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 BALTIMORE, MARYLAND Respondent	
and	Case No. 9-CA-00133
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3937, AFL-CIO Charging Party	

Susan E. Jelen, Esquire
For the General Counsel

Wilson Schuerholz
For the Respondent

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on December 18, 1989, by the American Federation of Government Employees, Local 3937, AFL-CIO, (hereinafter called the Union), a Complaint and Notice of Hearing was issued on March 30, 1990, by the Acting Regional Director for Region IX, Federal Labor Relations Authority, San Francisco, California. The Complaint alleges that the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, (hereinafter called the Respondent), violated Sections 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations

Statute (hereinafter called the Statute), by failing and refusing to provide to the Union certain requested appraisal information which was necessary for the processing of a possible grievance based upon alleged disparate treatment.

A hearing was held in the captioned matter in Portland, Oregon. All parties were afforded the full opportunity to be heard, examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent and the General Counsel submitted post-hearing briefs, which have been duly considered.1/

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.2/

Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive representative of an appropriate nationwide consolidated unit within the meaning of § 7112 of the Statute. The unit includes, among others, the employees of Respondent's Portland Teleservice Center, Portland, Oregon. The Union, at all times material, has been an affiliate of AFGE and an agent of AFGE for the purpose of representing certain employees of the Social Security Administration, including the employees of Respondent's Portland Teleservice Center, Portland, Oregon. The Union is

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1/ Appended to Respondent's post hearing brief were three attachments to which the General Counsel has filed an objection. Attachments 1 and 2 are letters dismissing unfair labor practice charges in two other separate cases. Attachment 3 is a FSIP decision dealing with Joint Exhibit No. 2 and which ordered the parties to implement the provisions of Joint Exhibit No. 2. Inasmuch as Attachment 3 is referred to in the record and is a published document available to all, I see no harm in allowing it to become part of the record. Attachments 1 and 2, however are not published decisions and are unrelated to the instant case. Accordingly, they are hereby stricken from the record and will not be considered by the undersigned in formulating the final decision in this matter.

2/ The facts for the most part are not in dispute.

the local designated representative for the employees at the Portland Teleservice Center. The Union president, Cheryl Loesch, works in Seattle, Washington. The Union's on-site representative at the Portland Teleservice Center is Deborah Roberts.

The AFGE and Respondent have been parties to a collective bargaining agreement which had an effective date of June 11, 1982. This was a three year agreement, which was rolled over one time and eventually expired in June 1988. During this time the parties negotiated a new agreement,[3/] however, it was not ratified by the Union's membership. Subsequently, pursuant to a decision of the Federal Service Impasses Panel on December 22, 1989 the negotiated agreement was made effective for all parties on January 25, 1990.

In 1984, pursuant to a settlement of an unfair labor practice charge, a Memorandum of Understanding (MOU) was negotiated between SSA, Region X and AFGE Region X field offices. The MOU, which was dated October 12, 1984 contained no expiration date and provided in pertinent part as follows:

INFORMATION REQUESTS

IN RE: GRIEVANCES CONCERNING EMPLOYEE APPRAISALS

> This agreement is entered into between SSA, Region X (hereafter referred to as Management) and AFGE Region X field offices (hereafter called the Union). This agreement is to establish procedures for the provision by management to the union of appraisal data requested per 5 USC 7114 in relation to information appraisal grievances.
>
> 1. This agreement applies to all requests for information in connection with grievances (already filed or potential) concerning performance appraisals.

3/ This new agreement was agreed to by negotiators around July 1988.

. . .

3. Management will provide information consisting of actual performance appraisals, progress reviews and summary data at the office level for those employees in the same position as the grievant's position, to such an extent that such data exists. This does not preclude the union's right to pursue the original information request.

. . .

4. Where management is required to provide the information under 5 USC 7114, this information will be provided to the union within 10 workdays. If mutually agreed, management will provide the union's designee access to the requested information and official time and facilities for accessing, reviewing and or photocopying this information. When this option is exercised, management will give access to the information in such a way that will not set conditions which cause the union to incur expenses for travel or perdiem. However, official time for travel for this purpose will be granted.

. . .

7. Prior to filing an unfair labor practice charge which alleges a refusal to provide information, the union agrees to give management advance notice and to make an informal attempt to resolve the matter under the Memorandum of Understanding and Article 24 (Grievance Procedure) of the National Agreement.

. . .

