UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C. 20424

OALJ 25-9

U.S. DEPARTMENT OF VETERANS AFFAIRS
JOHN J. PERSHING VETERANS AFFAIRS MEDICAL CENTER
POPLAR BLUFF, MISSOURI
Respondent

And

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 2338, AFL-CIO
Charging Party

CH-CA-22-0280

Alicia Weber
For the General Counsel

Dane R. Roper
For the Respondent

Kevin Ellis
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Today's case appears to be an ancillary skirmish in a long-term campaign of trench warfare between a veterans' hospital and its union.[1] This case involves the union's request for information concerning a workplace harassment complaint filed by a manager against a union officer. But it played out within a much larger context of hostility between the hospital's management and at least one particularly aggressive union steward. That steward's scorched-earth representation tactics got him accused of bullying a manager, but he turned around and

[1] By a "long-term campaign," I am referring to the scores of disputes between these two parties that have been decided either by the Federal Labor Relations Authority or by one of its administrative law judges. By my unofficial count, the Authority has decided twenty-eight arbitration cases between these two parties in the past four years, and I have decided two other cases besides this one in the past year. It would be foolhardy to believe that this decision will be the last – at least until the combatants choose to lay down their weapons of war and look for more productive methods of coexistence.

accused the manager of using the complaint to retaliate against him. Much as I am tempted to try to end the war itself, I am authorized only to resolve the union's request for information.

The union's information request here was filed after the manager's harassment complaint had been referred to a fact-finder for investigation, and soon after the fact-finder had issued his report. The union sought the fact-finder's full investigative report, as it was concerned both that the steward might suffer disciplinary action and that the manager may have retaliated against the steward. The agency denied the information request, claiming that the harassment investigation did not "impact upon bargaining unit employees." Later it added that disclosing the report would violate employee privacy.

While the agency here has tried to focus everyone's attention on the conduct of the steward, the issues in this case only relate to the union's information request. First, did the union articulate a particularized need for the fact-finder's report? The answer to this question is yes, because that report directly addressed conduct for which the steward could be (and ultimately was) disciplined. It was essential for the Union to have the report, in order to properly defend the steward if he was disciplined, and to determine whether the manager had retaliated against him for his union activities. Next, did the Privacy Act prohibit disclosure of the report? No, both because the report was not contained in a system of records covered by the Privacy Act, and because the agency never articulated the nature or significance of any privacy interests affected by disclosure.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or the Authority), 5 C.F.R. part 2423.

On April 5, 2022, the American Federation of Government Employees, Local 2338, AFL-CIO (the Union or Charging Party) filed a ULP charge against the U.S. Department of Veterans Affairs, John J. Pershing Veterans Affairs Medical Center, Poplar Bluff, Missouri (the Agency or Respondent). After investigating the charge, the Regional Director of the Chicago Region of the FLRA issued a Complaint and Notice of Hearing, on behalf of the FLRA's General Counsel (GC), against the Respondent on June 2, 2023, alleging that the Respondent violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by refusing to furnish the Union with information requested by the Union. GC Ex. 1(a). On June 27, 2023, Respondent filed its Answer to the Complaint, admitting some of the factual allegations but denying that it had violated the Statute. GC Ex. 1(c).

On September 27, 2023, the General Counsel served a subpoena duces tecum on the Respondent, seeking a variety of documents, including the information the Charging Party had originally requested and which is the subject of the current dispute. Respondent filed a petition to revoke the subpoena on October 3, 2023. GC Ex. 1(m). After a prehearing conference, I agreed to conduct an *in-camera* review of the subpoenaed documents, and Respondent agreed to

submit them to me for such a review.[2] After reviewing those documents, I ruled that a portion of the documents was necessary for the GC to prepare for the hearing. Accordingly, I issued a protective order on October 10, 2023, directing the Respondent to provide Counsel for the GC and the Charging Party's representative with that portion of the subpoenaed documents; I further ordered the GC and the Charging Party to maintain the confidentiality of that information. GC Ex. 1(p).

A hearing was held in this matter on October 11, 2023, with parties participating on the MS Teams platform. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses; a court reporter prepared a transcript of the hearing. The General Counsel and the Respondent have filed post-hearing briefs, which I have fully considered. On August 14, 2024, Respondent filed a motion to submit an additional document into evidence, and the GC has objected to that motion. I will rule on the motion in the course of this decision.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the certified exclusive representative of nationwide consolidated units of Department of Veterans Affairs employees. The Union is an agent of the AFGE for the purpose of representing bargaining unit employees of the Respondent. During the time period when the events of this case occurred, Omari Andwele, Human Resources Specialist; Janice Taylor, Harassment Prevention Program Coordinator; and Dr. Amanda Wallace, Psychology Program Manager, were agents of the Respondent and acting on its behalf. During that same period, Harold Lampley was employed by the Respondent as a lead medical support assistant and served as First Vice President and Chief Steward for the Union, and Jacob Jordan was employed as an advanced medical support assistant and served as Second Vice President of the Union.

The Department of Veterans Affairs has a Harassment Prevention Policy, embodied in VA Directive 5979, which prohibits employees from engaging in harassing conduct for any reason and requires management to investigate and act to address and correct harassing behavior. Resp. Ex. 3. VA Handbook 5979 contains the procedures for the Harassment Prevention Program (HPP), including the procedures for investigating harassment allegations. Resp. Ex. 4. As the Harassment Prevention Program Coordinator at the Agency, Janice Taylor received a workplace harassment complaint filed by Dr. Wallace against Mr. Lampley on January 26, 2022.[3] GC Ex. 13. Lampley had been representing an employee in a dispute with

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[2] These documents are contained in a digital file labelled "Responsive Records" consisting of 91 pages, the first eight of which were provided to the GC and the Charging Party before the hearing and are GC Ex. 13. The remaining 83 pages will be kept as a separate part of the record and will remain sealed until the decision is final.

