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, DETROIT DISTRICT, DETROIT, MICHIGAN Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. 5-CA-10141

Byron D. Smalley, Esq., and
James Rogers, Jr., Esq.
For the Respondent

Paul R. Klenck, Esq., and
Valerie R. Searcy-Cox
For the Charging Party

John F. Gallagher, 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,[1] the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Acting Regional Director for the Chicago Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by failing and refusing to supply the Union with data it requested.

A hearing on the Complaint was conducted in Chicago, Illinois at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally.[2] Briefs were filed by the Respondent, the Charging Party and the General Counsel and have been carefully considered.[3]

1/ An issued was raised by counsel for the Respondent concerning the Internal Revenue Service being an "agency within the meaning of the Statute and the name of Respondent was amended at the hearing to include Department of the Treasury as the "Agency." However, clearly the Internal Revenue Service is the agent of Department of the Treasury and as such is a viable respondent standing alone without explicit reference to the Department of the Treasury in a case captioned. Scores of cases litigated before the Authority in the past naming only the Internal Revenue Service as a respondent support this conclusion.

2/ Counsel for the General Counsel's unopposed motion to correct the transcript is hereby granted.

3/ In its brief Respondent referred to an attached arbitration decision dated March 1991. The document was not offered to be placed in evidence at the hearing conducted on May 8, 1991 and counsel for the General Counsel moved to strike the document and the portion of Respondent's brief that referred to the document. Counsel for Respondent replied urging counsel for the General Counsel's motion to strike be denied. No good cause has been shown as to why the arbitration decision could not have been offered as evidence at the time of the hearing or why, in any event, the document should be accepted after the close of hearing. To receive the document under the circumstances herein would deprive the other parties of an opportunity to challenge, question or rebut the matters contained in the document or arguments related thereto. Accordingly, Counsel for the General Counsel's motion to strike is hereby granted and no consideration shall be given to the document or argument with regard thereto.

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

Findings of Fact

The Internal Revenue Service (herein IRS) is headquartered in Washington, D.C. and is composed of seven Regions including the Central Region which has its Regional Office in Cincinnati, Ohio. The Central Region is divided into various District Offices including the Detroit District Office in Detroit, Michigan. At all times material the Union has been the exclusive collective bargaining representative of a nationwide unit of certain of Respondent's employees including IRS employees in the Central Region and the Detroit Regional Office.

In January 1990 Respondent issued a notice of proposed adverse action to Detroit Regional Office employee Alice Strong proposing that Strong be removed from employment or otherwise disciplined for alleged misconduct concerning unauthorized absences from work. On April 17, 1990 Respondent notified Strong of its decision to suspend her from both duty and pay for 12 days. On April 19 the Union notified Respondent that it wished to have the Strong matter heard by an arbitrator pursuant to provisions of the parties' collective bargaining agreement and requested the suspension be stayed.

Subsequently Strong's proposed suspension was scheduled to be heard by an arbitrator on December 4, 1990. On October 4, 1990 the Union's National Field Representative Randi Warshall sent to the Central Region General Legal Services Office the following request:

> All documents relating to the proposed disciplinary and adverse actions in the Central Region against bargaining unit employees during the three year period prior to December 6, 1990, based upon allegations of improper leave usage/failure to observe official duty hours and abide by established leave procedures. These would include violations of Section 215.3 of the Internal Revenue Service Rules of Conduct. Please also furnish the corresponding decision letters to each proposed action.

By letter dated October 23, 1990 Respondent's Central Region General Legal Services Office indicated: it failed

to see the relevance and necessity of the data generally; data after July 3, 1989 had already been provided to the Union since under the parties current collective bargaining agreement (herein NORD III), Respondent provided all such information to the Union nationwide; and it required "clarification" regarding whether the data requested was for Central "Regional Office employees, or all employees under the jurisdiction of the Regional Commissioner, Central Region, or all employees working within the geographic confines of the states comprising the Central Region?" "Clarification" was also required to determine whether, with regard to "bargaining unit employees," did the Union mean "all IRS employees who are within any bargaining unit, or . . . mean IRS employees who are within the same bargaining unit as the grievant" and what specifically did "all documents" include. Respondent also indicated it had problems concerning sanitization of identifying information and it considered the request was overly broad for various other reasons. However, Respondent acknowledged that proposal and decision letters for comparable actions in the Detroit District were necessary within the meaning of section 7114(b) of the Statute and agreed to have compiled for release to the Union "copies of proposal and decision letters, where a suspension or other discipline was proposed for an employee with a previous 5 day suspension (as with the case of Ms. Strong), or more severe penalty, for an attendance violation on his/her record."4/ Data already furnished under the terms of NORD III would not be recompiled.