12. Nothing in this MOU may detract or contradict the terms of the SSA/AFGE National Master Agreement, or constitute a waiver of the union or management's rights under 5 USC 7114(b)(4).

Most of the employees at the Portland Teleservice Center are contact representatives or teleservice representatives (TSRs). TSRs are responsible for answering telephone calls from the public and are the public's first contact with the Social Security Administration. During 1989 there were about 40 to 41 TSRs at the Portland Teleservice Center. All TSRs have the same performance standards. There is a standard appraisal cycle, beginning October 1 and ending September 30. Employees receive their performance appraisals in October of each year. At all times material, the manager of the Portland Teleservice Center has been Mr. Charley Cooke. By the end of the appraisal period for 1988/1989, employees were divided into two units, each with a supervisor. The two supervisors were Mr. Steve Satterlee and Ms. Cara Monner.

Following the receipt of appraisals in October 1989, the Union representative, Ms. Deborah Roberts, was contacted informally by three employees regarding complaints about their respective appraisals. Ms. Roberts, as the Union representative, submitted a request for data to supervisors Satterlee and Monner on October 13, 1989. Ms. Roberts, citing 5 U.S.C. § 7114(b)(4) stated that the Union was investigating possible grievances, including an issue of disparate treatment. Ms. Roberts then requested data regarding the 1988-1989 appraisal year for all bargaining unit employees.

On October 19 Ms. Roberts submitted a second data request to both supervisors supplementing her first request. This second request used a standard AFGE Information Request form. Ms. Roberts also attached the Memorandum of Understanding (MOU) dated October 12, 1984.

When, by October 30, 1989, Ms. Roberts had not received any response to her data requests, she asked Mr. Satterlee when she could expect the data and was informed that he would get back to her. On October 31 Mr. Satterlee told Ms. Roberts that the activity did not intend to provide the requested data.

Ms. Roberts continued to pursue the request for information and on November 1 submitted another request for information with both the October 13 and October 19, 1989 requests attached thereto.

By memorandum dated November 30, Mr. Satterlee and Ms. Monner replied to Ms. Roberts' requests for information furnishing certain data and declining to provide the remaining data.

On November 21 Ms. Roberts filed a grievance on behalf of unit employee Ms. Donna Pickett regarding her performance appraisal for the 1988-1989 appraisal year, and particularly regarding the appraisal in generic job task (GJT) #71. The grievance questioned whether the grievant had been subjected to disparate treatment in her performance evaluation.4/

On December 4, 1989 Ms. Roberts submitted a memorandum to Mr. Satterlee and Ms. Monner regarding her previous information requests and the Respondent's November 30, 1989 response. Ms. Roberts continued to request the information set forth in her previous requests and specifically stated that the information was requested "in conjunction with both the investigation of possible grievances, and a pending grievance, involving allegations of disparate treatment." Ms. Roberts also stated, in part:

> In your memorandum of 11/30/89, you indicated that you did not believe the union has, as of yet, provided adequate justification for this request. I remind you that the union has received complaints from bargaining unit employees questionning [sic] whether or not the 1988-1989 performance evaluation standards were applied to all employees in the bargaining unit in a fair and equitable manner. These allegations provide adequate justification for the union obtaining the requested information so an investigation into these allegations can be conducted.

Respondent, by Mr. Satterlee and Ms. Monner, responded by memorandum dated December 5, 1989, which stated as follows:

4/ Three employees had originally sought the assistance of Union representative Deborah Roberts. At the urging of Ms. Roberts, one employee discussed the appraisal with the supervisor and settled the dispute informally. The second employee looked into the EEO process and was also able to resolve the problem informally. The only grievance filed over the 1988-1989 performance appraisals was that filed by the Union on behalf of Donna Pickett.

> The November 30, 1989 response stands. The information provided summarizes [sic] data in the 7-b files for comparative purposes. Your request doesn't justify the release of additional, more detailed information when weighed against the burdensome nature of the request.

On December 8, 1989 Ms. Roberts submitted identical requests for information to supervisors Mr. Satterlee and Ms. Monner. The parties were in disagreement regarding the scheduling of a time and date to meet on the Pickett grievance. Ms. Roberts informed Mr. Satterlee and Ms. Monner that she still had not yet received all of the requested information that was necessary for the effective representation of the grievant. Ms. Roberts requested that the following information be provided to the Union as quickly as possible, but no later than the close of business, Friday, December 15, 1989:

> 1. Summary data indicating CPH for TSR's assigned to the Portland OR TSC for the 1988-1989 appraisal year for Gate 10.
>
> 2. Gate assignments of TSR's for the 1988-1989 appraisal year.
>
> 3. Summary data for TSR's weekly work unit reports for 1988-1989 appraisal year.
>
> 4. Summary data for TSR's test/quizzes for the 1988-1989 appraisal year.

