**FEDERAL LABOR RELATIONS AUTHORITY** OALJ 22-12
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

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| SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC<br><br>RESPONDENT<br><br>AND<br><br>AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 228, AFL-CIO<br><br>CHARGING PARTY | Case No. DE-CA-21-0558 |

Adam Johnson
For the General Counsel

Carson Kern
Douglas Huth
For the Respondent

Christie Lewis
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

## DECISION ON MOTION FOR SUMMARY JUDGMENT

This case, once again, presents us with the consequences of an agency's failure to engage in real dialogue with a union regarding a request for information under Section 7114(b)(4) of the Statute. Despite the Authority's decades-long effort to encourage both parties in a labor-management relationship to fully communicate their needs and interests in a timely manner and to facilitate mutual accommodation, parties all too often default to brusque and adversarial positions, delaying the process and defeating the purpose of the law. In this case, the Agency's failure to timely communicate its interests against disclosure of the requested information deprives it of the opportunity to make those arguments now, and its conflation of the information-request process with the grievance procedure deprived both parties of the opportunity to find a mutually acceptable compromise.

The case is before me now on the General Counsel's Motion for Summary Judgment and the Respondent's Motion to Dismiss. Respondent asks that if its Motion to Dismiss is denied, I hold a hearing on the merits of the case; the General Counsel insists that there are no factual disputes requiring a hearing and that the evidence demonstrates that the Agency unlawfully refused to provide necessary information to the Union.

I agree with the General Counsel. The defects cited by the Respondent for dismissing the complaint lack merit, and the only genuine disputes in this case are legal, not factual; therefore, a hearing is not necessary. Moreover, upon consideration of the evidence I conclude that the information sought by the Union is directly related to, and essential for the resolution of, a grievance it had previously filed. Regardless of whether the grievance had any merit, the Agency was required to furnish the Union with information necessary for resolving it.

## I. 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 Authority or FLRA) (5 C.F.R. part 2423).

On September 16, 2021, the American Federation of Government Employees, Local 228 (the Union or Charging Party) filed a ULP charge against the Small Business Administration, Washington, DC (the Agency or Respondent). Motion for Summary Judgment (MSJ), GC Ex. 1(a). After investigating the charge, the Regional Director of the FLRA's Denver Region issued a Complaint and Notice of Hearing on April 5, 2022, on behalf of the Acting General Counsel (GC), alleging that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by refusing to furnish the Union with certain information it had requested. GC Ex. 1(b) at ¶¶ 13-16.

On April 29, 2022, the Respondent filed its Answer to the Complaint, admitting some of the factual allegations but denying that its actions violated the Statute. GC Ex. 1(c) at ¶¶ 12-14. On June 9, 2022, the GC filed a Motion for Summary Judgment, arguing that there were no material facts in dispute and that it was entitled to judgment in its favor. The Respondent filed its Opposition to the Motion for Summary Judgment (Opp. MSJ) on June 21, 2022, and it simultaneously filed a Motion to Dismiss the Complaint (Mot. Dis.). The GC filed an Opposition to the Motion to Dismiss (Opp. Mot. Dis.) on June 23, 2022. In order to consider the motions, I issued an order on July 21, 2022, cancelling the hearing and closing the record as of August 5, 2022.

In this decision, I will first determine whether the case can be decided without holding a hearing. Then I will evaluate the Respondent's Motion to Dismiss and determine whether it states any valid grounds for dismissing the Complaint. Finally, I will rule on the substance of the Complaint itself: that is, whether the Agency was justified in refusing to furnish any of the information requested by the Union.

## II. THE MOTION FOR SUMMARY JUDGMENT

The Authority has long held that motions for summary judgment filed with an Administrative Law Judge serve the same purpose and have the same requirements as motions filed in U. S. District Court under Rule 56 of the Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn*., 50 FLRA 220, 222 (1995). Under Rule 56, the moving party has the initial burden to show the absence of a genuine issue of material fact; if it makes a prima facie case, the party opposing the motion cannot rely on its pleadings alone, but must show by affidavits or otherwise that there is a genuine dispute of a material fact. *Brown v. Chaffee*, 612 F.2d 497, 504 (10 Cir. 1979); *see generally Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

The parties in this case have submitted exhibits in support of their pleadings, and after reviewing these documents fully, I conclude that there are no genuine issues of material fact in this case. The Respondent has not conceded this point, and its brief opposing the Motion for Summary Judgment lists several issues (which Respondent characterizes, sometimes inaccurately, as facts) that it contends are material and disputed. I will address each of these arguments in Sections B and C, below. Notwithstanding the Respondent's opposition, it is my determination that the disputes between the Agency and the Union here are legal, not factual, and that a hearing is not necessary to resolve them. Therefore, it is appropriate to decide the case on the motion for summary judgment.

I will start by summarizing the facts that are not in dispute; I will then discuss the reasons cited by the Respondent for denying summary judgment and explain why there are no genuine issues of material fact.

### A. FINDINGS OF FACT

The Respondent is an agency within the meaning of 5 U.S.C. § 7103(a)(3). GC Ex. 1(b), ¶ 2.[1] The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization within the meaning of 5 U.S.C. § 7103(a)(4) and is the certified exclusive representative of nationwide consolidated units of employees of the Small Business Administration (SBA), which includes employees of the Respondent. *Id*., ¶ 3. The Union is an agent of the AFGE for the purpose of representing employees of the Respondent. *Id*., ¶ 4; GC Ex. 1(c), ¶ 4.

The SBA and the Union are parties to a Master Labor Agreement (MLA) covering employees nationwide, and including employees at the SBA's El Paso Disaster Loan Servicing Center (EPDLSC or El Paso Center). GC Ex. 2; Resp. Ex. A. The MLA includes, among other things, provisions governing the use of annual performance evaluation plans, referred to as Personal Business Commitment Plans, or PBC Plans, as well as a grievance procedure with provisions for arbitration of unresolved grievances. *Id*.

[1] The GC submitted GC Exhibits 1 through 17 with the MSJ, and GC Exhibits 18 through 30 with its Opp. Mot. Dis. The Respondent submitted Resp. Exhibits A through K with its Mot. Dis. and Resp. Exhibits 1 through 6 with its Opp. MSJ. I will refer to them directly as GC or Respondent exhibits, without reference to the pleadings to which they were attached.

Under Article 28 of the MLA, each employee's PBC Plan spells out the critical elements and performance standards of his or her job. Section 2.1 begins:

> The employee will be provided an opportunity to participate in the establishment of the job specific performance standard of his/her PBC Plan prior to finalization of the plan. At the beginning of the rating period, when PBCs are established, the supervisor, in conjunction with the employee, will meet and establish a PBC Plan that will be communicated to the employee and/or communicate the critical elements and performance standards will remain the same for the new rating period.

GC Ex. 2 at 58; Resp. Ex. 6 at 79. The employee is further entitled to seven days to review the critical elements and performance standards and to offer comments and suggestions regarding them before they are finalized. *Id*.

1. The Union's Information Requests

In January of 2021,[2] Christie Lewis, one of the Union's Regional Vice Presidents, became aware that the director of the El Paso Center had conducted an all-employee meeting at the start of the FY 2021 rating year to discuss the PBC Plans and management expectations regarding them, but supervisors did not conduct one-on-one meetings with their employees on the subject. GC Exs. 3, 4. While the Agency insisted that this practice was perfectly acceptable under the MLA, especially since the standards had not changed that year, Ms. Lewis argued that it improperly deprived employees of the opportunity to discuss their PBC Plans personally with their supervisors, and she filed a grievance on the matter on February 3. GC Exs. 4, 5. The grievance also alleged, more generally, that the Agency "failed to ensure the elements and standards are based on objective, reasonable, and measurable criteria, and provide a clear means of assessing whether objectives have been met." GC Ex. 5 at 3. Managers in the El Paso Center met with Union officials concerning the grievance on February 9, but they could not resolve the dispute, and the grievance was submitted to arbitration.[3] GC Ex. 4-7.

