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

DEPARTMENT OF DEFENSE, MINOT AIR FORCE BASE, NORTH DAKOTA Respondent and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1041 Charging Party	Case No. 7-CA-00456

Major Michael C. Calopy
For Respondent

John Morrison
For the Charging Party

Michael Farley, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Denver Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by refusing to furnish the Union with a copy of a portion of an Inspector General report of an inspection of a detachment at the Minot Air Force Base.

A hearing on the Complaint was conducted in Minot, North Dakota at which all parties were afforded full opportunity to adduce evidence, call, examine and cross examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.1/

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees. On May 16, 1989 Janice Tomlinson, a secretary at Respondent's Administrative Section of Detachment 21, 9th Weather Squadron, was notified by Respondent that her work performance did not meet prescribed standards regarding various critical elements of her job and she was given until August 1 to demonstrate acceptable performance. Tomlinson, a member of the collective bargaining unit, was the only civilian employee on the 18 member staff of the Administrative Section. Tomlinson's duties included distributing mail, answering telephones, maintaining and briefing the Commander concerning his schedule, typing correspondence and other documents, filing and maintaining the office file plan, maintaining the suspense file2/, posting changes, supplements and new library publications, maintaining the library catalog of available publications and ordering publications, providing reports to the Finance Office concerning the use of leave by office employees, providing new employees with information concerning housing and shopping, and maintaining an inventory and adequate supply of office supplies.

On August 18, 1989 Respondent notified Tomlinson it was proposing to remove her from her position because of her unacceptable performance. The letter indicated Tomlinson's

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1/ Counsel for the General Counsel's unopposed motion to correct the transcript and Respondent's unopposed motion to correct its post-hearing brief are hereby granted.

2/ The suspense file is a filing system which reflects the dates specific personnel were responsible to complete various projects or reports and includes the unit leave control log.

performance was deficient in the areas of maintaining library publications and forms; typing correspondence, reports, forms, documents and other written material; and establishing and maintaining an internal suspense system. Tomlinson replied to the notice challenging the proposed action.

Meanwhile, during the period of August 14 to August 18, 1989 Respondent's Inspector General conducted a Unit Effectiveness Inspection of Detachment 21, 9th Weather Squadron which is composed of four sections: Administrative; Forcasting; Observing; and Staff Liaison Support. Each section was separately inspected and around August 21 the Inspector General issued a six page as Inspection Report which included separate and specific comments concerning the operation of each section. A copy of the report was provided to Detachment 21 Commander, Captain Wendell Stapler.3/ The first page of the report is a cover page containing no privileged information. The next page has one short paragraph with a one word overall rating for "Administration" and four typewritten lines containing a summary statement reflecting: conclusions about support given by the "civilian administrative specialist"; the needs of the unit relative to various programs, and; reference to problems in several administrative and orderly room functions. The last page contains: (1) under the caption "Condition", conclusionary statements regarding the management of the files, publications and leave program; (2) under "Impact", the impact on unit effectiveness, and; (3) under "Cause", the unit administrator's role in the management of the programs. The rest of the page contained comments under the caption "Symptoms", wherein findings concerning the filing system, publication maintenance and maintenance of the unit leave program were highlighted.

The primary purpose of a Unit Effectiveness Inspection (UEI) is to evaluate how a unit's administrative and management procedures impact upon its ability to perform its mission. The inspectors question staff and explore the manner in which jobs are being performed and examine various functions in a unit including management practices, the condition of files, whether regulations' binders are kept current and the like. The final report is given to the Commander and supervisors use it to assess how well the unit

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3/ The report was received in evidence and placed under seal and a protective order to preserve its confidentiality.

is performing its functions. Management therefore uses the report as a "tool" in assessing and improving the operation and effectiveness of the organization.

Respondent removed Tomlinson from employment on September 26, 1989 based upon its evaluation of Tomlinson's current performance and the instances of unacceptable performance set forth in the notice of August 18, supra. On September 28 Tomlinson filed a grievance under the parties' negotiated agreement, designating the Union's Chief Steward as her representative. The grievance proceeded through various steps, Tomlinson taking the position that she had not been made aware of having committed errors in her work, was not given periodic counselling concerning her alleged poor performance; was not offered extra training to upgrade her alleged poor performance; and the typing, filing and other errors could have been committed by others. The grievance was rejected by Respondent at each step and on December 8, 1989 the Union sent Respondent a letter of intent indicating Tomlinson's grievance would be submitted to arbitration.