In her December 8 letter, Ms. Roberts also took issue with Respondent's claims in its December 4 letter that it had attempted to reach some type of accommodation. Specifically, Ms. Roberts stated,

> In your memo of November 30, 1989 you indicated that you have "attempted to offer . . . less burdensome alternatives." I am unsure of what you are referring to here as I have received no offers for providing data from yourself or Ms. Monner. If you are referring to the offer by Mr. Charlie Wunderlich of 11/28/89, please remember that this offer was a proposed settlement of an unfair labor practice charge filed by the

> Union. The unfair labor practices charge was in no way related of this request, nor this grievance. There are many different issues involved in the unfair labor practice charge; consequently, the union did not accept the proposed settlement offered by Mr. Wunderlich.
>
> In your memo of December 5, 1989 you assert that you have provided all of the information necessary by providing the TSR Progress Review data. This information is not adequate. The statistics indicated do not give an accurate breakdown of the information requested; this is evidenced in particular by examining the data provided for EE#15. The appraisal for this employee states: ". . . answered more than 14,000 phone call[s] at the rate of 28 calls per hour in an accurate and timely manner." Yet the information provided in the progress review indicates an average call per hour rate of 21.41.
>
> In addition to other issues, disparate treatment is a pertinent issue. The grievant advises me that when she queried her lowered rating in GJT #71 she was told by her Operations Supervisor that her calls per hour were less in Gate 10 than the average for Portland TSRs.

On December 8, Ms. Satterlee responded to Ms. Roberts' December 8, 1989 request, indicating that Respondent's position had not changed. Mr. Satterlee also accused Ms. Roberts of being uncooperative, since she had rejected management offers that the Union be furnished documents from every third 7-B file or every third piece of data selected at random. He also asserted that Roberts had also rejected an offer of access to all TSR 7-B files that had been given with regard to a proposed settlement agreement in another case.

Ms. Roberts' testimony confirmed that Respondent had, in fact, offered alternatives to the furnishing of the requested data which she had rejected. She had rejected an offer of 1/3 or 1/5 of the requested data, selected at

random from the 7-B files, since she was looking at an issue of possible disparate treatment and needed to compare statistics across the unit rather than a limited sampling. Ms. Roberts had also rejected an offer that she have access to the 7-B files since restrictions had been placed on access. In response to the Respondent's concerns regarding the possible burdensome nature of the request, Ms. Roberts had requested summary data for the months of the appraisal year.

On December 11, 1989 Ms. Roberts sent a memorandum to Mr. Satterlee and Ms. Monner informing them for the first time that her request for information had been made pursuant to § 7114(b)(4) of the Statute and not under the 1984 MOU. Ms. Robert stated that she had "been advised that the SSA management has received notification of the union's intent to no longer participate or be bound by [the MOU] agreement". According to Ms. Roberts she had been told by Union President Cheryl Loesch that the 1984 MOU had been revoked and that she should not have been referring to the MOU in her requests for data.

By memorandum dated December 18, 1989, Mr. Satterlee and Ms. Monner informed Ms. Roberts that it was Respondent's position that the Union could not unilaterally decline to be bound by the MOU, that the MOU was still in effect and that the Union was expected to abide by its terms. Mr. Satterlee and Ms. Monner also stated that the settlement offer received from Charlie Wunderlich in another case had been on behalf of the Portland Teleservice Center and that the offer, to allow the Union access to the 7-B files, still stood.

On December 21, 1989 Ms. Roberts sent a memorandum to Mr. Satterlee and Ms. Monner, stating that the Union would accept their offer to view employees' 7-B files, as long as certain considerations were included. Ms. Roberts also stated that she had consulted with Ms. Loesch and that the Union rejected management's contentions regarding the continuing existence of the MOU.

