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

DEPARTMENT OF VETERANS AFFAIRS, HUNTER HOLMES MCGUIRE MEDICAL CENTER RICHMOND, VIRGINIA Respondent	
and	Case No. 3-CA-10626
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145, AFL-CIO Charging Party	

Robert E. Hadley, Esq.
For the Respondent

Ana de la Torre, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Washington Regional Office, issued a Complaint and Notice of Hearing alleging Respondent

violated the Statute by failing to provide the Union with certain data requested by the Union in connection with a grievance concerning non-selection for a position within the bargaining unit.

A hearing on the Complaint was conducted in Richmond, Virginia 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 Union has been the exclusive collective bargaining representative of various of Respondent's employees.

On February 6, 1991 Respondent posted Vacancy Announcement No. 91-39 for a Maintenance Mechanic, grade WG-9. The area of consideration of applicants was facility-wide, applications to be submitted by February 15. Although a number of employees, including unit employees Larry Garnett and Elmo Scott, applied for the job, Respondent made no selection but rather, around April 25, posted another Vacancy Announcement for the same job (#38). This announcement indicated, in part, that to be eligible for consideration an applicant had to be presently working for the Federal Government at a grade WG-9 level or higher or have had previous Federal employment at the WG-9 level or higher. Employees Garnett and Scott were not eligible to apply for the job under the terms of the second notice of vacancy since they were each at the WG-8 level of pay.

On May 8, 1991 Respondent announced that Michael Carter, a candidate from outside the Veterans Administration, was selected for the job and employees Garnett and Scott sought Union representation over their non-selection.1/ On May 13 the Union requested Respondent provide various information,

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1/ The record herein contains a notification from Respondent to employee Scott that although he was "qualified and referred for consideration," Carter was selected regarding Vacancy Announcement No. 91-39.

stating that it represented employees Garnett and Scott and the request was made:

> . . . to obtain a full understanding of the questions concerning the reasons for expanding the area of consideration, rewriting and re-advertising the same position, and the referral of candidates from other recruitment sources before full consideration was given to the candidates in the first area of consideration in the position of Maintenance Mechanic (Drywall) Vacancy Announcement No. 91-39.

Respondent denied the Union's request for information and on June 26, 1991 the Union filed an unfair labor practice charge on the refusal. Meanwhile, the Union filed a grievance concerning the selection and on July 1, 1991 made a request for arbitration to the Federal Mediation and Conciliation Service, designating the issue as the grievance of Garnett and Scott "concerning procedures, considerations used and good faith by the Agency in their selecting a person for a vacant position." On October 22, 1991 the Union requested the designated arbitrator hold the arbitration proceedings in abeyance claiming it would be seriously disadvantaged when presenting its case without access to the requested information. The Union was granted a continuance by the arbitrator on November 12.

Shortly thereafter the parties entered a settlement agreement whereby Respondent agreed to furnish the Union with the information it had requested. Pursuant thereto Respondent provided the Union with various documents, among which were "sanitized" Federal employment application forms (SF-171) for the four candidates for the job. However, so much information the Union deemed to be essential on the forms had been blocked out, including the names of the candidates and the rating each specific candidate received from the Office of Personnel Management (OPM) when the individual had first made application for employment, that the Union found the SF-171s to be useless. Subsequently Respondent identified Carter's and Garnett's SF-171s but continued to refuse to identify Scott's SF-171 or the ratings received by any of the candidates.

Testimony revealed the Union wanted the SF-171 ratings of each candidate, by name, for comparison purposes. Thus, Union Executive Vice-President Terry Groves testified that, in his view, the parties' collective bargaining agreement requires applicants' ratings from outside the facility to be

equal to or higher than facility employees.2/ According to Groves, the only document which the Union found containing a "rating" was the SF-171 and with such information the Union could ascertain whether Article 34 of the agreement was violated. Groves testified he needed the information to determine whether there had or had not been a violation of the agreement before deciding to pursue arbitration of the matter.

Respondent subsequently provided the Union with some of the information it requested but refused to provide selectee Michael Carter's rating, contending production was prohibited by Chapter 332, section 1-11 of the Federal Personnel Manual and the Privacy Act. Thereafter, the Regional Director of the Washington Regional Office of the Authority set aside the settlement agreement and set the matter for hearing.

