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

UNITED STATES DEPARTMENT OF THE TREASURY, UNITED STATES CUSTOMS SERVICE, SOUTHWEST REGION, HOUSTON, TEXAS Respondent	
and	Case No. 6-CA-01195
NATIONAL TREASURY EMPLOYEES UNION Charging Party	

Gordon Moise, Esq.
For the Respondent

Joseph T. Merli, Esquire
For the General Counsel

Walter E. Dresslar, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on March 25, 1991, by the Regional Director for the Dallas, Texas Regional Office, Federal Labor Relations Authority, a hearing was held before the undersigned on June 14, 1991 at El Paso, Texas.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, et seq., (herein called the Statute). It is based on a first amended

charge filed on March 18, 1991 by the National Treasury Employees Union (herein called the Union) against the United States Department of the Treasury, United States Customs Service, Southwest Region, Houston, Texas (herein called the Agency or Respondent).

The Complaint alleged, in substance, that on August 28, 1990 the Union requested Respondent to furnish copies of certain data which it alleged was necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. Further, that since August 28, 1990 Respondent has failed and refused to furnish the requested information - all in violation of section 7116(a)(1), (5) and (8) of the Statute.

Respondent's Answer, dated April 22, 1991, admits that the Union requested the information as alleged in the Complaint; that the records and documents are generally maintained in the regular course of business; that some of the information requested is reasonably available, while other such information may not be reasonably available; that the information requested does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining; that much of the information requested is not prohibited by law. Respondent denies that the information requested is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining.

The Answer also admits that since August 28, 1990 it has failed to respond to the Union's request of August 28,1990 and has not furnished the requested information.1/ It also denies the commission of any unfair labor practices.

All parties were represented at the hearing. Briefs were filed with the undersigned on August 7, 1991 which have been duly considered.

General Counsel moves to strike portions of Respondent's brief in two respects. It moves to strike from the summary of facts a statement that this case involves a failure to provide information responding to paragraphs 5-9 in the

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1/ As hereinafter indicated, certain requested items were furnished by Respondent on May 24, 1991.

Union's request for information. It is contended that the Complaint alleged a failure to furnish Items 1 through 9, not just 5 through 9. The motion in this respect is denied. This statement represents Respondent's theory of the issue, which it may well assume since the other items (1-4) were furnished.

The motion also moves to strike from the record the three attachments to Respondent's brief which were not introduced in evidence. The motion in this respect is granted. Documents not adduced in evidence at the hearing may not be part of the record or considered when attached to the briefs and submitted after the hearing. See U.S. Department of Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Salt Lake City, Utah, 40 FLRA 303; Section 2429.5 of the Authority's Rules and Regulations.

Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the Union has been, and still is, the exclusive representative of an appropriate nationwide unit of the employees of United States Customs Service. The said unit includes employees of Respondent in the Southwest Region, Houston, Texas.

2. At all times material herein the Union and the United States Customs Service have been, and still are, parties to a collective bargaining agreement which covers unit employees of Respondent's Southwest Region.

3. After the posting of a vacancy announcement for the position of Senior Customs Inspector, Respondent promoted 10 of the selectees to that position on August 27, 1989. Three of the selectees were promoted on September 10, 1989 and a fourth selectee was promoted on September 24, 1989.

4. On September 27, 1989 the Union's local Chapter 143, filed a grievance on behalf of three selectees, Arturo Chacon, Antonio Gonzalez, and Gilbert Perez of El Paso, Texas. The record reflects that Gonzalez and Perez were

promoted on September 10, 1989 while Chacon was promoted on September 24, 1989.2/

5. The grievances were denied, and the Union invoked arbitration in respect thereto on May 31, 1990.

6. On August 28, 1990 Walter E. Dresslar, Assistant Counsel of the Union, wrote the Director, Office of Human Resources, U.S. Customs Service, requesting the following information in regard to the aforesaid grievances:

(1) Materials which document the date the agency notified all selectees of their selection, or tentative selection, to the position of GS-11 Customs Inspector under vacancy announcement OPSC/89-0286KM;

(2) Materials which document the effective date of promotion to the GS-11 Customs Inspector position for all selectees promoted under Vacancy Announcement OPSC/89-0286KM;

(3) Materials which are letters to the selectees (or tentative selectees) notifying each selectee of his selection (or tentative selection) under Vacancy Announcement OPSC/89-0286KM;

(4) Materials which document the date each selectee (or tentative selectee) under Vacancy Announcement OPSC/89-0286 reported for drug testing, drug testing required for promotion;

(5) Materials which document the date the agency notified all selectees of their selection (or tentative selection) to promotion under any and all vacancy announcements in the Southwest Region during the last three years;

(6) Materials which document the effective date of promotion for all selectees under any and all

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2/ The grievances were filed with the Director, Office of Human Resources, United States Customs Service, Washington, D.C. They were based on the failure to promote the three named selectees on August 27, 1989 which resulted in a loss of pay from that date until their promotion dates.

vacancy announcements in the Southwest Region during the past three years;

(7) Materials which are letters to selectees (or tentative selectees) under any and all vacancy announcements issued in the Southwest Region during the last three years notifying each selectee of his selection (or tentative selection);

(8) Materials which document the date each selectee (or tentative selectee), under any and all vacancy announcements issued in the Southwest Region during the last three years, reported for drug testing, drug testing required for promotion.

