67 FLRA No. 121

UNITED STATES
NUCLEAR REGULATORY COMMISSION
(Respondent)

and

NATIONAL TREASURY
EMPLOYEES UNION
(Charging Party)

WA-CA-10-0444

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DECISION AND ORDER

June 24, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

This unfair-labor-practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondent. The Respondent and the Charging Party (parties) recently entered into a private settlement agreement resolving the charge. The parties filed a joint motion asking the Authority to give effect to the agreement and to withdraw the Respondent's exceptions and the Charging Party's ULP charge. The General Counsel (GC) does not oppose the motion.

For the reasons discussed below, in light of the considerations identified in *USDA, Food Safety & Inspection Service, Washington, D.C.* (*FSIS*),[1] we grant the parties' joint motion and dismiss the complaint.

II. Background and Judge's Decision

The GC issued a complaint alleging that the Respondent violated the Federal Service Labor-Management Relations Statute (the Statute) and committed a ULP by refusing to provide the Charging Party with certain information related to employee performance awards. The Respondent admitted it did not provide the information, but contended its actions did not violate the Statute.

The Judge found that the Respondent committed a ULP when it refused to provide the Charging Party with the information. The Respondent filed exceptions to the Judge's decision, and the GC and the Charging Party both filed oppositions to the Respondent's exceptions.

Subsequently, the Charging Party and the Respondent entered into a settlement agreement, which "resolve[d] all pending matters [between the parties] related to employee performance awards."[2] In light of the settlement agreement, the parties requested leave to file, and did file, a joint motion to dismiss the ULP proceeding.

In their motion, the parties request that the Authority give effect to their settlement agreement in lieu of further proceedings upon the ULP complaint. The parties argue that, pursuant to the factors set forth in *FSIS*, the Authority should grant their motion. The parties further request permission to withdraw both the Respondent's exceptions and the Charging Party's ULP charge. The parties notified the GC of their motion, and the GC indicated no opposition to it.

III. Preliminary Matters

As noted above, the parties requested leave to file, and did file, a joint motion to dismiss the ULP proceeding in order to give effect to their settlement agreement. The GC does not oppose the motion. Although the Authority's Regulations do not provide for the filing of supplemental submissions, the Authority, pursuant to 5 C.F.R. § 2429.26, may grant leave to file documents as the Authority deems appropriate.[3] Because it is the Authority's policy to consider settlement agreements entered into at any phase of a ULP proceeding,[4] we grant the parties' request and consider their joint motion.

IV. Analysis and Conclusions: Granting the joint motion and giving effect to the settlement agreement will effectuate the purposes and policies of the Statute.

When the parties to a ULP proceeding request that the Authority give effect to a settlement agreement in lieu of further proceedings on a ULP complaint, the Authority must determine whether granting that request will effectuate the purposes and policies of the Statute. In making this determination, the Authority examines all of the circumstances surrounding the case including, but not limited to: (1) whether the charging party, the respondent, and any of the individual discriminatees have

[1] *USDA, Food Safety & Inspection Serv., Wash., D.C.*, 49 FLRA 431 (1994) (*FSIS*).

[2] Joint Mot. at 1.

[3] *E.g., U.S. DHS, U.S. CBP*, 66 FLRA 904, 907 (2012).

[4] *FSIS*, 49 FLRA at 434.

agreed to be bound by the settlement, and the position of the GC regarding the settlement; (2) whether the settlement is reasonable, in light of the nature of the violations alleged in the complaint, the risks inherent in continued litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has a history of engaging in violations of the Statute, has breached previous settlement agreements resolving ULP disputes, or has failed or refused to honor previous orders of the Authority.[5]

With regard to the first criterion, both the Charging Party and the Respondent are parties to the agreement and, thus, have agreed to be bound by the proposed settlement. Moreover, the GC does not object to the agreement, and there are no third parties alleged to have been harmed by the alleged ULP.

With regard to the second criterion, the settlement agreement is part of a global settlement agreement resolving several years of litigation over employee performance awards, and the parties have agreed to modify their collective-bargaining agreement to address the exchange of awards-related information. Thus, the parties have explained that the agreement "allows a 'reset' of the labor-management relationship with regard to performance awards" and aims to "minimize future disputes with regard to the sharing of award information."[6] Moreover, we note that the agreement does not simply resolve the allegations that give rise to the ULP charge in this case, but additionally seeks to prevent similar disputes from arising in the future.[7] Although the proposed settlement has reached us at a late stage in the decisional process, as the Authority stated in *FSIS*, this fact alone is not "a sufficient basis for us to refuse to accept the parties' settlement."[8] Thus, we find the settlement is reasonable in light of the violations alleged in the complaint, the risks inherent in continued litigation, and the stage of litigation.

With regard to the third criterion, no one alleges, and there is no evidence, that the agreement is the product of fraud, coercion, or duress.

Finally, with regard to the fourth criterion, no one alleges, and there is no evidence, that the Respondent has a history of violations of the Statute, has breached previous settlement agreements resolving ULP disputes, or has failed or refused to honor previous orders of the Authority. In this regard, in their joint motion, the parties note that they enjoy "a productive working relationship with relatively few instances of alleged or actual statutory violations by either party" and that they "have entered into many settlements and other understandings in the past and . . . are not aware of any instances of alleged or actual breaches of such agreements."[9]

Having examined all of the circumstances of this case, we find that allowing the Charging Party to withdraw its charge in light of the settlement agreement will best serve the public interest in this case and best effectuate the purposes and policies of the Statute. Therefore, we will give effect to the agreement and will permit the Respondent and the Charging Party to withdraw, respectively, the exceptions and the charge.

V. Order

We grant the parties' joint motion to withdraw the exceptions and the ULP charge, and we dismiss the complaint.

[5] *Id.* at 434-35 (citing *Indep. Stave Co.*, 287 NLRB 740, 743 (1987)).
[6] Joint Mot. at 5.
[7] *Id.*
[8] *FSIS*, 49 FLRA at 437.
[9] Joint Mot. at 5.

Office of Administrative Law Judges

UNITED STATES
NUCLEAR REGULATORY COMMISSION
Respondent

and

NATIONAL TREASURY
EMPLOYEES UNION
Charging Party

Case No. WA-CA-10-0444

Sandra LeBold
For the General Counsel

Nina Bafundo Crimm
Stephanie Liaw
For the Respondent

Luke Chesek
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

STATEMENT OF THE CASE

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

On June 8, 2010, the National Treasury Employees Union (the Union or Charging Party), filed an unfair labor practice charge against the Nuclear Regulatory Commission (the Respondent or Agency). Resp. Ex. 4. On March 24, 2011, the Union filed a First Amended Charge against the Respondent. Resp. Ex. 5. After investigating the charge, the Regional Director of the Chicago Region of the Authority, on behalf of the Authority's General Counsel (the GC), issued a Complaint and Notice of Hearing on March 25, 2011, alleging that the U.S. Nuclear Regulatory Commission violated section 7116(a)(1), (5), and (8) of the Statute by refusing to furnish the Union with information related to unit employees' race, gender, age, grade, salary, location, annual performance ratings, performance awards, and allowances for 2007 and 2008. Resp. Ex. 6. The Respondent filed its Answer to the Complaint on April 18, 2011, admitting that it refused to furnish the specified information and other factual allegations of the Complaint, but denying that its refusal constituted an unfair labor practice. Resp. Ex. 7.