Additional Findings, Discussion and Conclusions

Respondent defends its refusal to provide the Union with selectee Michael Carter's rating score found on his SF-171 employment application form by essentially contending: (1) the General Counsel failed to show a "particularized need" for the information; (2) release of the information would violate the Privacy Act of 1974, 5 U.S.C. 552a; and (3) release of the information would be contrary to the parties' collective bargaining agreement and various government rules and regulations.

Section 7114(b)(4)(B) of the Statute states that the duty to negotiate in good faith requires:

> "(4) . . . an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data--
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> > "(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining . . ."

2/ Article 34, Section 13 B of the agreement provides: "B. In order to be referred, candidates who have to compete under the procedures of this Article and who are outside the facility shall have a rating equal to or better than the meaningful break or cutoff established by the promotion candidates within the first area of promotion consideration."

The duty of an agency to supply data requested by the employees' collective bargaining agent depends upon the nature of the request and the circumstances of each particular case. Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA 624 (1986) (AAFES, Fort Carson). Thus, when it is clear from the facts of a case that a union needs requested information to enable it to fulfill its representational functions, the Authority has required agencies to furnish such data to the union. See U.S. Department of Defense, Defense Logistics Agency, Defense Contract Administrative Services Region (Boston, Massachusetts), 31 FLRA 800, 808-809 (1988) (DOD DLA). In the case herein, the Union required the selectee's rating from his SF-171 because a grievance had been filed concerning the selection and the Union was considering taking the matter to arbitration and wished to compare the selectee's "rating" with the grievants "ratings" since it found contract language which it felt brought the matter of "ratings" into issue.3/ With such information the Union could perhaps decide not to process the case through arbitration if it felt the selectee's "rating" was such that the selection could not be challenged on that ground and thus avoid the costs of time, effort and money. On the other hand, the selectee's rating could be such to where the Union might conclude it had sufficient support to bring the matter to an arbitrator to challenge the selection. However, without such information the Union was severely handicapped.4/ Accordingly, I conclude the data the Union requested Respondent furnish it was necessary for full and proper discussion, understanding, and negotiation of a subject within the scope of collective bargaining within the meaning of section 7114(b)(4)(B) of the Statute. Id.

Respondent contends the Union must show a "particularized need" for the data, citing NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) and Scott Air Force Base v. FLRA, 956 F.2d 1223 (D.C. Cir. 1992) to support its contention. In those cases the Second Circuit indicated that in addition to the Statutory requirement of "necessity" for data in section

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3/ If the contract envisioned other "ratings" as opposed to the "rating" contained on the SF-171, the Union was unaware of the existence of such "ratings".

4/ Whether the Union would ultimately prevail before an arbitrator is not determinative of whether it should have been furnished the information for the purposes of evaluating the grievance and the chances of successfully prosecuting the matter before an arbitrator.

7114(b)(4)(B) of the Statute, it was adding the requirement that a collective bargaining agent must show a "particularized need" for the data in the circumstances of those cases. Although the Authority has not indicated it would adopt the Second Circuit's approach in all future cases involving a union's request for information, I nevertheless conclude that the evidence set forth herein to support a showing of "necessity" would satisfy the Second Circuit's additional standard of establishing a "particularized need" for the data.

Respondent also contends that release of the selectee's rating found on his SF-171 would violate section 552a(b) of the Privacy Act of 1974, 5 U.S.C. 552a, which provides, inter alia, that absent written consent of the individual to whom the record pertains, disclosure of any covered agency record is prohibited unless authorized by one or more of the enumerated exemptions. The General Counsel contends that disclosure is permitted under 552a(b)(2) of the Privacy Act which essentially permits disclosure if such would be required by 5 U.S.C. 552, known as the Freedom of Information Act (FOIA). However section 552(b)(6) of the FOIA provides that the requirement of disclosure of information under the FOIA does not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. . . ."

When assessing whether information requested by a union is exempt from disclosure under section 552(b)(6) of the FOIA, the Authority balances the individual's right to privacy against the public interest in having the information disclosed. See U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II, 43 FLRA 164 (1991) (Health and Human Services, Region II) and cases cited therein and National Federation of Federal Employees, Local 858 and U.S. Department of Agriculture, Federal Crop Insurance Corp., Kansas City, Missouri, 42 FLRA 1169 (1991).