On June 29, Lewis sent a letter to El Paso Center Director Charles Jones, requesting eight categories of documents relating to the establishment of the FY 2021 PBC Plans for El Paso employees and to the communication of the PBC Plans by supervisors to employees. GC Ex. 9.[4] The letter included an extensive introduction, describing the legal framework under the Statute for making, and responding to, information requests. *Id*. at 1-2. Then,

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[2] Hereafter, all dates are in 2021, unless otherwise noted.

[3] The Agency has insisted that it "cancelled" the grievance because it was untimely filed. Opp. MSJ at 4: Resp. Ex. 2. Nonetheless, Respondent concedes that the grievance was filed for arbitration and that it participated in the selection of an arbitrator to hear the case. *Id*.; GC Ex. 6, 7. It is not clear what the current status of the grievance is.

[4] This document is also attached as Exhibit B of the Respondent's Motion to Dismiss; several other exhibits are duplicated as Respondent exhibits, but hereafter, if there is duplication, I will normally cite only to the GC exhibit.

under the heading "Exactly why the Union needs the requested information," Ms. Lewis stated, in part:

> The Union was contacted by several BUEs [bargaining unit employees] who believed management at the EPDLSC failed to follow Article 28 of the MLA when establishing, communicating, and/or finalizing his/her FY 21 Personal Business Commitment (PBC) Plan. The Union needs the information to determine whether management violated established guidelines, principles, and procedures when establishing, communicating, and/or finalizing the BUEs' FY21 PBC Plan.

*Id*. at 2. Under the heading "How the Union will use the requested information," the letter specified, among other things, that the information would be used to: "Correctly identify affected BUEs. . . . To assess whether . . . the FY21 PBC Plan was established, communicated, and/or finalized in accordance with the provisions of Article 28 of the MLA . . . [and] To evaluate and prove the underlying facts and contentions of union grievance 228-02-03-2021-SU-1." *Id*. at 2-3. Lewis asked that if the Agency found any of the requested items to be ambiguous, or if the Agency intended to object to any of the requested information, a management representative should contact her directly to seek clarification, "so that the Parties can make a good faith effort to resolve any differences and avoid unnecessary, and protracted litigation." *Id*. at 5.

Among the items requested by the Union on June 29 were "all records of informal and formal communication . . . from and between the Agency and any management official related to establishing, communicating, and/or finalizing the BUEs' FY21 PBC Plan for any and all BUEs working in, at, or for the EPDLSC." *Id*. at 6. Similar requests were made for communications between El Paso management and other levels of the SBA bureaucracy, such as the Office of Capital Access and the Office of the Chief Human Capital Officer, and between El Paso management and BUEs. *Id*. The Union further requested the actual PBC Plans that were established, communicated, and finalized for each BUE. *Id*.

On July 16, Director Jones denied the Union's information request in its entirety. GC Ex. 10. Jones noted to start that the Union's request "is extremely broad and nonspecific. It identifies no real basis for the request and no connection to any employee complaint." *Id*. at 1. Then, citing the Union's repeated use of the words "all" and "any," Jones stated:

> Broad requests for "all" informal and formal communications between "any" management official that relate to the request "in any way" based on general, unspecified, wholly unsupported allegations of mismanagement or malfeasance are not sufficient to state a particularized need for the requested information. Such requests, are, in fact the opposite of particularity. Essentially, the Union intends to conduct a general audit of all the Center's activities related to its performance management system in an apparent attempt to somehow uncover a nine-month-old contract violation.

*Id*. at 1-2. Finally, noting the Union's reference to Grievance 228-02-03-2021-SU-1, Jones stated that this grievance had been rejected by the Agency as untimely. *Id*. at 2. He

concluded: "Relying on a broad, nonspecific, untimely grievance to support a broad, nonspecific information request does not establish a particularized need for the information." *Id*.

On August 18, the Union sent Director Jones a new information request, seeking ten categories of documents relating to the FY 2021 PBC Plans. GC Ex. 11. This letter contained much of the same introductory and explanatory language as the Union's June 29 information request, and it sought many of the same documents as the earlier letter, but some of the requests differed, and the new letter supplemented its explanations with "additional particularized need" for each of the ten items requested. *Id*. at 6-16. As in the June request, the Union explained, among other things, that the information was connected to a grievance it had filed after being contacted by several BUEs who felt that management had violated Article 28 of the MLA when it implemented their FY 2021 PBC Plans. *Id*. at 2, 3.

When the Union did not receive a response to its August 18 request in five days, as required by the MLA,[5] Lewis emailed Jones on August 24 to remind him that his response was delinquent. GC Ex. 15. She stated that she was trying to resolve the matter without filing a ULP charge, but that she would file a charge if the Agency did not respond within five additional days. *Id*. As a partial response, Labor Relations Specialist Douglas Huth sent Lewis a short email on August 27, promising to provide a full response after reviewing the request further. *Id*. Referring to the Union's first information request of June 29, which had already been denied, Huth stated: "Given that the Union is requesting the same information a second time, it is likely the Agency will respond in a similar manner and deny the information requested." *Id*.

On September 3, Lewis emailed Jones again, indicating that Mr. Huth's preliminary response was inadequate and advising the Agency that this was her last attempt to resolve the dispute before filing a ULP charge.[6] GC Ex. 14. Jones subsequently responded to the Union's second information request on September 24. GC Ex. 17. The Agency's letter noted the similarity between the Union's June 29 and August 18 information requests, and it then denied the new request in virtually the identical language as its July 16 letter. The Agency asserted that both requests were "extremely broad and nonspecific," "identif[y] no real basis for the request and no connection to any employee complaint," and represented an attempt to "conduct a general audit" of the Agency's entire performance management system. *Id*. at 1-2. And as in its July 16 denial, the Agency again argued that the Union's equally nonspecific – and untimely -- grievance could not serve as a valid basis for an information request. *Id*. at 2.

On behalf of the Union, Ms. Lewis filed its ULP charge on September 16, describing her two information requests, the Agency's denial of the first request, and complaining that the Agency had not responded to the second request. The Agency sent the Union its letter denying the information request on September 24. After the General Counsel investigated

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[5] *See* GC Ex. 2, MLA Article 6, Section 5(b) at 15.

[6] Indeed, the Union followed through on this on September 16, when the instant ULP charge was filed. GC Ex. 1(a).

the charge, its Complaint alleged that the Agency's refusal to furnish the Union with five of the items listed in the August 18 information request (specifically items 4-8) violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute. GC Ex. 1(b) at ¶¶ 6, 14-16.

2. The Authority to File Unfair Labor Practice Charges for the Union

Article 12, Section 1 of the MLA provides:

> The Agency agrees to recognize those Union Representatives designated by Council 228 President, or designee, having authority to represent the Council. Such designations shall be made in writing and shall specify the scope of authority of the designated representative. Designated representatives of the Council may re-designate, in writing, their authority. All designations and re-delegations of authority will be provided to Agency Labor Relations Representative, and re-delegations shall also be provided to the appropriate Regional Administrator(s). Failure to receive notice of change in designation or re-delegation will mean the designated individual of record remains authorized to represent the Union.

Resp. Ex. K.[7]

In a letter dated March 30, 2021, AFGE President Everett Kelley notified SBA officials regarding the officers of Local 228 and of AFGE's "continued delegation" to Local 228 to represent unit employees, including the authority to file unfair labor practice charges. GC Ex. 21. The letter stated that Johnnie Green was the Union's President, Niklas Gustafsson was Executive Vice President, and Christie Lewis was Vice President South, and it further advised that the Local President was authorized to re-delegate his authority as he deemed appropriate. *Id*.