Subsequently, the Respondent filed a Motion for Summary Judgment, asserting that there are no material issues of fact in dispute, that a hearing is not necessary to resolve the issues in this case, and that the facts warrant summary judgment in favor of the Respondent. The General Counsel responded with a Cross-Motion for Summary Judgment, agreeing that there are no material facts in dispute and asserting that summary judgment should be issued against the Respondent. Both the General Counsel and Respondent submitted documentary exhibits and briefs in support of their motions for summary judgment, and these documents shall constitute the complete factual record in this case. On May 17, 2011, an Order Cancelling the Hearing was issued.

After fully reviewing the record, I agree that there is no genuine issue of material fact, and that it is appropriate to decide the case on summary judgment. *See Dep't of Veterans Affairs, Veterans Affairs Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Based on the entire record, I will summarize the material facts and make the following conclusions of law and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. Resp. Exs. 6, 7. The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of the Agency's employees. Resp. Exs. 6, 7. The Respondent and the Union have been parties to a series of collective bargaining agreements (CBAs): the current agreement took effect on November 1, 2009 (Resp. Br. in Suppt. of MSJ at 5 n.2), and its predecessor took effect on April 1, 2005 (Resp. Ex. 11 at 2).

The Respondent maintains an employee awards program, including performance awards and other types of incentive awards, that is referenced in Article 22 of the current CBA and Article 29 of the prior CBA (Resp. Exs. 13 & 12, respectively). Both the new and the old CBA provide that the Agency "will implement its awards program in a fair and equitable manner." (Article 22.2 & Article 29.2, respectively). The old CBA gave the Union a significant role in reviewing award nominations before they were approved by management (Article 29.3 and 29.4), and after award decisions were finalized the Agency was required to "inform NTEU of the names of

all unit employees who receive any type of performance award, the type of the award and its amount on an annual basis." Article 29.7. The current CBA appears to eliminate the Union's role in reviewing and commenting on award nominations before they are finalized, but it expands the range of information that the Agency is required to furnish the Union each year. Article 22.3. Thus, the current CBA entitles the Union to receive sanitized (i.e., employee names excluded) spreadsheets for each office in the Agency, showing each employee's grade, performance evaluation score, summary rating, and the amount of any performance award received, as well as the distribution of awards by race/national origin, gender, age, and disability status. Article 22.3.1 – 22.3.6. The two CBAs also contain provisions prohibiting discrimination in personnel matters on the basis of race, national origin, sex, age, or handicapping condition, among other factors. *See* Article 5 of current CBA (GC Ex. 1); comparable language in the prior CBA is cited in Resp. Ex. 11 at 14.

The back-story to the events of this case begins with a letter sent by the Union to the Agency's Chief of Labor Relations on March 19, 2007, asking for information, pursuant to 5 U.S.C. § 7114, regarding the Agency's "administration of its employee award system during the fiscal years 2004-2006." Resp. Ex. 9. Specifically, the Union asked for information on every employee, specifying (among other things) the employee's race, gender, age, national origin, disability status, annual performance rating, and awards received. *Id.* The Union stated that it needed the information "to assist in its representational duties with regard to ensuring that the Commission's employee award system complies with The Civil Rights Act, 42 USC 2000 et seq.; The Age Discrimination in Employment Act, 29 USC 621 et. seq; and other applicable laws and regulation[ ]" and to "determine whether there exist separate violations of the collective bargaining agreement between the parties and whether to pursue any such violations through the grievance procedure." *Id.* at 1.

When the Agency did not respond to the March 19 letter, the Union filed a national grievance on November 2, 2007, claiming (among other things) that the Agency was:

> administering its employee awards and compensation system in a manner that violates Articles 2.4, 29.2, and 48 of the Collective Bargaining Agreement (CBA) as well as Title VII of the Civil Rights Act of 1964 – 42 USC Section 2000, et seq., and other applicable civil rights statutes, e.g., ADEA, EPA, etc. For example, we believe that the agency has engaged in systemic disparate treatment of protected classes of employees as well as created a disparate impact.

Resp. Ex. 10 at 1. In order to correct the illegal aspects of the Agency's awards system, the Union invoked the contract reopener provisions of the CBA to renegotiate all compensation-related articles of the agreement. *Id.* at 3. The letter also reiterated the Union's March 19 request for information, although the November 2 letter asked for a somewhat broader range of information and worded its information request slightly differently. *Id.* at 1-3. The Union said it had "a particularized need for the information in order to determine the level of the agency's noncompliance with the CBA as well as prevailing law and regulation." *Id.* at 1.

The grievance was not resolved by the parties, and a hearing was held before Arbitrator Michael Wolf, who issued his decision and award on October 22, 2008. Resp. Ex. 11. Before the arbitrator, the parties agreed that the only issue to be decided was whether the Union had demonstrated a particularized need for the information requested on March 19 and November 2, 2007; the Union did not pursue before the arbitrator the substantive allegations that the Agency had discriminated in the implementation of its awards program. *Id.* at 2, n.1. The arbitrator denied the grievance and ruled that the Union had not demonstrated a particularized need for the information under either section 7114(b)(4) of the Statute or Article 45 of the CBA. *Id.* at 15-16.

On March 4, 2010, the Union sent a letter to the Agency's FOIA/Privacy Officer,[1] asking for information regarding the Agency's distribution of employee awards "from 2004 to the present day." Resp. Ex. 2 at 1. The letter cited earlier requests the Union had made for the same information on July 3 and October 21, 2009, and it noted that on July 28, 2009,[2] the Agency had provided much of the requested information but had failed to specify the award recipients' race/national origin, gender, age, or disability. *Id.* The Union reasserted its need for the information in redacted (i.e. sanitized) form, explaining that it needed the information to "ensure the Commission is not participating in discriminatory practices in the dissemination of employee awards. We have a particularized need to gather information for the

[1] The March 4 letter asserted the Union's right to the information under 5 U.S.C. § 7114 and the Freedom of Information Act, which apparently explains why the letter was sent to the Agency's FOIA/Privacy Officer.

[2] Neither the Union's letters of July 3 and October 21, 2009, nor the Agency's letter of July 28, 2009, are a part of the record of this case.

period requested to determine whether there is a statistically significant pattern of discrimination in the dissemination of performance awards." *Id*. at 2. The Union cited case law in support of its position, asserting its responsibilities in both the negotiation and administration of the CBA and the need to know the position, race, and sex of employees in order "to 'make judgments concerning the filing of a grievance,' . . . and to determine 'whether there is a statistical pattern of discrimination on a basis prohibited by the Civil Rights Act of 1964.'" *Id.* at 3, quoting *Veterans Admin. Med. Ctr., Jackson, Miss.*, 32 FLRA 133, 138-39 (1988) (*VAMC Jackson*).