[3] Unless otherwise noted, all events and dates are in 2022. Records reflect that Dr. Wallace first made her complaint on January 21, but it was not referred to the HPP until January 26. *Compare* GC Ex. 13 at 1 *and* 3.

the employee's supervisor (Dr. Wallace) over the employee's reasonable accommodation request, and Dr. Wallace objected to what she perceived as threats by Lampley to have her professional license revoked (among other things) for denying the reasonable accommodation request. *Id.* at 4; Tr. 33.

Pursuant to the HPP procedures, Ms. Taylor referred the complaint on January 31 to Akil Aabid, an EEO official at a VA facility in North Carolina, to conduct a fact-finding investigation and report. GC Ex. 13 at 1-2. Mr. Aabid was instructed to conduct a full investigation of the harassment complaint -- to interview the complainant, the alleged offender, and any relevant witnesses -- and then to issue a report – including his conclusion whether the complaint was substantiated or not, and whether any corrective actions or other preventive measures were needed. *Id.* at 1. Aabid contacted both Lampley and Wallace and conducted separate interviews with each of them remotely: first with Wallace on February 7 and then with Lampley on February 11. *Id.* at 3.[4] Mr. Jordan served as Lampley's Union representative at his interview. Wallace gave Mr. Aabid a large number of documents to support her allegations, and these documents constitute the bulk of the investigatory file that remains under seal. Responsive Records at 13-88. Wallace also identified nine officials at the medical center who could support her allegations; Aabid listed them in his final report but stated that he found it unnecessary to interview them, because Wallace's supporting documents fully characterized their knowledge. GC Ex. 13 at 4.

Finally, Mr. Aabid summarized his conclusions from the investigation in his report, dated February 21: he stated that while Dr. Wallace considered Lampley's words and actions offensive, he was acting as a Union official at the time, representing another employee. Citing language from the Supreme Court's decision in *Letter Carriers v Austin*, 418 U.S. 264 (1974), which recognized "uninhibited, robust, and wide-open debate" as a permissible aspect of labor-management dialogue, Aabid found that Lampley didn't commit any action that constituted flagrant misconduct. Therefore he found that the allegations against Lampley were unsubstantiated. He did recommend, however, that Agency leadership "have a meeting with the AFGE Local 2338, to discuss how to improve the working relationship amongst union stewards, supervisors, managers, section chiefs, etc." GC Ex. 13 at 6.

When Lampley learned of the nature of Dr. Wallace's allegations against him, he and the Union were concerned that the complaint was a reprisal for Lampley's Union activity; they contemplated filing a grievance or a ULP charge against the Agency, but they waited until the HPP investigation had concluded. Tr. 36-37. Lampley and Jordan stayed in touch with Aabid as his investigation continued, and once they were advised that the investigation was over, Jordan filed a request for information, dated March 4. *Id.* He requested:

> the entire fact-finding investigatory/evidence file regarding the harassment complaint filed by Amanda Wallace (Wallace), HPP 3904, on Harold Lampley (Lampley) dated 4 February 2022. . . . [including] all emails with attachments, all

[4] Wallace did not sign her written statement incorporating her interview responses until February 18, and Lampley did not sign his statement until February 14. Responsive Records at 12, 91. But it appears that the actual interviews occurred on the 7th and 11th, respectively. The discrepancy in dates is likely because of the time it took for Aabid to send them their statements and for them to review them.

> communications between Janice Taylor (Taylor) and Lampley . . ., all communication between Janice Taylor and Akil Aabid . . . the initial complaint filed by Wallace to include all attachments, the fact-finding report that was completed by Akil Aabid, the final investigative report that was submitted, and the proposed discipline (if any). This information needs to be unredacted.

Resp. Ex. 1 at 1.[5] Jordan's request further stated that the Union was investigating whether Dr. Wallace's complaint was due to Lampley's performance of his representational responsibilities. The Union said it would utilize the requested information to determine whether its concerns were substantiated, and if so, it would file a grievance or a ULP charge. *Id.* at 1-2; *see also* Tr. 38-39.

The Agency responded to the Union's request in a memo dated March 25 and signed by Human Resource Specialist Omari Andwele. Resp. Ex. 2.[6] The memo stated:

> AFGE Local 2338 is not entitled to the requested information referenced in this memorandum. A non-bargaining unit employee was the subject matter of the investigation referenced in this memorandum. Additionally, no disciplinary action was proposed or implemented that affected a bargaining unit employee. The FLRA has established the Agency has no requirement to furnish information that does not impact upon bargaining unit employees.

Id. On March 25 and 28, Jordan and Andwele exchanged a series of emails, each person trying to explain his position. One hour after Jordan received the above-quoted email from Andwele, he attempted to rebut Andwele's assertion that "a non-bargaining unit employee was the subject" of the HPP investigation. Jordan attached Ms. Taylor's initial notification to Lampley of the complaint against him; Jordan insisted, therefore, that Lampley (whom everyone agrees is in the bargaining unit) was the subject of the investigation, and that the requested information was necessary for the Union to represent him. GC Ex. 7. An hour later on March 25, Andwele responded:

> Additionally, in my response I noted that there was not any proposed disciplinary action that impacted any bargaining unit employee in the fact finding referenced below. Therefore, the Agency is not seeing the connection between the information requested and the Union's representational duties. Furthermore, the FLRA statute supports the Agency not furnishing investigative reports unredacted as it would violate employees [sic] privacy. The Union was encourage when it initially sought the information referenced below to file a FOIA request. . . .

GC Ex. 8 at 2. Three minutes after receiving this email, Jordan responded: "The Union is not required to file a FOIA request. That's why 7114 exists. Redact the names, provide the

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[5] The information request is also a part of GC Ex. 5; but GC Ex. 5 also contains subsequent emails between the parties, which makes page references more confusing. When referring to the March 4 information request itself, I will cite to Resp. Ex. 1.