A situation similar to that contained herein was presented to the Authority in AAFES, Fort Carson, wherein the Authority decided in favor of disclosure, holding, inter alia:

> The balance to be drawn under the FOIA's (b)(6) exemption is one between the protection of the individual's right to privacy and the promotion of important public interests. In determining whether "necessary" data under section 7114(b)(4) of the Statute should be disclosed to the Union, the

> Authority will balance the necessity of the data for the Union's purposes against the degree of intrusion on the individual's privacy interests caused by disclosure of the data. In striking the balance (employee) Allen's privacy interest and the Union's need for the documents in the circumstances of this case, the Authority notes that there has been no allegation, nor does the record reflect, that the documents in Allen's OPF (Official Personnel File) sought by the Union contain any stigmatizing information. Moreover, the fact that the Union requested the documents only with respect to a possible grievance proceeding concerning a particular personnel action indicates that the documents would be likely to receive only limited circulation. Therefore, in view particularly of the Union's need for these documents in order to pursue its representational duties and to aid in ensuring that the government's merit promotion system operates fairly, compared to the limited intrusion on Allen's privacy, the Authority finds that the disclosure of the requested documents would not result in a clearly unwarranted invasion of Allen's privacy. Further, the Authority finds in the circumstances of this case, that disclosure of the data serves two important public interests: ensures that the Government fairly follows its own merit promotion procedures, and encourages the use of non-disruptive grievance procedures. . . (Footnotes omitted).

I have evaluated the case herein against the factors considered by the Authority in AAFES, Fort Carson and I note there is no indication in this record that the selectee's rating would be used for anything other than evaluating and processing the grievance on the job selection. Having balanced the Union's need for the selectee's rating from his SF-171, as set forth above, and the public interest inherent in the Union's discharge of its obligations under the Statute (see Health and Human Services, Region II at 166-168) against the nature of the data requested and the selectee's personal privacy interest in having his score kept confidential, I conclude the Privacy Act does not justify Respondent's refusal to furnish the Union with the data it requested. See also Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Omaha District, Omaha, Nebraska, 25 FLRA 181 (1987).

Respondent further contends that the parties' collective bargaining agreement and various Government rules and

regulations preclude it from disclosing the requested data to the Union. Respondent relies on Article 3, Section 1 of the agreement which provides:

> In the administration of all matters covered by this Agreement, officials and employees shall be governed by applicable Federal Statutes. They will also be governed by Government-wide regulations in existence at the time this Agreement was approved and the Civil Service Reform Act of 1978.

A contract violation does not necessarily constitute a valid defense against an obligation imposed by the Statute unless a "waiver" is established. The record herein clearly does not support a contention that the Union waived its Statutory right for information under section 7114(b)(4) by executing Article 3, Section 1 of the agreement.

To support its contention that it was precluded from providing the requested data, Respondent placed in evidence and relies on the Federal Personnel Manual (FPM), Chapter 332-9, Subchapter 1-11 (Inst. 359, December 18, 1989), a publication of the Office of Personnel Management (OPM), which provides:

> a. **Restrictions on access to certificates of eligibles.** Certificates of eligibles, including applications and other attached papers, are to be treated as privileged information. This is especially true of reports of investigations pertaining to any of the eligibles on the certificate. Ratings of eligibles on certificates should not be disclosed except to the competitor or his/her duly authorized representative; the rating of one eligible should not be revealed to another eligible on the certificate. The appointing officer is responsible for taking any precautions that may be necessary to make sure that these papers are not accessible to unauthorized persons and that their confidential nature is not violated.

Section 7114(b)(4) of the Statute indicates that under certain conditions data is to be furnished to the collective bargaining representative, to the extent that furnishing the data is not prohibited by law. Clearly the FPM regulation is not a law. However, if a regulation has the force and effect of law it will constitute a "law" within the meaning of section 7114(b)(4) of the Statute. Thus the Authority held in National Treasury Employees Union and U.S. Department

of the Treasury, Internal Revenue Service, 42 FLRA 377 (1991) (Treasury), that the term "applicable laws" found in section 7106(a)(2) of the Statute[5/] encompassed a government-wide Office of Management and Budget (OMB) circular concerning "contracting out" disputes. The Authority found that since the OMB circular was a properly promulgated regulation, issued pursuant to statutory authority and affected individual rights and obligations, it constituted a substantive regulation having the force and effect of law, and therefore was an "applicable law" within the meaning of section 7106(a)(2) of the Statute.

Subsequently, in Department of Defense, U.S. Army Armor Center and Fort Knox, Fort Knox, Kentucky, 43 FLRA 476, 493 (1991) (Fort Knox), the Authority concluded the word "law" in section 7114(b)(4) of the Statute was coextensive with "applicable law" in section 7106(a)(2) and restated that regulations will be found to have the force and effect of law where they: "(1) are promulgated pursuant to an explicit or implicit delegation of legislative authority by Congress; (2) affect individual rights and obligations; and (3) are promulgated in accordance with applicable procedural requirements."

