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

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION AND SOCIAL SECURITY ADMINISTRATION FIELD OPERATIONS, REGION II Respondent	
and	Case No. 2-CA-90212
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

Wilson G. Schuerholz
For the Respondent

Ana Angelet
For the Charging Party

Edgar Allan Jones, 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 against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for Region II, issued a Complaint and Notice of

Hearing alleging Respondent violated the Statute by failing and refusing to furnish to the Union unsanitized copies of performance appraisals for various employees who had an "interviewing" standard in their generic job tasks for the appraisal periods ending September 1987 and September 1988.

A hearing on the Complaint was conducted in San Juan, Puerto Rico, 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.

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 American Federation of Government Employees, AFL-CIO (herein AFGE) has been the exclusive collective bargaining representative of various of Respondent's employees including those employed in Respondent's Area 8 which encompasses approximately 20 offices located primarily in Puerto Rico. AFGE Local 2608 (herein the Union) has been the agent of AFGE for the purpose of representing those employees.

In early November 1988 Union President Pedro Romero, while representing employees dissatisfied over recent performance appraisals, observed what appeared to him to be a trend in employees having had their recent appraisals lowered regarding the appraisal generic job task of "interviewing."1/ The manner of scheduling interviews had changed during the previous year and Romero suspected that this change might have resulted in lower appraisals. However, Romero recognized that the appraisals he had seen might not be representative of the appraisals of all employees who had interviewing as an appraisal factor.2/ Accordingly, on November 8, 1988 Romero mailed the Area 8 Director the following typewritten letter:

1/ Performance appraisals for the prior year ending September 30 are issued to employees around the last week of October of that year.

2/ The Union represents approximately 350 Area 8 employees, most of whom have interviewing as a job task.

> The Union needs copies of all Performance Appraisals for all interviewing personnel in Area 8 for appraisal periods ending September 1987 and 1988. We are contemplating filing an Areawide Section 10 grievance and this information is needed for this representational function. This request is made pursuant to 5 USC 7114 B 4.3/
>
> Respond by COB November 22, 1988.

Romero received no reply from Respondent and in early December 1988 sent Respondent a copy of the November 8 letter, noting across the top of it in underscored handwriting, "2nd Request." The Area 8 office received the letter on December 5 and replied to the Union on December 7 indicating it had no record of having received any prior communication from the Union on the matter. The reply also stated:

> In order to give full consideration to your petition for performance appraisals of all interviewing personnel for appraisal periods ending September 1987 and 1988, please explain why this information is relevant and necessary for the pursuit of this specific grievance and for your representational functions. Once this information is received, I will be able to evaluate if release is in order.

Within a week or ten days after receiving the Union's request for appraisals the Administrative Assistant to the Area 8 Director, Jorge Valez, telephoned the various Area 8 local offices where the appraisals are retained and was informed by 13 offices that the appraisals for the 1986-1987 appraisal year had been destroyed. The established practice regarding such documents is to destroy them after a subsequent appraisal enters the employee's personnel file. Thus, when the appraisal for the year ending September 30, 1988 was given, the prior appraisal was considered no longer needed and therefore available for destruction. Indeed, offices are reminded by Regional offices every February that

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3/ Romero testified he needed to compare two years' appraisals to ascertain if a general lowering of appraisals on the interviewing task had actually occurred.

the files should be purged of such material, but purging may occur any time after a current appraisal enters the employee's personnel file.

Later in December 1988 Union President Romero had a number of conversations with Administrative Assistant Valez concerning the request for appraisals. During these talks Romero informed Valez he needed the unsanitized appraisals to determine if there was a tendency over the past appraisal year to lower appraisals for interviewing.4/ Romero also indicated he needed the unsanitized appraisals so he could contact particular employees to see if they wished to file a grievance on the matter.5/

By letter of January 12, 1989 Union President Romero again requested the performance appraisals stating:

> We have not received copies of the performance appraisals of all interviewing personnel in Area 8 which we have requested on two previous occasions. We have noted a trend this appraisal year to lower ratings in the interviewing area and need to asses this with the information requested. We are requesting that the information not be sanitized as we may need to contact individual employees regarding this matter.
>
> Please respond by COB January 20, 1989.

On January 26, 1989 Respondent's Area 8 Director's office replied to Romero indicating that they expected to supply sanitized copies of the requested appraisals within one week, noting that the reason the appraisals were not previously furnished was because the Activity needed to know why the desired information was relevant and necessary and that information was not received until January 17 when Romero's January 12, 1989 letter, supra, was received.

4/ Unsanitized meant providing performance appraisals which contained the name and address, but not social security number, of each employee.

5/ The ex-Area Administrative Assistant, who was working with Valez during his training, testified that with regard to compliance with the Union's "2nd Request" supra, the real issues which troubled the Activity was the question of sanitization of employees' identities.

