64 FLRA No. 16

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FORT DIX, NEW JERSEY
(Respondent/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
LOCAL 2001
(Charging Party/Union)

BN-CA-06-0188

DECISION AND ORDER

September 28, 2009

Before the Authority: Carol Waller Pope, Chairman, and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This unfair labor practice case (ULP) is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel (GC). The Respondent filed an opposition to the GC's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by refusing to provide the Union with the crediting plan used to score applicants for a promotion to GS-8 Senior Officer Specialist. The Judge found that the Respondent did not violate the Statute and ordered that the complaint be dismissed.

For the following reasons, we deny the GC's exceptions and dismiss the complaint.

II. Background and Judge's Decision

A. Factual Background

The facts are fully set out in the Judge's decision and are summarized here. Under the Agency's merit promotion procedures, applicants submit application forms, copies of their most recent performance appraisals, and sets of Knowledge, Skills and Abilities (KSAs) for a vacant position. Judge's Decision (Decision) at 2-3. The rating panel is guided by a crediting plan [2] for the position when it scores the narrative responses to each element of the KSAs. *Id*. at 3. The combined scores for the KSAs are added to the points given for the most recent performance appraisal and awards received for a total score. *Id*. Applicants whose total scores are in the upper half of the applicant pool are placed on a "best qualified" list. *Id*. The selecting official may select anyone on the "best qualified" list or anyone who non-competitively qualifies for the position noncompetitively. *Id*.

Two correctional officers who were not selected for a GS-8 Senior Officer Specialist position consulted the Union about their non-selections. *Id*. at 5. Subsequently, the Union sent the Agency an information request for seven categories of information pertaining to the selection process including the promotion file and the crediting plan. *Id*. The request indicated that the Union was investigating "the possible introduction of inadmissible criteria being used to select and/or not select this past group of GS-8 candidates." *Id*. (quoting GC Ex. 4 at 1). The request further stated that the information was needed "to provide adequate and effective representation for [the two correctional officers]" and "to determine if the Agency acted in accordance with all applicable laws and regulations in their conduct of a proper merit system promotion board review." *Id*.

The Union was permitted to view the entire promotion file, including all the applications, but was denied access to the crediting plan. *Id*. at 5-6. The Union claims that after it reviewed the promotion file, it told an Agency human resources employee that the two correctional officers' scores were "unusually low." *Id*. at 6. Then the Union submitted a second information request, this time including a section labeled "Particularized Need." *Id*.. The Union explained that it needed the seven categories of information to:

> (1) assess whether the employees who sought Union assistance were minimally qualified for the vacant position;

1. Member DuBester did not participate in this decision.

2. Crediting plans are "documents developed by an employer to rate and rank candidates for a specific position. A crediting plan typically consists of a list of criteria reflecting knowledge, skills, and other characteristics deemed necessary for a particular job, as well as devices used to measure whether a candidate satisfies those criteria." *United States Dep't of Justice, Bureau of Prisons v. FLRA*, 988 F.2d 1267, 1268 (D.C. Cir. 1993).

(2) determine whether the rating and ranking factors were applied uniformly;

(3) determine whether merit principles, policies, and procedures were followed in a fair and equitable manner;

(4) compare the applicants, and the credit they received for each KSA; and

(5) learn what guidance the selecting official relied on in determining how applicants should be rated and ranked, and what was used to establish the selection certificate.

Id. at 6-7 [3] ; Exceptions at 5. Three weeks after the Union submitted its second request, and one day before the ULP was filed [4] , the Agency's human resources officer sent an e-mail to the Union president citing three decisions from the United States Courts of Appeals and an Authority decision, which she interpreted as upholding the need to maintain crediting plans as confidential. *Id*. at 7.

B. Judge's Decision

The Judge found that the only issue before him was whether the Union's access to the crediting plan is, under § 7114(b)(4)(B), "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining." Decision at 13. He applied the Authority's analytical framework for determining necessity in *Internal Revenue Service, Washington, D.C.*, 50 FLRA 661 (1995) (*IRS, Wash., DC.*). *Id*. at 14. The Judge found that, under that framework, the Union was required to show a "particularized need" for the crediting plan by demonstrating that the information was "required in order for the [U]nion adequately to represent its members." *Id*., citing 50 FLRA at 669-70. In this regard, the Judge found that whether the Union has shown a particularized need will be judged by whether the Union has adequately articulated its need at or near the time of its request, rather than at the hearing in any litigation over the request. *Id*. The Judge also found that, under *IRS, Kansas*, the agency must identify and articulate any countervailing anti-disclosure interests at or near the time it denies the request. *Id*.

