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

DEPARTMENT OF JUSTICE, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, EL PASO, TEXAS Respondent	
and	Case No. 6-CA-00519
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO NATIONAL BORDER PATROL COUNCIL. Charging Party	

Robert J. Marren
For the Charging Party

Janis Baldwin, Esq.
Joseph Swerdzewski, Esq.
For the General Counsel

Ricardo Palacios, III
For the Respondent

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION

Statement of the Case

The National Border Patrol Council requested certain data of Respondent for the stated purpose of enabling it to determine whether it should file a grievance concerning what it claims to have perceived as discriminatory treatment of Union officials. Respondent Border Patrol denies that the information sought is either reasonably available or necessary for full and proper collective bargaining, and asserts that the Privacy Act prohibits the nonconsensual release of medical information encompassed by the request.

Facts[1/]

Robert J. Marren, an agent of the Union, has a long history of health problems and compensation claims in connection with his work as a Border Patrol Agent, in Fabens, Texas. He was reinstated to duty, after a separation based on troubles with alcohol, in November of 1985. At that time he submitted an SF-47, a physical fitness inquiry for motor vehicle operators. Section 6 of that form asks applicants whether they have ever had, or presently have, a number of conditions which would bear upon ability to drive. He testified that he recounted problems with breathing due to asthma and allergies as well as his status as a recovering alcoholic. His license was renewed, he says, without further ado.

Licenses must be renewed on the same cycle as that of the State of residence, and are contingent upon a valid State license. In Texas that occurs every four years, during the month of birth. Accordingly, Marren submitted an SF-47 to his supervisor on December 5, 1989, seventeen days before his license expired. Again he said he had experienced (or was experiencing) problems with breathing because of asthma and allergies, and that he was (or had been) subject to dizziness or fainting spells. He explained that he was, as of July 1984, a recovering alcoholic and that in 1988 he was diagnosed as an "allergic asthmatic with reactive airway disease." In the meantime in the Spring of 1989, he had succeeded in a worker's compensation claim, having been found to be suffering from a compensable condition. As a result he was ordered to take a fitness for duty examination. In connection with that proceeding his doctor, in September of 1989, submitted a form CA-17, a report on his condition which found him fit to drive but apparently said he should be permitted to rest from time to time. INS took the position that this amounted to a request for light duty, and that it had none. The CA-17 was forwarded to the personnel section in El Paso, and a copy of it was furnished to Marren's supervisor in October.

Marren's supervisor forwarded the SF-47 to Jerry Armstrong, Assistant Chief Patrol Agent in El Paso. Armstrong was in charge of personnel and labor-management relations, and, specifically, of determinations concerning

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1/ General Counsel's Motion to Correct Transcript is granted.

the propriety of issuing or renewing government motor vehicle operators' licenses. Armstrong reacted to the disclosures on December 14, denying renewal of the license pending receipt of medical documentation concerning Marren's ability to drive. Armstrong testified that he was concerned about the lack of any information that Marren could safely drive. Marren never replied, and was required to ride with other Border Patrol Agents.

According to hearsay from Marren, Texas Trooper Matthews, at a coffee-shop frequented by Border Patrol Agents and Texas policemen, asked a question addressed to nobody in particular in the group, about why Marren was no longer driving. Border Patrol Agent Lucero volunteered that Marren was having dizzy spells. Thereafter, Charles Roberson, Patrol Agent In Charge at the Fabens Station, was called by Trooper Matthews, who said he had received information that "one of the" Patrol Agents had been denied permission to drive because of fainting and dizzy spells. Roberson responded that license renewal had been denied until documentation of the ability to drive safely had been submitted. Roberson testified that Matthews said he took the matter very seriously. Roberson told him the denial was based on information supplied by Marren himself on his application for license renewal, and said he would forward a copy to Matthews. Matthews said he would see to it that it went to the license section.

Marren received a letter from Trooper Torres requesting that he come in for an interview about his capacity to operate a motor vehicle safely. He learned from her that the Texas Department of Public Safety had received a copy of his SF-47 from the Border Patrol. When he reported for the interview he was sent to Sgt. Frank Elder, supervisor of the license section. He showed Elder his SF-47 and asked whether his office had received a copy of it. Elder said it had. Marren gave him a copy of the CA-17 executed by his doctor in connection with the compensation claim, and provided him with an explanation of how his medication prevents dizziness or fainting as well the fact he had not taken a drink since 1984. Elder cleared him for renewal of his Texas license.2/

2/ In interesting contrast, Marren told his supervisor he had no control over what his doctor submitted to the Agency and, as noted, never responded to Armstrong's letter. It was his position at hearing, never expressed to Respondent at relevant times, that it already had the CA-17 in its files from early October and thus had all it needed.