On November 5, 1990 Respondent through one of its attorney's informed the Union that there existed three cases fitting the description of the data the Union requested concerning the Strong arbitration, but under NORD III those cases had already been provided to the Union.

National Field Representative Warshall met with another attorney representing Respondent concerning the Strong case on November 7, 1990 and was told that management's position on the information request was that the Union was not entitled to information from the Central Region because it was not necessary and relevant. By letter dated November 14 an attorney for Respondent advised the Union of the following:

4/ Apparently Respondent had no confusion regarding what was being requested as it applied to Detroit District Office employees.

This letter will follow-up on our previous responses to your request for documents in the above-referenced matter. In particular, you requested information regarding similarly situated bargaining unit employees in the Central Region. It is our position that only the Detroit District documents are relevant within the meaning of the Merit Systems Protection Board decisions which have addressed the consistency of the penalty with those imposed upon other employees for the same or similar offenses. The deciding official, John Wilson, does not decide disciplinary and adverse actions outside the Detroit District. Accordingly, we have not furnished these documents.

Prior to the date set for arbitration of the Strong case, all parties signed a Settlement Agreement which provided:5/

In full and complete settlement of the invocation of arbitration filed by the National Treasury Employees Union (hereinafter "Union"), on behalf of Alice Strong (hereinafter "Grievant"), on April 19, 1990, the Union, the Grievant, and the Internal Revenue Service (hereinafter "Agency"), hereby agree as follows:

1. The Agency will impose a ten (10) calendar day suspension upon the Grievant, to begin on January 5, 1991.

2. The Union agrees to withdraw its invocation of arbitration, and further agrees not to file any appeal or claim on behalf of the Grievant with respect to the matters raised by its invocation of arbitration.

3. This agreement does not constitute an admission by the parties of any violation of the NORD III Agreement, Title VII of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, or of any federal or state statute or regulation.

5/ The Settlement Agreement was signed by an attorney for Respondent on November 14, by National Field Representative Warshall on November 15, and by the grievant and the IRS District Director on November 21, 1990.

4. The Grievant acknowledges that she fully understands the terms and conditions of this agreement and has voluntarily agreed to settle this dispute subject to this agreement's terms and conditions. The Grievant agrees not to pursue any other claim, lawsuit, or statutory appeal of any kind arising from the allegations that have been raised or could have been raised with respect to the invocation of arbitration.

5. This agreement constitutes the complete understanding of the parties. No other promises or agreements shall be binding unless placed in writing and signed by the parties.

6. The terms of this agreement shall not establish any precedent, nor will the agreement be used by any other person, organization or group to seek or justify similar terms in any subsequent case; provided, however, that the Agency may consider the Grievant's ten-day suspension in the event that subsequent disciplinary or adverse action is proposed or sustained against the grievant.

7. The parties will bear their own costs, fees, and attorney's fees in this matter. The Agency and the Union will each pay fifty per cent (50%) of the fees incurred for the services of the arbitrator.

8. This agreement will become effective upon the date it is executed by all parties.

On December 7, 1990 the Union filed an unfair labor practice charge giving rise to these proceedings, essentially alleging Respondent, by its letters of November 5 and 14, above, refused to furnish to the Union copies of all cases involving disciplinary and adverse actions taken against employees in the Central Region for charges of AWOL.