Even though the Agency did not furnish the crediting plan, the Union's representatives were permitted to review the entire promotion file, including the KSA narratives. *Id*. at 17. The Judge found that its access to these files was adequate to allow the Union to articulate a "particularized need" and "to demonstrate that the crediting plan was the only way of rationally distinguishing the successful from the unsuccessful candidates." *Id,* at 19. Instead, the Judge found that the Union argued to the Agency only that the grievants' scores were "unusually low" but not that the crediting plans were "essential" to determine that the rating and ranking factors were applied unfairly "in this case". *Id;* at 19-20.

III. Positions of the Parties

A. GC's Exceptions

The GC's exceptions can be summarized as follows: (1) the Union made a particularized showing of need for the crediting plan; (2) the Judge erred in concluding that the Union's access to the entire promotions file made access to the crediting plan unnecessary; and (3) the Judge erred in concluding that the Agency complied with § 7114(b)(4).

The GC contends that the Union made a showing of particularized need for the crediting plan after the Union had reviewed the promotion file. Exceptions at 8. The GC notes that the Authority, in *Health Care Financing Administration*, 56 FLRA 503, 507 (2000) (*HCFA*), held that requiring a union to identify specific irregularities in the application process in order to demonstrate a particularized need for a crediting plan and other information was asking too much in that it would have required the union to describe the contents of documents it had not seen. Exceptions at 8-9. Stated otherwise, the burden that the Judge's decision placed on the Union constituted a significant departure from the Authority's decision in *HCFA*. *Id*. at 9.

3. The Judge observed correctly that this explanation of particularized need is identical to that given by the union in *Health Care Financing Administration*, 56 FLRA 503, 503 n.1, 504 (2000), and found by the Authority to have articulated a particularized need for seven categories of information similar to those requested by the Union in this case. Decision at 20 n.13.

4. The Union's second information request was dated January 31, 2006, and the Agency's e-mail response to it was sent on February 21, 2006. The Judge found that the ULP charge was filed the next day, February 22, 2006. Decision at 1. The GC asserts, however, that the Union signed the ULP charge on February 15, 2006, and faxed it to the Agency on the same day. Exceptions at 6 n.2. The GC explains that February 22 was the day on which the Federal Labor Relations Authority's Boston Regional Office received and docketed the ULP charge. For this reason, the GC claims that the Agency did not respond to the second information request until after the ULP charge was filed. However, as discussed below, whether the Agency's response preceded or followed the filing of the ULP charge, we find that the amount of time the Agency took to respond to the second request was not unreasonable and did not amount to an unfair labor practice.

The GC argues that the Judge erred further in concluding that the Union's review of the applications rendered the crediting plan unnecessary. *Id*. While acknowledging that a review of the applications could establish a potential breach of the collective bargaining agreement, the GC contends that only a review of the crediting plan could determine whether an actual breach occurred and, therefore, whether a grievance should be submitted to arbitration. *Id*. at 9-10. In addition, the GC asserts that the Union needs the crediting plan because its investigation was not limited to the two correctional officers but, instead, concerned the selection process as a whole, including the possibility that inadmissible criteria were used. *Id*. at 11-14.

The GC contends that the Agency did not fulfill its duty under § 7114(b)(4) to engage in a dialogue with respect to the Union's request for the crediting plan but, instead, declined the request based on its view that it was a "restricted document" according to its human resources manual. *Id*. at 16. The GC asserts that the Agency's subsequent statement citing precedents recognizing the need to maintain the confidentiality of crediting plans was not a proper articulation of its countervailing non-disclosure interest because of the statement's timing. *Id*. at 16-18. Further, the GC asserts that the statement is insufficient because it does not address the Union's offer to view the crediting plan instead of receiving a copy. *Id*. at 19. In sum, the GC contends that the Judge erred in failing to conclude that the Agency's failure to reveal its anti-disclosure concerns sooner and consider the Union's proposed compromise violated § 7114(b)(4).