On June 29, Union President Green emailed Agency officials to remind them that he had delegated his authority to file ULP charges to all regional vice presidents and to Executive Vice President Gustafsson. GC Ex. 22 at 1.[8] However on September 2, AFGE President Kelley notified the Agency that he had suspended Green as Local 228 President and that Gustafsson had assumed the office in his place. GC Ex. 23. On September 14, Gustafsson notified SBA officials that was delegating to Lewis and the other vice presidents the authority to file ULP charges on behalf of Local 228. GC Ex. 24. On October 25, AFGE President Kelley sent a second letter to SBA management notifying them that Gustafsson was President of Local 228 and that he was authorized to deal with the Agency on all matters relating to conditions of employment, including the authority to file ULP charges and to re-delegate his authority as he deemed appropriate. Resp. Ex. J.

[7] According to Lewis, Council 228 became Local 228 after the MLA had been negotiated. GC Ex. 13 at 2.

[8] Green sent this notice to the Agency after the Agency contended Green had not delegated his ULP authority to anyone. *See* GC Ex. 22 at 2, 3.

After the Union filed its ULP charge in this case, Respondent submitted a position statement to the General Counsel, dated December 1, 2021, setting forth its reasons why the charge had no merit. GC Ex. 8. Among these reasons, the Respondent asserted that it had never received any written notification from the Local 228 President delegating the authority to file ULP charges to Ms. Lewis or to anyone else. *Id*. at 1. Responding to this assertion, counsel for the General Counsel showed Respondent the letter that Gustafsson had sent to SBA management on September 14, in which he had delegated his ULP authority to Lewis. GC Ex. 18. Nonetheless, Respondent continued to deny that Gustafsson had delegated that authority, and it further argued that Gustafsson could not delegate his ULP authority while continuing to file charges himself. Resp. Ex. 20 at 1.

**B. Facts Allegedly in Dispute**

In its Opposition to the Motion for Summary Judgment, the Respondent argues that there are genuine issues of material fact, and it sets forth several such issues. First, it notes that the ULP charge filed by the Union alleged that the Agency had not adequately responded to the Union's information requests, but the Complaint issued by the GC alleged that the Agency improperly denied the information requests. Opp. MJ at 2-3. In light of this disparity, Respondent argues: "Whether and to what extent the FLRA was entitled, without amending the initial charge, to expand the charge in the complaint, is a genuine issue of material fact." *Id*. at 3.

Next, the Respondent submits that it cancelled the Union's grievance as untimely at Step 2 of the grievance procedure, although it admits that the grievance nonetheless was advanced to arbitration. Because the grievance was cancelled for being untimely filed, Respondent insisted that it had no obligation to comply with the Union's information request. GC Ex. 10. It now asserts, in response to the Motion for Summary Judgment, "The application of the cancellation provision to the Union's grievance is a material fact central to discussion of the case." Opp. MSJ at 4. Respondent also identifies the following as disputed issues of material facts: whether the Union failed to comply with the MLA's requirement that it attempt to resolve a dispute before filing a ULP charge;[9] whether Ms. Lewis had been properly authorized to file a charge on behalf of the Union;[10] whether some of the requested information was precluded from disclosure as internal management communication;[11] whether (as alleged by the Union in its grievance) management is required to meet personally with employees when their performance standards are unchanged;[12] and whether the requested information was normally maintained or reasonably available.[13]

**C. There are no genuine issues of material fact.**

Both the GC and the Respondent have submitted numerous exhibits to support their positions, but scrutiny of those exhibits does not identify any disagreement on the essential

[9] Opp. MSJ at 6-7.
[10] *Id*. at 7.
[11] *Id*. at 7-8.
[12] *Id*. at 8-9.
[13] *Id*. at 11-12.

facts of the case; rather, Respondent's pleadings and exhibits raise a variety of legal arguments based on undisputed facts. For instance, the discrepancy between the ULP charge filed by the Union and the complaint issued by the GC does not involve a factual dispute at all, but simply a dispute as to the legal significance of those facts. This is also true regarding the Agency's cancellation of the Union's grievance. The GC does not dispute that the Agency sought to cancel the grievance, but the parties all acknowledge that the grievance was nonetheless submitted to arbitration. The dispute is not whether the Agency sought to cancel the grievance, but whether the Agency's action absolved it from furnishing the information requested by the Union. This does not require a hearing to resolve.

Similarly, the facts are undisputed regarding the Union's actions prior to its filing of the ULP charge: after the Union's initial information request was denied, it modified the request and filed a second one; when the Agency delayed in responding to the second request, Ms. Lewis sent management a reminder and advised that she would file a ULP charge if she didn't receive an answer; when the Agency provided a partial answer to the second request, Lewis insisted on a complete answer and advised management that this was her second and final attempt to resolve the dispute internally. When the Agency did not respond further within two weeks, Lewis did file a charge, and the Agency denied the Union's second information request a week after that. Article 44 of the MLA requires the parties to "make every reasonable effort . . . to resolve" an alleged ULP before filing a charge with the FLRA, and the Respondent argues that the Union did not comply with this requirement. Mot. Dis. at 8 and Resp. Ex. I. Resolving this involves applying the law to these undisputed facts and does not require a hearing.

As to Lewis's authority to file a ULP charge, the record contains several letters and notices from Union officials -- from the National President of AFGE, from former Local 228 President Green, and from current Local 228 President Gustafsson – on this topic, as well as email correspondence from the Respondent arguing that the Union's purported delegation to Lewis was inadequate. Resp. Ex. J; GC Exs. 18, 20-30. Again, these exhibits do not demonstrate a dispute regarding any material fact, but simply a dispute as to whether the Union properly delegated authority to Lewis to file charges. In its position letter of December 1 to the GC (GC Ex. 8 at 1), the Respondent did deny that the President of Local 228 had re-delegated his ULP authority to anyone else, which did (at least on first glance) identify a factual dispute. But the GC sent Respondent a copy of a letter dated September 14 from Local 228 President Gustafsson to Agency management, delegating ULP authority to Lewis (GC Ex. 24). Subsequent correspondence between the GC and Respondent on this issue confirms the essence of the parties' dispute: Respondent does not deny that Gustafsson notified the Agency that Lewis was authorized to file ULP charges; rather it contends that Gustafsson's notification was not legally sufficient. *See* GC Exs. 20, 25. This is a legal issue, and I have all the evidence necessary to resolve it without a hearing. Similarly, Respondent cites the question of whether some of the information requested by the Union constituted internal management communications. This again is a legal question. The information request and the Agency's response are in evidence, and the record is sufficient for me to resolve it without a hearing.

Additionally, the Respondent cites its contention that supervisors are not required to meet with employees when their performance standards are unchanged, contrary to what the

Union alleged in its grievance. While this issue may be central to the underlying grievance filed by the Union in February 2021, it is not material to the complaint filed by the General Counsel – that is, whether the Agency was obligated to furnish all or some of the information requested by the Union in August regarding supervisor-employee performance meetings. Respondent essentially argues that it has no such obligation because the Union's grievance has no merit; but it is not my role to rule on the merits of the grievance, nor was it the Agency's role to use this argument as a basis for refusing to furnish information. A union's need for information is not dependent on whether its underlying grievance is meritorious; on the contrary, the information-gathering process is essential in helping a union assess whether its grievance is meritorious and whether it is worth pursuing or not. *Dep't of Veterans Affairs, VA Med. Ctr., Decatur, Ga.*, 71 FLRA 428, 430 (2019) (*VAMC Decatur*). The U.S. Supreme Court articulated this principle in the context of a provision of the National Labor Relations Act in *NLRB v. Acme Industrial Co*., 385 U.S. 432, 438 (1967), and the Authority has applied the *Acme* rationale to the comparable language of § 7114(b)(4) of our Statute regarding information requests. *Dep't of the Air Force, Scott AFB, Ill*., 51 FLRA 675, 683 n.5 (1995) (*Scott AFB*); *see also FAA*, 55 FLRA 254, 256, 271 (1999). Accordingly, the Respondent's many objections to the grievance are not material to this case.