On January 12 Marren wrote the Chief Patrol Agent in El Paso, noting that Trooper Torres had informed him that that office had given Texas authorities a copy of his SF-47. As a result, he said, the Union suspected that such action was "based upon disparate treatment/improper motive". In order to investigate whether there existed sufficient evidence to grieve such action, the Union (by Marren) requested, pursuant to section 7114(b)(4):

> 1) a copy of the SF-47 I completed when I returned to duty after my illegal removal in November 1985, along with copies of any documents completed in response to the answers provided on that form; 2) a copy of all material forwarded to the Texas Department of Public Safety which relates to allegations concerning my ability to operate a motor vehicle; 3) a copy of the cover letter accompanying this information; 4) copies of <u>all</u> SF-47's (Physical Fitness Inquiries for Motor Vehicle Operators) completed by any agency employee in the Southern Region since 1/85 through the present, and; 5) copies of any and all documents relating to the answers given by those employees to Question #6 on the SF-47's, including copies of any referrals made to other agencies as a result of any information provided therein, along with the results of those referrals. This information is to be provided within five (5) working days after receipt of this request. If additional time is needed, I should be contacted and provided with an explanation of need for additional time.

Armstrong replied to Marren by letter dated January 23. He said that Trooper Torres was in error when she advised Marren that his office had provided Marren's SF-47 to her. Rather, his inquiry of the Patrol Agent In Charge in Fabens determined that Texas authorities had requested information relating to his ability to drive, having learned, through contact with Marren's peers, that there appeared to be a problem. PAIC Roberson responded to the request by providing a copy of the SF-47. He concluded

> The investigation by DPS was not instituted by anyone from the Office of the Chief Patrol Agent, nor by any of the Supervisors at the Fabens Station. With this information the Union does not have reason to believe that disparate treatment or an improper motive was the basis for releasing the data requested.

There was no further response.

At some point subsequent to Marren's letter complaining of the SF-47 being furnished to Texas, Roberson called Elder to gather whatever information he could. He learned that Marren had furnished a copy of his CA-17 and, apparently, that he would be cleared by Texas. That was one reason, among other undisclosed reasons, for the supervisor to recommend that his license be granted. According to Armstrong, "the thing finally ended when I told his supervisor . . . Edward Ruffel, to talk with Marren and find out his relationship to the boxes he had checked and his ability to drive. Marren then provided a logical explanation, and so I issued the driver's license."3/ That apparently occurred in early February.

Discussion

The information sought would concern a check of several thousand records in offices stretching across the South. On a record such as this one regrets that he is not empowered to say "a pox on both their houses", or, more to the point, that one who requests information can, in extreme circumstances, be found to have forfeited any right to it by virtue of his own misconduct. It certainly appears that Marren dropped an SF-47 on Armstrong, who had been in charge of that office for eighteen months, which would evoke legitimate concern and could not, in fact, be responsibly ignored. Yet Marren ignored a request for more information which he had readily at hand. He did more, telling his supervisor that he could not extract more information from his doctor. Nevertheless he promptly gave the Texas authorities both his CA-17 and a full explanation of how both his reported dizziness and fainting spells were fully controlled by medication and his alcohol addiction was likewise under control. An immediate, open response to his supervisor, or an answer to Armstrong, would have shown his good faith and, more importantly, have nipped in the bud

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3/ Armstrong appeared to believe that Marren brought the Patrol's attention to the CA-17 in early 1990 and he asserts he had not seen it, although he is in charge of such files. Had he known, he said, that would not have eliminated the possibility that he had new problems postdating the September CA-17. All Marren had to do, he said, "was provide simple information relating to his ability to drive . . . and I would have issued his driver's license."

this tempest in a tea pot which has grown to be a federal case, one perhaps requiring that we play midwife to the delivery of a mass of information which must first be found and sanitized. Were I aware of a "clean hands" doctrine, I would recommend that the Authority dismiss this case.

Much was made here, for reasons not entirely clear to me, over which party initiated the federal-state collaboration. It seems absolutely clear that the State did. While the State did not specifically request the SF-47, it would have had no reason to do so, never having seen one before. It had clearly inquired about a serious-sounding matter, and the form was responsive to that inquiry. Just as clearly, it seems to me, Marren was concerned about clearing up any question about his Texas license to drive, while unconcerned about the cloud over his government license, if not in fact anxious to provoke what has happened here. Were it in my power, again, I would find the state-federal exchange so completely reasonable (in fact a duty) as to negate any inference that it was a sophisticated form of disparate treatment, and hence a predicate for a wide-ranging information request.