On March 23, 2010, Angela Bolduc, the Chief of the Agency's Employee/Labor Relations and Worklife Branch, responded to the Union's March 4 letter. GC Ex. 3. She noted that the Agency had no record of the Union's letters dated July 3 and October 21, 2009, which apparently had been sent to the U.S. Office of Personnel Management rather than to the Agency. *Id.* She further noted that on July 28, 2009, the Agency had responded to FOIA requests from the Union by providing some of the pre-2009 information the Union requested, and that the Agency was in the process of compiling the awards data for FY 2009 that it is required to furnish to the Union, under Article 22 of the new 2009 CBA. *Id.* But Ms. Bolduc stated that the Union had not articulated a particularized need for any pre-2009 data, other than what had been given to the Union on July 28, 2009. She asserted that the decision of Arbitrator Wolf was binding on the parties. The Union's current information requests were identical to the request that was the subject of the 2008 arbitration, and the Union had not offered any further justification for the data that would satisfy the criteria established by the arbitrator. Thus the Agency refused to provide any additional information for the years prior to FY 2009. *Id.*

On May 4, 2010, the Union renewed its request for the awards information listed in its March 4 letter, but it narrowed the time period of the data to FY 2004-2008 and offered further explanation of its particularized need. Resp. Ex. 1. First, it argued that under Arbitrator Wolf's 2008 award, the Union was free to renew its request for information, as long as it perfected the particularized need that the arbitrator had previously found lacking. *Id.* The Union explained that it needed the awards data "to determine whether there is a statistically significant pattern of discrimination in the dissemination of performance awards." *Id*. It asserted that in the arbitration grievance, the Union had pursued a claim that the awards constituted disparate treatment of employees, while in its current information request, the Union was pursuing a claim of disparate impact. *Id.* Arbitrator Wolf had focused on the Union's failure to cite specific instances of discrimination in its statement of particularized need, but the Union now asserted that a claim of disparate impact on the basis of race, gender, national origin, age, or disability does not require a showing of discriminatory intent or unequal treatment – therefore, a showing of specific instances of discrimination is irrelevant to the purpose for which the Union wants the information. *Id*. at 2. More importantly, the Union argued, it would be impossible for it to show specific instances of this type of discrimination without first obtaining and reviewing the statistical data as to the impact of the Agency's award program on different racial, age, and other groups. In support of this argument, the Union cited a Supreme Court decision, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), which held, among other things, that Title VII of the Civil Rights Act of 1964 "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation[ ]" (*Id.* at 431), and that the Act was directed at "the consequences of employment practices, not simply the motivation." *Id*. at 432. Thus the Union asserted that requiring it to cite specific instances of discrimination in order to obtain the awards data would defeat the very purpose of the *Griggs* line of cases. Resp. Ex. 1 at 2.

On May 21, 2010, the Agency responded to the Union's May 4 letter and again insisted that the Union had failed to articulate a particularized need for the data relating to the awards program. Resp. Ex. 3. Citing Arbitrator Wolf's 2008 decision, the Agency conceded that the Union would have a need for the data if there were a specific employee grievance or complaint of discrimination in the awards program, or "if credible information has come to its attention from any source that the Agency has administered its performance award program in a way that violates either the collective bargaining agreement or a governing law or regulation." *Id.*, quoting Resp. Ex. 11 at 14. But the Agency stated that none of these criteria had been met. Moreover, the Agency rejected the Union's contention that disparate impact EEO claims are not required to cite specific instances of alleged discrimination as a basis for a data request. The Agency noted that at the hearing before Arbitrator Wolf, the Union had justified its data request by saying that it would "make an initial statistical analysis of whether there is any form of disparate impact or treatment that conflicts with the collective bargaining agreement or various civil rights laws and regulations. . . ." *Id.*, quoting Resp. Ex. 11 at 6. Since the arbitrator had rejected the Union's argument and the Union was offering no new justification for the requested data, the Agency said that the Union had not demonstrated a particularized need for the information. *Id*.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

As outlined by the Authority in *Internal Revenue Serv.*, 50 FLRA 661, 669 (1995) (*IRS Kansas City*), section 7114(b)(4) of the Statute entitles an exclusive representative to information from an agency if it demonstrates to the agency, among other things, a "particularized need" for the information: that is, why it needs the requested information, including the uses to which it will put the information and the connection between that information and the union's representational responsibilities under the Statute. The GC insists that the Union met these requirements in its May 4, 2010 letter.

Citing *Fed. Aviation Admin.*, 55 FLRA 254, 258-60 (1999) (*FAA*), the GC says that a union's statutory duties include the administration of a CBA and the determination of whether to file a grievance under that CBA. In furtherance of a similar purpose, the Union in the instant case advised the Agency that it needed to know the race, gender, age, and grade of employees who received awards, so that it could "determine whether there is a statistically significant pattern of discrimination in the dissemination of performance awards." Resp. Ex. 1 at 1. The Union tied the information to its intent to determine whether there were grounds to file a grievance based on the disparate impact of the Agency's awards program on one or more statutorily protected groups. The Union further cited the Supreme Court decision in *Griggs v. Duke Power Co*., 401 U.S. 424 (1971), which held that the Civil Rights Act of 1964 prohibits facially neutral employment practices that have a disparate impact on a racial minority. The Union explained to the Agency that obtaining the awards information, broken down by race, gender, age, and other criteria, was the only way that it could ascertain whether the Agency's facially neutral awards standards had such a disparate impact. On the other hand, the Agency's insistence that the Union identify a specific way that the Agency has administered its awards program in an unlawful manner imposes an impossible hurdle, in that it prevents the Union from obtaining the very information it would need in order to evaluate whether the program is administered unlawfully. The GC also argues, based on *Library of Congress*, 63 FLRA 515, 519 (2009), and contrary to the Agency, that the Authority does not require a union to identify an actual or potential grievant in order to establish particularized need.

The General Counsel disputes the Respondent's assertion that *U.S. Dep't of the Air Force, AFMC, Kirtland AFB, Albuquerque, N.M.*, 60 FLRA 791 (2005), *aff'd in part sub nom. AFGE, AFL-CIO, Local 2263 v. FLRA*, 454 F.3d 1101 (10th Cir. 2006) (*Kirtland AFB*), is applicable to the case at bar. In *Kirtland AFB*, the agency asked the union to clarify its information request and offered to meet with the union to discuss the matter, but the union declined both requests. Thus, the Authority found that the agency had acted in accordance with the spirit of *IRS Kansas City* by making a reasonable request for clarification, while the union had fallen short by refusing to respond to that request. 60 FLRA at 795. In contrast, the GC argues that the Union's May 4 information request was explained specifically as tied to its intent to determine whether the awards program had a disparate impact on protected groups, while the Respondent neither asked the Union for clarification, offered to discuss the request further, nor raised any countervailing anti-disclosure interests. Thus, the GC concludes that the Union met its burden of demonstrating particularized need, and the Agency offered no satisfactory basis for refusing to furnish the information.

The General Counsel further argues that the Union's unfair labor practice charge is not barred by its 2007 grievance that was arbitrated in 2008. The Union filed requests for information about the Agency's awards program on March 19 and November 2, 2007; the latter document also contained a grievance over the Agency's refusal to furnish the awards information. Resp. Exs. 9, 10. Both 2007 information requests sought awards data for Fiscal Years 2004 through 2006. *Id.* Arbitrator Wolf's award of October 22, 2008, found that the Union had not demonstrated a particularized need for the requested information in its requests of March 19 and November 2, 2007. Resp. Ex. 11 at 2. The GC notes that the Union's ULP charge in the instant case was filed on June 8, 2010, and that the charge explicitly cited the Agency's denial of information requests made by the Union on March 4 and May 4, 2010, for awards information for Fiscal Years 2004 through 2008. Resp. Ex. 4, Attachment A at 1. Thus, the GC asserts that while the information requested in 2007 was similar to that requested in 2010, they were for different periods of time, and the Union's 2010 explanation of its need for the data was more detailed than its 2007 requests. Accordingly, the GC insists that the ULP charge is not based on the same factual circumstances as the earlier grievance, and that section 7116(d) does not bar the current ULP charge. *U.S. Dep't of the Air Force, 62nd Airlift Wing, McChord AFB, Wash.*, 63 FLRA 677, 679 (2009) (*McChord AFB*); *Library of Congress*, 58 FLRA 486, 488 (2003).