By memorandum dated January 2, 1990 Respondent, by Mr. Satterlee and Ms. Monner, conditioned Union access to the employee 7-B files with the Union withdrawing the unfair labor practice charge in this case. Respondent also, among other things, included ground rules for Union access, which provided that the location of the review take place in view of management personnel at a table between the two supervisors' desks; that the Union request one file at a time and be given access only to one file at a time and that certain

limitations be placed on photocopying. Ms. Roberts did not accept these conditions and no settlement was reached. Mr. Satterlee testified that the data requested by Ms. Roberts was contained in the employees' 7-B files and that review of those files would give the Union access to the data it had requested. Although in its correspondence with the Union Respondent apparently raised a burdensome defense to the furnishing of the requested data, no specific evidence was offered to support such a defense.

The Union's request for data related to information contained in individual employee 7-B files. These are personnel files kept on site by management for performance appraisal purposes. The files are to be screened and purged annually. Employees are to be advised of the nature and purpose of the 7-B file and are to be notified and given a photocopy of any material placed in the 7-B file within three working days.

In its December 8, 1989 memo, the Union first requested "1. Summary data indicating CPH [calls per hour] for TSR's assigned to the Portland OR TSC for the 1988-1989 appraisal year for Gate 10", since the grievant had been told by her supervisor that her calls per hour in Gate 10 were less than other employees, indicating a drop in performance. During the rating period, Respondent was using a gating system which had created specialized units to handle calls that dealt with specific issues, i.e., such as the SSI program, nonreceipt procedures for claimants who hadn't received checks, SSA card requests, medicare problems and other issues, were each assigned a specific gate. Employees handled specialized calls before handling general calls. Gate 10 calls included all of the general calls or anything that did not fit into one of the specialized gates. Ms. Deborah Roberts had observed that the specialized calls were usually longer and more complex and impacted on the number of calls per hour an employee would handle. The specialized calls would also impact on the number of Gate 10 calls an employee handled.

Data regarding the Gate 10 calls would be located in employee 7-B files. On a weekly basis the supervisors provided the TSRs with information from the automatic call distribution equipment on how many calls they had answered in each gate and each unit, including Gate 10.

The Union's next specific request in its December 8 memo was for "2. Gate assignments of TSR's for the 1988-1989 appraisal year". This information was requested in order

for the Union to determine how much impact employee gate assignments were having on all calls per hour. With this information the Union could determine whether or not other employees who were in specialized gates had received similar consideration as the grievant. This information would also be available in the employees' 7-B files.

The third item requested by the Union[5/] was for "3. Summary data for TSR's weekly work unit reports for the 1988-1989 appraisal year". Work unit reports are used to assess the performance of a TSR and are a numeric indicator of types of calls handled by TSRs. In the Portland Office these records are maintained in employee 7-B files and are used for appraisals. The Union would utilize this information to determine whether assignments were being done fairly, whether a person could control what type of calls they received, and whether their gate assignments impacted on their overall production. The Union asked for summary data on this item because Respondent had referred to summary data in their data progress reviews, even though inconsistently. For some employees the references were very specific, such as the number of work units, the number of calls per hour. Other employees did not have specific references, but only narrative reviews. The request for summary data was also an attempt by the Union to respond to the Respondent's burdensome defense. Since Respondent referred to summary data, the Union was willing to forego daily or weekly data and use the summary data instead.

The requested data was to be used by the Union in preparing and presenting the grievance filed on behalf of Pickett regarding her performance appraisal. The Union wanted to show that Pickett had been unfairly rated in one particular GJT [generic job task], which is an interviewing skills GJT. The Union wanted to show everything that impacted on the grievant's ability to do her work. The Union asserted that the grievant's performance had not dropped but that in her rating she was subjected to disparate treatment since other employees in the same circumstances had been rated higher.

The Union was not furnished the data requested under items 1, 2 or 3.

5/ The fourth item requested in the Union's December 8 memorandum is not at issue in this case. This information, which related to tests and quizzes, was furnished pursuant to a settlement of another unfair labor practice charge.

The MOU applied to all requests for information in connection with actual or potential grievances concerning performance appraisals. The MOU had been further defined as a result of two arbitration awards and a settlement agreement pursuant to a grievance between the Social Security Administration and AFGE, Local 3937. Thus, under the MOU, if the Union had a problem with regard to the agency's response to a request for data needed to pursue a grievance concerning performance appraisals, it was required to first file a grievance rather than an unfair labor practice charge. It is clear from the record that the parties followed the MOU until the events underlying the instant complaint.