Subsequently an arbitration proceeding was scheduled for May 2, 1990. In the course of preparing for the arbitration Tomlinson mentioned the UEI report to the Union. Union President Johnnie Gorthy testified that he felt the report might "shed light" on Tomlinson's performance. Thus the information in the report might either be helpful to Tomlinson's case before the arbitrator or if the report reflected negatively on Tomlinson, the Union could reconsider whether it wished to proceed to arbitration on the matter. Accordingly, on April 9, 1990 Union President Gorthy met with Detachment 21 Commander Captain Stapler and requested that portion of the August 1989 UEI report which pertained to the Administrative Section where Tomlinson worked.[4/] Stapler was prepared to provide a copy to Gorthy when he noticed the report contained a statement that it was a "Privileged Document" and was not releasable, in whole or in part, to persons or agencies outside the Air Force,

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4/ I find that during all communications between Union President Gorthy and Respondent's representatives, Respondent was aware the Union was requesting only those portions of the report dealing with the Administrative Section and Respondent was also aware the Union was seeking the report in connection with the pending Tomlinson arbitration.

without the express approval of the Secretary of the Air Force. Stapler telephoned Douglas Goetz, an attorney with the Minot AFB Legal Office and informed Goetz of the situation. After Goetz reviewed Air Force regulations and conferred with higher authorities, Union President Gorthy was told that Base management did not have authority to release the report to him and if the Union wanted the report it would have to make its request directly to the Secretary of the Air Force, Office of the Inspector General in Washington, D.C.[5/] In any event, on April 10 Gorthy notified Respondent, in writing, that the Union intended to file an unfair labor practice charge over its refusal to provide the UEI report. Respondent's reply of April 17 disagreed with Gorthy's allegations and on that same day Gorthy filed a written request for the report, stating the information pertained to Tomlinson's arbitration case. Respondent's reply of April 25 acknowledged the prior Union requests and indicated the Union had been referred to the procedures to request the information.

Additional Findings, Discussion and Conclusions

Section 7114(b)(4) of the Statute requires Respondent herein:

> . . . to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
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> (A) which is normally maintained by the agency in the regular course of business;
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> (B) which is reasonably available and necessary for full and proper discussion, understanding,and negotiation of subjects within the scope of collective bargaining; and
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> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . .

5/ Air Force Regulation AFR 123-1 governing such reports provides in relevant part: "Requests from agencies or individuals other than Congress (Official Business), GAO or DOD should be sent to SAF/IG Wash., DC 20330-1000 for review and processing." Gorthy was given this address.

Respondent has stipulated that the UEI report was normally maintained in the regular course of business and that the Union requested only that portion of the report relating to the investigation of Detachment 21's Administrative Section. Respondent contends however that the Union did not submit a proper request for the information. Respondent further contends management's evaluation or opinions contained in the UEI report are not "data" under the Statute, and the report was not" reasonably available", or "necessary" within the meaning of Section 7114(b)(4) of the Statute. Although Respondent does not contend the UEI report constitutes guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, as it clearly does not, Respondent nevertheless does argue that at least some portions of the report constitute management's opinion and evaluation of internal matters and agency operations and should therefore not be released to the Union.6/

As to the Union's request for the UEI report, Respondent essentially urges that although the Union's request was made at the level of recognition, Respondent's directing the Union to make its request to another office was proper under the circumstances herein and the Union's failure to do so precludes an unfair labor practice finding. To support its position Respondent cites the language of the Authority's decision in Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 19 FLRA 790 (1985), wherein the Authority stated:

> While section 7114(b)(4) of the Statute does not preclude the parties from establishing procedures for the furnishing of information to an exclusive representative, or preclude an agency from suggesting that the exclusive representative should take reasonable steps to secure information from the actual custodians of such records where appropriate, and an exclusive representative is not precluded from accepting the invitation to do so, the exclusive representative may not be denied the opportunity to secure the requested information in a timely manner and without undue burden or delay.

6/ Respondent does not contend and the record does not support a finding that furnishing the report to the Union is prohibited by law.

The procedure for obtaining the Inspector General report herein was not bilaterally established by the parties nor was the procedure accepted by the Union. Rather, the Union sought to obtain the document at the level of recognition from the parties with whom the Union had traditionally dealt. The record does not establish an attempt on the part of Respondent to delay furnishing the report to the Union. Nevertheless I find no valid reason herein to burden the Union by requiring it to independently seek the document from Washington, D.C., officials of Respondent. While the Air Force may limit the authority of local management and require it to forward such requests to Washington for consideration, in my view it may not unnecessarily burden the Union with that obligation and require the collective bargaining representative to contact and deal with others in order to conduct representational business, especially, as here, where the documents sought are maintained by the activity at the site where: the inspection occurred; the level of recognition exists; and the parties have traditionally conducted their affairs.7/

Respondent argues that management and the Union had no established procedures dealing with requests of this nature and when it referred the Union to Washington it was merely following its regulation (AFR 123-1), supra, and the Union agreed in the collective bargaining agreement that they would be governed by Agency policies and regulations.8/ Therefore, Respondent suggests, the Union is bound by the agreement and an unfair labor practice may not be held where

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7/ I note that FOIA requests made to the Base are forwarded by local management to the office designated and authorized to treat such requests.