[6] The Agency's March 25 response is also contained in GC Ex. 6, but that exhibit also includes a cover letter. Again, I will cite to Resp. Ex. 2 when referring to the March 25 response.

information, and we can be done with this back and forth." *Id.* Two hours later, Andwele replied, in pertinent part:

> Additionally, Harold Lampley does not have the sole authority to grant the Agency permission to release any information that would compromise the privacy of its employees. . . . However, along with the concerns of maintaining its employee's privacy, the totality of the Agency's position is that the information being requested by the Union did not impact the employment of any bargaining unit employee at JJPVA. Therefore, without additional clarification of the connection between the requested information and the representational duties of AFGE Local 2338, then the Agency cannot furnish requested information referenced in this email chain. If AFGE Local 2338 would like whatever information that is publicly available (if any) regarding the matter referenced in the subject line of this email then AFGE Local 2338 must file a FOIA request.

Id. at 1-2. The final communication on this subject was Jordan's email on March 28: "The agency keeps moving the goalpost. We will not argue regarding the matter at hand. We've attempted to work with the agency, at the lowest level, to resolve this request. It is now clear to the Union that the agency is not willing to work with us. Thanks." *Id.* at 1. The Union filed the instant ULP charge against the Agency on April 5.

On April 26, Lampley filed a request under the Freedom of Information Act (FOIA) for his HPP Case 3904 file as well as other information maintained under his name, including his eOPF. GC Ex. 9; Resp. Ex. 6. The Agency's FOIA and Privacy Officer responded on June 9: she advised Lampley that of the 101 pages of responsive documents, 78 pages could not be disclosed, 11 pages were partially disclosable, and 12 pages could be furnished to him in full. The withheld information was prohibited from disclosure based on Exemption 5 (pre-decisional documents) and Exemption 6 (unwarranted invasion of privacy). GC Ex. 9 at 1-2; Resp. Ex. 6 at 2; Tr. 108-11. Lampley did not appeal the FOIA denial.

While the Union's ULP charge was being investigated by the GC, an attorney for the GC exchanged a series of emails with Lisa Edwards, the Agency's Privacy and FOIA officer, regarding the Agency's assertion that employee privacy would be compromised by disclosure of the requested information. GC Ex. 10. The GC attorney asked Ms. Edwards whether the HPP fact-finding file was contained in a system of records under the Privacy Act. Ms. Edwards responded that "A fact finding does not become a part of a Privacy Act (PA) System of Records (SOR) until charges are filed against an employee." *Id.* at 5. When the attorney continued to press her whether the VA had ever issued a System of Records Notice regarding EEO and HPP documents, Edwards wrote on September 13, "I don't know what else to tell you, but you are not going to find any SORN for those records. They are **not** in a Privacy Act System of Records." *Id.* at 1 (emphasis in original). At the hearing in this case, however, Ms. Edwards testified that she subsequently learned that a System of Records Notice for EEO files, including HPP records, had been published in the Federal Register on May 20, 2022. Tr. 91-92. *See* Resp. Ex. 5. At the time she exchanged emails with the GC's attorney in September of that year, she was not aware of any such notice. Tr. 91-92, 96.

On March 9, 2023, Lampley's supervisor proposed that he be issued a written reprimand, based on three instances in January and February of 2022 of alleged "flagrant misconduct through bullying and abuse" regarding his interactions with Dr. Wallace. GC Ex. 11. That reprimand was approved on March 22, 2023, by the Associate Medical Center Director. GC Ex. 12. The Union filed a grievance challenging the reprimand; that grievance was still pending at the time of the hearing in this case, but it was subsequently settled by the parties. Tr. 74.[7]

POSITIONS OF THE PARTIES

General Counsel

The GC makes three basic arguments in support of its complaint. It asserts first that the Union showed a particularized need for the HPP fact-finding file; the Union was thus entitled to the file, unless the Agency demonstrated that disclosure was prohibited by law. Next, it argues that the Agency has failed to show that disclosure of the file would violate the Privacy Act or constitute an unwarranted invasion of another employee's privacy. Finally, it submits that the Privacy Act expressly permits the disclosure of information (such as Lampley's HPP file) that is necessary for an employee in the performance of his duties. GC Brief at 3 (citing 5 U.S.C. § 552a(b)(1)).

Under Section 7114(b)(4) of the Statute, in order to require an agency to furnish it with information, a union must demonstrate (among other things) that it has a particularized need for the information in order to fulfill its statutory duties of representation. *U.S. DOJ, Fed. BOP, FCI Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495-96 (2015) (*FCI Ray Brook*). The GC claims the Authority has repeatedly held that a union meets this burden when it identifies an alleged agency action and asserts that it needs the information to assess whether the agency has violated established policies and to determine whether to file a grievance over the action. GC Brief at 9 (citing *FCI Ray Brook* at 496). Here, the Union cited the undisputed fact that the Agency was investigating Lampley in relation to actions he took while representing another employee, and it was concerned that this may have been in reprisal for his protected activity. Reprisals against union officials may constitute the basis for a grievance or a ULP charge; thus, the GC concludes, the Union had met its burden of showing that it needed the HPP file in order to represent Lampley. GC Brief at 11.

Moreover, the reasons given by the Agency's representative, Mr. Andwele, for denying the information request were either groundless or fatally vague. Contrary to Andwele's insistence, it was obvious that Lampley was the subject of the HPP complaint at issue; and even though the Agency was not then considering disciplinary action against Lampley, the nature of

[7] Several months after this hearing, and after the record had been closed, the Respondent filed a motion under the heading Agency's New Information Regarding Disposition of Grievance, which attached a Settlement Agreement reached by the Union and the Agency. In that Settlement Agreement, the Union agreed to withdraw its grievance regarding Lampley's reprimand, in return for certain actions to be taken by the Agency. The GC objects to reopening the record for this purpose and filed a motion to strike the "additional information." Despite the general reluctance of courts to reopen hearing records *(see Pension Benefit Guaranty Corp.*, 52 FLRA 1390, 1399 (1997)), I will admit the Settlement Agreement, because it is relevant to the remedy proposed by the General Counsel. As I will explain in more detail later, however, the fact that Lampley's grievance has been withdrawn does not render the case moot or dispense with the need for the Union to obtain the information.