As a remedy, the General Counsel seeks an order that the Respondent furnish the Union with the requested information for 2007 and 2008, that it cease and desist from its unlawful conduct, and that it post a

notice to this effect to employees on the Agency's bulletin boards.

Respondent

The Respondent denies that it violated the Statute. As a threshold matter, it asserts that the current ULP proceeding is barred by section 7116(d) of the Statute, because the Union chose to pursue an identical information request through the grievance procedure in 2007. Secondly, it insists that the Union's letter of May 4, 2010, failed to show a particularized need for the information it requested.

The Agency urges that the complaint be dismissed without addressing the merits, because the Union is seeking to obtain a result through the ULP process that it failed to achieve through the contractual grievance procedure. The central dispute between the parties regarding section 7116(d) is whether "the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar." *McChord AFB*, 63 FLRA at 680 (citation omitted); *U.S. Dep't of the Army, Army Finance & Accounting Ctr., Indianapolis, Ind.*, 38 FLRA 1345, 1351 (1991). The Respondent asserts that the factual circumstances of the 2007 grievance and the 2010 ULP charge are identical. Comparing Resp. Ex. 1, the Union's May 4, 2010 information request (the subject of the current ULP), to Resp. Ex. 10, the Union's November 2, 2007 information request (the subject of the 2008 arbitration), the Agency states that both documents sought the race, gender, age, grade, and salary (among other things) for every employee, and the Union's justification for the information was the same in both instances. The only difference between the two information requests was that the earlier one sought data for FY 2004-2006, while the later request sought the same data for FY 2004-2008.[3] In the Respondent's view, this latter difference does not alter the fact that the requests were for the same information and justified in the same terms. Moreover, the Union's legal theory for demanding the data was the same in both 2007 and 2010, and thus the second prong of the 7116(d) analysis is satisfied. The Agency notes that the Union is simply wrong in claiming that the 2007 data request was based on a theory of disparate treatment of employees in the awards programs, while the 2010 data request was based on a theory of disparate impact. The Agency refers to Arbitrator Wolf's decision, which quoted the Union as asserting a need for the data based on the need to determine whether there was "any form of disparate impact or treatment" that violated the CBA or civil rights laws. Resp. Ex. 11 at 6. Since the Union raised the disparate impact theory in both the 2007 grievance and the 2010 ULP, its legal theories were the same, and the current ULP proceeding is barred by section 7116(d).

On the merits of the alleged ULP, the Respondent also urges that the complaint be dismissed. For the same reasons cited by the arbitrator in his 2008 award, the Respondent asserts that the Union has continued to fail to adequately explain its need for the broad range of data it seeks. The Union's assertion here -- that it needs the information "to determine whether or not the [Respondent's] dissemination of awards creates a disparate impact on protected classes of employees" (Resp. Ex. 1 at 1) -- is unsupported and conclusory, as was the union's justification in *Kirtland AFB* that it needed information to "ensur[e] compliance with Merit System Principles," and to "monitor contract compliance[.]" 60 FLRA at 794-95. The Respondent argues further that the Authority held in *Dep't of Health & Human Serv., SSA., New York Region, N.Y., N.Y.*, 52 FLRA 1133, 1147-48 (1997) (*SSA New York*), that a union's assertion that it needs information to "pursue possible grievances . . . due to the inequities in the distribution of award money" is insufficient under section 7114(b)(4) of the Statute. The arbitrator cited similar case law in his 2008 award, when he ruled that the Union's information request was deficient under the Statute when it failed to show any "credible information . . . that the Agency has administered its performance award program in a way that violates either the collective bargaining agreement or a governing law or regulation." Resp. Ex. 11 at 14. Lacking such specific information, the Union's data request is merely "a fishing expedition," in the words of *U.S. Dep't of Justice, Office of Justice Programs*, 45 FLRA 1022, 1040 (1992); *quoted in U.S. Dep't of Veterans Affairs, Wash., D.C. v. FLRA*, 1 F.3d 19, 23 (D.C. Cir. 1993). Accordingly, the Union failed to establish a particularized need for the requested data, as required by *IRS Kansas City*, 50 FLRA at 669-71.

Analysis

1. The Limited Issues Presented by the Pleadings in This Case

Before addressing the issues which the parties dispute in this case, it is appropriate to note those issues which are not disputed. This is particularly relevant here, because there was no hearing; the parties agreed that the facts were not in dispute and that the factual record is fully set forth in the briefs and exhibits thereto.

[3] The 2010 information request sought the awards data for FY 2004-2008 (Resp. Ex. 1 at 1, but the complaint issued by the General Counsel narrowed the information sought to data for FY 2007 and 2008 (Resp. Ex. 6 at ¶7).

First, it is important to identify the unfair labor practice that the Respondent is accused of committing here. This is somewhat convoluted, as the Union actually submitted a series of information requests to the Agency: two of them, the letters of March 4 and May 4, 2010, are part of the record as Resp. Exs. 2 and 1, respectively; additionally, the March 4 letter (Resp. Ex. 2 at 1) refers to earlier letters (dated July 3 and October 21, 2009) written by the Union, also seeking related information. In order to put the issues into focus, I am guided by the allegations made by the General Counsel in its Complaint, and specifically the allegations of paragraph 7 of the Complaint: "On May 4, 2010, the Union, in writing, requested that the Respondent furnish the Union with the information related to unit employees' race, gender, age, grade, salary, location, annual performance ratings, performance awards and allowances for years 2007 and 2008." Resp. Ex. 6 at 2. By virtue of this language, the General Counsel has eliminated some of the allegations previously made by the Union: the GC does not allege that the Agency's refusal to furnish **all** of the information itemized in the May 4, 2010 letter was unlawful, but only that the Agency was required to furnish information for 2007 and 2008, and further that the Agency was only required to furnish "information related to unit employees' race, gender, age, grade, salary, location, annual performance ratings, performance awards and allowances . . . ." The Respondent noted this limitation of the issues in paragraph 7 of its Answer to the Complaint and stated that it understood the ULP case "to be limited to the information as described in this paragraph of the Complaint." Resp. Ex. 7 at 1-2. Therefore, it is not necessary to determine whether the Union established a particularized need for the requested data for years 2004-2006 or 2009, or for any other types of information not specified in paragraph 7 of the Complaint, as quoted above.

Second, the Respondent has not asserted in the proceeding before me that disclosure of the information sought by the Union is prohibited by law. GC Ex. 3 is the Agency's March 23, 2010 response to the Union's March 4, 2010 information request; Resp. Ex. 3 is the Agency's May 21, 2010 response to the Union's May 4, 2010 information request. At no point in either GC Ex. 3 or Resp. Ex. 3 did the Agency assert that disclosure of any of the information sought by the Union was prohibited by law. In both of its letters, the Agency asserted solely that Arbitrator Wolf's 2008 award was binding, and that the Union had not articulated a particularized need for the information. Moreover, the Union had already told the Agency that it was seeking only "redacted information." Resp. Ex. 2 at 1. The Union indicated this in its March 4, 2010 letter to the Agency, which the Union expressly referred to in its May 4, 2010 letter. While the series of information requests sent by the Union is confusing, especially since each letter asks for slightly different information, the potential for confusion is eliminated by the GC's Complaint and by the Agency's responses to the Union and in its pleadings before me.