Finally, Respondent asserts (without actually identifying) that there are factual disputes as to whether the information requested by the Union is normally maintained by the Agency, reasonably available, or constitutes privileged internal management communication. The problem, however, is that the Agency never communicated these objections to the Union at the time it responded to either of the information requests; this failure deprived the Union of the opportunity to address those objects in a timely manner and to seek a mutually agreeable compromise on specific items of information. The Authority has stated time and again since at least its decision in *IRS, Wash., D.C*., 50 FLRA 661 (1995) (*IRS*), that both unions and agencies share a joint responsibility to lay their cards on the table regarding information requests: unions must "articulate and exchange their respective interests in disclosing," and agencies must, when denying a request, assert and establish any countervailing interests weighing against disclosure. *Id.* at 670; *see also, e.g., VAMC Decatur*, 71 FLRA at 430. The purpose of these dual responsibilities is to "permit[] the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which information is disclosed." *IRS*, 50 FLRA at 670-71. The Authority emphasized that this mutual exchange should occur in a timely manner. *Id*. at 670.

It should be clear that the Respondent's assertion for the first time, in its Answer to the GC's Complaint, of objections regarding the maintenance and availability of the information sought by the Union, was not timely, nor did it enable the Union to attempt to accommodate those objections and reach agreement.[14] These objections, conclusory and unsupported as they are, were first raised over a year after the Union's first information request and eight months after the second request. The Authority has long held that it will

[14] When the Agency denied the Union's information requests on July 16 and September 24, it objected that the requests were too broad and nonspecific, that they were unconnected to employee complaints, and that the grievance was untimely. It further asserted that the Union had not established a particularized need for the information. MSJ, GC Exs. 10, 17.

not consider either a union's explanation of its particularized need or an agency's objections to disclosing information, when they occur for the first time in ULP litigation. *U.S. DOJ, INS, N. Region, Twin Cities, Minn*., 51 FLRA 1467, 1472-76 (1996) (*INS Twin Cities*). In *INS Twin Cities*, the Authority explained that the purpose of the analytic framework established by the Authority in *IRS* is to enable the agency to make a reasoned judgment as to whether it must disclose the information and to allow the union to try to accommodate objections raised by the agency. *Id*. at 1472. It further explained:

> To accomplish this, a union must articulate its disclosure interests at or near the time of the request – not for the first time at the unfair labor practice hearing. . . . In addition, for the same reasons that we expect a union to articulate its disclosure interests at or near the time of a request, we expect an agency to timely communicate its interests as well."

*Id*. at 1472-73. Accordingly, the only reasons that I will consider for denying the information requested by the Union are those which the Agency articulated in its letters of July 16 and September 24.

Having considered all of the Respondent's objections to the Motion for Summary Judgment, I am convinced that there are no genuine issues of material fact. The record contains sufficient evidence on which to rule – on both the Respondent's Motion to Dismiss and the merits of the General Counsel's Complaint. I will now proceed, on the basis of these undisputed facts, to determine whether the Respondent's Motion to Dismiss has merit.

## III. THE MOTION TO DISMISS

### A. The charge and complaint are not deficient.

The Respondent asserts that the Union's charge and the General Counsel's complaint are deficient, as they allege different types of misconduct: while the charge alleges that the Agency failed to respond to the Union's August 18 information request, the complaint alleges that the Agency unlawfully refused to provide the requested information. In the Respondent's view, the GC's "leap" from one type of ULP to another was unwarranted, as the charge was missing a "critical factual element" by failing to account for the Agency's September 24 response to the information request. Mot. Dismiss at 6-7, citing *U.S. Dep't of Agric., Food Safety & Inspection Serv., Wash., D.C*., 59 FLRA 68 (2003).

Section 2423.4(a)(5) of the Authority's Regulations requires that a ULP charge contain "[a] clear and concise statement of the facts alleged to constitute an unfair labor practice, a statement of how those facts allegedly violate specific section(s) and paragraph(s) of the Statute, and the date and place of occurrence of the particular acts[.]" 5 C.F.R. § 2423.4(a)(5). Section 2423.20(a)(3) and (4) of the Regulations requires a complaint issued by a regional director to set forth, among other things, "[t]he facts alleged to constitute an unfair labor practice[]" and "[t]he particular sections of [the Statute] and the rules and regulations involved[.]"

The Authority has long held that: (1) a ULP charge serves merely to initiate an investigation and to determine whether a complaint in a matter should be issued; (2) a charge is sufficient in an administrative proceeding if it informs the alleged violator of the general nature of the violation charged against him; and (3) where a procedural defect exists concerning the charge, a respondent must be prejudiced by the alleged defect in order for the Authority to decline to resolve the allegedly defective claim. *U.S. Dep't of Veteran Affairs, VA Med. Ctr., Richmond, Va.*, 68 FLRA 882, 886 (2015) (*VA Richmond*) (citing *U.S. DOJ, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pa.*, 40 FLRA 449, 455 (1991)). The Authority has repeatedly held that a complaint complies with these requirements "if the allegations in the complaint bear a relationship to the charge and are closely related to the events complained of in the charge." *Allenwood*, 40 FLRA at 455.

The Respondent's objections are misplaced in a variety of ways. First, while Respondent asserts that the charge "solely" alleged that the Agency had "failed to respond" to the Union's second information request, in fact the charge encompassed a much broader range of misconduct. The Union objected to the Agency's earlier refusal to provide any of the information sought in the Union's first request; to the Agency's statement on August 27 that it would likely deny the second request for the same reasons it had denied the first; and to the Agency's failure (as of September 16) to respond fully to the second request. In this context, it is evident that the Union's charge encompassed both a refusal to furnish information as well as a failure to respond. Thus, the charge satisfies the requirements of § 2423.4(a)(5), as it stated the facts and the alleged misconduct, as of the date of the charge.

Nonetheless, Respondent is correct that the ULP charge fails to cite the Agency's September 24 refusal of the second information request, and it is this refusal that forms the basis of the GC's complaint. The charge failed to cite this for the simple reason that the Agency had not yet denied the request when the charge was filed. Yet the Respondent could not possibly have been surprised that the General Counsel's investigation of the charge would include subsequent events directly related to the charge – i.e., the Agency's refusal (eight days later) to furnish the information the Union had requested. Although the GC's investigation went beyond the delayed response to the information request, its complaint alleged conduct that is closely related to the conduct described in the charge and grew directly out of the events complained of in the charge. This is perfectly appropriate. As the U.S. Supreme Court noted in an analogous situation: "Once its jurisdiction is invoked the [NLRB or FLRA] must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it." *NLRB v. Fant Milling Co*., 360 U.S. 301, 307-08 (1959) (quoted in *VA Richmond*, 68 FLRA at 886). Finally, Respondent's allegation that it was prejudiced by this discrepancy is unconvincing. After the charge was filed and several months before the complaint was issued, the Agency submitted a position statement to the GC, explaining that it had refused the Union's information requests because the Union had not established a particularized need for the information, and it engaged in numerous subsequent communications with the GC regarding the merits of the Union's allegations. Opp. Mot. Dismiss, GC Exs. 8, 18, 20, 25. The Respondent had every opportunity to address and to justify its refusal to furnish the information the Union had sought, and it did so.

For these reasons, I find the charge and the complaint are not deficient.