Following the expiration of the 1982 collective bargaining agreement in June 1988, Ms. Cheryl Loesch, as president of AFGE, Local 3937, had several discussions with higher officials within AFGE regarding the MOU. She spoke with the general counsel for AFGE and also Mr. Witold Skwierczynski, the president of Field Office Council for AFGE. It was the Union's view that since they were in a period between the expiration of one contract and the implementation of another contract, the MOU, as a permissive topic of bargaining, could be revoked by the Union.

On October 24, 1989 Ms. Loesch sent a letter to the Commissioner, Region X, Social Security stating as follows:

> This letter concerns the Memorandum of Understanding (MOU) between SSA and AFGE Local 3937, setting procedures for requesting information in connection with appraisal grievances. The procedures were further defined in an arbitration settlement dated February 29, 1986.
>
> As you know the subject MOU was negotiated and signed under the National Agreement dated June 11, 1982, as a refinement of the expectations, rights, and responsibilities of the parties under 5 USC 7114(b)(4) when addressing employee grievances.
>
> This is to notify you that effective in five days from the date of this letter, AFGE, Local 3937, no longer considers the MOU in effect. Local 3937 will pursue its full rights to secure information and

> documents which SSA normally maintains in the regular course of business, which is reasonably available, and which is in AFGE's belief, necessary for full and proper representation of the grievant.

Ms. Loesch did not receive any direct response from the Respondent regarding this memorandum. Ms. Loesch was aware that Ms. Roberts had been pursuing a data request at the Portland Teleservice Center, and, in fact, informed Ms. Roberts in late November 1989 that the MOU was no longer in effect. In late December 1989 or early January 1990, Ms. Loesch received from Ms. Roberts a copy of a letter allegedly sent to Ms. Loesch from Ms. Ruth J. Ruby, Respondent's Assistant Regional Commissioner, Management and Budget, date November 21, 1989. In this letter Ms. Ruby disagreed that the MOU concerned a permissive subject of bargaining. Ms. Ruby indicated that any attempt to modify or repudiate the MOU should be addressed from the national level. Ms. Ruby concluded by stating management's position, i.e. that the MOU remained in effect and that the Union would be expected to abide by its terms and conditions.

On February 13, 1990 Ms. Loesch wrote the Commissioner stating that she had just received a copy of the November 21, 1989 letter. Ms. Loesch indicated that she received this from the Portland TSC representative and it was the first time she had seen the letter. The letter was sent to the Union's former post office box, which had been closed for five years. The correct zip code for the Union's current post office box was included in the address. Ms. Loesch questioned whether the letter was sent in a way that would allow her to receive the memo in a timely fashion, or whether the letter had been written in a timely manner at all. Ms. Loesch further explained that the MOU was a regional memo and that no permission was required from the national level to either create or revoke the MOU. Ms. Loesch closed by stating "I do not deem the memorandum [November 21, 1989 letter] to be a valid response because of the questionable timely and appropriate service to the Union. Local 3937 considers the MOU to be no longer in effect."

In a letter dated March 6, 1990 Respondent indicated that the incorrect address was in error and assured the Union that future correspondence would be directed to the proper address. Respondent then reiterated its view that the subject of the MOU concerned a mandatory topic of bargaining rather than a permissive topic, that the abrogation of an existing MOU would have to be dealt with at

the national level, and therefore that the existing MOU remained in effect.

Discussion and Conclusions

Respondent takes the position that the complaint should be dismissed since the Union, in accordance with the MOU, is required to first process all disputes concerning 7114(b) appraisal information through the grievance procedure set forth in the national agreement prior to utilizing the Statutory ULP procedure to enforce its section 7114 rights to such information. Further, according to Respondent, since the MOU contains no expiration date it can only be terminated after appropriate notice and bargaining. To the extent that the General Counsel contends that the MOU may be canceled without negotiations following the expiration of the national agreement since it involves a permissible subject of bargaining, it is Respondent's position that the General Counsel is incorrect because the MOU is in no way based on the national agreement but rather is a byproduct of a settlement agreement reached in an unfair labor practice case which dealt with information bearing on performance appraisals. In any event Respondent would find the subject of the MOU to be a mandatory rather than a permissive subject of bargaining since it dealt with a procedure to be utilized in obtaining the requested information and did not foreclose the Union's ultimate right to utilize the ULP procedure should Respondent fail to make the requested information available. Alternatively, Respondent appears to take the position that the requested information is not necessary material, is not kept in the regular course of business in the form requested and that the request is burdensome. In this latter connection, as noted, supra, there is no probative evidence in the record supporting Respondent's burdensome defense.