The Respondent's recognition that the Union sought only redacted information is evidenced first by its failure to raise a Privacy Act objection to the Union's data requests, as noted above. Additionally, while the Respondent's Answer to the Complaint asserted a Privacy Act objection, it did so in conditional terms. In paragraph 12 of the Complaint, the GC alleged that the information unlawfully withheld by the Agency "is not prohibited from disclosure by law." Resp. Ex. 6 at 2. In paragraph 12 of its Answer, the Respondent denied that allegation "to the extent that disclosure of the requested information in paragraph 7 would violate the Privacy Act, if the information includes names of unit employees and/or other personal identifiers." Resp. Ex. 7 at 2. Subsequently, the Respondent filed its Motion for Summary Judgment, which stipulated that there were no disputes of material fact and which attached (among other documents) the Union's March 4, 2010 letter (Resp. Ex. 2), which in turn indicated that the Union sought only redacted information. Thus, I must accept as fact that the Union seeks only information about the Agency's awards program that is not name-identifiable. The Respondent also appears to accept this fact, because at no point in its Brief in Support of Motion for Summary Judgment does it argue that the Union seeks unredacted or name-identifiable information. Finally, the Respondent itself eliminated any possible Privacy Act issue from the case in the summary paragraph of its Brief in Support of Motion for Summary Judgment:

> The only issue for determination, therefore, is the legal issue as to whether Respondent was obligated to furnish the Union with the information in the Union's May 4, 2010 request. As demonstrated above, Respondent was not obligated to furnish the Union with the requested information since the Union failed to establish a particularized need for the information under Section 7114(b)(4) of the Statute. Additionally and in the alternative, the Union is barred from bringing this unfair labor practice charge by its earlier-filed grievance under Section 7116(d) of the Statute.

Resp. Br. in Suppt. of MSJ at 9.

I write at some length about the nonexistence of a dispute about the Privacy Act in order to make it clear that this case is distinguishable from *U.S. Dep't of*

Justice, Fed. Bureau of Prisons, U.S. Penitentiary, Marion, Ill., 66 FLRA 669 (2012) (*USP Marion*). In the latter case, the ALJ ruled that although the agency had cited the Privacy Act as one basis for refusing to disclose information to the union, its references to the Privacy Act were conclusory and did not satisfy the evidentiary burden placed on an agency by *U.S. DOT, FAA, N.Y. TRACON, Westbury, N.Y.*, 50 FLRA 338, 345-46 (1995) (*DOT*). The Authority disagreed and held that the agency had adequately raised a Privacy Act objection to disclosure by citing the Privacy Act in its response to the Union and in its answer to the complaint, and by offering witness testimony on the issue. *USP Marion*, 66 FLRA at 673-74. The Authority stated that the burdens of proof established in the *FAA* decision must be satisfied in the proceeding before the ALJ and the Authority, not when the parties discuss the union's data request. *Id*. at 673, *citing FAA* at 345. Applying the *USP, Marion* reasoning to our case, it is clear that the Respondent has chosen not to offer any evidence to support a Privacy Act objection to disclosure. Its conditional assertion of a Privacy Act objection in its Answer was limited to name-identified information, and the Union had previously advised the Respondent that it wanted only redacted information. Resp. Ex. 2 at 1. Accordingly, there is no factual or procedural basis in the record on which to make a Privacy Act determination pursuant to *FAA*.

2. Section 7116(d) Does Not Bar the Unfair Labor Practice Charge

Section 7116(d) of the Statute provides that "issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures." Citing the legal standard that has long been applied, the Authority stated in *McChord AFB*, 63 FLRA at 679:

> In order for a ULP charge to be barred under § 7116(d) by an earlier-filed grievance: (1) the issue that is the subject of the grievance must be the same as the issue that is the subject of the ULP; (2) such issue must have been raised earlier under the grievance procedure; and (3) the aggrieved party in both actions must be the same.

See also Fed. Bureau of Prisons, 18 FLRA 314, 315 (1985). Each prong of the test must be met for the ULP to be barred. *Olam Southwest Air Def. Sector (TAC), Point Arena Air Force Station, Point Arena, Cal.*, 51 FLRA 797, 802 (1996). The most commonly litigated prong is the first one, and in such cases, it must be determined whether "the ULP charge arose from the same set of factual circumstances as the grievance and the theory advanced in support of the ULP charge and the grievance are substantially similar." *Id*. at 801-02.

In many 7116(d) cases, the grievance and the ULP charge originate from the same facts or incident, but the parties dispute whether the legal theory advanced in each proceeding is the same. For instance, the Authority has frequently held that a grievance alleging that an agency action violated the parties' collective bargaining agreement involves a different theory than a ULP charge alleging that the same action violated the Statute. *See, e.g., Dep't of Def., U.S. Army Reserve Personnel Command, St. Louis, Mo.*, 55 FLRA 1309, 1313 (2000) (removal of union materials allegedly violated the CBA and section 7116(a)(1) of the Statute); *AFGE, Nat'l Council of EEOC Locals No. 216*, 49 FLRA 906, 914-15 (1994) (agency suspended employee allegedly for his union activity and not for just cause). Less common is the posture of our case, in which the same aggrieved party advances the same legal theory at two different times.

To be fair to the parties, the Agency does not concede here that the grievance and ULP arise out of separate sets of factual circumstances, and the Union does not concede that it raised the same legal arguments in both the grievance and ULP; nonetheless, that is the conclusion I reach. In the Union's May 4, 2010 information request, it differentiated its current request from the earlier arbitration case by stating, "we are pursuing a claim of disparate impact as opposed to a claim of disparate treatment, as was presented to Arbitrator Wolf." Resp. Ex. 1 at 1. This is factually incorrect, however, as noted by the Agency in its May 21, 2010 reply to the Union. Resp. Ex. 3. The arbitrator himself indicated in his 2008 award that the Union had sought information about the Agency's awards program in order to evaluate whether there was "any form of disparate impact or treatment" in the program. Resp. Ex. 11 at 6. The General Counsel seems to recognize this fact as well, as its brief does not echo the Union's insistence that the grievance involved only a claim of disparate treatment. Rather, the General Counsel prudently bases its 7116(d) argument on the premise that the grievance and the ULP involve different sets of factual circumstances. It is

clear from the 2008 arbitration award that the Union was trying to investigate whether there was a statistical basis for either a disparate impact or disparate treatment claim, and the 2010 information request continued to justify the Union's need for the data as necessary to enable it to determine whether the awards program has a disparate impact on various protected classes of employees. Thus, I conclude that the theory advanced by the Union for the requested information in this ULP case is the same as the theory advanced in the grievance. Moreover, since the aggrieved party in both proceedings was the Union, the only question that remains is whether the grievance and the ULP arose out of the same set of factual circumstances. If the answer is yes, then the ULP is indeed barred by 7116(d); but if the answer is no, the charge is not barred, and we must proceed to decide the charge on its merits.