(9) Material which reflect the average number of days between the date of notification of selection, or tentative selection, and the date a selectee's promotion is effected. This would be limited to selections and promotions effected after implementation of the agency's drug testing program which mandates drug testing for promotion.

7. In his letter to Respondent Dresslar stated the Union needed Items 1-4 to determine if the agency treated the grievants in a disparate manner since the Union contended that the Agency improperly delayed their promotion. The Union wished to determine the selection notification dates, the drug testing dates, and the promotion dates - all to match selectees with respect to such items.

In said letter Dresslar stated the Union needed Items 5-8 to determine the average time it took to process a promotion in the Southwest Region for the last three years.3/ This data would enable the Union to determine the delay in effecting the grievant's promotion and its length re all other promotions. Regarding Item 9, the Union wanted such data to compare the grievant's treatment to that of the Customs workforce. It was concerned that the grievants were the object of disparate treatment based on their Hispanic origin.

3/ Dresslar testified the Union sought data for three years since the drug testing program commenced three years ago.

8. The national agreement governing the employees herein provided in Article 31, Section 16D., inter alia, that ". . . The employer will provide to the grievant or his Union representative all relevant and necessary information for the processing of a grievance to the extent required by law. . . ."

Said agreement also provided, inter alia, as follows:

> An employee who is selected for promotion will have his promotion become effective no later than one (1)
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> complete pay period following his selection and the meeting of all placement requirements. . . .

9. On May 24, 1991 Respondent furnished the Union with Items 1-4 of the latter's request. The remaining Items 5-8, were never furnished by Respondent.

10. Rod White, Respondent's Labor Relations Specialist, testified that the Agency intended to supply Items 1-4 initially but failed to do so until later on because of an oversight on its part. The added information, he testified, was not furnished since it did not support a finding of disparate treatment; that, under the agreement, an employee is not entitled to promotion until he meets all requirements. It was necessary to be cleared for drug testing, and all grievants were promoted within one pay period from the date they were so cleared.

Conclusions

General Counsel contends that Respondent's failure and refusal to furnish Items 5-9, as requested by the Union, was not in accord with the Agency's obligation under section 7114(b)(4)(B) of the Statute. Further, that while it furnished Items 1-4 as requested, Respondent did not do so in a timely fashion. Accordingly, it is maintained that Respondent violated section 7116(a)(1), (5) and (8) of the Statute.

The principal issue, as raised by the Respondent, is whether the unfurnished data is necessary for the Union to fulfill its representational functions. Respondent insists that no merit exists to the Union's concerns that the grievants were not promoted along with the other selectees because of disparate treatment. It asserts that the delay in promoting the grievants was due to the drug testing procedure and not based on any fault of the Agency. Hence

the Union could not prevail at arbitration and the Union has no need of the remaining items.

With respect to the delay in supplying Items 1-4, Respondent insists that was an oversight; that the Agency had every intention to send the information earlier and then the Union filed its charge herein. Respondent concedes that Items 1-4, which not furnished, were relevant and necessary for the Union to pursue its duties as the employee's representative.

Section 7114(b)(4) of the Statute requires an agency to furnish a union, upon request and to the extent not prohibited by law, data which (1) is normally maintained by the agency in the regular course of business; (2) is reasonably available and necessary for discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.4/

It is well established that an agency is obligated under section 7114(b)(4)(B) to provide an exclusive representative of its employees with information that is reasonably available and necessary for the union to fulfill its representational duties. These duties include the filing of grievances and processing them on behalf of employees. Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas, 41 FLRA 137, 141 (1991); U.S. Department of Treasury, Internal Revenue Service, Washington, D.C., and Internal Revenue Service, Helena District, Helena, Montana, 39 FLRA 241. This includes information requested in order to effectively process a grievance in arbitration proceedings. See U.S. Department of Transportation, Federal Aviation Administration, New England Region, Burlington, Massachusetts, 38 FLRA 1623 (1991).

4/ Respondent has not contended that the unfurnished data was not maintained in the regular course of business. Neither has it maintained that the data constituted guidance, advice, counsel or training as set forth in this section of the Statute. Respondent's Answer averred that some of the requested data may not be reasonably available, and that much of this data is not prohibited by law. However, no evidence was adduced in regard to these averments.

In the instant case the Union requested the information to determine whether the grievants, who were Hispanic, had received disparate treatment by Respondent in respect to their promotion to GS-11 Customs Inspector. The other selectees had been promoted within one pay period from the date they cleared drug screening, whereas the promotion date for the grievants had been delayed since they had to retake the drug test.

