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

DEPARTMENT OF THE TREASURY INTERNAL REVENUE SERVICE WASHINGTON, D.C. AND INTERNAL REVENUE SERVICE, CHICAGO, ILLINOIS DISTRICT OFFICE Respondent	
and	Case No. 5-CA-60265 (32 FLRA 237) (32 FLRA 717)
NATIONAL TREASURY EMPLOYEES UNION AND NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 10 Charging Party	

John F. Gallagher, Esq.
For the General Counsel

Denise Jarrett Dow, Esq.
For the Respondent

Martin P. Barr, Esq. with
Michael J. McAuley and
Paul R. Klenck, on brief
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION ON REMAND

On November 16, 1987 the undersigned issued a Decision in the above-captioned proceeding finding that the case was controlled by National Park Service, National Capitol Region, United States Park Police and Police Association of the District of Columbia, 26 FLRA 441 (1987) a case which issued after the hearing in the matter. Based on National Park Service the undersigned recommended that Respondent had not failed to comply with section 7114(b)(4) in violation of

section 7116(a)(1), (5) and (8) of the Statute and that the case be dismissed. Thereafter the U.S. Court of Appeals for the District of Columbia Circuit vacated and remanded the Authority's decisions in National Park Service and a companion case, National Labor Relations Board, 26 FLRA 1089 (1987). National Labor Relations Board Union, Local 6 v. FLRA, 842 F.2d 483 (D.C. Cir 1988). The court held that section 7106 does not forbid the disclosure of data and, therefore, it does not bar the disclosure of information under section 7114(b)(4).

Consistent with the above court decision, the Authority on June 3, 1988, found that disclosure of the documents sought in this matter is not barred under section 7114(b)(4) because they concern the "deliberative process" by which management exercises its rights under section 7106 of the Statute. Accordingly, the Authority vacated the Decision of November 16, 1987 and remanded the case to the undersigned. Since it did not have the documents before it, the Authority directed the undersigned to decide the questions whether the documents are "necessary" within the meaning of section 7114(b)(4)(B), or whether they constitute "guidance, advice, counsel, or training . . . relating to collective bargaining" under section 7114(b)(4)(C).

On June 20, 1988, Respondent filed a Motion For Reconsideration Or In The Alternative to Amend Remand Order. Thereafter, on July 22, 1988, the Authority issued an Order Denying Motion For Reconsideration And Granting Motion To Amend Remand Order. In granting Respondent's motion, the Authority directed the undersigned to "consider all contentions" necessary to resolve the case consistent with the court's decision. During telephonic communications on July 28, 1988, all parties agreed that reopening the record for additional testimony was unnecessary. The Respondent agreed, over objection of the General Counsel to submit the subject documents for in camera inspection. Further, all parties agreed to submit additional legal memorandum concerning the governmental deliberative process privilege and on any new case law developments since original briefs were filed.

Pursuant to an Order issued on July 29, 1988 all parties filed timely supplemental briefs with the undersigned. Upon consideration of the entire record in this matter, I make the following findings of fact conclusions of law and recommendations on remand:

Findings of Fact

The basic facts are set forth in the original Decision and again summarized in the Authority's Decision and Order Remanding Case.

In addition to the above facts the remand requires that facts concerning whether the penalty documents were "necessary" be considered. Testimony of Michael L. Peacher, a Union official, sought to establish that the documents were necessary for the Union to perform representational functions. According to Peacher Article 39[1/] of the agreement between the parties listed factors to be considered in arriving at the appropriate penalty and disciplinary actions. He also stated that a distinct element of management's burden of proof was to show that the proper penalty was selected.

Peacher stated that he had no evidence that a single factor in Article 39 was considered. He also stated that this information would assist him in his analysis of the merits of the case, the hazards of litigation and aid him in making a determination as to whether the case should be taken to binding arbitration. Such information, according to Peacher, would be both vital and critical to the Union in making its decision. As previously stated, the information did contain reference to some of the factors found in Article 39 of the agreement.

Finally, the in camera inspection of the subject documents, which in essence was only one document, persuaded the undersigned the documents were necessary for the Union to perform is representational functions.

Conclusions

A. WHETHER THE PENALTY DOCUMENTS ARE PROHIBITED BY LAW FROM BEING RELEASED AS THEY ARE PROTECTED BY THE GOVERNMENTAL DELIBERATIVE PROCESS PRIVILEGE.