B. Agency's Opposition

The Agency contends that the Judge did not err when he found that the Union failed to establish a particularized need for the crediting plan and concluded that the Agency did not violate § 7114(b)(4). Opposition at 1. It contends that the GC is attempting to make the showing of particularized need for the Union by reconstructing the Union's information request. *Id*. at 9. Specifically, the Agency points out that the

GC's arguments that the Union required the crediting plan to enhance its litigation posture in arbitration and to carry out an investigation of the selection process were not made by the Union. *Id*. at 11-12. The Agency asks the Authority to reject the GC's "attempts to reconstruct the Union's requests." *Id*. at 9.

Focusing on the Union's attempt to establish particularized need, the Agency contends that the Union's unsupported assertion that the scores of the two correctional officers were unusually low did not establish a particularized need at the time of the request. *Id*. at 9-10. In this regard, the Agency contends that the GC's reliance on *HCFA* is misplaced. *Id*. at 11. The Agency argues that *HCFA* can be distinguished from the instant case. In *HCFA*, the agency did not provide any information in response to the union's requests, declined to respond to one request, and took seven weeks to respond to a second. *Id*., citing *HCFA*, 56 FLRA at 504. The Agency here argues that it promptly responded to the Union's information requests and provided access to the entire promotion file. *Id*. According to the Agency, *HCFA* does not excuse the Union's failure to articulate why it still needed the crediting plan after reviewing the promotion file. *Id*. Moreover, the Agency contends that the record supports the Judge's finding that the Union did not require the crediting plan to adequately represent grievants. *Id*. at 12. Specifically, the Agency argues that a review of the KSA instructions and the applicants' responses to each KSA allow a comparative analysis without access to the crediting plan. *Id*. at 13.

The Agency also asserts that contrary to the arguments of the GC it did not fail to act promptly and did not violate § 7114(b)(4) when it failed to respond to the Union's second information request for three weeks. *Id*. at 15-16. The Agency argues that, in light of the large quantity of boilerplate and legalistic language in the Union's information request, three weeks was not an unreasonably long time by which to respond to it. *Id*. at 16-17.

IV. Analysis and Conclusions

A. The Union did not articulate a particularized need for the crediting plan.

Under § 7114(b)(4) of the Statute, an agency must furnish information to a union, upon request and "to the extent not prohibited by law," if that information is: (1) "normally maintained by the agency in the regular course of business"; (2) "reasonably available"; (3) "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining;" and (4) not "guidance, advice, counsel or training."

In order to demonstrate that information is "necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining" under § 7114(b)(4) of the Statute, a union "must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information, and the connection

between those uses and the union's representational responsibilities under the Statute." *IRS, Wash., D.C.*, 50 FLRA at 669. It is not sufficient that the information would simply be useful or relevant; instead, the information must be "required in order for the union adequately to represent its members." *Id*. at 669-70. The union's responsibility for articulating its interests in the requested information requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether disclosure of the information is required under the Statute. *Id.* at 670. To accomplish this, a union must articulate its need at or near the time of the request, not for the first time at the ULP hearing. *United States Dep't of Justice, INS, N. Region, Twin Cities, Minn.*, 51 FLRA 1467, 1472 (1996) (*Twin Cities*).

The agency is responsible for establishing any countervailing anti-disclosure interests and, like the union, must do so in more than a conclusory way. *Id.* at 1472–473. *See also HCFA*, 56 FLRA at 506. Such interests must be raised at or near the time it denies the union's request. *See United States DOJ, Fed. Bureau of Prisons, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91, 93 (2004) (*FDC Houston*) (citation omitted).

The record supports the Judge's determination that neither of the Union's information requests articulated a particularized need for the crediting plan. As the Judge found, the Union's initial request explained its need for the requested information, including the crediting plan, in order to determine whether the Agency complied with all applicable laws and merit promotion principles in its selection procedures. Decision at 16. In response to its initial request, the agency provided the Union the opportunity to review the entire promotion file, except for the crediting plan. It is undisputed that Union officials were provided an opportunity to come to the Agency's office and review the promotion file and compare the KSA responses of the two correctional officers with those of the other applicants, including the selectee. *See id*. at 17-18; Exceptions at 4. The GC also acknowledges that if a thorough review had been conducted by the Union officials, they "would have known, to an absolute certainty" whether the selection process was flawed, and the Union would not have required access to the crediting plan to discover an error in the selection process. *Id*.

The Union then submitted a second information request that was essentially identical to the first but also included a section labeled "particularized need". Even though that section used the same language that the Authority found to establish a particularized need in *HCFA,* the specific facts of this case warrant a different result.