8/ Section 3.1 of the parties' collective bargaining agreement provides:

Governing Regulations. In the administration of all matters covered by the Agreement, officials and employees are governed by existing or future laws and the regulations of appropriate authorities, including policies set forth in the Federal Personnel Manual; by published Agency policies and regulations in existence at the time the Agreement was approved; and by subsequently published Agency policies and regulations required by law or by the regulations of appropriate authorities, or authorized by the terms of a controlling Agreement at a higher Agency level.

Respondent merely followed its own regulation. I view this argument as essentially interposing a waiver by the Union regarding its right to information where Respondent follows its regulations. However, a waiver of a Statutory right must be clear and unmistakable and will not be lightly inferred. See Department of the Navy, Marine Corps Logistics Base, Albany, Georgia, 39 FLRA 1060 (1991) at 1065-1067 and Internal Revenue Service, 29 FLRA 162 (1987). I discern no waiver by the Union of its Statutory right to receive the document it sought herein and accordingly, I conclude Respondent's argument is without merit.

Respondent also contends that the portions of the UEI report consisting of management's evaluations, opinions or conclusions are not "data" and therefore not subject to release under section 7114(b)(4) of the Statute. Respondent offers various arguments to support this position. However, based upon established Authority precedent I reject those arguments. Thus, in Defense Mapping Agency, Washington, D.C. and Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 24 FLRA 154 (1986), the Authority required the agency to release to the collective bargaining representative various requested portions of a similar Inspector General report. Accordingly, it is clear that the report itself does not carry with it any special privilege against disclosure under section 7114(b)(4) of the Statute. While Defense Mapping Agency did not deal with furnishing "management's opinions and evaluations of internal matters and (agency) operations "since such was not sought by the Union, the Authority subsequently held that agency documents which contain managerial opinions and recommendations must nevertheless be furnished to a union on request where otherwise not privileged from disclosure. See National Labor Relations Board, 38 FLRA 506 (1990) and National Park Service, National Capital Region, United States Park Service, 38 FLRA 1027 (1990). I find Respondent's arguments herein to be not substantially different from those previously raised and rejected by the Authority in the above cases and to be otherwise totally unpersuasive. Accordingly, I reject Respondent's arguments raised to support its contention.9/

9/ Respondent urges that "data" under section 7114(b)(4) of the statute should be interpreted to mean only factual matters and should not include opinions and recommendations concerning management's assessment of itself in order not to inhibit the "free and open discussion necessary for the
(footnotes continued on next page.)

Respondent further suggests that the UEI report was not "reasonably available" within the meaning of section 7114(b)(4)(B) of the Statute since authority to release the report to the Union resided with the Inspector General's office in Washington, D.C., even though the report was physically located at the Minot AFB. I conclude that since the requested data is available where the level of recognition exists and where the request was made, the location of the authority to release the report is irrelevant. See Department of Health and Human Services, Social Security Administration, 36 FLRA 943 (1990).

Finally Respondent contends the UEI report was not necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining within the meaning of section 7114(b)(4)(B) of the Statute. Respondent attempts to support this contention by arguing that although Ms. Tomlinson was solely responsible for many duties within the Administrative Section, the UEI report focused upon the performance of the unit in general and not individual employees; the report was not relied on to support Tomlinson's removal action; and the request for the report was not made until after the Union invoked arbitration and therefore any issue involving the request for the report should be resolved by the arbitrator.

I find no merit in Respondent's arguments and find the record supports a conclusion that the UEI report was "necessary" with the meaning of the Statute. The Union sought the UEI report which reviewed the operation of the Administrative Section to determine whether something in the report might help Tomlinson, an employee in the Administrative Section, when the case was presented to the arbitrator, or if the report was injurious to Tomlinson, the Union might decided not to go to the expense of pursuing a futile matter. Indeed the report referred to numerous items which were arguably the responsibility of Ms. Tomlinson.10/

(Footnote continued from previous page.)
efficient operation of government." However, it appears from National Labor Relations Board and National Park Service that if management opinions or such data is necessary for a union to carry out its representational functions, no privilege exists against disclosure.