The Authority has held that a union has a significant interest in the issue of disparate treatment, and documents relating to that issue are necessary within the meaning of section 7114 of the Statute. See Department of Defense Dependent Schools, Washington, D.C. and Department of Defense Dependent Schools, Germany Region, 28 FLRA 202 (1987). The data sought by the Union herein is directly related to the grievances concerning the three employees. Items 5-9 concern the selectees for promotion under other vacancy announcements - the dates of notification of selection, dates the selectees reported for drug testing, dates the selectees were notified of their promotions, and the effective dates of promotions. This information would enable the Union to make a comparative evaluation of the time it took to effectuate promotions and thus determine whether the promotions of the grievants herein were processed in a different manner so as to justify proceeding to arbitration. As such, the data would be necessary within the meaning of the Statute.5/

Respondent's arguments relate, for the most part, to the merits of the grievance, and that the Union would not be able to establish disparate treatment at arbitration. Contentions of this nature challenge the merits of the grievance, and they are more properly raised before an arbitrator. However, they do not relieve an agency of its obligation to furnish the requested data. See Internal Revenue Service, National Office, 21 FLRA 646, 649, n.3 (1986). Thus, I conclude that it is not for Respondent to determine whether disparate treatment occurred with respect to the grievants. Further, the Agency may not refuse to furnish the requested data on the ground that it finds no disparity existed as alleged in

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5/ Since Items 5-9 involve a three year period, it may be questioned whether the amount of material would impose a burden upon the Respondent. However, the Agency has not challenged the request as burdensome, nor was any evidence adduced in regard thereto.

the grievances. In sum, I find that Respondent was obligated to furnish Items 5-9, as requested by the Union, and its failure to do so was violative of section 7116(a)(1), (5) and (8) of the Statute.6/

Decisional law in the public sector also makes it clear that an agency is obliged to furnish requested data, which satisfies the requirements of section 7116(b)(4), in a timely manner. See and compare Bureau of Prisons, Lewisburg Penitentiary, Lewisburg, Pennsylvania, 11 FLRA 639. In a subsequent case the agency withheld the delivery of certain data until nine months after the union requested the information. The Authority held in U.S. Food and Drug Administration and U.S. Food and Drug Administration, Region VII, Kansas City, Missouri, 19 FLRA 555, that the agency "acted in derogation of its statutory obligation under section 7114(b)(4) by its untimely delivery of the requested data.

In the instant case Respondent did not furnish Items 1-4 until May 24, 1991, which was nine months after the Union's request made on August 28, 1990. No waiver having been interposed by the Union to the receipt of this data in due time, I conclude that the material in Items 1-4 were not furnished within a reasonable time. By taking nine months to supply the Union with data which Respondent admits was relevant and necessary, and it not appearing that a reasonable basis existed for not furnishing it much earlier than May 24, 1991, Respondent failed to respond in a timely manner as to Items 1-4 of the Union's request. In that respect, it also violated section 7116(a)(1), (5) and (8) of the Statute. Such duty is imposed upon an agency when the data is normally maintained by it in the regular course of business, is

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6/ Respondent admits that much of the material requested would not be prohibited by law. Note is taken that no evidence was presented to establish that privacy interests of employees would prevail. Moreover, Items 1-4 were furnished and this issue was not raised before presentation. In any event, section (b)(2) of the Privacy Act provides that the prohibition against disclosure is not recognized if disclosure is required under FOIA. Disclosure is required under FOIA unless, under exemption (b)(6), it would constitute an unwarranted invasion of personal privacy, 5 U.S.C. 552(b)(6). No such unwarranted invasion of privacy has been established herein by furnishing the materials requested by the Union. Thus a defense in this regard is not tenable.

reasonably available and necessary for discussing collective bargaining subjects, which does not constitute guidance, advice or counsel relating to collective bargaining, and is not prohibited from disclosure by law.7/

Having concluded that Respondent violated the Statute as aforesaid, 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 United States Department of the Treasury, United States Customs Service, Southwestern Region, Houston, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Treasury Employees Union, exclusive representative of its employees, the balance of the information requested by the exclusive representative in connection with the processing of grievances, to which it is entitled under the Statute.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to the effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Furnish the National Treasury Employees Union, exclusive representative of its employees, the balance of the information requested by the Union.

(b) Post at its Southwest Region 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 Regional Commissioner, and shall be posted and maintained for sixty (60) consecutive days thereafter in conspicuous places, including all bulletin

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7/ The only issue raised at the hearing by Respondent concerns the necessity and relevance of Items 5-9 under the Statute.

boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure 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, Dallas 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, October 10, 1991

William Naimark

WILLIAM NAIMARK
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 National Treasury Employees Union, exclusive representative of our employees, the balance of the information requested by the exclusive representative in connection with the processing of grievances, to which it is entitled under the Statute.

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 Treasury Employees Union, the exclusive representative of our employees, the balance of the information requested by the Union.

_____
(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, Dallas Regional Office, whose address is: 525 Griffin Street, Suite 926, LB-107, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.