of officials to their supervisors as to the proper resolution of the complaint. We do not believe that this pre-decisional material is necessary or relevant to Officer Farrell's grievance. . . ." (Jt. Exh.1-8)

The memorandum of January 24, 1986 from Field Commander, Lieutenant Jerry W. Jones to Commander West District, which was not furnished the Union, is Respondent Exhibit 1. This memorandum of two pages consists of three parts: "Nature of Complaint"4/; "Previous Record"; and "Recommendations". In the margin of the "Recommendation" sections on page 1 are comments and concurrences as there are following the "Recommendation" section on page 2.

5. Case No. 3-CA-60183 involved unit employee Kurt P. Goebel and concerned information regarding the denial of Administrative (Sick) Leave (Jt. Exh. 2, par. 10). The request for information was made on February 21, 1986 (Jt. Exh. 1-5) and Respondent answered by letter dated March 6, 1986 (Jt. Exh. 1-9) stating, in part, as follows:

> "The requested information is enclosed. Certain document(s) however, which are considered to be part of the internal management decision making process, e.g., recommendations, have been deleted as they are not relevant to the grievance." (Jt. Exh. 1-9).

4/ The Union's request was for "all memo's, tapes, documents used in formulating this disciplinary action", and pursuant thereto the Union was entitled to the first two parts: "Nature of Complaint" and "Previous Record", as nothing contained therein constitutes guidance, advice or counsel within the meaning of § 14(b)(4)(C), and Respondent's failure to furnish these portions of the memorandum violated §§ 16(a)(1),(5) and (8). Nevertheless, as all parties treat this case solely as a request for supervisory recommendations and concurrences (see Stipulation Jt. Exh. 2, par. 12), I make no finding that Respondent violated the Statute by not furnishing this information, especially as there could by no possible prejudice to the Union, or to Mr. Farrell, since the material under "Nature of Complaint" consists wholly of text of General Order 32.03, Sections 22 and 26 and under "Previous Record", there was no previous record.

The information deleted, i.e., not furnished, is Respondent Exh. 2 which consists of five pages made up of: a) U.S. Park Police Illness/Injury Record form dated 1/9/86. The Union was furnished this document with the data under "Administrative Remarks", which consisted of Major Ronald F. Miller's recommendation, deleted; b) Same form dated 1/23/88. Again, document furnished except that data under "Administrative Remarks" was deleted; c) Same form dated 12/5/85. Again, document furnished except that data under "Administrative Remarks" was deleted; and d) a two page supplimentary Case/Incident Record form entitled Medical Supplemental prepared by Major Ronald F. Miller and dated 1/23/86. This is a summary of details set forth in USPP Administrative Complaint Nos. 42529/85 and 42745/85 with regard to Officer Goebel.5/ The final paragraph constitutes the recommendation of Major Miller. No part of this document was furnished the Union.

6. Case No. 3-CA-60288 involves unit employee James A. Dennis (Jt. Exh. 2, par. 11). In the grievance on behalf of Officer Dennis, the Union requested, ". . . all documents, tapes and memos in reference to the denial of Officer Dennis' P.O.D. Sick Leave. . . ." (Jt. Exh. 1-6, penultimate paragraph). Respondent replied by letter dated April 15, 1986, stating, in part, as follows,

> "The requested information is enclosed. Certain information however, which is considered to be part of the internal management decision making process, e.g., recommendations, has been deleted as it is not relevant to the grievance." (Jt. Exh. 1-10)

5/ This portion could be viewed as Major Miller's assessment of the incident together with his deliberative or thought process for his recommendation and, therefore, exempt from disclosure under § 14(b)(4)(C), or as essentially factual statements forwarded for consideration and subject to disclosure. In view of the stipulation of the parties that, "Respondent . . . furnished all information requested with the exception of documents or portions of documents containing recommendations, opinions of supervisors/ management or concurrences. . . ." (Jt. Exh. 2, par. 12), I make no resolution of the matter but, for the purpose of this case, accept and consider this document as a single document which does, indeed, contain the recommendation of Major Miller. See, also n. 4, supra.

The information not furnished consisted of the "Administrative Remarks" section of U.S. Park Police Illness/Inquiry Record dated 10/16/85, which sets forth the recommendation of Lieutenant Tomlinson.6/

7. The parties have stipulated that the following is a summary of the process followed when investigating an administrative complaint which could serve as the basis for disciplinary action:

> (a) An internal administrative complaint is initiated by any police officer alleging a violation of a U.S. Park Police General Order (rules and regulations) by any other police officer. The administrative complaint is forwarded to the Office of the Chief, for initial review, and then to the Internal Affairs Unit. The alleged violation may be investigated by the Internal Affairs Unit or by the involved officer's immediate supervisor depending on the severity of the alleged violation.
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> (b) Once the investigation is complete, the case file is reviewed by the involved officer's second line supervisor. If the second line supervisor determines that the charge has merit, he/she will then prepare an internal memorandum recommending that the violation should be sustained and also recommending the appropriate corrective action or discipline to be taken. This memorandum along with the entire case file is forwarded through the officer's chain of command to the division level, Deputy Chief. Each lower level supervisor in the chain of command initials off on the internal memorandum expressing his/her opinion with respect to

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6/ Actually, the Union had this information in its entirety as shown by the quotation in the grievance, Jt. Exh. 1-6. pp. 2-3. In its Brief, Respondent stated,

> "Although it appears from Joint Exhibit 6 [Jt. Exh. 1-6] that the Union did receive some of the withheld information, the source of this release is unknown and was unauthorized." (Respondent's Brief, p. 6 n. 3),

the merits of the alleged violation and expressing his/her personal recommendation, if any, for further action. The Deputy Chief renders a decision on the merits of the charge and on the appropriate corrective or disciplinary action to be taken based on the information contained in the case file.

(c) The officer is notified in writing of the decision, the factual basis and rationale supporting the decision, and the corrective action or discipline, if any, to be taken. If the affected officer disagrees with the Deputy Chief's decision, he/she may appeal through the negotiated grievance procedure under the 1985 Labor-Management Contract between the National Capital Region, National Park Service and the Police Association of the District of Columbia.

8. The parties have further stipulated that the following is a summary of the process followed when making administrative (sick) leave decisions.

(a) An officer claims that he/she was injured or taken ill in the line of duty. The officer completes the required forms, advises a supervisor of the illness or injury, and seeks medical attention and/or treatment. The Medical Services Officer provides the Commander, Administrative Branch, Services Division, USPP (the approving official) with all the medical reports relating to the claim and the affected officer's claim request, as well as lower level management opinions and/or recommendations regarding the appropriateness of the request for administrative leave.

(b) The approving official makes a decision as to whether the claim will be approved based on a preponderance of the medical evidence and notifies the officer in writing of the decision. If the officer disagrees with the approving officials's decision, he/she may appeal the decision through the negotiated grievance procedure contained in the 1985 Labor-Management Agreement.

CONCLUSIONS

§ 14(b) of the Statute provides in pertinent 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 reasonable available and necessary for full 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, ..." (5 U.S.C. § 7114(b)(4))

General Counsel asserts that the § 14(b)(4)(C) exemption is limited to negotiations:

> ". . . Counsel for the General Counsel would first contend that it is clear that subsection (C) of section 7114(b)(4) of the Statute has appropriately been interpreted to exclude from the obligation to furnish data information provided for management official or supervisors which constitutes guidance, advice, counsel or training directly related to the actual process of engaging in collective bargaining. A contrary reading of the subsection to encompass all intra-management communications involving subjects which could conceivably be the subject of collective bargaining would unduly narrow the scope of section 7114(b)(4). . . ." (General Counsel's Brief pp. 11-12).

I do not agree. General Counsel's imaginative "legislation" by interpretation distorts the language of the Statute and

misconceives Authority law. The Authority has long made it clear that under § 14(b) an agency has a duty to furnish data within the scope of collective bargaining which means not only actual negotiations but the union's full range of representational responsibilities, including the effective evaluation and processing of grievances. National Treasury Employees Union, Chapter 237, 32 FLRA 62, 68, 70; U.S. Customs Service, Region VII, Los Angeles, California, 10 FLRA 251 (1982); Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 (1982). Indeed, in American Federation of Government Employees, AFL-C10 Local 1345 v. FLRA, 793 F.2d 1360 (D.C. Cir. 1986), the Court of Appeals stated, in part, as follows [as the Authority had also consistently stated therein: Army and Air Force Exchange Services (AAFES), Fort Carson, Colorado, 17 FLRA 624, 626 (1985)]:

> ". . . it is well-settled in both private and public sector labor law that this obligation applies not only to information needed to negotiate an agreement, but also to data relevant to its administration . . . (793 F.2d at 1363).
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> . . .
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> ". . . section 7114 creates a duty to provide information that would enable the Union to process a grievance or to determine whether or not to file a grievance. In addition, the Union is entitled to information relevant to its obligation to represent a unit employee subject to disciplinary action . . .
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> . . .
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> ". . . the Union has a legitimate concern with its own status as the exclusive bargaining representative. . . ." (793 F.2d at 1364) (footnotes omitted).