10/ It is possible that after the Union had the report it might decide to alter its strategy or arguments on
(Footnote continued on next page.)

Considering the nature of the report and the fact that the Union President was familiar with the general content of UEI reports, I find the report was relevant to Tomlinson's case and would undoubtedly be helpful to the Union in effective and efficient performance of its representational duties.

The Authority has long held that information an agency is required to disclose to a union under section 7114(b)(4) encompasses a broad range of data necessary for a union to carry out its representational rights and responsibilities, including information needed for the effective investigation, evaluation and processing of a grievance or for informed decision making as to whether a grievance is appropriate in a particular case. See U.S. Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire, 37 FLRA 515 (1990), footnote 18 and cases cited therein and National Park Service, supra, at 1037. In addition, the Authority has also, rejected a contention that information a union requested should not fall within the purview of section 7114 because the union requested information for the first time in preparation for arbitration. Thus, in U.S. Department of Transportation, Federal Aviation Administration, New England Region, Burlington, Massachusetts, 38 FLRA 1623 (1991), the Authority held at 1629-1630:

> . . . There is nothing in the Statute or the Authority's case law that suggests such a narrow reading of section 7114. We agree with the Judge that such a narrow reading would not serve the purposes of the Statute. We note in this regard that the National Labor Relations Board, with court approval, has long required "the provision, after as well as before a grievance has been submitted to arbitration, of requested information necessary to its intelligent evaluation and processing." Fawcett Printing Corporation, 201 NLRB 964, 972 (1973) (production on request after arbitration has

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(Footnote continued from previous page.)

Tomlinson's behalf, depending upon how it evaluated the document. Thus, the Union might have used the report to argue to an arbitrator that management was deficient in properly training and supervising Tomlinson and suggest such should temper any action taken against her.

been sought lessens the burden on the arbitral system by contributing to settlement of grievances without arbitration, by permitting representatives who are often more skilled and sophisticated at that stage to assess what information is necessary for arbitration, and, by assisting the parties in preparing the case for arbitration, thereby shortening the arbitration hearing and making the evidence received at the hearing more complete). See also, Pfizer, Inc., 268 NLRB 916, 918 (1984), enf'd 763 F.2d 887 (7th Cir. 1985); Chesapeake and Potomac Telephone co., 259 NLRB 225, 227 (1981), enf'd 687 F.2d 633, 635 (2d Cir. 1982).

Respondent further contends that if the report is found to be producible, then the data required to be furnished should be limited to factual findings of bargaining unit employees' conditions of employment but not those portions of the report dealing with opinions, evaluations and assessment of management of the unit. I reject this contention. In my view the entire document should be furnished to the Union to evaluate as to how it might be most beneficially used in the Tomlinson case and to make of it what they will if the matter should be presented to an arbitrator. Thus, the Union might wish to somehow develop and weave into their presentation and argument before an arbitrator an issue of lack of managerial guidance to Tomlinson. Indeed that was part of her grievance. Having found the report to be generally relevant and necessary, what specific use the Inspector General's report might serve the Union I would leave to the Union.

Accordingly, in view of the entire foregoing and in all the circumstances of the record herein, I conclude Respondent, by the conduct described above, violated section 7116(a)(1)(5) and (8) of the Statute and recommend the Authority issue 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 Defense, Minot Air Force Base, North Dakota, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish National Federation of Federal Employees, Local 1041, the exclusive

representative of its employees, with a complete copy of the August 1989 Inspector General's Unit Effectiveness Inspection report for the Administrative Section of Detachment 21, 9th Weather Squadron, Minot AFB.

(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) Upon request furnish National Federation of Federal Employees, Local 1041, the exclusive representative of its employees, with a complete copy of the August 1989 Inspector General's Unit Effectiveness Inspection report for the Administrative Section of Detachment 21, 9th Weather Squadron, Minot AFB.

(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 Commanding Officer of the Minot Air Force Base 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, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, July 25, 1991

SALVATORE J. ARRIGO
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 National Federation of Federal Employees, Local 1041, the exclusive representative of our employees, with a complete copy of the August 1989 Inspector General's Unit Effectiveness Inspection report for the Administrative Section of Detachment 21, 9th Weather Squadron, Minot AFB.

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 the National Federation of Federal Employees, Local 1041, the exclusive representative of our employees, with a complete copy of the August 1989 Inspector General's Unit Effectiveness Inspection report for the Administrative Section of Detachment 21, 9th Weather Squadron, Minot AFB.

_____
(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, Denver Regional Office, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303) 844-5224.