Additional Findings, Discussion and Conclusions

The General Counsel contends Respondent violated section 7116(a)(1), (5) and (8) of the Statute by failing to furnish the Union with proposed disciplinary and adverse action letters and disciplinary and adverse action decision letters concerning absence without leave matters which involved IRS Central Region bargaining unit employees, excluding the IRS

Detroit District, for the period December 6, 1987 through June 1989.6/

Respondent contends: the Union's information request is moot; the Union waived its right to file an unfair labor practice charge when it executed the Settlement Agreement; and the information the Union sought is not necessary or relevant to dispose of the underlying issue which would have been presented at the arbitration had it been conducted.

With regard to its defense of mootness, Respondent essentially contends the request for information was "grievant-specific" and after the Settlement Agreement was effectuated, the Union's need for the information was extinguished, thus rendering the matter moot.7/ Clearly, after the Settlement Agreement was effectuated, the Union no longer had a need for the data it had requested, as National Representative Warshall acknowledged. However, if Respondent's refusal to supply the data prior to the Settlement Agreement constituted a violation of the Statute, that violation in itself would require a remedy. Thus, in the circumstances herein "mootness" would not

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6/ NORD III effective July 2, 1989 and currently in effect, provides in Article 38 section 7 and Article 39, section 7, inter alia, that the employer will provide the Union with unsanitized copies of all proposal and decision letters for suspension of less than 14 days and adverse actions simultaneously with their issuance to employees.

7/ In its brief Respondent mentions that it did not deny the Union's request of October 4, 1990 but rather raised various "questions or concerns" on October 23 which were never answered. In my view the Union's request of October 4 was clear and specific and Respondent's reply of October 23 was little more than an attempt to delay compliance with the request and raise disingenuous issues. Indeed, Respondent had no difficulty later concluding that what was subsequently provided to the Union for the Detroit District amounted to compliance with the request, at least for that District. In any event, Respondent's stated positions on November 5, November 7, and November 14, supra, indicate that there was no confusion as to what the Union wanted or what Respondent's position was, i.e., Central Region data beyond the Detroit District would not be provided because such was not deemed to be necessary or relevant to the Strong matter.

constitute a valid defense to a finding of a violation of the Statute for refusing to furnish information but would be a factor to consider when fashioning an appropriate remedy. Accordingly, Respondent's contention regarding mootness is rejected. See Veterans Administration, Washington, D.C. and Veterans Administration Regional Office, Buffalo, New York, 28 FLRA 260 (1987).

Respondent also contends that by entering into the Settlement Agreement the Union waived its right to file an unfair labor practice charge over the refusal to furnish information concerning the Strong matter. Respondent asserts that the "plain wording" of the Settlement Agreement constitutes clear evidence of the waiver, alluding to the text of paragraph 2 of the agreement.

All parties acknowledge that under Authority law, to constitute a waiver of a Statutory right the waiver must be clear and unmistakable. See Internal Revenue Service, Washington, D.C., 39 FLRA 1568 (1991); Library of Congress, 9 FLRA 421 (1982); and Department of the Air Force, Scott Air Force Base, 5 FLRA 9 (1981). My analysis of the Settlement Agreement indicates no such clear and unmistakable intent by the Union to waive its right to file an unfair labor practice charge over Respondent's failure and refusal to furnish information the Union requested. Thus, in paragraph 2, supra, referred to by Respondent, the Union agreed to withdraw its invocations of arbitration and further agreed "not to file any appeal or claim on behalf of the grievant . . ." regarding the matters raised in the arbitration request. (Emphasis added.) However, clearly the Union thereby did not make any agreement regarding filing any further action on its own behalf. The unfair labor practice charge herein concerns the Union's right to the requested information when arbitration of the Strong matter was envisioned.8/ The "plain wording" therefore does not indicate that by entering into the Settlement Agreement the Union was agreeing not to pursue any action it might have

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8/ Such data generally was clearly necessary within the meaning of section 7114(b)(4) of the Statute since the Union obviously would find records of discipline given to other employees in similar situations useful when preparing the case for presentation to an arbitrator. See Department of Defense Dependents Schools, Washington, D.C. and Department of Defense Dependents Schools, Germany Region, 28 FLRA 202 (1987).

which arose when it decided to send the matter of Strong's discipline to arbitration.