Dr. Wallace's accusations placed Lampley in jeopardy of being disciplined. And indeed, the very acts Wallace accused Lampley of committing became the basis of the Agency's reprimand of Lampley, albeit a year later. *Id.* at 10. Second, Andwele's assertion that disclosure would "compromise the privacy of its employees" was so vague and conclusory that it failed to satisfy the Agency's obligation to explain its anti-disclosure interests in a manner that would enable the Union to understand them and try to accommodate them. *Id.* at 11 (citing *U.S. INS, U.S. Border Patrol Del Rio, Tex.*, 51 FLRA 768, 776 (1996)). Andwele did not identify any actual privacy interests that might be compromised, and he stood fast in his refusal to disclose, even after the Union agreed to allow him to redact the information. GC Brief at 11.

The GC presents several bases for its position that disclosure of the HPP file was not prohibited by the Privacy Act. First it notes, and the Respondent admits[8], that the Agency's HPP files were not contained in a System of Records, as required by the Privacy Act when the Union submitted its request for information in March 2022. Ms. Edwards conceded this in her September 2022 correspondence with the FLRA and testified that the Agency published a System of Records Notice only in May of 2022. GC Ex. 10 at 1, 5; Resp. Ex. 5. The GC submits that the existence of a document in a system of records is a prerequisite for an agency to shield a document from disclosure, and therefore the Respondent's claim of privacy protection should be denied without even getting to its merits. GC Brief at 12-13 (citing *Dep't of VA, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 431 (2019) (*VA Decatur*); and *Henke v. U.S. Dep't of Commerce*, 83 F.3d 1453, 1459 (D.C. Cir. 1996)).

The GC further argues that the Respondent's privacy claim fails on the merits. The GC notes that throughout the litigation of this case, the Agency has articulated the substance of its privacy concerns in only the barest of language, and has failed to explain what employee interests are at stake or jeopardized by disclosure. GC Brief at 13. Ms. Edwards cited the names and email addresses of employees as confidential, but she never articulated how or why this was true. Tr. 110-11. Utilizing the Authority's test for evaluating Privacy Act claims in 7114(b)(4) cases, the GC asserts that the Respondent failed to show that employee privacy interests are implicated here or to explain the nature and significance of those interests. GC Brief at 13 (citing *U.S. DOJ, Fed. Bureau of Prisons, Fed. Det. Ctr., Houston, Tex.*, 60 FLRA 91, 93-95 (2004) (*BOP Houston*)).

Additionally, the GC cites the text of the Privacy Act itself, 5 U.S.C. § 552a(b)(1), as explicitly permitting disclosure of information in situations such as this. That provision of the Act permits disclosure of records to officers or employees of the agency maintaining the record, if they have "a need for the record in the performance of their duties." *Id.* The GC asserts that Lampley and his Union representative needed the HPP file in order to carry out their representational duties relating to the Agency's investigation of Lampley. GC Brief at 14 (citing *Roberts v. U.S. Dep't of Justice*, 366 F. Supp. 2d 13, 27 (D.D.C. 2005)).

And finally, the GC argues that Respondent should not even be permitted to raise the Privacy Act as a defense, as its cryptic reference to "employee privacy" in its March 25 response to the information request was not sufficient to make the Union aware of, or enable the Union to accommodate, the Agency's objections. The GC recognizes that the Authority has permitted agencies to raise Privacy Act objections even as late as the hearing – *see U.S. DOJ,*

[8] Tr. 25-27.

Bureau of Prisons, U.S. Penitentiary, Marion, Ill., 66 FLRA 669, 673 (2012) -- but it urges the Authority to overrule this precedent. GC Brief at 11.

In order to remedy the Agency's unlawful denial of the Union's information request, the GC requests that I order the Agency to provide that information to the Union (unredacted except for names, Social Security numbers, and contact information) and to post a notice to employees of its unfair labor practice, signed by the Medical Center Director. The GC further requests that the Agency be prohibited from raising timeliness as a defense in any grievance filed by the Union in connection with the information. *Id.* at 15. The GC insists that the settlement of the parties' grievance over Lampley's discipline does not render the case moot.

Respondent

The Respondent argues that the Union's information request was properly denied, both because the Union failed to articulate a particularized need for the information and because its disclosure is prohibited by the Privacy Act.

With regard to particularized need, Respondent notes that when the Union made its request for information, Lampley and the Union already knew that the HPP fact-finding investigation had been concluded, that it had found Dr. Wallace's harassment complaint unsubstantiated, and that no discipline against Lampley had been proposed. Resp. Brief at 7-8. The information request itself stated that the Union would use the HPP report "to dispel the allegations to the bargaining unit employees." Resp. Ex. 1 at 1-2. The Respondent interprets the Union's comment as an admission that it would use the contents of the HPP report "to continue to victimize Dr. Wallace" and "to splash her sensitive pleas for help across 900+ BUE computer screens." Resp. Brief at 7. Respondent submits that "it is unclear how the requested information would in any way assist the Union in protecting employees' workplace safety, uncover misinformation, or otherwise support their representation of bargaining unit employees." *Id.* at 8.