By letter dated February 16, 1989 Respondent provided the Union with various sanitized copies of appraisals for employees engaged in interviewing.6/ Thus the Union was provided with sanitized appraisals for all such employees in the 20 offices comprising Area 8 for the October 1987 to September 1988 appraisal period, separated by office. Respondent also provided sanitized appraisals for the October 1986 to September 1987 period. However these appraisals were only for employees in 7 out of 20 offices since appraisals for employees in the other 13 offices had been previously purged from the files.

Additional Findings, Discussion and Conclusions

The General Counsel contends the requested unsanitized appraisals constituted data within the meaning of section 7114(b)(4) of the Statute, necessary for collective bargaining purposes, and disclosure of the data was not prohibited by any employee privacy interest. The General Counsel also contends that destruction of some of the documents sought after the demand was made by the Union also violated the Statute. Respondent contends that the Union's demand for data did not clearly articulate "need" for the data as required by the Statute and, in addition, because of the Union's vagueness, Respondent reasonably concluded that privacy considerations raised by the Privacy Act, 5 U.S.C. § 552a(b)(2), outweighed the Union's need for unsanitized appraisal information when competing considerations were balanced. Respondent also denies that its purging various appraisals violated the Statute.

Section 7114(b)(4) of the Statute states that the Statutory obligation to negotiate in good faith includes the duty:

> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
>
> (A) which is normally maintained by the agency in the regular course of business;

6/ Names and other identifying information was removed from the documents.

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. . . .

The parties stipulated that the requested data is normally maintained by the Agency in the regular course of business; is reasonably available; and does not constitute guidance, advice, etc., relating to collective bargaining. The parties also stipulated that the records sought by the Union were part of a "system of records" within the meaning of the Privacy Act.

Thus, the first issue to be resolved is whether the Union's obtaining unsanitized appraisals was necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. Union President Romero testified that shortly after employees received their performance appraisals for the year ending September 30, 1988, he had conversations with employees concerning the appraisals and thought he perceived that appraisals for the "interviewing" job task were lower than the prior appraisal year. However he needed the current and prior appraisals of employees, by name, so he could compare one year against the other and discern if their was a general lowering of appraisals for interviewing and, if such occurred, to explore the possibility of filing a grievance or contacting employees to see if any adversely affected employee wished to grieve.

The court in AFGE, AFL-CIO, Local 1345 v. FLRA, 793 F.2d 1360 (D.C. Cir., 1986), held that the duty to provide information under section 7114(b)(4) of the Statute encompasses information needed by the exclusive representative to perform the full range of its responsibilities under the Statute. The court went on to explain, inter alia: as the exclusive representative represents potentially aggrieved employees, the union must have sufficient information to process a grievance or be able to determine whether to file a grievance; as the representative of all bargaining unit employees the exclusive representative must have relevant

information to understand and assess new policies or the application of old policies that affect unit employees regarding the administration and negotiation of agreements; and the union has a legitimate concern with its own status as exclusive representative and must have sufficient information to assess its representational responsibilities.

The Authority's views on the scope of the obligation to supply information under section 7114(b)(4) of the Statute are consistent with those expressed by the court in AFGE v. FLRA, supra. See National Labor Relations Board, 38 FLRA No. 48 (1990). Accordingly, in view of the exclusive representative's status and need for the data as described above, I conclude in the circumstances herein that the unsanitized employee appraisals for the periods 1986-1987 and 1987-1988 were 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.7/

Although Romero's letter of November 8, 1988, which Respondent undeniably received by December 5, simply indicated the information was necessary because the Union was contemplating filing a grievance, in subsequent conversations in December with Assistant Area Administrator Valez, Romero related that he wished to examine the data, unsanitized, to determine whether there was a pattern of lowering appraisals for interviewing and to enable the Union to contact specific employees where he felt a grievance might be justified. Essentially the same information was relayed to the Activity by Romero in his letter of January 12, 1989. However in December Respondent knew precisely what the Union wanted and why it wanted the data.8/ Accordingly, I conclude Respondent was clearly apprised by at least mid-December 1988 of the reasons the Union required the data sought.

7/ See also Portsmouth Naval Shipyard, supra, for discussion on a union's right for information to assist it in the performance of its representational duties which, under section 7101(a)(1)(B) of the Statute, "contributes to the effective conduct of public business[.]"

8/ Indeed, the major problem the Activity had with the request in December was whether the data could be provided to the Union in an unsanitized fashion and not why the Union wanted the materials.