The immediate problem that the Respondent faces in insisting that the grievance and ULP arose from the same facts is that the grievance was filed in 2007 and decided by the arbitrator in 2008; the information request that is the subject of the current ULP was sent to the Agency by the Union in 2010. In both cases, the Union has sought virtually the same **types** of information about the Agency's awards program, but the grievance sought data for 2004–2006, while the ULP (as narrowed by the Complaint) seeks data for 2007 and 2008. Thus, while the nature of the requested data is virtually the same, the actual information contained in those records is entirely different: that is, the number of people in each racial, gender, and other classification who received awards, and the type and basis of those awards, will be different in each year. Accordingly, it is indisputable that the grievance and the ULP sought different information. (Analogously, if you were to request U.S. Census data for the State of Maryland for 2010, you would receive entirely different information than if you requested the exact same data for 2000.) It is very hard, if not impossible, to understand how a 2010 request for information for the years 2007 and 2008 "arises from the same set of factual circumstances" as a 2007 request for information for the years 2004-2006.

Moreover, as we shall see in more detail soon, the legal standard for evaluating whether an agency must furnish information to a union depends on whether the union has articulated a particularized need for the information. *IRS Kansas City*, 50 FLRA at 669-71. The sufficiency of a data request cannot be judged solely on the list of items sought; that evaluation must be based on how well the union has explained its need for the information, in the context of its statutory responsibilities. *AFGE, Local 2343 v. FLRA*, 144 F.3d 85, 89 (D.C. Cir. 1998). The Union had the opportunity in 2007 to explain to the Agency why it needed the 2004-2006 data, and the arbitrator could only evaluate the request based on the explanations given by the Union at that time. Similarly, the Union's 2010 data request must be judged on the basis of the explanations given by the Union in 2010. Even if the explanation given by the Union in 2007 was inadequate, the Union might provide an explanation in 2010 for its subsequent request that fills in the gaps left from its earlier explanations. Not only do the 2007 and 2010 requests seek information for different years, but the explanations offered in 2010 are separate and discrete from the explanations offered three years earlier, and must be judged separately.

This rationale was evident in the Authority's decisions in *U.S. Dep't of the Navy, Naval Surface Warfare Ctr., Carderock Div., Acoustic Research Detachment, Bayview, Idaho*, 59 FLRA 763 (2004), and *Library of Congress*, *supra*. In *Carderock*, two union stewards filed a ULP charge alleging that their agency gave them lower performance appraisal ratings for the appraisal year ending June 30, 2000, because of their union activities. The next year, the same stewards filed a grievance alleging that the agency gave them lower appraisal ratings for the year ending June 30, 2001, because of their union activities. The Authority held that the grievance was not barred by the earlier ULP, because "each appraisal year is factually separate and distinct[ ]" and thus "the ULP charge and the grievance did not arise from the same set of factual circumstances for purposes of applying § 7116(d)." *Id*. at 764. Similarly, in *Library of Congress*, the Authority held that a grievance over the denial of a union official's request for official time to conduct an off-site meeting was not barred by the union's earlier ULP protesting the denial of a different union official's request for official time to conduct an off-site meeting. Although both meetings were for similar purposes, the meetings involved different individuals, at different times; accordingly, the factual circumstances giving rise to the grievance and

the ULP were not the same. *Library of Congress*, 58 FLRA at 488.

As in the two cases cited above, the information request that is the subject of the current ULP charge was filed at a different time (three years later) than the data request that was the subject of the grievance and arbitration; and while the information requested in the two cases was quite similar in nature, it was for different years. While the Union used similar language to explain its particularized need for the data in 2007 and 2010, the explanations of need were phrased somewhat differently. Each information request stands on its own and either succeeds or fails on its own merits.

Accordingly, section 7116(d) of the Statute does not bar the ULP charge filed in this case, and I must resolve the substance of the General Counsel's Complaint.

3. The Union Demonstrated a Particularized Need for the Disputed Information

Section 7114(b)(4) of the Statute requires an agency, upon request and "to the extent not prohibited by law," to provide a union with 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, advice, counsel, or training to management. *Id. See U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Fort Dix, N.J.*, 64 FLRA 106, 108 (2009). As I noted earlier, the Respondent does not contend that the Union's May 4, 2010 data request failed to meet any of these criteria, except for (3). Specifically, the Respondent asserts that the Union failed to show that the requested data was "necessary," within the meaning of 7114(b)(4)(B), because it failed to demonstrate a "particularized need" for the information.

"Particularized need" is, in turn, a legal concept that has been developed by the courts and the Authority, chiefly in the *IRS Kansas City* decision and the many cases applying the *IRS Kansas City* framework since then. The case law creates an interlocking series of responsibilities on both unions and agencies to articulate their needs or interests and to clarify areas of ambiguity. First, a union must articulate, with specificity, why it needs the requested information, including the uses to which it will put the information, and the connection between those uses and the union's representational responsibilities under the Statute. *USP Marion*, 66 FLRA at 672; *IRS Kansas City*, 50 FLRA at 669. A union cannot do this in conclusory terms; rather, its explanation must be detailed enough to permit the agency to make a reasoned judgment as to whether the Statute requires it to furnish the information. 66 FLRA at 672; 50 FLRA at 670. An agency, in turn, is responsible for establishing any countervailing, anti-disclosure interests; it too cannot do this in a conclusory way, and it must raise these interests at or near the time of the union's request. *Soc. Sec. Admin.*, 64 FLRA 293, 295-96 (2009). If the agency reasonably requests clarification from the union regarding aspects of the data request that may be unclear, the union's failure to do so will be taken into consideration in evaluating whether it has shown a particularized need. *Kirtland AFB*, 60 FLRA at 794.

In our case, the Union's May 4, 2010 letter is the primary basis for evaluating whether it demonstrated a sufficient need for the information. However, by referring to its earlier, March 4, 2010 information request in the May 4 letter, the Union was calling the Agency's attention to the arguments it had made previously; accordingly, the March 4 letter must be considered here as well. On May 4, the Union stated that it needed the information (i.e. the racial and other demographic characteristics of employees who had and had not received awards) in order "to determine whether there is a statistically significant pattern of discrimination in the dissemination of performance awards." Resp. Ex. 1 at 1. The Union argued that Arbitrator Wolf's rationale (that the Union must identify specific allegations or complaints of discrimination violating the law or the CBA in order to demonstrate particularized need) may have been appropriate in a disparate treatment case, but not here, where the Union is trying to ascertain whether the Agency's awards program has had a disparate impact on protected classes of employees. Citing the Supreme Court's decision in *Griggs v. Duke Power Co.* (that even facially neutral job requirements may constitute illegal discrimination), the Union argued that parties are sometimes unaware of the discriminatory effects of a practice, and that evaluating the statistical data which it was seeking was its only means of determining whether the Agency's awards program was being administered unfairly. Requiring the Union to identify such discrimination as a predicate for obtaining the data would undermine the federal civil rights laws, as it would essentially require the Union to cite, in advance, information that is only available upon disclosure of the statistical data. Resp. Ex. 1 at 2. The Union also noted that in *VAMC Jackson*, 32 FLRA at 133, the Authority had ordered the disclosure of data including the race, sex, position, and grade of all employees, to enable a union to evaluate whether "there is a statistical pattern of discrimination on a basis prohibited by the Civil Rights Act of 1964[ ]" and whether it should file a grievance based thereon. Resp. Ex. 1 at 3.

The Agency's response to the May 4 letter stated that the Union had failed to articulate a particularized need for the data, for the same reasons given by Arbitrator Wolf in his 2008 award. The Agency asserted on May 21, 2010, that the Union had still failed to identify any specific instances of discrimination or otherwise demonstrated a particularized need for the demographic data. Resp. Ex. 3. While acknowledging that the Union was now asserting a need for the data in order to pursue a disparate impact claim, the Agency noted that disparate impact had already been considered (and rejected) by the arbitrator as a basis for disclosure. *Id*. The Agency did not express any doubt about, or request any clarification of, any aspect of the Union's request, nor did it offer to meet with the Union to discuss the matter further. And as noted previously, it did not cite any Privacy Act concerns or other interests that might weigh against disclosure of the requested information.