After Mr. Andwele denied the information request, and after he and Andwele exchanged emails regarding the Union's alleged need for the information, Respondent interprets the Union's decision to file a ULP charge as an "abandonment" of its 7114(b)(4) request. Respondent argues, "Rather than attempt to cure its defective RFI, the Union abandoned the process, unilaterally declared that their aborted RFI was denied, and filed a ULP requesting FLRA assistance." *Id.*[9]

While apparently conceding that the HPP report requested by the Union on March 4 was not contained in a system of records at that time, Respondent argues that it corrected that "loophole" by issuing a System of Records Notice on May 20, 2022, and that notice became effective on June 19, 2022. Therefore, the Union had until June 19 to demonstrate a particularized need for the report. Having failed to do so, Respondent argues that the "loophole" closed, the report became subject to the Privacy Act, and the Union lost its opportunity to obtain the confidential information. *Id.* at 9-10.

[9] Respondent repeatedly insists in its brief that the Agency "sent back for clarification, but did not deny" the information request. *See also* Resp. Brief at 2.

The Respondent asserts that Lampley was directed to pursue his information request by filing a FOIA request – which Lampley did indeed do on June 9 (Resp. Ex. 6) – and that the Agency's privacy officer properly furnished him with those HPP documents that related to him alone, but withheld those documents relating to Dr. Wallace, because disclosure of those documents was prohibited by 5 U.S.C. § 552(b)(6). Resp. Brief at 10. Respondent argues that the privacy interests of third parties are protected under this FOIA exemption, and it cites *Sussman v. Marshalls Serv.*, 494 F.3d 1106, 1121 (D.C. Cir. 2007), in support of this precept. Resp. Brief at 10.

Finally, the Respondent justifies the disciplinary action it subsequently took against Lampley in 2023 and insists that the 2023 discipline should not retroactively be used as a basis for requiring disclosure of the HPP file back in 2022. *Id.* at 11. Respondent asserts that Dr. Wallace played no part in the 2023 disciplinary process, since she was no longer employed at the VA; Lampley's supervisors, however, were justified in reviewing his interactions with Wallace and determining that they warranted punishment. *Id.* at 11-12.

ANALYSIS AND CONCLUSIONS

Section 7114(b)(4) of the Statute requires an agency, upon a union's request and to the extent not prohibited by law, to furnish data that is: (1) normally maintained by the agency; (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 or training to management relating to collective bargaining. An agency's failure to provide information meeting these criteria violates § 7116(a)(1), (5), and (8) of the Statute. *Internal Revenue Serv.*, 50 FLRA 661, 671 (1995) (*IRS*).

The parties in our case agree that the HPP file requested by the Union is normally maintained by the Agency and is reasonably available; similarly, the report does not constitute guidance to management regarding collective bargaining. Their dispute focuses on whether the Union established a particularized need for the file and whether its disclosure is prohibited by the Privacy Act.

Throughout its post-hearing brief, the Respondent sought to shift the focus from the Union's information request to the character and conduct of Mr. Lampley. On repeated occasions, Counsel for the Respondent attacked Lampley's conduct during his attempts to represent another employee in a personnel dispute: for example, at page 2, Lampley's behavior is called "atrocious" and "despicable;" as an objective observer, I am asked to feel "righteous indignation" at his behavior. At page 3, Lampley's conduct is called "intolerable", "witness tampering", and an effort to "humiliate" supervisors, "with the help and assistance of the FLRA." But the GC has simply alleged that the Agency unlawfully refused to furnish the Union with information in support of a potential grievance. Regardless of what an employee is accused of doing, he is entitled to union representation and to information that is necessary to pursue that representation. The Agency ultimately chose to pursue disciplinary action against Lampley for his conduct with Dr. Wallace, but the merits of that disciplinary action are not before me; I am simply called to decide whether the Agency was required to provide the contents of the HPP file to the Union in March of 2022. The language and methods Lampley used in representing this employee are indeed offensive, and they walk a very fine line between

"robust debate" and "flagrant misconduct," but they are not material to the issues before me: did the Union show a particularized need for the HPP file, and was disclosure of the file prohibited by the Privacy Act?

Particularized Need

In order for a union to establish a particularized need for information, it must articulate, with specificity, why it needs the information, including how it will use it and how its intended use relates to its representational responsibilities under the Statute. It is not enough that the information might be relevant or useful to a union; instead, it must be necessary for the union to adequately represent its members. *Dep't of Justice v. FLRA*, 991 F.2d 285, 290 (5th Cir. 1993); *U.S. Dep't of Justice, INS, N. Reg., Twin Cities, Minn.*, 51 FLRA 1467, 1472 (1996). The union's explanation must be more than a conclusory assertion and must permit the agency to make a reasoned judgment as to whether the Statute requires it to furnish the information. *FCI Ray Brook*, 68 FLRA at 495-96. But the union's explanation need not be so specific as to reveal its strategy. *Id.* at 496. A union frequently will not be aware of the contents of a requested document, and the degree of specificity required of the union must take that into account. *IRS* at 670 n.13. Moreover, whether the requested information would actually accomplish the union's purpose is not determinative of whether it is necessary under 7114(b)(4). *Soc. Sec. Admin.*, 64 FLRA 293, 296 (2009).

After a union has made its request, the burden shifts to the agency to either furnish the information or explain why it is not obligated to do so. Like the union, the agency must explain its reasons with specificity; it cannot satisfy its burden by making conclusory or bare assertions; its burden extends beyond merely saying "no." *IRS* at 670. If an agency reasonably requests clarification of a union's information request, the union's failure to respond will be taken into account in determining whether it has established a particularized need for the information. *U.S. Dep't of the Air Force, Air Force Materiel Command, Kirtland AFB, Albuquerque, N.M.*, 60 FLRA 791, 794-95 (2005) (*Kirtland AFB*). The analytic framework set forth in *IRS* and subsequent decisions thus serves the purpose of encouraging the parties to articulate and exchange their respective interests concerning requested information, which enables each party to consider and, as appropriate, accommodate their respective interests. *Id.* at 794.

