UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE, WASHINGTON, D. C. AND AIR FORCE LOGISTICS COMMAND, WRIGHT-PATTERSON AIR FORCE BASE, OHIO

Respondents

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Charging Party

Case Nos. CH-CA-20193
CH-CA-20459

Major David L. Frishberg
Counsel for the Respondent

Paul D. Palacio
Representative of the Charging Party

Judith Ramey
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint in CH-CA-20193 alleges that Respondent Air Force Logistics Command (AFLC)[1] violated section 7116(a)(1), (5), and (8) of the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7116(a)(1), (5), and (8), by refusing to furnish to American Federation of Government Employees (AFGE) Council 214 (Council 214 or Union), an agent of the Charging Party, a copy of a safety inspection report requested by Council 214 on November 26 and December 9, 1991. The complaint also alleged that Respondent AFLC failed to inform Council 214 as to the

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1/ The Air Force Logistics Command underwent a reorganization and name change effective July 1, 1992. It is now known as the Air Force Materiel Command.

existence or nonexistence of the information. The complaint in CH-CA-20459 alleges that Respondent AFLC violated the same subsections of the Statute by refusing to furnish to Council 214 a report of a performance effectiveness review conducted at Kelly Air Force Base in November 1991. Both complaints allege that Respondent Department of the Air Force (AF) precluded AFLC from furnishing the information to Council 214, thereby interfering with the bargaining relationship between AFLC and Council 214, in violation of section 7116(a)(1) and (5).

Respondent answered the complaints, admitting some allegations and denying others, but denying any violation of the Statute.

A hearing was held in Dayton, Ohio on these consolidated cases. At the hearing, Respondents' Counsel was granted an amendment of his answer to the complaint in CH-CA-20459 to deny paragraph 17 of the Complaint (Tr. 6). Counsel for the General Counsel was granted an amendment to the complaint in CH-CA-20193 to delete the words of paragraph 11 which follow the words "safety inspection report" (Tr. 14).

Prior to the hearing, Counsel for the General Counsel subpoenaed the documents which are in issue in this case. Respondent's Counsel produced the documents and, upon request, they were admitted as ALJ Exhs. 1 and 2 and placed under seal for _in camera_ review and determination. (Tr. 121-28, 155). The parties stipulated that the "documents furnished pursuant to the General Counsel's subpoena duces tecum are the information that is responsive to the requests of Council 214 as described in paragraph 11 of the General Counsel's complaints." The parties also stipulated that the "information described in paragraph 11, both complaints, is information that is normally maintained by Respondents in the regular course of business and reasonably available." (Tr. 7-8).

The parties were afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

Initial IG Report

In July 1989 a B-52 bomber exploded at Kelly Air Force Base (Kelly AFB), killing one bargaining unit employee and injuring several others. Investigations of the accident were conducted by the Occupational Safety and Health Administration (OSHA) and by Respondent AFLC. The Union was given a copy of the AFLC accident report in late 1989.

Subsequently an inspection team visited Kelly AFB during the period February 11-15, 1991. It was part of an inspection of each of the five Air Logistics Centers conducted during the period December 2, 1990 to March 1, 1991. The inspection team was under the direction of the Respondent AFLC Office of the Inspector General (IG). The IG issued a "Report of Process Effectiveness Review, Safety Program Integration, AFLC Air Logistics Centers, 2 December 1990 - 1 March 1991, PN 91-04" (IG Report) as a result of the inspection.

Representatives of AFGE Local 1617, Kelly AFB received unverified information that the IG Report dealt with whether management at Kelly AFB had corrected the safety discrepancies found in the investigation of the B-52 explosion. AFGE Local 1617 tried to obtain a copy of the Report during the period March 1991 to November 1991. This effort was unsuccessful.

On November 26, 1991 the Union requested a copy of the IG Report from Respondent AFLC, the level of exclusive recognition. The Union understood from its sources, and stated in the request, that the inspection at Kelly AFB concerned "the B-52 explosion where one of our members was killed." The Union requested the Report under section 7114(b)(4) of the Statute "so that Council 214 can determine if grounds exist for submission of a grievance because of non-compliance with the report in addressing the citations cited by OSHA as well as others."