**B. The Union did not fail to meet its contractual obligations before filing its ULP charge.**

Article 44, Section 1 of the MLA states:

> The Parties hereto agree that each shall make every reasonable effort to prevent the occurrence of any Unfair Labor Practice under 5 U.S.C. 7116 and to attempt to resolve any Unfair Labor Practice, if possible, prior to filing a charge with the Federal Labor Relations Authority (FLRA). Nothing herein shall in any way limit the rights each party has in accordance with 5 U.S.C. 7118, and any relevant regulations issued by the FLRA.

Mot. Dismiss, Exhibit I. As noted earlier, Respondent asserts that the Union failed to fulfill the requirements of this provision before filing the current ULP charge. Respondent's argument is puzzling, because if Ms. Lewis's pre-filing conduct in this case fell short, it is hard to imagine a set of facts in which a ULP charge would be permitted.

After she filed the grievance in this case, Lewis met with management officials. She then submitted an information request, and when the Agency told her that she had not established a particularized need for the information, she submitted a modified request containing a more detailed explanation of the Union's need. Lewis then sent Director Jones two separate letters explicitly invoking the language of Article 44, Section 1 -- advising him that these represented her efforts to resolve the dispute consensually and that she would file a ULP charge if he didn't respond by a certain date. These actions stand in stark contrast to the Agency's inaction, delays, and summary rejections of the Union's attempt to resolve the matter.

Article 44 itself does not explain what is meant by "every reasonable effort," but the facts demonstrate that the Union made considerable effort to resolve the information dispute short of filing a ULP charge. Article 44 further emphasizes that it does not limit a party's statutory right to file a charge. Reading the provision in full, Section 1 could reasonably be understood as simply encouraging the parties to seek consensual agreement instead of litigation; but even if it actually bars a party from filing a charge in some situations, the Union here clearly fulfilled its contractual obligations. It affirmatively sought to resolve its complaint without going to the FLRA, and it filed its charge only after repeated efforts failed.

**C. Ms. Lewis had the authority to file ULP charges on behalf of the Union.**

In its Motion to Dismiss, the Respondent bases its refusal to accept Lewis's authority to file charges on a letter dated October 25, 2021, from AFGE National President Kelley to several Agency officials, advising them of the "continued delegation of authority" to Local 228 and its president, Niklas Gustafsson, "to deal with the Agency on all matters" under the Statute. Resp. Ex. J. That letter also authorized Gustafsson to re-delegate his authority as he deemed appropriate. *Id*. But in its brief, Respondent insists that Gustafsson "has never re-delegated his authority . . . to Christie Lewis or any other Union officer." Mot. Dis. at 9-10. This echoes a similar argument the Agency made during the investigation of the ULP charge,

when it cited a March 30, 2021 letter from AFGE President Kelley to SBA officials, in which Kelley delegated ULP and other authority to Local 228's then-President, Johnnie Green. GC Ex. 8 at 1; *see also* GC Ex. 21.

The Agency's position, however, is contradicted by the evidence -- evidence consisting largely of documents sent to Agency officials, which the Respondent totally ignores in its Motion to Dismiss. In June of 2021, while Johnnie Green was still President of Local 228, he notified Agency officials in writing that he had previously delegated ULP authority to all regional vice presidents (which then included Gustafsson and Lewis, among others), and that they continued to have that authority. GC Ex. 22 at 1. On September 2, Kelley notified SBA officials that Green had been suspended as Local 228 President and had been replaced by Gustafsson. GC Ex. 23. Gustafsson promptly notified Agency officials on September 14 of his new status as President and advised the Agency that he had delegated the authority to file ULPs to Lewis and three other regional vice presidents, "in addition to myself." GC Ex. 24. Ms. Lewis filed the ULP charge in this case on September 16.

In light of these facts, the Respondent's continued refusal to accept Lewis's authority to file ULPs appears to demonstrate willful blindness. The Agency representative who signed the December 1 position statement to the FLRA General Counsel, in which he insisted that the Local 228 President had never re-delegated his authority to file ULPs, is the same official who was notified by email from the Local 228 President on June 29 that the Regional Vice Presidents were authorized to do so. *Compare* GC Ex. 8 at 1 *and* GC Ex. 22 at 1. And while this particular Agency representative was not copied on AFGE President Kelley's September 2 letter naming Gustafsson as the new Local 228 President (GC Ex. 23) or on Gustafsson's notification to the Agency that he was re-delegating ULP authority to Lewis and other officers (GC Ex. 24 at 1), the Agency itself was fully and appropriately advised of these facts; nevertheless, the Agency representative continued to deny that a delegation had been made. GC Ex. 24 at 2.

Respondent's bases for rejecting the delegations have shifted over time, but are otherwise unsupported. In its December 1 position statement, the Agency asserted that "verbal communication . . . concerning re-delegation of the Local President's authority is insufficient to establish a cognizable re-delegation." GC Ex. 8 at 1. When the Agency was confronted with the September 2 letter designating Gustafsson as Local President and the September 14 email from Gustafsson re-delegating authority to Lewis (GC Exs. 23 and 24), the Agency argued that "[a]n email assurance is no substitute for an actual document/memo confirming the re-delegation of authority." GC Ex. 25. Never mind that the email in question was indeed a "document," and that it was directed to the two highest officials in the Agency. The Agency's insistence on a written, rather than a verbal, delegation was appropriate, but both Green in June and Gustafsson in September had submitted written delegations to the appropriate Agency officials – the same officials who had previously been notified by the AFGE President of Green's, and then Gustafsson's, status as Local 228 President. Accordingly, the requirements established by the Agency for a proper re-delegation had been satisfied. The Agency finally shifted its defense to the notion that the ULP authority is an "either/or" proposition: either the Local President has it or he delegates it to someone else, but the authority cannot be retained by both officials. *See* GC Ex. 20 at 1-3. But Respondent has not supported this proposition with any legal support, in statute, in

case law, or in the common law of agency, and it flies in the face of widespread practice in labor relations and in government. Accordingly, this does not constitute a valid basis for dismissing the Complaint.

Since none of the grounds cited by Respondent in its Motion to Dismiss have merit, the motion is denied. Therefore, I will proceed to address the substance of the GC's Complaint.

## IV. THE UNION'S INFORMATION REQUEST

### A. Positions of the Parties

1. General Counsel

The GC submits that the Union satisfied the requirements of § 7114(b)(4) of the Statute, thus obligating the Agency to furnish the Union with Items 4 through 8 of its August 18 (i.e. second) information request. First, the GC asserts that the Union established a particularized need for these items, as defined by the Authority in *IRS, Wash., D.C.*, 50 FLRA 661, 669-71 (1995) (*IRS*). The Union's detailed explanation in its August 18 letter set forth why the information was necessary for it to represent El Paso bargaining unit employees regarding the grievance it had filed on behalf of those employees, and it enabled the Agency to make a reasoned judgment as to whether the Agency was required to disclose the information. MSJ at 15-16.

Specifically, the August 18 information request cited the Union's pending grievance regarding the Agency's alleged violation of Article 28 of the MLA and its requirements concerning performance standards and evaluations. According to the GC, the link between the information requested and a specific grievance, as well as the Union's identification of a specific contractual provision alleged to have been violated, are factors that the Authority has repeatedly recognized as establishing particularized need. MSJ at 16-17 (citing *VAMC Decatur*, 71 FLRA at 428, and *U.S. DOJ, Fed. Bureau of Prisons, U.S. Penitentiary Marion, Ill.*, 66 FLRA 669, 672 (2012). Additionally, the Union explained how it would use the information it was seeking: among other things, to "assess whether . . . management followed the provisions of Article 28 . . . when establishing, communicating, and/or finalizing the BUEs' FY21 PBC Plan." MSJ at 17 (citing GC Ex. 11 at 2-3).

Moreover, the GC cites the efforts made by the Union after the Agency denied its initial information request, in an effort to accommodate the Agency's concerns. *Id*. Thus, in addition to the general explanation that it offered at the outset of the request (broken down into sections labelled "why the Union needs this information," "how the Union will use this information," and "how the information requested relates to the Union's role as exclusive representative"), the August 18 request contained further explanations after each item of information requested.

