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

DEPARTMENT OF JUSTICE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES BORDER PATROL, DALLAS, TEXAS Respondent	
and	Case No. 6-CA-90117
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, NATIONAL BORDER PATROL COUNCIL Charging Party	

Mr. Robert N. Smith
For the Charging Party

Robert S. Hough, Esquire
For the Respondent

Joseph T. Merli, 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)(C) will be referred to, simply, as "§ 14(b)(4)(C)."

Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether certain data requested by the Union constitutes "guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining" within the meaning of § 14(b)(4)(C) of the Statute.

This case was initiated by a charge filed on December 19, 1988 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on June 30, 1989 (G.C. Exh. 1(d)) and set the hearing "during the week of October 16, at a location to be determined in Dallas, Texas." On motion of the General Counsel, dated September 20, 1989 (G.C. Exh. 1(h)), to which the other parties did not object, for good cause shown, by Order dated September 26, 1989, (G.C. Exh. 1(j)), the hearing was rescheduled for January 22, 1990, at a place to be determined in Dallas, Texas; and by Order dated December 7, 1989 (G.C. Exh. 1(l)), the hearing was further rescheduled to the week of February 12, 1990, in Dallas, Texas. By motion dated January 25, 1990 (G.C. Exh. 1(n)), General Counsel moved that the hearing be rescheduled for February 14, 1990, and be moved from Dallas to El Paso, Texas. By Order dated February 8, 1990, no timely opposition having been filed, for good cause shown, the hearing was rescheduled for February 14, 1990 (G.C. Exh. 1(p)), in El Paso, Texas, pursuant to which a hearing was duly held on February 14, 1990, in El Paso, Texas, before the undersigned.

All Parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which Respondent exercised. At the conclusion of the hearing, March 14, 1990, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, initially, on motion, of the General Counsel, to March 21 and thereafter, on motion of Respondent, to March 28, 1990, by Orders dated March 6 and March 15, 1990, respectively. General Counsel and Respondent each timely mailed an excellent brief, received on, or before March 30, 1990, which have been carefully considered. Upon the basis of the entire record,[2/] I make the following findings and conclusions:

2/ Respondent filed a motion, to which there was no opposition, to correct the transcript. Respondent's motion is granted and the transcript is hereby corrected as follows:
Page 6, line 5 "Merli" is changed to "Hough."
Page 7, line 4 "Merli" is changed to "Hough."

Findings

1. The American Federation of Government Employees, AFL-CIO, National Border Patrol Council (herein also referred to as the "Union") is the exclusive representative for all non-professional personnel assigned to Border Patrol Sectors, except employees excluded by the Statute (G.C. Exhs. 1(d) and (f)). The level of exclusive recognition is between the Respondent's National Office and the Union. A Master Labor Agreement exists between the parties (G.C. Exhs. 1(d) and (f)).

2. Mr. Robert N. Smith, a Border Patrol Agent at Alpine, Texas (Tr. 12), is also Regional Vice President and Executive Assistant in the Union whose duties include the handling of grievances (Tr. 6, 12, 13).

3. During June, 1988, Mr. Smith was involved with grievances the Union had filed on behalf of three employees each of whom had been recommended for disciplinary action as the result of alleged misconduct. Respondent had proposed suspension of each employee.

4. Following the filing of the grievances, Respondent issued its decisions to suspend the employees and the Union requested arbitration. The Union, by Mr. Smith, made an information request in order to assist the employees and the Union in preparing for arbitration. The Union's June 21, 1988, letter requested, pursuant to § 14(b)(4), copies of,

> ". . . Memos SR-P-381A; SR 71/85.2-P; and SR 71/93.1-P, dated June 15, 1978, and revised 06/85 relating to Regional Office Policy governing Disciplinary/ Adverse Actions. If any or all of these memos have been superseded, please provide the most recent revisions." (G.C. Exh. 6)

The letter continued,

> This material is considered relevant as there are several Adverse Action cases awaiting Arbitration in which one of the issues raised was disparate treatment and it is hoped that the aforementioned material will aid us in clarifying and possibly resolving these issues prior to Arbitration.

> This material is considered necessary because, in order for the Union to provide adequate and meaningful representation to the bargaining unit members, it must be cognizant of the policies under which Management operates." (G.C. Exh. 6).

5. Mr. Smith testified that the Union was concerned over the punishment which had been imposed on each grievant as it believed the length of the suspensions were too severe and, in addition, it suspected that the punishment was not the same as punishment which had been administered in other cases involving similar misconduct. (Tr. 21-25). Not only would proof of disparate treatment be a defense at the arbitration, but would be grounds for a separate allegation of a violation of Article 4B of the Parties' Agreement, i.e., a procedural violation (G.C. Exh. 13; Tr. 21).

Mr. Smith further testified that, in response to earlier information requests, Respondent had denied the existence of an indexing system (Tr. 37; G.C. Exh. 10); see, also, G.C. Exh. 9 in which Respondent's Assistant Regional Commissioner, Personnel, Ms. Mary Dodd, had informed Mr. Robert J. Marren, inter alia, "10. We do not maintain an index of disciplinary action by reasons or charge. . . ."