Reviewing the exchange of email correspondence between Jordan and Andwele in March of 2022, I keep scratching my head, trying to understand how Andwele could have possibly believed that the HPP file was **NOT** necessary for the Union to represent Lampley. Looking at Andwele's statements piecemeal or as a whole, his explanations make no sense whatsoever. First, he began by stating that "a non-bargaining unit employee was the subject matter of the investigation." Resp. Ex. 2. While it seems likely that Andwele was referring to Wallace as the "subject matter" of the HPP complaint, he was aware that Wallace was the complaining party and that Lampley was the alleged perpetrator; Jordan's request plainly stated as much. Resp. Ex. 1. Thus, regardless of who the "subject" of the complaint was, Lampley was a central character in the drama, and Lampley was the person being accused of misconduct. The HPP file contained the evidence of Lampley's actions, Wallace's reactions, and the findings of the investigator. For Andwele to state that that evidence "does not impact upon bargaining unit employees" is sheer nonsense. And when I read and re-read Andwele's hearing testimony, trying to explain his reasoning, I still cannot make sense of it. Tr. 131-33.

The Agency – both in March 2022 and in its post-hearing brief – seems to argue that as long as management was not actively considering imposing discipline on Lampley at the time of the information request, the HPP allegations had no impact on him. Resp. Brief at 7-8. Even if we ignored the fact that management did indeed, ultimately, discipline Lampley for just these very actions, and if we only viewed the information request with the facts known to the parties in March 2022, Andwele's March 25 response defies credulity. Any objective employee, faced with the accusations Wallace made against Lampley, would reasonably fear that he might be subject to discipline, or that his employment status might be adversely affected, and such an employee would want to arm himself with every shred of evidence that might support his case. *See, e.g. VA Decatur*, 71 FLRA at 430-31. Furthermore, the HPP file would not only be essential to the Union defensively, but also offensively, to evaluate whether to file a grievance or ULP charge for retaliation. Jordan had stated in his request that the Union was investigating whether Wallace's complaint was filed in reprisal for Lampley's protected activities, and that it might file a grievance or a ULP charge. Since it was known at that time that the fact-finder had determined Wallace's complaint was not substantiated, the fact-finder's report, explaining his conclusions and laying out the evidence, would be the best evidence possible for the Union to evaluate whether to file a grievance or ULP charge. The fact that the Agency did indeed (albeit a year later) impose discipline on Lampley for these same actions only reinforces what was already obvious in March 2022 – that the HPP complaint and its supporting file directly affected Lampley's employment.

It is worth noting that the Agency's March 25 response to the Union made no mention of the Privacy Act or the privacy interests of any employee. The Agency raised this issue only after the Union rebutted Andwele's assertion that a bargaining unit employee was not the subject of the HPP investigation, and only after doubling down on its contention that an employee was not "impacted" by the complaint.[10] GC Ex. 8 at 2. More significantly, Andwele raised the issue of "privacy" in only the most general and ambiguous terms: in his 3:09 pm response to Jordan on March 25, he said the Agency would not provide the unredacted requested file "as it would violate employees [sic] privacy." *Id.* This was not at all helpful in explaining what privacy interests were affected, although it did suggest that those unspecified privacy interests might be protected if the file was redacted. Indeed, Mr. Jordan got the hint, and he immediately replied to Andwele that he would accept the file in redacted form. *Id.* But this did not suffice for the Agency: Andwele insisted that even in redacted form, the documents "would compromise the privacy of its employees." *Id.* at 1. And then Andwele immediately returned to his original premise, that the information "did not impact the employment of any bargaining unit employee at JJPVA." *Id.* Reading this correspondence objectively, the Agency was telling the Union that no amount of redacting or protecting "employee privacy" was going to demonstrate the Union's need for the HPP file.

In its post-hearing brief, the Respondent tried to spin Andwele's comments: he "did not deny," but rather "sent back for clarification" "the Union's first and only attempt" to obtain the HPP file. Resp. Brief at 2. Therefore, when the Union lost hope that the Agency would voluntarily provide the documents, and instead it filed this ULP charge, the Agency treated the information request as having been "abandoned." *Id.* at 4, 8. This is a brave, but totally insufficient, attempt at damage control. At every stage in the parties' email communications,

[10] This is probably not the appropriate forum for me to air my personal grammar peeves, but I strongly disapprove of using "impact" as a verb. Sadly, that train has already left the station.

Andwele "denied" the Union's information request: in his initial response at 12:49 pm on March 25, in his second response at 3:09 pm, and in his final response at 5:24 pm that day, Andwele stated that the Union was not entitled to the information it requested. The fact that Andwele added the words "without additional clarification of the connection between the requested information below and the representational duties of AFGE Local 2338," before refusing to furnish the information does not alter the fact that the Agency had denied the request at every stage of the process.

I noted earlier the language in the *Kirtland AFB* decision that an agency may make reasonable requests for a union to clarify its statement of particularized need, but the facts of that case stand in stark contrast to those of today's case. 60 FLRA at 794; *see also U.S. Dep't of the Treasury, IRS, Washington, D.C.*, 51 FLRA 1391, 1395-96 (1996). The union's information requests in *Kirtland* were voluminous, and many of the items requested had little or no apparent connection to the issue the union was pursuing; in that context, the agency's request for clarification was "genuine and reasonable." 60 FLRA at 795. But when (as here) an information request already states a particularized need, a request for clarification is just a pretext for denial.