Nevertheless, it is the teaching of the Authority that I am not to measure whether a grievance would lie in the circumstances - that is for an arbitrator. (IRS, National Office, 21 FLRA 646, 649 n.3). The Union professes to suspect discrimination based upon Marren's status as an officer and the allegedly unprecedented nature of the referral to the State. In such circumstances such information is deemed to be necessary as it will assist the Union in investigating, evaluating and processing a grievance, HHS, Social Security, Baltimore, Maryland and SSA Region X, 39 FLRA 298, 308, 309. There is no showing that the information sought is not normally maintained and reasonably available (i.e. that its production would be burdensome), and no contention that it constitutes privileged-management guidance relating to collective bargaining. Nor is there any risk of impermissible encroachment on privacy, given Marren's willingness to accept sanitization. It is clear then, that Respondent violated sections 7116(a)(1), (5) and (8) by failing to comply with section 7114(b)(4)'s mandate that it furnish such information to the collective bargaining agent.

However, it is far from clear that a conventional remedy is here appropriate. It has come to my attention that Marren has been removed by Respondent, with MSPB approval. Border Patrol, 41 FLRA 259, 262 n. In that case, as well as

Border Patrol, 43 FLRA 697, 711, the Authority said that such departure did not render moot the need for the requested information. In the latter case Marren sought data about all journeymen bargaining unit employees at his Station relating to their work performance and appraisals, in order to determine whether he had been discriminatorily rated as "fully successful". The Authority noted that, while the "information specifically related to Marren, (it) is necessary for the Union to fulfill the full range of its obligations as exclusive bargaining representative."

A later case appears to the undersigned to be virtually indistinguishable and hence to constitute a reversal of the above-described approach to mootness. In F.E. Warren AFB, Cheyenne, Wyoming, 44 FLRA 39, the Respondent refused to furnish the Union a copy of an investigative report, prepared by its Office of Special Investigations, concerning allegations of physical abuse at its Child Care Center. The Judge had ordered that the report be, in part, furnished to the union, as it formed the basis for a Notice of Decision to Remove the prospective grievant, notwithstanding that the latter had disappeared soon after the grievance was filed. He noted that the union had failed to prosecute the grievance, "contending that it was unable to do so without the OSI report."

The Authority disagreed, holding that "the report is no longer needed by the Union" where the "potential grievant is no longer an employee and has 'disappeared'". The Authority noted that the "report applied only to the . . . potential grievant, and could not have been used otherwise to further the Union's representational duties". It therefore modified the Judge's recommended Order so as not to require the release of any portions of the report. The Authority cited two cases as clearly supporting the proposition that the production of the information should not be ordered. In the first,[4/] a settlement of the grievance occurred, ending any need for the data sought, which was "grievant-specific", i.e. sought all records concerning discipline of others for reasons given to grievant. The second case[5/] involved a grievance based upon an allegedly race-based nonselection for a promotion. The Union unsuccessfully sought the standards, objectives and performance appraisals contained

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4/ IRS, IRS Detroit, 43 FLRA 1378.

5/ IRS, IRS Helena, 39 FLRA 241.

in the performance plans of the immediate supervisor, the selecting official and the District Director, in the areas of EEO, development of subordinates and management of human resources. During the pendency of the unfair labor practice case, an arbitrator found the nonselection was discriminatory. Respondents argued that complaint should be dismissed on the ground the underlying information request had been rendered moot by the arbitration proceeding. Charging Party and General Counsel argued that the legality of the refusal had not been determined and the matter was therefore not moot. Each however, agreed that there was no need to require production of the data. The Authority concluded that the appropriate remedy would be a cease and desist order as it would not effectuate the purposes and policies of the Statute "at this time to now direct the Respondents to furnish" the information.

I can understand the failure to direct production based on the union's waiver of any continuing interest in it. However, the Authority, citing cases where the requested data was highly comparable to that sought here, instead found it would not effectuate the purpose of this law to direct production, noting that the report at issue applied only to the grievant and could not "otherwise further the union's representational duties." In the circumstances, and while not free from doubt, I take the latest guidance, in Warren, as applicable in this instance, and conclude that the purposes of the Statute are not served by burdening Respondent Southern Region with the production of records that can no longer impact upon Marren's federal career. Accordingly, I recommend 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 the United States Immigration and Naturalization Service, El Paso, Texas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish, upon request by the American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of its employees, information which is reasonably available and necessary for the Union to effectively represent unit employees in grievance proceedings, or for purposes of determining whether to grieve.

(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 its El Paso, Texas 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 Chief Patrol Agent 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.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Regional Office, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, LB107, Dallas, TX 75202, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, April 13, 1992

John H. Fenton

JOHN H. FENTON
Chief 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 American Federation of Government Employees, AFL-CIO, National Border Patrol Council, the exclusive representative of our employees, information which is reasonably available and necessary for the Union to effectively represent unit employees in grievance proceedings, or for purposes of determining whether to grieve.

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.

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(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, LB107, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.