The General Counsel then notes that the Agency did not cite any countervailing interests that would be harmed by the disclosure of the requested information, other than its assertions that the Union failed to demonstrate a particularized need for the information and

that the grievance itself was meritless. *Id*. at 21-24. Agencies, like unions, must assert their interests for and against disclosure at or near the time the request is made, not for the first time at a hearing. *Id*. at 21 (citing *INS Twin Cities*, 51 FLRA at 1472-73). Accordingly, the GC urges that the Agency's recent assertions that the information was not normally maintained or reasonably available, and that it included confidential management communications, not be considered. Similarly, the GC argues that the Authority has long held that objections to the merits (substantive or procedural) of a grievance are immaterial to the duty to furnish information under § 7114(b)(4), because one purpose of the information-gathering process is to enable a union to sift out unmeritorious grievances. *See VAMC Decatur*, 71 FLRA at 430; *Scott AFB*, 51 FLRA at 683.

The GC further argues that the Agency's refusal to engage the Union in good faith concerning the information request violated § 7114(b)(4) and contrasts with the Union's attempt to accommodate the Agency's objections after the initial information request was turned down. MSJ at 25. In this vein, the GC notes that the Union responded to the Agency's July 16 claim that its earlier statement of need was too broad and nonspecific by offering a more detailed explanation on August 18 of why it needed the information, and it withdrew its request for some of the items in its earlier request. *Id*. at 25-26. The GC points to the Authority's decision in *U.S. Dep't of the Air Force, Air Force Materiel Command, Kirtland AFB, Albuquerque, N.M.*, 65 FLRA 791, 795-96 (2005), which encouraged agencies to seek clarification and compromise regarding information requests and penalized unions if they failed to address the agencies' concerns. In contrast, the GC asserts that Respondent failed to ask for clarification of the Union's requests or to seek a meeting to discuss the matter, acts that the GC interprets as indicia of its conclusory and unsupported denials of the requests. MSJ at 25-26.

For an agency to be obligated to furnish requested information, the information must also be normally maintained by the agency; be reasonably available; must not constitute management guidance regarding collective bargaining; and disclosure must not be prohibited by law. 5 U.S.C. § 7114 (b)(4). The General Counsel again notes that the Agency did not raise objections on any of these grounds at or near the time of the Union's requests, and even now it offers no specific support for objecting on these grounds. MSJ at 26-34. Moreover, the GC cites provisions in the MLA which require the Agency to maintain much of the information requested by the Union; thus, absent specific evidence from the Agency that items are not maintained or available, they must be presumed to be available. *Id*. at 27-28.

To remedy the Agency's unfair labor practice, the GC requests that the Respondent furnish to the Union Items 4 through 8 of the Union's August 18 request and post a notice to employees to that effect.

2. Respondent

Many of the Respondent's arguments were raised in its opposition to the Motion for Summary Judgment and in support of its own Motion to Dismiss: it argues that disputes remain on issues of material fact (such as the discrepancy between the charge and the Complaint, the Agency's dismissal of the Union's grievance, the Union's failure to attempt to resolve the dispute before filing its charge, Ms. Lewis's lack of authority to file a charge,

and whether the MLA requires annual performance meetings between supervisors and employees). In earlier portions of this decision, I rejected these arguments: the alleged factual disputes are actually legal disputes, and those legal disputes do not warrant the dismissal of the Complaint. Moreover, some of the legal defects alleged by the Respondent (those attacking the merits or arbitrability of the Union's grievance) are immaterial to the question of whether the Union was entitled to the information: even if the Respondent's attacks on the grievance are correct, they do not absolve the Agency of providing the information to the Union. I have already explained and rejected the Respondent's positions on these points, and I will not address them further.

Similarly, I will not consider objections to the information request that the Respondent should have, but failed to raise in the summer of 2021. In its opposition to the Motion for Summary Judgment, Respondent claims that some of the requested information may not be normally maintained, that some of it may not be reasonably available, and that some of it relates to internal management communications. As I ruled earlier, agencies cannot raise these issues for the first time before an ALJ.

Respondent argues, however, that "there was no reason to identify" those countervailing interests in the summer of 2021, "because the Agency concluded no category of requested information was supported by a particularized need." Opp. Mot. Dis. at 11. This argument reveals a fundamental misunderstanding of the process under § 7114(b)(4) for requesting and disclosing information. As the Authority explained in *IRS*:

> We conclude that applying a standard which requires parties to articulate and exchange their respective interests in disclosing information serves several important purposes. It 'facilitates and encourages the amicable settlement of disputes . . .' and, thereby, effectuates the purposes and policies of the Statute. 5 U.S.C. § 7101(a)(1)(C). It also facilitates the exchange of information, with the result that both parties' abilities to effectively and timely discharge their collective bargaining responsibilities under the Statute are enhanced. In addition, it permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed.

50 FLRA at 670-71. The Authority added: "We expect the parties to consider . . . alternative forms or means of disclosure that may satisfy both a union's information needs and an agency's interests in information." *Id*. at 671. In *INS Twin Cities*, it elaborated on this principle: "The purposes [identified in *IRS*] are not served when either party fails to fully communicate its interests and concerns prior to litigation. Litigating a ULP charge should not be a substitute for practicing good labor relations." 51 FLRA at 1476.

Thus, there was indeed a good reason for the Agency to tell the Union, in the summer of 2021, if the Agency didn't normally maintain the information; if it was not reasonably available; or if some of the information constituted privileged management communication. If the Agency had done so, the Union would have had an opportunity to address those concerns, and the parties might have engaged in direct discussions to reach a mutually acceptable degree of disclosure. By waiting until it filed its Answer to the Complaint many

months later, the Agency foreclosed any possibility of reasonable accommodation, and delayed a resolution for at least a year.

Therefore, this case boils down to the one issue that the Agency raised in a timely manner: whether the Union articulated a particularized need for the information in Items 4 through 8 of its August 18 request. In this regard, the Agency stated in its September 24 letter to the Union that the information request was, like the Union's earlier request, "extremely broad and nonspecific. It identifies no real basis for the request and no connection to any employee complaint." GC Ex. 17 at 1. The Agency further objected to the Union's request for "all" communications between "any" management official "based on general, unspecified, wholly unsupported allegations of mismanagement or malfeasance." *Id*. at 2. The Agency interpreted the Union's request as a "general audit" of all Agency activities regarding its performance management system. *Id*. Then, acknowledging that the Union identified its need for the information as relating to a specific grievance, the Agency noted that the grievance also lacked any "specific underlying facts," and therefore failed to establish a particularized need. *Id*.

In its opposition to the MSJ, the Respondent makes this same argument -- that both the grievance and information request were too broad, too unspecific and unconnected to any employee's complaint. Opp. MSJ at 6. It explains: "Ordinarily, it is not difficult to establish a particularized need when a genuine employee grievance is filed." *Id*. But the Union failed to identify any employee who had complained about his or her performance standards, instead alleging that "every supervisor and every employee violated multiple sections of the Agreement with no details and no underlying facts." The Respondent insists that this did not constitute a statement of particularized need. *Id*.

## B. ANALYSIS AND CONCLUSIONS

In Sections II.C and IV.A.2 of this decision, I addressed in passing the analytical framework that the Authority uses for evaluating a union's request for information under § 7114(b)(4) of the Statute. The Authority used its decision in *IRS* to summarize the state of the law, particularly insofar as some court decisions prompted the Authority to re-evaluate its standards in these cases. 50 FLRA at 665-66. It sought to establish "a consistent approach," applicable to requests for all types of information, "that clarifies the burdens placed on both parties in requesting and responding to requests for information under section 7114(b)(4)." *Id*. at 669.