Andwele's request for clarification here was neither genuine nor reasonable: he was asking the Union to "clarify" the "connection" between the HPP file and the Union's stated purpose of investigating whether Dr. Wallace was retaliating against Lampley. The connection between the HPP file and the Union's investigation of possible retaliation was already as clear as day from the Union's original request, and it needed no further elaboration. The Agency already knew that Wallace was accusing Lampley of harassing her by using abusive language in his pursuit of another employee's accommodation request, and that an HPP fact-finder had investigated this complaint and submitted his final report. The Agency already knew that the fact-finder's report would help support Lampley's position and hurt the Agency in a possible future grievance or ULP charge. The fact-finder had assembled evidence which, in his view, showed that while Lampley had utilized language that might have been "offensive," it constituted "robust debate" that did not constitute "flagrant misconduct" or exceed the bounds of Lampley's protected activity. GC Ex. 13 at 6.[11] "Flagrant misconduct" was precisely how the Respondent characterized Lampley's actions in its proposed reprimand a year later (GC Ex. 11 at 2). Assuming Andwele read the HPP file, or even its summary report, he would have understood all this, and he would have needed no further "clarification" to understand how the file was essential to the Union's proper defense of Lampley.

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[11] It is also worth noting here that some documents in the Responsive Records file – which are still under seal – at least partially support Lampley's case, which the Union was trying to investigate when it filed its information request on March 4. Other than the first eight pages of the 91-page file (which have already been furnished to the Union and the GC), the remaining 83 pages consist almost entirely of notes written by Dr. Wallace keeping track of the reasonable accommodation dispute with Lampley and another employee, as well as emails between Wallace, Lampley, other VA management officials, and outside licensing authorities. The emails illustrate the inflammatory language and tactics used by Lampley, which formed the basis for Wallace's HPP complaint, but they also reflect that at least two officials in VA management who read Lampley's emails advised Wallace (prior to her filing the HPP complaint) that while Lampley's behavior was offensive, it came within the legally protected bounds of "robust conversation" in labor disputes. *See* Responsive Records at 13, 52-54. While these statements might not support a charge that Wallace was retaliating against Lampley, they would certainly support him in a grievance challenging his possible discipline. This is precisely the type of information that the Union was seeking when it filed its information request.

Regardless of how the Respondent characterizes Andwele's responses to the information request, Andwele "denied" the Union's request three times on March 25. From the outset, the Union's March 4 request fully articulated its need for the HPP file; it required no clarification. The Union had advised the Agency that it was considering filing a grievance or a ULP charge regarding Wallace's filing of the HPP complaint, on the ground that it constituted possible retaliation for Lampley's protected activity. The Union stated that the HPP file would help to resolve concerns whether this was true or not. This sufficiently demonstrated the Union's need for the information. *See, e.g. FCI Ray Brook*, 68 FLRA at 496. The Union's request was sufficient from the outset, and the Agency had no reasonable basis for requiring clarification. Therefore, I conclude that the Union demonstrated a particularized need for the HPP file.

The Privacy Act

Next, the Respondent defends its denial on the grounds that disclosure of the HPP file was prohibited by the Privacy Act, 5 U.S.C. § 552a. In *U.S. Dep't of Transp., FAA, New York TRACON, Westbury, N.Y.*, 50 FLRA 338, 345-46 (1995) (*FAA*), the Authority laid out its analytical framework for evaluating an agency's contention that disclosure under § 7114(b)(4) of the Statute is prohibited by the Privacy Act. It noted that in such cases, an agency is in the best position to articulate the privacy interests of its employees that are in jeopardy, and to show that the requested information is in a system of records. *Id.* at 345. The Authority thus placed the burden on the agency to show: (1) that the requested information is contained in a system of records under the Privacy Act; (2) that disclosure of such information would implicate employee privacy interests; and (3) the nature and significance of those privacy interests. *Id.*[12] In our case, Respondent has failed to satisfy the first and third test, and perhaps the second test as well.

Respondent has failed to meet its threshold burden of showing that the HPP file was contained in a Privacy Act system of records. Respondent refers to this as a "loophole," but it is a fundamental necessity for a party seeking to invoke the protection of that law. The record is clear that when the Union filed its information request on March 4, 2022, and for at least three more months, HPP records were not contained in any system of records. Resp. Ex. 5. While Ms. Edwards, the Agency's Privacy Officer, may have been unaware (when she spoke to the FLRA attorney in September 2022) that the Agency had issued a System of Records Notice for EEO and HPP records in May 2022, that did not alter the fact that the HPP file was not contained in a system of records on March 4, when the file was requested by the Union, and on March 25, when the Agency denied that request. Ms. Edwards also advised the FLRA attorney that "[a] fact finding does not become a part of a Privacy Act (PA) System of Records (SOR) until charges are filed against an employee." GC Ex. 10 at 5. Thus, even after the Agency's System of Records Notice was published in May 2022, and became effective in June 2022, it appears that the HPP complaint filed by Wallace did not become a part of that system of records until the Agency proposed to reprimand Lampley in March of 2023.

[12] If the agency meets this initial burden, the burden then shifts to the union to meet certain criteria, and if necessary, the competing interests must be balanced. *FAA*, 50 FLRA at 345. But it is unnecessary to evaluate these factors, because Respondent did not meet its initial burden.

Regarding the second and third prongs of the *FAA* test, I have already noted that Mr. Andwele barely mentioned employee privacy in his communications with the Union. He didn't cite it at all in his initial denial, and in his subsequent email he vaguely cited "privacy" as a fall-back position, after Jordan had rebutted his initial reason. GC Ex. 8 at 2. Even in its post-hearing brief, the Respondent never really addresses what specific privacy interests are at stake in the disclosure of the HPP file, although it does cite Dr. Wallace as the person who would be affected by disclosure, and it cites a fear that the Union will use the documents to "victimize her outside of the federal government." Resp. Brief at 10; *see also id.* at 7. Andwele's comments do not even attempt to explain the nature and significance of Wallace's privacy interests. Her identity was not a secret; Lampley was told at the outset of the HPP complaint process that Wallace was the accuser and that she claimed his efforts to represent another employee constituted harassment. The identity of the employee Lampley was representing was also known to all. Moreover, a large portion of the documents in the HPP file consisted of emails and letters Lampley sent to various people inside and outside the Agency; Lampley was already aware of, and likely in possession of, those documents. The remainder of the file, and the only documents that can even remotely be considered personal or confidential, consists of Wallace's communications with other VA officials, in which she pleaded for support in stopping Lampley from harassing her and threatening her license.