Respondent submits that the governmental deliberative process privilege protects documents containing internal

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1/ Article 39, Section F contains 11 different factors which are to be used by management in deciding what action may be appropriate. The factors are neither "meant to be exhaustive review nor intended to be applied mechanically. . . ."

deliberative communications, recommendations, and advisory opinions. United States v. Weber Aircraft Corp., 465 U.S. 792, 799 (1984); NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975); EPA v. Mink, 410 U.S. 73 (1973); Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184 (1975). Under Respondent's reasoning the deliberative process privilege's primary purpose is to enable governmental decision makers "to engage in that frank exchange of opinions and recommendations necessary to the formulation of policy without being inhibited by fear of later public disclosure." American Federation of Government Employees, Local 2782 v. U.S. Department of Commerce, 632 F. Supp. 1272, 1275 (D.D.C. 1986) (quoting Paisely v. CIA, 712 F.2d 686, 697-698 (D.C. Cir. 1983).

Both the Charging Party and the General Counsel argue that the potential harm of excessive public scrutiny, Respondent's basic appeal in this case, is not germane since the deliberative process privilege is not meant to shield government documents from other government employees or to be applied to purely internal personal matters. I agree that the privilege does not protect documents such as the penalty documents from disclosure to an exclusive representative. An analysis of Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866-867 (D.C. Cir. 1980) persuades the undersigned that neither the predecisional deliberative test nor the actual agency test precludes disclosure of the information requested in this case. The documents did not concern themselves with the pros and cons of any action, but made a clear, concise recommendation. The evidence shows that the document or documents were subsequently adopted as Respondent's initial position in justifying the discipline in the case. Under the agency position test, the information, although predecisional at the time it was prepared, lost that status when it was "adopted, formally or informally, as Respondent's position" on the matter. See Coastal States, supra. Furthermore, disclosure of the predecisional documents would assist in proper agency decision making to the extent that it forces Respondent's supervisors and managers to consider established policy and procedures when involved in the making of disciplinary decisions while nondisclosure would allow those same supervisors and managers to cover up mistakes at the expense of the disciplined employee. Accordingly, it is my view that the governmental deliberative process privilege is not applicable to conduct based removal cases such as this where both issues of fact and mitigation must be explored by the exclusive representative in performing its representational functions. Consequently, Respondent's argument that the deliberative process privilege applies here is rejected.

B. WHETHER THE PENALTY DOCUMENTS WERE NECESSARY WITHIN THE MEANING OF SECTION 7114(b)(4)(B) OF THE STATUTE.

The General Counsel and Charging Party contend that the penalty documents were relevant and necessary in this case because the documents included a discussion of the supervisor's assessment of the allegations made against the employee and because they contained a discussion of at least some of the 11 mitigating factors outlined in Article 39 of the agreement and also that they contained a recommended penalty. Of course there is, in reality, only one document since the documents prepared by Novack for Monaco's signature and the concurring route-slip are merely concurrences with the original document.

Respondent maintains that the documents are neither necessary nor relevant since essentially the penalty was not at issue at that stage of the disciplinary proceeding when the data was requested. Further, Respondent argues that the agency does not have to prove the appropriateness of the penalty imposed.

The facts establish that the Union was not seeking the documents to attack Respondent's position on what penalty to impose or to bring the proposed penalty into issue. Peacher's testimony clearly shows instead that he was seeking to determine whether Respondent had considered the mitigating factors set out in Article 39 of the agreement; whether the document contained information which would assist him in his analysis of the merits of the case; and, aid him in making his own determination of whether the case should be taken to binding arbitration. All the aforementioned are, in my opinion, legitimate representational functions. Peacher repeatedly emphasized his view that the documents were critical for his assessment of the grievance. In camera review of the documents supports the view of Peacher that the documents might have aided him in making an intelligent assessment of what action he should take on the matter.

The law is well settled that an exclusive representative is entitled to information relevant to its obligation to represent a unit employee subject to disciplinary treatment. Internal Revenue Service, Western Region, San Francisco, California, 9 FLRA 480, 493. Furthermore, the cases are legion which state that the full range of representational responsibilities includes the effective evaluation and processing of grievances. National Treasury Employees Union, Chapter 237, 32 FLRA 62, 68, 70 (1988); U.S. Customs Service, Region VII, Los Angeles, California, 10 FLRA 251

(1982); Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 (1982).

Based on the testimony of Peacher as to the necessity of the information for review to determine what further action need be taken by the exclusive representative and to assure that agency management had conformed with the provisions of the agreement, it is my view that the data sought was essential for Peacher to effectively evaluate Union action on the grievance. Thus, the documents were both relevant and necessary in order to allow the exclusive representative an opportunity to fulfill its representational responsibilities. Accordingly, it is found that the documents were necessary within the meaning of section 7114(b)(4)(B).

C. WHETHER THE PENALTY DOCUMENTS CONSTITUTE GUIDANCE OR ADVICE PROVIDED FOR MANAGEMENT OFFICIALS RELATING TO COLLECTIVE BARGAINING.