By letter dated December 23, 1991, Respondent AFLC gave the Union the address of the Secretary of the Air Force and stated that the Report was releasable only by the Secretary. The letter stated that the inspection at Kelly AFB was part of an AF and AFLC effort which included all the AFLCs. The letter also advised the Union that clarification of its request was required "since the reference to 'citations issued by OSHA as well as others' is too general."

On February 4, 1992 the Union requested the IG Report from the Secretary of the Air Force pursuant to the Freedom of

Information Act. The Union stated that the report "was generated from an inspection . . . regarding the B-52 explosion at Kelly AFB, Texas." After a long period, during which there was much confusion as to whether Respondent AFLC or Respondent AF should respond, and the Union had to reiterate the request, the Union finally received a substantive reply from Respondent AF dated July 7, 1992. The letter stated, in part, as follows:

> This letter responds to your 4 and 27 Feb 92 requests for a copy of the Air Force Logistics Command (AFLC) Inspector General's report of the Process Effectiveness Review (PER) of Safety Program Integration at AFLC Air Logistic Centers (ALC), 2 December 1990 to 1 March 1991, Project Numbe 91-04. Contrary to the assertion in your letters, the report was not "generated from an inspection regarding the B-52 explosion which occurred at Kelly AFB, Texas." In fact, the review was conducted to assess integration of safety programs throughout each of the five ALCs. The resulting PER report is written in general terms, very seldom refers to individual ALCs, and does not mention or refer to the B-52 explosion at Kelly AFB.
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> Inspector General reports are exempt from release per 5 U.S. Code 552(b)(5); AFR 12-30 (The Air Force Freedom of Information Act Program) paragraphs 10b(1), 10c, 10e(1)(a) and (f), and 10e(3); and AFR 123-1 (The Inspection System) paragraph 1-9e(10)(a). We are not releasing the PER report because it contains conclusions, opinions, recommendations and self-evaluations. Furthermore, releasing the report would disclose and compromise the evaluative and deliberative processes used to conduct and report the PER.

Follow-Up IG Report

During the period October 20, 1991 to January 17, 1992 Respondent AFLC's IG conducted a follow-up inspection of each of the five ALCs. As a result, the IG issued a "Report of Follow-Up Safety Program Integration, Process Effectiveness Review, 20 October 1991 - 17 January 1992, PN 92-01" (Follow-Up IG Report).

In early January 1992 the Union learned that the follow-up inspection team had visited Kelly AFB from November 18-22, 1991. On April 20 and May 14, 1992 the Union requested AFLC for a copy of the Follow-Up Report, setting forth its need for this Follow-Up IG Report as follows:

> A copy of the above referenced report is necessary to assist us in developing proposals for the upcoming Master Labor Agreement (MLA) negotiations. The report is also necessary to determine whether any employee or Union rights have been violated and if they have, so the Union can take appropriate remedial action through our negotiated grievance procedures.

Respondent AFLC replied by letter dated May 22, 1992. Respondent AFLC stated that it did have authority to release the Follow-Up Report, and it should be requested from Respondent AF, IG. Respondent AFLC said it would be unlikely that Respondent AF would release the document in light of the court's decision in National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (NLRB v. FLRA). The letter explained this position, in part, as follows:

> The information you seek is clearly guidance and advice to a management official because it was prepared specifically for SA-ALC/CC about the operation of SA-ALC. You assert that Council 214 needs the report in question in order to develop proposals for the upcoming MLA negotiations, and to determine if union and/or employee rights have been violated. This does not appear to satisfy the particularized showing of need the court discussed in NLRB. You have not identified which portion of the MLA this relates to, nor have you identified how the report relates to a potential grievance by an employee or the union. Therefore, even though the decision to release this report rests with HQ USAF/IG, we would not recommend the report be released. If you have any further questions concerning this matter, please feel free to contact me.

General Nature of the Reports

The Initial IG Report and the Follow-Up IG Report deal with a safety process effectiveness review, an interdisciplinary evaluation of the safety processes of the five Air Logistics Centers. The inspection team made observations on the organizational safety structure, as well as on flight, ground, weapons, materiel, and systems safety, and other related matters such as training and tool control. The Reports generally do not separate statements of fact from opinions and recommendations. Where deficiencies were noted in the programs and processes reviewed, they were identified and possible solutions were set forth for the responsible individuals at management levels where capability to correct

the problems exist. The possible solutions were generally set forth in the form of opinions and recommendations rather than mandates. Air Force Regulations (AFR) 123-1 provides that "[R]ecommendations contained in an IG Report do not represent an approved Air Force position until final action is taken by the responsible Air Force agency."