The fact that the request for arbitration was withdrawn by the Settlement Agreement does not alter this conclusion. While the Union clearly no longer needed the data it originally sought, whether a violation of the Statute occurred must be evaluated by considering the facts at the time of the demand and refusal. If the Union had a Statutory right to the data when requested, the Respondent had a Statutory obligation to furnish it at that time. While in such a situation as herein subsequent events may well affect the appropriate remedy available for a Statutory violation, they do not affect whether the violation actually occurred. Accordingly, Respondent's defense of waiver is rejected.

Finally, Respondent argues that the information sought was not necessary under section 7114(b)(4) of the Statute since it was not relevant to a determination of the matter before the arbitrator.9/ Essentially, Respondent based its argument that information from outside the Detroit District was not relevant on its assertion, articulated in Respondent's letter to the Union dated November 17, 1990, supra, that only relevant documents were those "relevant within the meaning of Merit Systems Protection Board decisions which have addressed the consistency of the penalty with those imposed upon other employees for the same or similar offenses" and that "(t)he deciding official . . . does not decide disciplinary and adverse actions outside the Detroit District." However, the record contains insufficient

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9/ In its answer Respondent also denied that the information sought was normally maintained in the regular course of business; was reasonably available; or was not prohibited from disclosure by law. Respondent did not raise these matters as a defense during the hearing in this case nor in its brief to me. It would appear therefore that its position on these matters has been abandoned. In any event, the record herein supports a conclusion that the information sought by the Union was normally maintained in the regular course of business and was reasonably available. Further, Respondent offered no evidence or argument to support a contention that the information sought was prohibited from disclosure by law within the meaning of section 7114(b)(4) of the Statute. In its answer Respondent admitted that the information sought did not constitute guidance, advice, etc., under section 7114(b)(4).

evidence to support this conclusion.10/ In any event, I conclude the information sought by the Union was necessary and relevant to the issue of whether Strong's discipline constituted disparate treatment which the Union might wish to place before the arbitrator or otherwise consider and evaluate when preparing its case for arbitration. Indeed, one arbitrator may differ from another in evaluating the question of disparate treatment including deciding the appropriate geographic or administrative universe to consider when determining disparate treatment. Accordingly, Respondent's contentions regarding the matter of the necessity and relevance of the data sought are rejected. Cf. U.S. Department of Treasury, Internal Revenue Service (Salt Lake City).

In view of the foregoing and the entire record I conclude that by its failure and refusal to furnish the data requested by the Union which involved IRS Central Region bargaining unit employees, excluding Detroit District employees, for the period between December 6, 1987 and June 30, 1989, Respondent violated section 7116(a)(1), (5) and (8) of the Statute. However, since the data sought is no longer needed by the Union an order requiring that Respondent furnish the Union with the documents is not necessary. Nevertheless, since the information requested herein was made on a Region-wide basis and the Respondent's Regional personnel were responsible for the refusal found violative of the Statute, I shall recommend Respondent post a Notice to Employees on a Region-wide basis and be signed by the Regional Commissioner for the Central Region.11/ Accordingly, I recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-

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10/ I note in U.S. Department of Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Salt Lake City, Utah, 40 FLRA 303 (1991), that this assertion was not resolved and it was the position of the Union, at 308, that other arbitrators "found a region-wide comparison group to be relevant under . . . (the collective bargaining agreement)."

11/ It appears the specific type of violation found herein is not likely to occur again in view of the terms of NORD III.

Management Relations Statute, the Department of the Treasury, Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Detroit, Michigan, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish, upon request by the National Treasury Employees Union, the employees' exclusive representative, information which is necessary for the exclusive representative to effectively prepare for processing a grievance through arbitration.

(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) Post at all its facilities in the Central Region where bargaining unit employees are located, 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 Commissioner for the Central Region and shall be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted, and shall be maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for the Chicago Region, Federal Labor Relations Authority, 175 W. Jackson Blvd., 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, DC, September 27, 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, upon request by the National Treasury Employees Union, the employees' exclusive representative, information which is necessary for the exclusive representative to effectively prepare for processing a grievance through arbitration.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

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