Respondent contends that providing the data requested by the Union in unsanitized form would violate section (b)(2) of the Privacy Act, 5 U.S.C. § 552a. Section (b)(2) of the Privacy Act provides:

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to written consent of, the individual to whom the record pertains, unless disclosure of the record would be--
>
> * * *
>
> (2) required under section 552 of this title. . . .
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> 5 U.S.C. section 552, the Freedom of Information Act, provides in section 552(b)(6) that an agency need not disclose:
>
> (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . .

Where, as here, information requested by a union are filed under section 552(b)(6) of the Privacy Act, the Authority must balance the needs of the union to perform its representational duties against the privacy rights of employees. See Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 25 FLRA 1060 (1987) and Portsmouth Naval Shipyard, supra. The Union herein needed the appraisals, as more fully described above, to test its observation that the "interviewing" generic job task for employees had been generally graded lower during the last appraisal year. Only after reviewing the unsanitized appraisals could the Union decide, if a pattern was disclosed, that a general grievance should be filed and affected unit employees should be notified of the matter so they could decide whether they wished to file a grievance. Thus the Union's review of appraisals of unit employees it represents was for a clearly representational purpose, which function is in the public interest and also safeguards the public interest. See Veterans Administration Medical Center, Jackson, Mississippi, 32 FLRA 133 (1988). Further, in seeking to protect unit employees' interests by being

vigilant to possible lowering of appraisals due to a change in interviewing procedures, the employees' exclusive representative was carrying out its right and obligation as mandated by the Statute. While public disclosure of the contents of an employee's performance appraisal might well be considered an unwarranted invasion of privacy, there is no indication that the Union envisioned public disclosure or desired the appraisals for anything more than to compare two years' appraisals for "interviewing" in the exercise of its representative rights and responsibilities as explained above. Accordingly, balancing the various considerations herein I conclude that Respondent's Privacy Act defense to producing the requested performance appraisals in an unsanitized manner to be without merit. See Army and Air Force Exchange Service (AAFES) and Portsmouth Naval Shipyard, supra.

However, I do not find that Respondent's purging of the appraisal files constituted a violation of the Statute. While I have found the Union mailed its initial request for information on November 8, 1988, I also have found Respondent did not receive the request until the "2nd Request" was received on December 5. At that time all Respondent possessed was the Union's request for performance appraisals which did not, in view of the privacy consideration which attach to such files, inform Respondent of the Union's need for the documents with sufficient specificity to satisfy the requirements of section 7114(b)(4)(B) of the Statute as to why it was "necessary" that the Union have the unsanitized appraisals. Within a week or 10 days thereafter Administrative Assistant Valez telephonically requested that the various local offices supply him with the appraisals and he was informed that some files had already been destroyed. The appraisal files were purged consistent with normal Activity practice. I find the request for the appraisal files was made to local offices in a timely fashion and the files were destroyed before Valez made his request for the files. In these circumstances I cannot conclude the files were deliberately destroyed to preclude their being available to the Union nor can I conclude that the destruction occurred in such circumstances as to indicate the files were destroyed with reckless disregard of bargaining obligations or as a result of an improper or bad faith refusal to timely produce the documents. I therefore reject the contention that the Activity's purging of the 1987 appraisal files at the 13 local offices constituted a violation of the Statute.

Accordingly, in view of the entire foregoing I conclude Respondent, by the conduct described above, violated section

7116(a)(1), (5) and (8) of the Statute and I 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 Federal Service Labor-Management Relations Statute, the Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, AFL-CIO, Local 2608, the agent of the exclusive representative of various of its employees, unsanitized copies of all existing performance appraisals of Area 8 unit employees with a generic job task for "interviewing" for the appraisal periods ending September 1987 and September 1988.

(b) In any like or related manner, interfering with, restraining, or coercing their 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 the American Federation of Government Employees, AFL-CIO, Local 2608, unsanitized copies of all existing performance appraisals of Area 8 unit employees with a generic job task for "interviewing" for the appraisal periods ending September 1987 and September 1988.

(b) Post at its Area 8 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 Area 8 Director, 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, Boston

Region, Federal Labor Relations Authority, New York, New York, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, January 31, 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 NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, AFL-CIO, Local 2608, the agent of the exclusive representative of various of our employees, unsanitized copies of all existing performance appraisals of Area 8 unit employees with a generic job task for "interviewing" for the appraisal periods ending September 1987 and September 1988.

WE WILL, upon request, furnish the American Federation of Government Employees, AFL-CIO, Local 2608, unsanitized copies of all existing performance appraisals of Area 8 unit employees with a generic job task for "interviewing" for the appraisal periods ending September 1987 and September 1988.

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

_____

(Agency or 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 its provisions, they may communicate directly with the Regional Director, Boston Region, Federal Labor Relations Authority whose address is: 26 Federal Plaza, Room 3700, New York, NY 10278, and whose telephone number is: (212) 264-4934.