The Reports do not mention or refer to the July 1989 B-52 explosion at Kelly AFB or refer to safety citations issued by OSHA or to others. The 1991 and 1992 Reports do deal with safety matters generally, and it is possible that they mention some or all of the same safety matters which were investigated following the 1989 B-52 explosion. However, no determination could be made in this regard from the _in camera_ review because, as stated, the reports do not mention the B-52 explosion or the safety discrepancies associated with the 1989 B-52 explosion found by OSHA and others. These discrepancies were not identified by the General Counsel or by the Union either at the hearing or in the Union's requests for the Reports.

Lieutenant Colonel Gregory McKillop, Chief of Inspection Plans, Office of the Inspector General, Office of the Secretary of the Air Force, testified that during these inspections witnesses were interviewed and told that the inspection reports would be retained within the Air Force. The Authority for this assurance is AFR 123-1 which provides that unclassified inspection reports are "privileged" documents with controlled distribution. They are marked "For Official Use Only," which means that persons who need copies of the report to perform their jobs, including safety personnel, can have copies of the report. According to AFR 123-1, the Report "cannot be released in whole or part to persons or agencies outside the Air Force . . . without the express approval of the Secretary of the Air Force." The Secretary has delegated this approval authority to the IG.

The Reports in issue were distributed to about 20 organizations or offices including all five Air Logistics Centers.

Colonel McKillop testified that inspection reports are internal management tools by which Air Force leaders can deliberate about the effectiveness of the Air Force and by which they can make decisions about how to manage the Air Force. He testified that if such reports were distributed

outside the Air Force, such as to the Union in this case,[2] the inspection process would be damaged as individuals would not be as willing to provide free and frank answers during such interviews if they or their offices could be publicly identified.

Discussion and Conclusions

Under section 7114(a) of the Statute, a labor organization which has been accorded exclusive recognition is entitled to "act for, and negotiate collective bargaining agreements covering, all employees in the unit." Section 7114(b)(4) of the Statute provides that an agency shall, upon request, furnish the exclusive representative, to the extent not prohibited by law, data which is normally maintained in the regular course of business; which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and which does not constitute guidance, advice, counsel or training provided for management officials or supervisors, relating to collective bargaining.

Normally Maintained - Reasonably Available

The parties stipulated that the information requested by the Union "is information that is normally maintained by Respondents in the regular course of business and reasonably available" (Tr. 7-8). Accordingly, I so find.

Requests Properly Directed to Respondent AFLC

As the reports were maintained and available at the level of exclusive recognition, Respondent AFLC, the Union was required only to request the reports, as it did, from Respondent AFLC. The location of the authority to release the reports is irrelevant. Department of Defense, Minot Air Force Base, North Dakota, 42 FLRA 235, 247 (1991) (Minot AFB).

Reports Not Exempt Under Section 7114(b)(4)(C).

The requested information does not constitute guidance, advice, counsel or training specifically related to the collective bargaining process, within the meaning of section 7114(b)(4)(C) of the Statute, as interpreted by the Authority. Minot AFB, 42 FLRA at 236-37 n.*.

2/ The General Counsel insists that the Union, the exclusive representative of AFLC employees, cannot be considered to be "outside the Air Force." General Counsel's Brief, 16-17.

Necessary

The Authority has held that section 7114(b)(4) encompasses information necessary for an exclusive representative to perform effectively the full range of representational responsibilities, including information necessary to enable a union to process a grievance, monitor the collective bargaining agreement, or prepare for negotiations. Federal Aviation Administration, Aviation Standards National Field Office, Mike Monroney Aeronautical Center, Oklahoma City, Oklahoma, 43 FLRA 1221, 1226-27 (1992) (collecting cases).

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"[A] union's mere assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data. The duty to supply data under section 7114(b)(4) thus turns upon the nature of the request and the circumstances of each particular case." Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 18 FLRA 400, 402 (1985) (footnote omitted).