In my view, the Union's March 4 and May 4 letters explained, with sufficient specificity, why it needed the demographic awards information, the uses to which it would put the information, and the connection between those uses and its own statutory role. The Union stated that it intended to investigate whether the Agency disseminates performance awards in a manner that has a disparate impact on certain classes of employees, thereby discriminating against those employees unlawfully; and if the investigation reveal edevidence of such discrimination, it would pursue a disparate impact claim against the Agency. The March 4 letter cited the Union's statutory duty to administer the CBA and case law enforcing data requests for that purpose. Resp. Ex. 2 at 3. The May 4 letter indicated that withholding the data would prevent the Union from pursuing a disparate impact claim and cited some of the same case law as its previous letter. Resp. Ex. 1 at 2, 3. Although the letters do not explicitly state what process the Union would invoke to pursue a claim of disparate impact discrimination, they refer to the Union's intent to pursue Civil Rights Act violations (which could be enforced by an EEO lawsuit such as in the *Griggs* case or by a CBA grievance), and the March 4 letter cites language in the *VAMC Jackson* decision that the information would enable the union to "make judgments concerning the filing of a grievance[.]" Resp. Ex. 2 at 3. The March 4 and May 4 letters must be read in the context of the Union's longstanding attempt to obtain demographic information about the Agency's awards program, which had already involved at least one contractual grievance claiming that the program was discriminatory, in violation of Articles 2.4, 29.2 and 48 of the CBA, Title VII of the Civil Rights Act, and the Age Discrimination in Employment Act. Resp. Ex. 10 at 1.[4]

In this context, the Union clearly communicated to the Agency that it needed the demographic information in order to investigate whether the Agency's awards program was discriminatory in its impact on classes of employees protected by the various federal civil rights laws, and that the Union would use the statistical information to perform the type of analysis required by the federal case law pursuant to *Griggs* and subsequent disparate impact decisions.[5] The Union further explained that it could not identify specific instances of the program's discriminatory impact in advance of receiving the demographic data: although the Agency's employment practices were neutral on their face, any discriminatory impact would become evident only after the Union has obtained and thoroughly analyzed the statistical data it was seeking. Resp. Ex. 1 at 1-2. In this respect, the Union's argument echoes the point made by the Authority in *Health Care Financing Admin.*, 56 FLRA 156 at 162 (2000) (*HCFA*):

> The Respondent complains that the Union failed to articulate what "act or failure to act [the] Respondent is alleged to have committed" and to "identify any specific promotion policy/procedure or any law or regulation that was alleged to have been misapplied or violated." . . . To require the Union to describe the exact nature of the alleged irregularities is asking too much of the Union. In essence, the Respondent is asking the Union to describe the potential contents of documents it has not seen. [footnote & case citation omitted].

See also IRS Kansas City, 50 FLRA at 670 n.13. Accordingly, I conclude that the Union provided an explanation to the Agency that was sufficient to allow the Agency to make a reasoned judgment concerning disclosure. The Agency, for its part, did not express any uncertainty as to what the Union sought or why the Union needed it. Rather, it simply refused to provide the information for 2007 and 2008, based on the reasons given by the Arbitrator in 2008 for earlier years' data.

[4] While the portion of this grievance relating to the data request was the subject of the 2008 arbitration, the substantive discrimination claims were excluded from the arbitration. Resp. Ex. 11 at 2.

[5] As illustrated in *Nat'l Treasury Employees Union*, 65 FLRA 302, 306-09 (2010), statistical data and analyses of this type will also be essential in discrimination claims pursued under a negotiated grievance procedure.

While Arbitrator Wolf's 2008 award is not binding on me or on the Authority[6] in this ULP case, it nonetheless stands as the most articulate statement of the position espoused by the Respondent against disclosure. Since the Respondent relied so heavily on the award in denying the May 4 data request, it is appropriate to consider the arbitrator's reasoning in order to evaluate the Respondent's. The arbitrator acknowledged the Union's responsibilities to pursue grievances and "to investigate facts that reasonably suggest that the Agency is not adhering to the contract." Resp. Ex. 11 at 9. He noted, however, that the Union "did not identify any specific complaints or grievances with regard to the administration of performance awards." *Id.* at 13, 15. When Union witnesses were asked for details as to how the awards program discriminated, the Union could not cite any concrete allegations of wrongdoing to the arbitrator (nor has it cited any to me). *Id.* at 12-13. The arbitrator traced the case law regarding particularized need and identified "[t]he existence of employee complaints or grievances as predicates for information requests . . . ." *Id.* at 11, citing *U.S. DOT, FAA, New England Region, Bradley Air Traffic Control Tower, Windsor Locks, Conn.*, 51 FLRA 1054, 1068 (1996); *U.S. Army Corps of Eng'rs., Kansas City District, Kansas City, Mo.*, 22 FLRA 667 (1986) (*Corps of Eng'rs*). Conversely, he noted that the Authority had rejected, as too "general and conclusory," data requests for the purposes of monitoring compliance with the CBA and pursuing "possible grievances and EEO complaints due to the inequities in the distribution of award money." Resp. Ex. 11 at 12, citing *SSA New York*, 52 FLRA at 1147-48. The arbitrator found that "the Union's objective in submitting its information requests was solely to engage in a general policing of the contract." *Id.* at 13. The issue before him, he said, had not been squarely addressed by the Authority or courts: "In the absence of employee complaints or grievances, what must the Union show in order to satisfy the 'particularized need' standard?" Resp. Ex. 11 at 14 (footnote omitted). Citing numerous provisions in the CBA incorporating statutory obligations on the Agency, the arbitrator felt that the Union's theory would entitle it to "massive amounts of relevant data" without evidence of violations, and "[w]hile such a policing authority by Unions might serve the public good," it is not supported by the case law. *Id.* at 15. In order to show a particularized need for demographic data about the Agency's awards program, he ruled that the Union must have either an actual employee complaint or independent facts pointing to a contractual or statutory violation in the awards program. *Id.* at 15-16.

I believe that the arbitrator (and in turn the Agency) misapplied the case law on this subject. For instance, while the Authority has cited the existence of specific employee complaints or a pending grievance about a program as a basis for particularized need,[7] it has never held that an employee complaint or grievance is essential for such purposes. *FAA, supra*, offers one example of the Authority finding information "necessary" for a union to administer provisions of the CBA, despite the absence of any specific grievance or complaint as a "predicate" for the information request. In *FAA*, the Authority held that service computation dates and other information on all bargaining unit employees were necessary for the union to determine the employees' seniority and to administer the various seniority provisions of the CBA. 55 FLRA at 255, 259. While the parties' dispute in that case focused primarily on the agency's insistence that section 7114(b)(4)(B) requires agencies only to furnish information pertaining to negotiations, the Authority's rationale for rejecting that argument is applicable on a broader scale.