In the case herein, under 5 U.S.C. § 3301, et seq., Congress empowered the President with authority regarding the examination, certification and appointment of individuals into the civil service. In that statute authority of the President to establish regulations for the conduct of persons in the civil service is granted the Office of Personnel Management. OPM is specifically given various functions regarding the administration of the selection process and the responsibility for the promulgation and enforcement of

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5/ Section 7106(a)(2) provides, in relevant parts:

> "(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency-
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> "(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and
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> "(2) in accordance with applicable laws-
>
> "(A) to hire, assign, direct, layoff, and retain employees in the agency . . ."

regulations necessary to carry out its duties including publishing such matters in a Federal Personnel Manual (FPM). See also 5 U.S.C. 1103; 5 C.F.R. Part 5; and 5 C.F.R. Part 110.101. Therefore, I conclude the FPM relied on by Respondent (Inst. 359) was "promulgated pursuant to an explicit or implicit delegation of authority for Congress." Treasury and Fort Knox.

Further I find FPM Inst. 359 by its very terms affects individual rights and obligations, i.e. the right of an eligible competitor to have the rating received remain confidential and the corresponding obligation of the government employee to keep the rating confidential.

However, it does not appear that FPM Inst. 359 has been "promulgated in accordance with applicable procedural requirements". Thus, no evidence has been presented where such was the case and I have found no corresponding reference to this requirement in the Code of Federal Regulations and I assume that if FPM Inst. 359 had been promulgated in the Federal Register, it would have been contained in the Code of Federal Regulations. Merely publishing the regulation in the FPM is certainly far short of promulgating it "consistent with the procedural requirements of the APA" as was the case of the regulation in Treasury which was found to meet the Authority's criteria in this regard. Accordingly, since the FPM regulation has not been shown to satisfy the Authority's criteria for establishing a regulation having the force and effect of law within the meaning of section 7102(b) of the Statute, I conclude the data requested was "not prohibited by law" and in all the circumstances herein Respondent was required under section 7102(b) to furnish the Union with the rating as requested.6/

In view of the entire foregoing and the record herein I conclude that by its refusal to furnish the Union with the selectee's rating found on his SF-171 government employment application, Respondent violated section 7116(a)(1), (5) and (8) of the Statute and I recommend the Authority issue the following:

6/ Respondent further suggests other agency-wide regulations also present a defense to its refusal to provide the Union with the data it requested. I find such regulations were not applicable to the situation herein and/or Respondent did not otherwise fulfill its burden of presenting relevant facts and argument to support these contentions. I therefore find such defenses to be without merit.

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, it is hereby ordered that the Department of Veterans Affairs, Hunter Holmes McGuire Medical Center, Richmond, Virginia, shall:

1. Cease and desist from:

(a) Refusing to furnish, upon request of the American Federation of Government Employees, Local 2145, AFL-CIO, the exclusive representative of certain of its employees, the rating contained on the Application For Federal Employment, Standard Form SF-171 for the individual selected for the position advertised under Vacancy Announcement No. 91-39.

(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 the American Federation of Government Employees, Local 2145, AFL-CIO, the exclusive representative of certain of its employees, the rating contained on the Application For Federal Employment, Standard Form SF-171 for the individual selected for the position advertised under Vacancy Announcement No. 91-39.

(b) Post at its Richmond, Virginia facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 2145, AFL-CIO, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center Administrator 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 of the

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

Issued, Washington, DC, September 29, 1992

SALVATORE J. ARRIGO
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to furnish, upon request of the American Federation of Government Employees, Local 2145, AFL-CIO, the exclusive representative of certain of our employees, the rating contained on the Application For Federal Employment, Standard Form SF-171 for the individual selected for the position advertised under Vacancy Announcement No. 91-39.

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

WE WILL furnish, to the American Federation of Government Employees, Local 2145, AFL-CIO, the exclusive representative of certain of our employees, the rating contained on the Application For Federal Employment, Standard Form SF-171 for the individual selected for the position advertised under Vacancy Announcement No. 91-39.

_____

(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, Washington Regional Office, whose address is: 1111 18th Street, NW, 7th Floor, P.O. Box 33758, Washington, DC 20033-0758, and whose telephone number is: (202) 653-8500.