The problem is, neither Andwele nor Respondent's counsel has ever addressed these privacy interests in any specific way. Instead, they seem to believe that merely uttering "privacy" is the equivalent of waving a magic wand to make documents disappear, that once they invoke the "privacy" talisman, they don't need to actually articulate the nature and significance of the privacy interests involved. In this regard, our case is similar to the facts outlined in *BOP Houston*, 60 FLRA at 95, where the Authority ruled that the agency failed to meet its burden of showing that disclosure would implicate employee privacy interests. And I reach the same conclusion here. My *in camera* review of the disputed documents reinforces my conclusion: while Dr. Wallace's emails to her colleagues in Agency management expressed her heartfelt distress at Lampley's offensive and threatening attacks, they were not different in kind from the basic allegations she had made to Lampley directly. Moreover, she made these statements to a variety of officials within the Agency, so she had already conveyed her views at least semi-publicly, and thus had a lesser expectation of confidentiality. As far as I could tell, there is no information, such as Social Security numbers, addresses, or phone numbers, that needs specific redaction or protection from disclosure. Thus, notwithstanding my characterizations of the documents at the start of the hearing (Tr. 12-14), I conclude that disclosure would not constitute an unwarranted invasion of privacy.[13]

For these reasons, I conclude that the Respondent failed to show either that the HPP file was part of a Privacy Act system of records or that significant privacy interests are jeopardized by disclosure of the file. And since the Union established a particularized need for the information, Respondent's refusal to furnish it constituted an unfair labor practice, in violation of §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute.

[13] In light of these conclusions, it is unnecessary to address the GC's argument that the Privacy Act's "need to know" exception entitled the Union to the requested documents; *see* 5 U.S.C. § 552a(b)(1). GC Brief at 14-15.

Remedy

When an agency unlawfully refuses to furnish necessary information, it is standard for the Authority to order the agency to cease and desist its unlawful activity, to post a notice to employees regarding its actions, and to furnish the union with the information it withheld. *See, e.g. IRS*, 50 FLRA at 674-75. The Authority has also, in appropriate instances, ordered an agency not to assert timeliness defenses to a grievance that is or may be pending. *U.S. Dep't of Justice, INS W. Reg'l Office Labor Mgmt. Relations, Laguna Niguel, Cal.*, 58 FLRA 656, 661-62 (2003).

The GC has requested here that the Agency be ordered not to assert a timeliness defense, because at the time of the hearing Lampley's grievance was still pending. As I ruled earlier, I have taken notice of the fact that that grievance was subsequently settled; in light of that, Respondent argues that the case is moot, or at least that it should not be ordered to furnish the Responsive Records. I agree that there is no longer a need to prevent the Respondent from raising a timeliness defense, but I do not agree that the case is otherwise moot, or that Respondent need not furnish the requested information.

The Authority addressed a similar situation in *U.S. Dep't of HUD*, 71 FLRA 616, 618 (2020), where it noted that parties urging mootness face a high burden to show that neither party has a cognizable interest in the determination of the legal or factual issues; they must show that there is no reasonable expectation that the violation will recur and that interim events have completely eradicated the effects of the violation. *U.S. Small Business Admin.*, 55 FLRA 179, 183 (1999) (quoting *City of L.A. v. Davis*, 440 U.S. 625, 631 (1979)). I am not convinced that the Respondent's unlawful denial of an information request will not recur, or that the Responsive Records are no longer useful to the Union, even though Lampley's grievance has been settled. Those records contain information that goes directly to an Agency investigation of his conduct as a union representative, and in my experience, the ghosts of such disputes frequently haunt the parties beyond their natural lives.

Finally, the Respondent requests that I order the Union not to distribute the information in the Responsive Records and not to have any further contact with Dr. Wallace. I do not agree that the information should remain confidential. And while it is beyond my authority to order the Union to avoid contact with Dr. Wallace, I hope that the Union will honor such a request; any such contact would far exceed the boundaries of a union's representational functions.

Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri, shall:

1. Cease and desist from:

   (a) Failing or refusing to furnish the American Federation of Government Employees, Local 2338, AFL-CIO (the Union) with the information it requested on March 4, 2022.

   (b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured under the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

   (a) Provide the Union with the entire fact-finding investigatory/evidence file in the harassment complaint, HPP 3904, filed against Harold Lampley, as requested by the Union on March 4, 2022.

   (b) Post the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Medical Center Director and shall be posted and maintained for sixty (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 ensure that such Notices are not altered, defaced, or covered by any other material.

   (c) In addition to the physical posting of paper notices, disseminate a copy of the Notice electronically, on the same day as the physical posting, through the Respondent's email, intranet, or other electronic media customarily used to communicate with bargaining unit employees. The message of the email transmitted with the Notice shall state, "We are distributing the attached Notice to you pursuant to an order of an Administrative Law Judge of the Federal Labor Relations Authority in Case Number CH-CA-22-0280."

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Denver Region, Federal Labor Relations Authority, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., March 25, 2025

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Veterans Affairs, John J. Pershing VA Medical Center, Poplar Bluff, Missouri, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish the American Federation of Government Employees, Local 2338, AFL-CIO (the Union), with the information it requested on March 4, 2022.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured under the Statute.

WE WILL provide the Union with the entire fact-finding investigatory/evidence file in the harassment complaint, HPP 3904, filed against Harold Lampley, as requested by the Union on March 4, 2022.

_____

(Agency/Activity)

Date: _____ By: _____

(Signature) Medical Center Director

This Notice must remain posted for sixty (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 its provisions, they may communicate directly with the Regional Director, Denver Region, Federal Labor Relations Authority, whose address is: 1224 Speer Boulevard, Suite 446, Denver, CO 80204, and whose telephone number is: (303) 225-0340.