The Authority stated in *FAA* that the statutory obligation to furnish necessary information "extends to the full range of representational activity, not just the context of pending negotiations . . . ." *Id.* at 258. As an illustration of "the full range of representational activity," the Authority cited *AFGE, Local 1345 v. FLRA*, 793 F.2d 1360 (D.C. Cir. 1986), whose facts resemble those of our case, where the court spoke in sweeping terms about a union's need for information that will enable it to administer the terms of an agreement. *Id.* at 1363-64. In *AFGE Local 1345*, the union had heard rumors that two employees had been discharged, and even though the union didn't know the identity of the employees and had not been asked by the employees to represent them, it asked the agency for "all written data . . . surrounding" the discharges. *Id.* at 1362. In rejecting the Authority's rationale for finding the requested information unnecessary -- that the union didn't know the identity of the employees and hadn't been asked to represent them -- the court held that a union has a statutory duty to represent all unit employees, not simply those who have been disciplined, and that it is also entitled to information related to "its own status as the exclusive bargaining representative." *Id.* at 1364. Thus, even if the employees chose not to be represented by the union, or if the union chose not to file grievances on their behalf, the information about the discharges was necessary for the union to fulfill its "obligation to police and administer the labor agreement." *Id.* Additionally, the Authority has long held that the investigation of whether an agency has engaged in discrimination prohibited by law is an integral part of a union's statutory responsibilities. *HCFA*,

[6] No exceptions to the award were filed, so it was never reviewed by the Authority.

[7] *See, e.g.*, the cases cited in *USP Marion*, 66 FLRA at 672.

56 FLRA at 160; *VAMC Jackson*, 32 FLRA at 140; *Corps of Eng'rs*, 22 FLRA at 669, 683.

By requiring the existence of a grievance or complaint of unlawful discrimination (or credible information of such discrimination) before the Union can obtain statistical data to analyze discrimination in an Agency program, the arbitrator unduly constricted the Union's "range of representational activity" to the grievance process, at the expense of the Union's legitimate role in investigating -- prior to receiving employee complaints -- whether the CBA or federal law is being violated. There is nothing in the Statute that requires a union simply to be reactive to employee complaints and prevents it from proactively investigating the Agency's administration of the CBA. As noted by the court in *AFGE Local 1345*, a union is entitled to information in at least three contexts: as the representative of "potentially aggrieved employees [ ]"; as the representative of all unit employees, even those who may not be aggrieved by an action or program; and in its own institutional status as exclusive representative. 793 F.2d at 1364. The arbitration award limits the Union's right to information to the first context, and even in that context, it improperly limits the meaning of "potentially aggrieved employees." Particularly in the area of racial or other types of discrimination, the Union rightly argues that employees may not be aware that they are victims of discrimination until they have seen a broad range of statistical data. That is what the Union was seeking to find out in this case.

The arbitrator also exaggerated the dangers of furnishing the Union with "massive amounts of relevant data" if it were given a "policing authority" under 7114(b)(4)(B). *See* Resp. Ex. 11 at 15. The most important check on this danger is that once a union receives the data it requests, it must put the information to use. In the case of the statistical data concerning the Agency's awards program, a stack of spreadsheets with columns and numbers on them will be meaningless and useless without a considerable amount of analysis and work on the Union's part. EEO lawsuits such as those referenced in the Union's May 4 letter are extremely time consuming to litigate, usually requiring expert testimony to make sense of the raw data (as evidenced by the *NTEU* case, *supra*, 65 FLRA at 307-09). In our case, the Agency has admitted that the information requested by the Union is reasonably available, and that it is normally maintained by the Agency in the regular course of business; there is no evidence, therefore, to suggest that furnishing the information would have been unduly burdensome for the Agency. On the other hand, the Union will have the responsibility to analyze that data, a task that is likely to be significant. Like a dog chasing a car, a union seeking information needs to know in advance what it is going to do with it, once its request is granted.

Both the arbitrator and the Respondent equated the Union's information requests here to the request that was found inadequate by the Authority in *SSA New York*; *see* 52 FLRA at 1147-48. Comparisons between the two cases are questionable, however. In *SSA New York*, the union sought name-identified copies of all records relating to performance and other awards, including the recommendations for such awards and detailed data about each employee. Initially it justified its need for the information simply "to monitor the national agreement . . . ." *Id.* at 1147. In a subsequent request, it added that it needed the information "to pursue possible grievances and EEO complaints due to inequities in the distribution of award money." *Id.* at 1147-48. The Authority held that the "bare assertion" of monitoring the CBA failed to meet the standards of *IRS Kansas City*. *Id*. at 1147. With regard to the expanded explanation in the later request, the Authority held that they "establish a need for some award information to monitor compliance with the national agreement and to determine whether there are inequities in the distribution of award money. They do not, however, explain why the Union needs the name-identified information it requested[.]" *Id*. at 1148 (emphasis in original).

In our case, the Union does not seek name-identified information, so it is not at all clear whether the Authority would have found such a request sufficient. (The agency in *SSA New York* actually furnished the requested records to the union, but in sanitized form. *Id*. at 1135.) Moreover, the Union's data request in our case was more specific and expansive than in *SSA New York*. It referred to its investigation as to "whether there is a statistically significant pattern of discrimination in the dissemination of performance awards [ ]" and whether the awards program has a disparate impact on certain classes of employees; it also discussed in some detail the meaning of federal case law regarding disparate impact claims, explaining how that case law supported the Union's argument that it could not be more specific in its allegations without first obtaining the data. Resp. Exs. 1, 2. The Union's detailed discussion of federal case law specific to its request also distinguishes this case from the request rejected in *Kirtland AFB*; in the latter case, not only was the union's request general and conclusory, but the union ignored the agency's requests for clarification and detail. 60 FLRA at 795. In our case, after the Agency rather perfunctorily rejected the Union's March 4 data request, the Union offered an additional explanation of the case law concerning disparate impact and how the Union's representational duty to investigate discrimination in the awards program could not be fulfilled without obtaining the requested data. *Compare* GC Ex. 3 *and* Resp. Ex. 1.

Looking at all these factors, I conclude that the Union's information request of May 4, 2010, supplementing and modifying its March 4 request, articulated a particularized need for the data for 2007 and 2008. The Agency's refusal to furnish that information, therefore, violated section 7114(b)(4) of the Statute and was an unfair labor practice in violation of section 7116(a)(1), (5), and (8).

To remedy this violation, it is appropriate to order the Respondent to cease and desist its unlawful conduct, furnish the Union with the information relating to the awards program for 2007 and 2008, and post a notice to that effect.

Accordingly, I recommend that the Authority Grant the General Counsel's Cross-Motion for Summary Judgment and Deny the Respondent's Motion for Summary Judgment, and issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the U.S. Nuclear Regulatory Commission shall:

1. Cease and desist from:

(a) Failing or refusing to provide the National Treasury Employees Union (the Union) with the awards-related information it requested on May 4, 2010, for 2007 and 2008.

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

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

(a) Furnish the Union with the awards-related information it requested on May 4, 2010, for 2007 and 2008.

(b) Post at its facilities where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chairman, Nuclear Regulatory Commission, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

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

Issued Washington, D.C., September 24, 2013

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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. Nuclear Regulatory Commission 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 NOT fail or refuse to provide the National Treasury Employees Union (the Union) with the awards-related information it requested on May 4, 2010, for 2007 and 2008.

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

WE WILL promptly provide the Union with the awards-related information it requested on May 4, 2010, for 2007 and 2008.

_____
(Nuclear Regulatory Commission)

Dated:_____ By: _____
(Chairman)

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, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 224 S. Michigan Avenue, Suite 445, Chicago, IL 60604, and whose telephone number is: (312) 886-3465.