I have already noted that this framework requires a union to state, with particularity, why the requested information is necessary for it to fulfill one of its statutory representational duties. The request must explain why it needs the requested information, how it will use the information, and how its use of the information relates to the union's legal responsibilities under the Statute. *U.S. DOJ, Fed. Bureau of Prisons, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y.*, 68 FLRA 492, 495 (2015). Although the union does not need to reveal its strategies or explain precisely how the information will enable it to accomplish its stated purpose, the explanation must enable the agency to make a reasoned judgment as to whether the Statute requires disclosure. *Id*. at 496. More analogously to our case, it stated:

> The Authority has found that a union establishes a particularized need where the union states that it needs information: (1) to assess whether to file a grievance; (2) in connection with a pending grievance; (3) to determine how to support and pursue a grievance; or (4) to assess whether to arbitrate or settle a pending grievance.

*Id*. (citations omitted). Moreover, a union's citation to specific provisions of the collective bargaining agreement notify the agency that the information is necessary to enforce and administer the agreement. *Id*.

Applying this analytical framework, I will address the specific items of information that the Union requested on August 18.

It is worth noting first that in the introductory paragraphs of her August 18 letter, Ms. Lewis advised the Agency, "The Union was contacted by several BUEs who believed management at [the El Paso Center] failed to follow Article 28 of the MLA when establishing, communicating, and/or finalizing his/her FY 21 Personal Business Commitment (PBC) Plan. . . . The Union needs the requested information to determine if EPDLSC management violated the MLA. . . ." GC Ex. 11 at 2. Shortly thereafter, Ms. Lewis added that the Union intended to use the information (among other things) "To evaluate and prove the specific underlying facts and contentions of Union Grievance 228-02-03-2021-SU-1." *Id*. at 3. Thus, it is immediately evident that the Union cited a specific grievance, which alleged a possible violation of a specific article of the MLA, and that the Union advised the Agency that it had filed its grievance after receiving complaints about this specific issue from bargaining unit employees in the El Paso Center.

Item 4 of the August 18 letter is the first item that the GC alleges the Agency was required to furnish. It requested:

> All records of informal and formal communication, including notes and emails, from and between management officials, to include but not limited to the first-line supervisor and/or the rating official and all BUEs relating to all meetings scheduled, held, and conducted to establish, communicate, and/or finalize the BUEs' FY21 PBC Plan, performance elements and standards, to include but not limited to:
>
> a. The name of the management official.
> b. The name of the BUE.
> c. Copy of calendar invitation(s).
> d. Copy of invitation acceptance(s).
> e. The date and time of the proposed meeting.
> f. The date and time the actual meeting took place.
> g. The meeting date recorded in Talent Manager.
> h. The means used for the meeting.
> i. The location of the meeting.

*Id*. at 9. Under the heading of "Additional Particularized Need" for Item 4, the Union further stated: "The Union also needs this information to determine how and where the meeting was

held to determine and confirm if management met one-on-one with the BUE in accordance with Article 28 of the MLA . . . or if management held an 'all-office' meeting in violation of Article 28." *Id*.

This explanation, therefore, directly contradicts the Respondent's fundamental basis for refusing to furnish any of the requested information. Not only has the Union cited a specific provision (Article 28) of the MLA that it is investigating; not only has it stated that several El Paso employees had raised complaints about this to the Union; and not only has it stated that the request is part of a specific grievance it had already filed; but it also stated the specific actions that it believed violated Article 28: namely, that management had communicated the FY21 PBC to employees at an all-office meeting rather than at individual meetings with each employee. The Respondent denies that such individual meetings are necessary under the MLA,[15] but that is precisely what the grievance-arbitration process is meant to resolve. Finding out whether managers held one-on-one meetings was exactly what the Union needed to know in order to determine whether its grievance was based in fact or not. The request in Item 4 is very narrowly and directly targeted at the information the Union would need to have in order to verify whether the employees' complaints were true. Moreover, the Union would need to obtain this information regarding each bargaining unit employee, in order to determine whether some supervisors held meetings with individual employees while others did not, as well as to determine whether supervisors' records matched employee recollections. Accordingly, I conclude that the Union demonstrated a particularized need for Item 4.

Item 5 of the August 18 letter requests "Copy of any notes the management official made related to the meeting." In explaining its need for this information, the Union stated it was to see whether the management official holding a PBC-related meeting noted the employee's input and suggestions regarding his or her performance elements or standards, and to see whether the manager "used the notations made during the PBC Plan meeting when the BUE's FY PBC Plan was established, communicated and/or finalized." GC Ex. 11 at 10. This relates directly to Article 28, Section 2 of the MLA, which provides that employees "will be provided an opportunity to participate in the establishment of the job specific performance standard of his/her PBC Plan prior to finalization of the plan." MLA (GC Ex. 2) at 58. It further provides that a supervisor will meet with the employee to communicate the employee's critical elements and performance standard, and that the employee will be allowed to submit comments regarding the plan before it is finalized. *Id*. In this regard, the managers' notes requested in Item 5 will reflect directly whether employees offered comments at the meeting and whether those comments were incorporated into the employees' final PBC Plan. The information, therefore, would enable the Union to assess whether the Agency was following the procedures established in Article 28, which was the crux of the Union's allegation in its grievance. Accordingly, I conclude that the Union demonstrated a particularized need for Item 5.

I will address the need for Items 6 and 7 together, as they work in tandem to address the same issues: whether each employee's PBC was identical or tailored to the individual employee, and how the standards in the PBCs evolved during the year. Item 6 requests:

[15] Opp. Mot. Dismiss at 8-9.

A copy of the FY21 Personal Business Commitment Plan (PBC) established, communicated, and/or finalized at the beginning of the rating period for all BUEs working in, at, or for the EPDLSC to include:

a. The name of the management official.
b. The name of BUE.
c. The grade of BUE.
d. The department the employee works in or worked in at the time the PBC Plan was established, communicated, and/or finalized.

GC Ex. 11 at 10-11. Item 7 requests:

Change(s) made to the BUEs' FY21 Personal Business Commitment (PBC) throughout the FY21 performance year to include:

a. The name of the management official.
b. The name of BUE.
c. The grade of BUE.
d. The department the BUE worked in at the time of the change(s).
e. The change(s) made.
f. The date(s) the change(s) were made.
g. The name of the individual(s) who determined the change(s) would be made.
h. The reason(s) for the change(s).

*Id*. at 12.

In support of Item 6, the Union stated that it needed it to identify the employees and management officials involved in the establishment of each PBC; to determine if management complied with Article 28 in establishing the plans; to determine if the plans "were administered in a fair, measurable, achievable, understandable, verifiable, reasonable, and equitable manner so as to permit the accurate evaluation of the BUEs' job performance as prescribed in Article 28 of the MLA. . . ." *Id*. at 11. The quoted language repeated one of the allegations of the Union's grievance, which in turn repeated language from the MLA. *Compare* GC Ex. 5 at 1, 2, 3 *and* MLA (GC Ex. 2) at 57. The Union further stated that it would use the information to evaluate and prove its grievance, including at arbitration if necessary. GC Ex. 11 at 11.

In support of Item 7, the Union noted that the Agency had previously acknowledged that changes were made in the El Paso employees' PBC Plans during the performance year. *Id*. at 12. The Union stated that it needed to see the revised plans to ascertain what changes were made independently by the employees' supervisors; to determine whether the employees were given the opportunity to participate in the changes; and to determine whether the changes complied with Article 28 of the MLA, including whether they were "fair, measurable, achievable, understandable, verifiable, reasonable, and equitable." *Id*.