In *HCFA*, the agency produced no documents in response to the union's two information requests and expressed no security concerns regarding the disclosure of crediting plans. By contrast, here, the Agency produced "upwards of several hundreds of pages" and provided the Union the opportunity to review the entire promotion file, except the crediting plan, and to explain why those documents did not satisfy its needs.

Additionally, unlike the agency in *HCFA*, the Agency human resources officer here denied access to the crediting plan in response to the first request based on her understanding that access to crediting plans was restricted to members of the rating panel. *See* Decision at 5. In response to the second request, the Agency cited decisions from the District of Columbia and Seventh Circuits which held that crediting plans are exempt from mandatory disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(2), because they relate "solely to the internal personnel rules and practices of an agency." *National Treasury Employees Union v. United States Customs Serv.,* 802 F.2d 525, 531 (D.C. Cir. 1986); *Kaganove v. EPA*, 856 F.2d 884, 886-90 (7th Cir. 1988). Subsequently, the D.C. Circuit held that the potential for harm from disclosure continued even after the challenged selection process was completed. *United States Dep't of Justice, Bureau of Prisons v. FLRA*, 988 F.2d 1267 (D.C. Cir. 1993) (*Bureau of Prisons*).

The GC argues that the Agency's explanation of its countervailing anti-disclosure concerns were "not responsive to" the Union's offer to view the crediting plans instead of receiving a copy. Exceptions at 19. In this regard, the GC mistakenly asserts that the cases cited by the agency address only risks associated with the release of copies of crediting plans. *Id*. at 19-20. All three decisions discussed above concern the risks of disclosing information within the crediting plan regardless of the method of disclosure. Specifically, in *Bureau of Prisons,* the DC Circuit determined that having the contents "known to the Union" would compromise the agencies' interest in maintaining the confidentiality of their crediting plans." 988 F.2d at 1272.

In its exceptions, the GC offers additional explanations of the Union's need for the crediting plan, specifically that: (1) access to the crediting plan would enhance the Union's litigation posture in arbitration; (2) a thorough review of the promotion file would have been too burdensome; and (3) the Union's information request was based not on the non-selections of the two correctional officers, but, instead, on an investigation of the selection process as a whole. Exceptions at 10-11; 13-14. However, the Authority will only consider asser-

tions that are made at or near the time of the request and not those that are made for the first time at the ULP hearing. *See Twin Cities*, 51 FLRA at 1472; *United States EEOC*, 51 FLRA 248, 258 (1995) (Authority declined to consider GC's explanation, at the hearing, for the Union's need for work assignment information when the Union offered no explanation at the time of the information request). Based on the foregoing, the Authority finds that the Union did not articulate a particularized need for the crediting plan at or near the time of its requests for information.

Accordingly, we deny the GC's exception.

B. The Agency's alleged lack of promptness in responding to the request for information did not amount to an unfair labor practice.

The GC asserts that the Agency committed a ULP when it did not respond to the Union's second request for information for three weeks. Exceptions at 16-21. The GC finds support for this assertion in the Judge's statement that the Agency's response "was somewhat late in coming." *Id*. at 16, *citing* Decision at 21. Although the Judge did make this statement, he also found that the Agency had previously articulated its anti-disclosure concerns, at least in general terms, when the Agency human resources officer responded to the first request and explained that access to the crediting plans was restricted to members of the rating panel. *Id.* at 21. As discussed above, the Authority finds the Agency's actions here to be distinguishable from those of the agency in *HFCA* as well as in *FDC Houston*, where the agency did not articulate its anti-disclosure concerns until the ULP hearing. 60 FLRA at 94-95. Furthermore, given the nature of the Union's information requests, which was "encrusted with boilerplate" and required the Agency to "sift through pages of legalism" (Decision at 15-16), the Agency required time to review the requests and formulate a legally sufficient response. These circumstances do not establish that a delay of three weeks was unreasonable. See *IRS Austin District Office and NTEU, Chapter 52*, 51 FLRA 1191, 1198 (1996) (Authority found a delay of eight months to be unreasonable.); *U.S. Department of Justice and AFSCME, Local 2830*, 45 FLRA 1022, 1026 (Authority found a delay of five months to be unreasonable under "the circumstances of this case.")

Accordingly, we deny the GC's exception.

V. Order

The complaint is dismissed.