Respondent asserts that the documents at issue in this case, Mr. Novack's memorandum, Mr. Monaco's memorandum adopting Mr. Novack's memorandum as his own, and the Personnel Office's routing slip adopting the Novack/Monaco memorandum as its predecisional analysis, all reflect assessment of the incidents, deliberations or thought processes, and recommendations concerning appropriate management action and as such are covered by section 7114 (b)(4)(C) and are therefore, exempt from disclosure. Contrawise, the Charging Party argues that in American Federation of Government Employees, AFL-CIO, Local 3483 and Federal Home Loan Bank Board, New York District Office, 13 FLRA 446 (1983), a negotiability case, the Authority struck a proper balance between an agency's obligation to supply information and the protection to be granted agency guidance when it said:

> Third, the Union has a legitimate concern with its own status as the exclusive bargaining representative. It is entitled to information when the Agency takes an action that affects its role as exclusive representative. The Union cannot fulfill its obligation to fully represent all employees in the unit if it lacks information necessary to assess its representational responsibilities.

The Charging Party reads this passage as limiting the scope of section 7114(b)(4)(C) to the negotiation context

thereby, assuring that unions will not be unduly hampered in assessing their representational responsibilities. Further, it asserts that the information sought does not pertain to any ongoing negotiations but merely to the discussion of mitigating factors and penalty recommendation in this particular matter.

The General Counsel cites Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, (National Weather Service), 30 FLRA 127 (1987)[2/] in asserting that the documents were not exempt from disclosure since they were not merely a recommendation but in fact, constitute the actual decision of Respondent. That decision however, was changed from termination to a suspension due to efforts of the Union.

Finally, as the Charging Party urged in its original brief, certain remarks by Congressman Ford established beyond doubt that documents such as involved in this case are not exempt from the broad disclosure obligation of section 7114(b)(4) when reporting to the House on particular features of the final bill where he stated:

> Section 7114(b)(4) requires that the agency provide certain information not otherwise prohibited by law relating to negotiations. There is no exemption for 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. (emphasis added)

124 Cong. Rec. H. 130608 (daily ed. Oct. 14, 1978).

2/ Interestingly my colleague, Administrative Law Judge William B. Devaney cites this same case in finding information similar to this as exempt from disclosure under section 7114(b)(4)(C) in National Park Service, National Capitol Region, United States Park Police and Police Association of the District of Columbia, OALJ-89-97, issued July 26, 1989. That case of course is the Authority's rehearing of the National Park Service, supra, court decisions which held that section 7106 did not forbid disclosure of the data.

The more persuasive argument here is that section 7114(b)(4)(C) pertains only to the actual conduct of negotiations and that confidential documents may be withheld only if they constitute guidance related to "collective bargaining." If that argument is accepted on its face no further analysis would be necessary since there are no ongoing negotiations here. Putting that argument aside, it is my view that the penalty documents did not contain guidance, advice or counsel but merely the facts, the supervisors assessment and a discussion of some of the mitigating factors sought by the Union. In fact the documents did not weigh any action but made a clear recommendation for action and, thus contain essentially the items Peacher testified that he needed to evaluate the grievance. Moreover, having already found that the documents are relevant and necessary for the exclusive representative to fulfill its representational function it would be incongruous to now find that the exemption applies and Respondent need not disclose the documents. Therefore it is found that the documents are not guidance, advice, counsel or training which would entitle Respondent to benefit by the section 7114(b)(4)(C) exemption.

Based on all of the foregoing, it is found that Respondent failed to comply with section 7114(b)(4) of the Statute when it failed and refused to furnish information available and necessary for the Union to fulfill its representational responsibilities and, thereby violated section 7116(a)(1), (5) and (8) of the Statute.

Accordingly it is recommended that the Authority adopt the following:

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 Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Chicago District, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of National Treasury Employees Union and National Treasury Employees Union, Chapter 10, requested materials pertaining to the selection of the penalty regarding a bargaining unit employee against whom an adverse action had been proposed.

(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 National Treasury Employees Union and National Treasury Employees Union, Chapter 10, requested materials pertaining to the selection of the penalty regarding a bargaining unit employee against whom an adverse action had been proposed.

(b) Post at its 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 the District Director or a designee 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 5, Federal Labor Relations Authority, 175 W. Jackson Boulevard, Suite 1359-A, Chicago, IL 60604, 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., September 28, 1989

Eli Nash, Jr.

ELI NASH, JR.
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 refuse to furnish the National Treasury Employees Union and National Treasury Employees Union, Chapter 10, requested materials pertaining to the selection of the penalty regarding a bargaining unit employee against whom an adverse action had been proposed.

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 materials pertaining to the selection of the penalty regarding a bargaining unit employee against whom an adverse action had been proposed as requested by the National Treasury Employees Union and National Treasury Employees Union, Chapter 10.

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