The PBC Plans, as initially established and as revised during the year, represent the essential focus of the Union's grievance. In order to understand whether the plans were established and finalized in accordance with the principles outlined in Article 28, the Union

needs to see the plans themselves, for each BUE. This information will help the Union to evaluate whether each employee was properly involved with his or her supervisor when the plans were first proposed and subsequently throughout the performance year, as Article 28 requires. This is especially true when it is acknowledged that at least some of the El Paso employees' plans had been changed during the year.

Nothing articulated by the Respondent in its denial letters of July 16 and September 24 refutes the legitimate need articulated by the Union. *See* GC Exs.10, 17. Director Jones selectively quoted generalized terms such as "all" and "any" from the information requests – arguing that the requests and the underlying grievance lacked any specifics – while omitting any reference to the very specific allegations made by the Union in its grievance and the requests. *Id*. at 1, 2. The Union explicitly alleged that the PBC Plans were imposed in FY21 without a one-on-one meeting between the employees and their supervisors, that employees were not afforded the opportunity to provide input regarding their plans, and that the plans failed to meet the fairness standards required in Article 28. Contrary to the Respondent's insistence, there is no requirement in the Statute or case law that a grievance or information request identify a specific employee, and the Respondent cites none.

Accordingly, I conclude that the Union has demonstrated a particularized need for the information cited in Items 6 and 7.

Item 8 of the Union's August 18 letter requests:

> The numeric standards communicated to the BUE, provided to the BUE and/or uploaded in Talent Manager Center (TMC) at the time of the establishment of the BUE's PBC Plan, to include:
> a. The date the numeric standards were communicated to the BUEs.
> b. The date the numeric standards were provided to the BUEs or the date the matrix or numeric standards were uploaded in the BUEs' TMC.
> c. The data used to determine the numeric standards.
> d. The management official who determined the numeric standards.

GC Ex. 11 at 13.

In support of this request, Ms. Lewis added a specific factual allegation that she was trying to verify or refute: employees had advised her that they were not given their numeric performance standards until several months into the performance year, rather than at the start of the year as required. *Id*. She stated that she needed the information "to ascertain if the numeric standards were based on actual data . . . and whether there is a direct correlation between the data and the numeric standards . . . [and] to determine if the numeric standards are fair, reasonable, [etc.]" *Id*.

Article 28, Section 1 of the MLA requires that an employee's performance standards, and any numeric standards within an employee's PBC Plan, be "fair, measurable, achievable, understandable, verifiable, reasonable, and equitable" and that they "permit the accurate evaluation of employee job performance." GC Ex. 2 at 57. In order for the Union to assess whether the numeric standards established in any employee's PBC Plan satisfy these

requirements, the Union must be able to review those numeric standards, to compare the standards established for different employees and different work groups, and to obtain the data justifying the numeric standards. Again, the Respondent has offered no specific objections to this request, other than to allege that it represents the Union's attempt to perform an audit of the Agency's performance appraisal system. But the information request is based on specific allegations by employees, and relayed to the Agency by the Union in its information request, that they were not given their PBC Plans by their supervisors at individual meetings at which they could discuss the standards, and that the plans were not given to them in a timely manner. Additionally, the Agency ignored Ms. Lewis's request in her August 18 letter to contact her if it needed clarification of any portion of the information request. Therefore, the Union had a right to evaluate the Agency's methodology for establishing and communicating the FY21 plans, as well as the fairness and accuracy of any numeric performance standards.

Accordingly, I conclude that the Union demonstrated a particularized need for the information requested in Item 8, as well as for the information requested in Items 4, 5, 6, and 7, of its August 18 letter. Furthermore, since the Respondent did not properly or timely assert any countervailing interests weighing against disclosure of this information, I conclude that the information meets the requirements of § 7114(b)(4): that is, it is normally maintained by the Agency in the regular course of business; it is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining; does not constitute guidance to management relating to collective bargaining; and its disclosure is not prohibited by law. Therefore, the Agency was and is obligated to furnish these items of information to the Union. By refusing to furnish the Union with Items 4 through 8, the Respondent violated § 7116(a)(1), (5), and (8) of the Statute.

In order to remedy this unfair labor practice, I will order the Respondent to furnish the requested information to the Union and to post a notice to employees in the El Paso Disaster Loan Servicing Center, signed by the Director of the El Paso Center. The General Counsel has requested that the SBA Administrator sign the notice, but since the unlawful activity here occurred within the El Paso Center, the El Paso Director is the appropriate official to sign the notice. The notice should be posted in writing on bulletin boards at the El Paso Center, as well as electronically.

Based on the foregoing, I recommend that the Authority adopt the following Order:

## ORDER

Pursuant to § 2423.41 of the Rules and Regulations of the Authority and § 7118 of the Statute, the Small Business Administration, Washington, DC, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 228, AFL-CIO (the Union), with the information it sought in Items 4 through 8 of its July 18, 2021 information request.

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

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

(a) Furnish the Union with the information requested in Items 4 through 8 of the Union's August 18, 2021 request, to include:

4) All records of informal and formal communication, including notes and emails, from and between management officials, to include but not limited to the first-line supervisor and/or the rating official and all BUEs relating to all meetings scheduled, held, and conducted to establish, communicate, and/or finalize the BUEs' FY21 PBC Plan, performance elements and standards, to include but not limited to:
   a. The name of the management official.
   b. The name of the BUE.
   c. Copy of calendar invitation(s).
   d. Copy of invitation acceptance(s).
   e. The date and time of the proposed meeting.
   f. The date and time the actual meeting took place.
   g. The meeting date recorded in Talent Manager.
   h. The means used for the meeting.
   i. The location of the meeting.

5) Copy of any notes the management official made related to the meeting.

6) A copy of the FY21 Personal Business Commitment Plan (PBC) established, communicated, and/or finalized at the beginning of the rating period for all BUEs working in, at, or for the EPDLSC to include:
   a. The name of the management official.
   b. The name of BUE.
   c. The grade of BUE.
   d. The department the employee works in or worked in at the time the PBC Plan was established, communicated, and/or finalized.

7) Change(s) made to the BUEs' FY21 Personal Business Commitment (PBC) throughout the FY21 performance year to include:
   a. The name of the management official.
   b. The name of BUE.
   c. The grade of BUE.
   d. The department the BUE worked in at the time of the change(s).
   e. The change(s) made.
   f. The date(s) the change(s) were made.
   g. The name of the individual(s) who determined the change(s) would be made.

h. The reason(s) for the change(s).

8) The numeric standards communicated to the BUE, provided to the BUE and/or uploaded in Talent Manager Center (TMC) at the time of the establishment of the BUE's PBC Plan, to include:
   a. The date the numeric standards were communicated to the BUEs.
   b. The date the numeric standards were provided to the BUEs or the date the matrix or numeric standards were uploaded in the BUEs' TMC.
   c. The data used to determine the numeric standards.
   d. The management official who determined the numeric standards.

(b) Post at the Agency's El Paso Disaster Loan Servicing Center, where bargaining unit employees are represented, 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 Director of the El Paso Disaster Loan Servicing Center and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous 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, the Notice shall be distributed electronically to all bargaining unit employees on the same day as the physical posting of the Notice.

(d) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director, Denver Regional Office, 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.
November 8, 2022

_____
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 Small Business Administration, Washington, DC, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL** furnish the American Federation of Government Employees, Local 228, AFL-CIO (the Union) with the information it requested in Items 4 through 8 of its August 18, 2021 information request.

**WE WILL NOT** fail or refuse to furnish the Union with the information it requested in Items 4 through 8 of its August 18, 2021 information request.
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**WE WILL NOT** in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights assured them by the Statute.

Date: _____ By: _____
Signature
Director, El Paso Disaster Loan Servicing Center

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, Denver Regional Office, Federal Labor Relations Authority, whose address is 1244 Speer Boulevard, Suite 446, Denver, Colorado 80204-3581, and whose telephone number is (303) 844-5224.