The necessity for the initial IG Report was not apparent from the Union's November 26, 1991 request. There the Union stated that it was requesting the Report so that it could determine whether to file a grievance based on "non-compliance with the report in addressing the citations cited by OSHA as well as others [during the investigation of the B-52 explosion]." Since the 1991 IG Report did not address the safety citations issued by OSHA or others, and did not mention or refer to the 1989 B-52 explosion, and the Union had not clarified the request, as recommended by Respondent AFLC, Respondent AFLC could not make an informed judgment as to whether or to what extent the information was necessary. Therefore, Respondents did not fail to comply with section 7114(b)(4) or otherwise violate section 7116(a)(1), (5), and (8) of the Statute when the initial IG Report was not furnished.

Nor did Respondent AFLC violate the Statute, as alleged, by failing to inform Council 214 as to the existence or nonexistence of the information. The parties stipulated that the Report in issue would have been responsive to the Union's request. Respondent AFLC properly acknowledged the existence of this Report in its December 23, 1991 reply to the Union.

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The Union subsequently requested the Follow-Up IG Report "to assist us in developing proposals for the upcoming Master

Labor Agreement (MLA) negotiations" and "to determine whether any employee or Union rights have been violated . . . so the Union can take appropriate remedial action through our negotiated grievance procedure."

The Union's expressed need for the Follow-Up IG Report, "to determine whether any employee or Union rights have been violated," did not establish that the data was necessary. The Union did not state what violations it believed might have been disclosed by the Follow-Up IG Report or how the Follow-Up Report might relate to a potential grievance by an employee or the Union, such as by the Agency's failure to follow some agreed-upon safety procedure. Given the nature of the Follow-Up IG Report, Respondent, on the basis of the Union's request, could not make an informed judgment as to whether or to what extent the information was necessary. The Union did not respond to Respondent AFLC's request for a more "particularized showing," and merely improperly left the determination in this regard, "open to conjecture or surmise." Defense Mapping Agency, Aerospace Center, St. Louis, Missouri, 21 FLRA 595, 607 (1986).

The Union's other justification for the Follow-Up IG Report was "to assist us in developing proposals for the upcoming Master Labor Agreement (MLA) negotiations." The General Counsel points out that the Follow-Up IG Report deals with safety concerns at the five AFLC Centers. Since safety is a general condition of employment, see U.S. Department of the Army, New Cumberland Army Depot, 38 FLRA 671, 677 (1990), the General Counsel argues that the Follow-Up IG Report was "necessary for negotiation of subjects within the scope of collective bargaining." It is also noted that Article 25, Section 25.01 to 25.25 of the parties' current Master Labor Agreement concerns health and safety matters.

Respondents assert that "to claim this report is necessary to compose articles for the upcoming Master Labor Agreement is so broad as to be meaningless. Accepting this statement as sufficiently specific would in effect be removing the specificity requirement." Respondents claim that the Union's need for the information was not established when balanced against management's countervailing interests. Respondents point out that the Inspector General's "candid evaluation and analysis of the operations of the AFLC . . . is useful specifically because it is an inherently subjective, third party analysis of operations." Respondents maintain that "the quality of the investigation is enhanced when individuals who were encouraged to give their views have assurances that the information will be retained by the Air Force and given only to individuals who need the information to do their jobs." Respondents state the Report sought is an

internal agency self-evaluation, prepared pursuant to independent statutory authority, and designed to uncover problems and deficiencies and make recommendations concerning Air Force programs. Respondents maintain that this is not a case where an IG report led to a specific change in conditions of employment, or formed the basis for an adverse action against a bargaining unit member, where a different balance in favor of the Union might require the release of all or some of the report.

"[T]he Authority has consistently required the disclosure of information for such purposes as proffered by the Union here: preparing for negotiations. . . ." Federal Aviation Administration, Aviation Standards National Field Office, Mike Maroney Aeronautical Center, Oklahoma City, Oklahoma, 43 FLRA 1221, 1227 (1992). The Authority has found such information to be "necessary" if it "would be useful to the Union." Commander Naval Air Pacific, San Diego, California and Naval Air Station Whidbey Island, Oak Harbor, Washington, 41 FLRA 662, 674-75 (1991).

I conclude that the Follow-Up IG Report, dealing as it does with safety processes at the five Air Logistics Centers, would be useful to the Union in developing health and safety proposals or in determining whether such proposals were needed. At a minimum, the Report would provide background information on the state of safety processes at the Centers.