The General Counsel, on the other hand, takes the position that the MOU involves a permissive subject of bargaining and as such may be terminated without any bargaining upon the expiration of the National Agreement. Further, according to the General Counsel, the record evidence establishes that the requested material is readily available and necessary for processing a grievance predicated upon a disparate performance appraisal. To the extent that the Union requests summary data which must be compiled by the Respondent, the General Counsel points out that the request for summary data was in response to Respondent's complaints concerning the work involved in supplying certain of the requested data and an attempt by

the Union to alleviate some of the work involved in supplying such data. Based upon the foregoing, it is the General Counsel's final position that the Union was entitled to use the ULP procedure without first exhausting the grievance procedure in order to obtain the requested information and that Respondent violated the Statute by failing to make the requested information available to the Union.

It is well settled and both parties appear to acknowledge that upon the expiration of a collective bargaining contract either party may forthwith terminate a permissive subject of bargaining contained therein. Federal Aviation Administration, 23 FLRA 209. There is a dispute, however, with respect to whether the MOU involved herein concerns a permissive or a mandatory subject of bargaining and whether it is a part of the expired 1982 agreement. As noted above, the General Counsel is of the opinion that the MOU concerns a permissible as opposed to a mandatory subject of bargaining since it restricts the Union's right to go directly to the Authority through the ULP procedure in order to enforce its Section 7114(b)(4) rights. Respondent on the other hand, relying on the Authority's decision in Department of Defense Dependents Schools, Washington, D.C., et al., 19 FLRA 790 takes the position that inasmuch as the MOU merely delays the Union's access to the ULP procedure pending the outcome of the grievance procedure the MOU concerns a mandatory subject of bargaining since the Union is not ultimately deprived of the right to utilize the ULP procedure to enforce its Section 7114(b)(4) request for information. Contrary to the position of Respondent, Department of Defense Dependents Schools, supra, merely stands for the proposition that Section 7114(b)(4) does not preclude the parties from establishing procedures for the furnishing of information. It in no way suggests that an employer may insist on such a procedure.

There is no doubt that the Union prior to the MOU had the right under the Statute to file forthwith an unfair labor practice charge over Respondent's failure to honor the Union's request for information meeting the standards set forth in Section 7114(b)(4) of the Statute. The MOU clearly restricted such right. Accordingly, I find that the waiver of the Union's statutory right to proceed directly to the Authority for enforcement of its request for information constituted a permissive subject of bargaining. FAA, supra.

Having concluded that the MOU concerned a permissible subject of bargaining it must now be determined what relationship existed between the expired National Agreement and

the MOU. In other words is the MOU part and parcel of the National Agreement and may it be canceled by the Union without any bargaining at the expiration of the National Agreement. As noted above, the General Counsel would find that the MOU was a supplement to the National Agreement while the Respondent would find the MOU to be an independent agreement terminable only after appropriate notice and bargaining.

Contrary to the position of the Respondent, I find that the MOU was a supplement to the National Agreement and terminable upon the expiration of the National Agreement since it concerned a permissible subject of bargaining. In reaching this conclusion it is noted that the National Agreement provides for supplemental agreements at the various regional levels as long as such agreements do not conflict with the terms of the National Agreement. The mere fact that the agreement is called an MOU rather than a supplemental agreement is of no importance since there is no doubt that the MOU supplements the National Agreement.

Moreover, the fact that the MOU might well have been the byproduct of an unfair labor practice settlement in another case involving the failure of the Respondent to make certain requested performance appraisal data available to the Union does not alter the foregoing conclusion. While the MOU was in no way related to the unfair practice settlement, it was an attempt by the parties to design a way or procedure for the Union to obtain the needed data in future cases dealing with performance appraisals without having to continually utilize the unfair labor practice provisions of the Statute to enforce its 7114(b)(4) rights.

Had the parties desired to have the MOU separate and apart from the National Agreement and not a supplement thereto, it would have been a simple matter to have inserted appropriate language into the MOU. However, inasmuch as there is no such language in the MOU, contrary to the contention of the Respondent who would treat the MOU as a separate and independent contract, I must find that the MOU is a supplement to the National Agreement and therefore subject to its expiration date. Accordingly, since the MOU concerns a permissive subject of bargaining the Union was within its rights in canceling the MOU during the period following the expiration of the extended 1982 National Agreement and the subsequent execution of the new National Agreement. Having done so, it was under no obligation to exhaust the MOU procedures prior to filing the instant unfair labor practice in order to secure the requested performance appraisal information.