Just as "negotiation of subjects within the scope of collective bargaining", in § 14(b)(4)(B), is not limited to mere negotiations, so, too, do the words "relating to collective bargaining," in § 14(b)(4)(C), apply with equal, or greater force, to the broad range of representational responsibilities. In fact, I would view the phrase "negotiation of subjects within the scope of collective bargaining" in § 14(b)(4)(B) as inherently more narrow than "relating to collective bargaining" in § 14(b)(4)(C); but to give the phrase "relating to collective bargaining" in § 14(b)(4)(C) the limited meaning urged, the General Counsel

is badly mistaken, cf., Overseas Education Association v. FLRA, ____ F.2d ____, United States Court of Appeals for the District of Columbia Circuit, Nos. 87-1468; 87-1575, decided May 25, 1989, Slip Opinion pp. 9, 10, Concurring Opinion, p. 4. Moreover, the legislative history demonstrates the fallacy of the argument,

> "The second area of change made by the substitute's section 7114 is in subsection (b)(4), concerning the obligation of an agency to provide data necessary for negotiations to the exclusive representative. The substitute qualifies this obligation by providing, in subsection (b)(4)(C), that data which constitutes 'guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining' need not be furnished to the exclusive representative." Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, Subcommittee on Postal Personnel and Modernization of the committee on Post Office and Civil Service, House of Representatives, Committee Print No. 96-7, 96th Cong., 1st Sess., 1977 (hereinafter, "Legislative History"), p. 926.
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> . . .
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> "Seccion 7114(b)(4) requires that the agency provide certain information not otherwise prohibited by law relating to negotiations. There is no exemption from this requirement for information, whether or not deemed 'confidential' by the agency unless that information constitutes guidance, advice, counsel, or training, each specifically related to collective bargaining." Legislative History, p. 995.

As well stated by Chief Administrative Law Judge Fenton, in Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, (hereinafter, National Weather Service), 30 FLRA 127, 158 (1987),

> ". . . I conclude that the exemption for management guidance ought to have the same breadth as the duty to furnish. In both instances Congress used the same touchtones:

> it indicated that data necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining is to be furnished, and that advice or guidance relating to collective bargaining is not to be." (30 FLRA at 158).

There is no question that in each instance the information withheld related to collective bargaining: two concerned discipline; two concerned sick leave; and all four involved actual or potential grievances. Nor is there any doubt that each recommendation and each concurrence, i.e. Respondent's Exhibit 1 through 4, constituted guidance, advice or counsel to management or supervisors. Recommendations, concurrences and/or comments from one level of management, through intermediate levels of management, to the deciding official represent the quintessence of "guidance, advise, counsel . . . provided for management officials or supervisors" within the meaning of § 14(b)(4)(C) of the Statute and each related to collective bargaining. Accordingly, the information Respondent withheld was exempt from disclosure under § 14(b)(4)(C) of the Statute. National Weather Service, supra, 30 FLRA at 143. I do not, however, hold, or imply, that any document containing a recommendation may be withheld in its entirety if portions of that document contain information necessary for the union, pursuant to § 14(b)(4)(B) and which is not guidance, advice, or counsel, see, National Weather Service, supra, 30 FLRA at 142.

For reasons fully set forth above, in accordance with the Stipulation of the parties, the data withheld has in each instance been treated as a single recommendation. Specifically, I have noted that: a) with respect to Respondent Exhibit 1 (John P. Farrell), the parts, or sections, entitled "Nature of Complaint" and "Previous Record" do not constitute guidance, advice or counsel; and b) with respect to Respondent Exhibit 2, pages 4-5 ("Medical Supplement"), the information, exclusive of the last paragraph which clearly is a recommendation, may or may not have constituted guidance, advice or counsel, cf, National Weather Service, supra, 30 FLRA at 142. It must be understood that only information constituting guidance, advice or counsel to management is exempt from production under § 14(b)(4)(C).

In addition, if it were necessary to reach the issue, I would find that recommendations and concurrences, which I have found to constitute guidance, advice or counsel within

the meaning of § 14(b)(4)(C), were not necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining within the meaning of § 14(b)(4)(B) of the Statute. If management takes, or proposes to take, any action against a bargaining unit employee based on an administrative complaint, the Union, as shown by the Stipulation, only needs to know what action is going to be taken together with the factual basis and rationale for the decision, and the corrective action or discipline, if any, to be taken. The Union can then contest the facts, the reasons, and/or the appropriateness of any penalty. Knowledge as to which lower level supervisor recommended or concurred in any action is neither necessary nor relevant to the full understanding and discussion of the case. The case is the decision of the deciding official and recommendations, comments or concurrences would not be useful in processing grievances. Cf., Department of Health and Human Services, Region II, 19 FLRA 132, 134-135 (1985); Department of Health and Human Services, Social Security Administration, Field Assessment Office, 12 FLRA 390, 404 (1983).

Having found that the information withheld by Respondent was exempt from disclosure under § 14(b)(4)(C) of the Statute, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case Nos. 3-CA-60168, 3-CA-60182, 3-CA-60183 and 3-CA-60288, be and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 26, 1989
Washington, DC