In National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (NLRB v. FLRA) the court held that "the employer's interest in protecting the sanctity of information on 'guidance,' 'advice,' 'counsel' or 'training' for management officials must be weighed against a union claim of necessity under § 7114(b)(4)(B)." Id. at 532. The court concluded "that 'guidance,' 'advice,' 'counsel' or 'training' for management officials that is claimed to be necessary for 'full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining' should be released upon union request only in the circumstances when the union has a particularized need for the information." Id. The court also held that the Statute requires the Authority to consider "countervailing interests" against disclosure. Id. at 531.

The Authority has not to date addressed the merits of NLRB v. FLRA or determined the extent to which it applies to cases such as this. Nevertheless, the Authority has, in at least three cases, found that requested information would be necessary even under that decision. See U.S. Department of Justice, Washington, D.C., 46 FLRA 1526, 1536-37 (1993), U.S. Department of Transportation, Washington, D.C., 47 FLRA 110,

121-23 (1993), and United States Border Patrol, Tucson Sector, Tucson, Arizona, 47 FLRA 684, 689 (1993). Therefore, it appears to be appropriate to determine whether release of the data would be necessary under that decision.

The Follow-Up IG Report clearly constitutes guidance, advice, counsel or training for management officials. It is a predecisional, deliberative document consisting of intermingled findings, opinions, and recommendations. The Report, from an independent Air Force source, does not represent an approved Air Force position until adopted by responsible management. It is part of the process for the formulation of Agency policy. The report was prepared pursuant to the independent statutory authority of the Inspector General to "inquire into and report upon the discipline, efficiency, and economy of the Air Force," 10 U.S.C. § 8020(b)(1), and to cooperate fully with the Inspector General of the Department of Defense under the Inspector General Act of 1978, 10 U.S.C. § 8020 (d). Public release of such reports could inhibit the discovery of deficiencies and recommendations for their correction.

I conclude that the Union's claim of necessity for the Follow-Up IG Report, "to assist . . . in developing [negotiable] proposals," is outweighed by the Respondents' interest in obtaining and retaining a confidential, frank analysis of its programs together with recommendations for correcting problems and deficiencies. Therefore, the data requested is not "necessary" under section 7114(b)(4)(B). Compare Minot AFB, 42 FLRA 235 (1991) (Portion of an IG report concerning an Air Force installation, dealing with the Administrative Section, was ordered disclosed as "necessary" for the Union's use in an arbitration proceeding regarding the removal of an Administrative Section secretary. The report dealt with numerous items which arguably were the responsibility of the secretary.); Defense Mapping Agency, Washington, D.C. and Defense Mapping Agency Aerospace Center, St. Louis, Missouri, 24 FLRA 154 (1986)(Disclosure of a portion of an IG report, containing only factual findings based on discussions with unit employees related to working conditions, found to be "necessary." The union did not seek management's opinion and evaluation of internal matters and operations.); U.S. Department of Justice, Washington, D.C., et al, 46 FLRA 1526 (1993) (Disclosure of exhibits to an IG investigative report, used to support a notice of proposed employee removal, found "necessary." Report exhibits could be sanitized of confidential information.)

In reaching this conclusion, it is unnecessary to decide whether disclosure of the data is prohibited by law. Social

Security Administration, Hemet Branch Office, Hemet, California, 43 FLRA 455, 457 n.2 (1991).

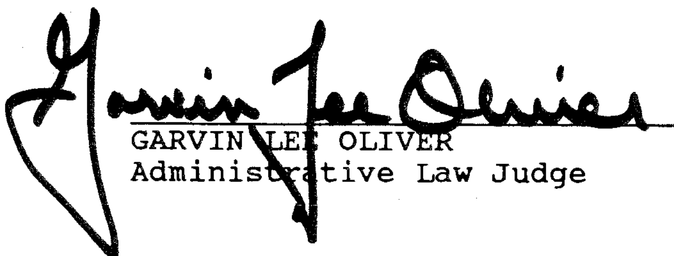
It is concluded that Respondent AFLC did not fail to comply with section 7114(b)(4) in violation of section 7116(a)(1), (5), and (8) of the Statute when it failed to furnish the Follow-Up IG Report. Respondent AF also did not violate section 7116(a)(1) and (5), as alleged, by precluding Respondent AFLC from furnishing the information.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order.

Order

The complaints in Case No. CH-CA-20193 and Case No. CH-CA-20459 are dismissed.

Issued: August 13, 1993, Washington, D. C.



GARVIN LEE OLIVER
Administrative Law Judge