With respect to Respondent's contention that the MOU could only be canceled or terminated at the National level, I find such contention to be without merit. The MOU was definitely a local agreement and signed by the local representatives of the Union. Accordingly, it appears that they retained the power to terminate the agreement at the appropriate time.

Finally, with respect to the necessity of the requested information I find, in agreement with the General Counsel, that items 1, 2, and 3 dealing with calls per hour (CPH) for TSR's assigned to Gate 10 in Portland, the Gate assignments of the TSR's, and the TSR's weekly work unit reports in summary form, all are necessary for the processing of the pending performance appraisal grievance.

Item 1 which dealt with summary data concerning the TSR's calls per hour for Gate 10 during the relevant appraisal year would establish whether or not Respondent's claims that the grievant had less calls than other employees while on Gate 10 were correct.

Item 2 which concerns the Gate assignments for all TSR's for appraisal year would show each employee's gate assignment during the year and would enable the Union to determine whether or not the gate assignment of an employee impacts on the employee's calls per hour.

Item 3 concerned the TSR's weekly work unit reports, which are a numeric indicator of the types of calls handled by TSR's and as such are directly related to an assessment of the employee's performance.

All the above information is contained in the employees' 7-B files.

As noted above the Union in order to make the Respondent's work in supplying the information less burdensome, has made it clear that it would accept some of the requested data in summary form. Inasmuch as Respondent is only under an obligation to make the requested information available as it exists and not in any summary or other form, Respondent will be given the option to either supply the requested information as it exists or in summary form.

Based upon the foregoing findings of fact, discussion and analysis, I find that the information requested by the Union is normally maintained by Respondent in the regular course of business, reasonably available and necessary for

the processing of a grievance concerning the unit employee's performance appraisal. I further find that Respondent by failing and refusing to make the requested information available violated Sections 7116(a)(1), (5), and (8) of the Statute. Accordingly, it is hereby recommended that the Authority adopt the following order designed to effectuate the purposes and policies of the Statute.

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 the Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, shall:

1. Cease and desist from:

(a) Failing or refusing to furnish the American Federation of Government Employees, Local 3937, AFL-CIO (AFGE), the exclusive representative of its employees, all requested data that is reasonably available and necessary for it to properly perform its representational function in connection with an employee grievance.

(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) Furnish AFGE data, indicating in raw or summary form, (1) calls per hour for Teleservice Center Representatives at the Portland, Oregon Teleservice Center for the 1988-1989 appraisal year for Gate 10; (2) gate assignments of Teleservice Center Representatives for the 1988-1989 appraisal year; and (3) Teleservice Center Representatives' weekly work unit reports for the 1988-1989 appraisal year, which were requested in connection with the processing of an employee grievance.

(b) Upon request, provide to AFGE, the employees' exclusive representative, all requested data which is reasonably available and necessary for it to properly perform its representational function in connection with employee grievances.

(c) Upon request of AFGE, reconsider the grievance for which the above data was requested in accordance with the negotiated grievance procedure, after having furnished such data to AFGE.

(d) Post at its offices where unit employees are employed 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 Manager of the Portland Teleservice Center, Portland, Oregon, and they 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, June 6, 1991.

BURTON S. STERNBURG
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 or refuse to furnish the American Federation of Government Employees, Local 3937, AFL-CIO (hereinafter called the AFGE), the exclusive representative of our employees, all requested data that is reasonably available and necessary for it to properly perform its representational function in connection with an employee grievance.

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 AFGE with data, in raw or summary form, indicating (1) calls per hour for Teleservice Center Representatives at the Portland, Oregon Teleservice Center for the 1988-1989 appraisal year for Gate 10; (2) gate assignments of Teleservice Center Representatives for the 1988-1989 appraisal year; and (3) Teleservice Center Representatives' weekly work unit reports for the 1988-1989 appraisal year, which were requested in connection with the processing of an employee grievance.

WE WILL, upon request, provide to the AFGE, the employees' exclusive representative, all requested data which is reasonably available and necessary for it to properly perform its representational function in connection with employee grievances.

WE WILL, upon request of AFGE, reconsider the grievance for which the above data was requested in accordance with the negotiated grievance procedure, after having furnished such data to AFGE.

_____
(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, San Francisco Region, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 744-4000.