6. The Union had obtained a partial copy of a document consisting of: title page entitled "Part 1 - General, Disciplinary/Adverse Actions", page 1 - 1, Southern Region, "Rev. 06/85"; page 1-2, Memorandum, dated June 15, 1978, re: "Delegation of Personnel Management Authority-Disciplinary/ Adverse Actions"; page 1-4, headed: "Check List" and the final section on the "Check List" was entitled "ROPER" (Regional Office Personnel - Tr. 59) and under that heading was, inter alia, the following:

> ". . .
> "Indexed by Reason (5x7 form) - copy to COPER[3/] & Regions _____
> "Indexed by name (3x5 card) _____
> . . ."

3/ A typographical error? General Counsel so treats it, see his Brief, p. 4; but neither party inquired about the word "COPER" used there or on the preceding line.

Page 1-5 headed, "The Adverse Record File;" page 1-7, headed "Merits of Adverse Action;" and page 1-9 (no heading) (G.C. Exh. 7).

7. Respondent had not responded to the Union's June 21, 1988, information request so, by letter dated December 5, 1988 (G.C. Exh. 11), the Union renewed its request, reminded Respondent of its delinquency, and told Respondent it would file an unfair labor practice charge if Respondent did not supply the information by December 23, 1988. Respondent replied to the Union's requests of June 21 and December 5, 1988, by letter dated December 20, 1988, in which it stated,

> ". . .
> "The information you requested relating to policy governing disciplinary and adverse actions is guidance to managers and supervisors.
>
> "Therefore, the data is denied under the provisions of 5 U.S.C. 7114."
> (G.C. Exh. 12).

8. Respondent had furnished to the Regional Director the missing pages, i.e., pages 1-3 (no heading), 1-6 (no heading and 1-8 ("3. Off-Duty Misconduct-Nexus"), with the assurance that, ". . . this document will not be copied, released to or read by any Union official or member of the bargaining unit . . . ." Respondent's letter to the Regional Director, dated May 10, 1989, together with the attached pages 1-3, 1-6 and 1-8, were received as Respondent's Exhibit 1, as an in camera exhibit (Tr. 69).

9. Mr. Ricardo Palacios, who had been an employee labor relations specialist for Respondent for 2 1/2 years (Tr. 65-66), testified that he had never seen an index, whether by reason or name (Tr. 68), and did not believe such an index had been put together (Tr. 68).

Conclusions

There is no question that the data requested by the Union constituted, ". . . guidance, advice, counsel, or training provided for management officials or supervisors . . . ." within the meaning of § 14(b)(4)(C) of the Statute. Rather, General Counsel asserts that:

"Section 7114(b)(4)(C) of the Statute is concerned only with guidance, advice, counsel or training which directly relates to the actual process of collective bargaining; i.e., preparing for negotiations and discussing and evaluating union and management proposals . . . ." (General Counsel's Brief, p. 10)

General Counsel's assertion, that § 14(b)(4)(C) relates only to the actual process of collective bargaining, is rejected. As noted in Social Security Administration, Baltimore, Maryland and Social Security Administration Area II; Boston Region, Boston, Massachusetts and American Federation of Government Employees, Local 1164, AFL-CIO, Case No. 1-CA-80309, OALJ 90-04 (October 24, 1989),

"The Authority has long made clear that under § 14(b)(4) 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 (1988); Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Wichita District, Wichita, Kansas, 32 FLRA 920, 924, 925 (1988); 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-CIO, Local 1345 v. FLRA, 793 F.2d 1360 (D.C. Cir. 1986) (hereinafter referred to as "Local 1345" case) the Court of Appeals stated [as the Authority had also 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.

> The relevance of the requested data is considered on a case-by-case basis; [footnote omitted] however, the employer's duty to provide the information must be evaluated in the context of the full range of union responsibilities in both negotiation and the the administration of a labor agreement . . . ." (793 F.2d at 1363-1364) (Emphasis in original).

The Court in the Local 1345 case further stated,

> ". . . 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 access its representational responsibilities." (793 F.2d at 1364). (Slip opinion, pp. 7-8)

A further question inherent in the facts of this case, although not raised or asserted by General Counsel, is whether the Union's possession of a portion of the delegation and 'guidance, advice, counsel . . . for management officials or supervisors . . ." render the remaining portions accessible to the Union? I conclude that the answer is "NO", even if Respondent had previously supplied part (see, Tr. 29-30), on all, of the data in question. § 14(b)(4) requires the furnishing of data, normally maintained, reasonably available, etc., except data which constitutes guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining and if the data requested is guidance, etc., there is no duty to furnish it whether or not the Union has been furnished some, or all, of the data on prior occasions. It is not required to be furnished because it is guidance, etc., not because it is confidential or classified.

Inasmuch as Agency Memoranda SR-P-381A, SR-71/85.2-P, SR-71/93.1-P (dated June 15, 1978 and revised June 1985) constituted "guidance, advice, counsel, or training provided for management officials or supervisors, relating to

collective bargaining" within the meaning of § 14(b)(4)(C) of the Statute, Respondent did not violate § 16(a)(1), (5) or (8) by refusing to furnish the memoranda and it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 6-CA-90117 be, and the same is hereby, dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 24, 1990
Washington, D.C.