

ORAL ARGUMENT SCHEDULED FOR MARCH 6, 1998

No. 97-1355

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2343
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL LABOR RELATIONS AUTHORITY

BRIEF FOR THE
FEDERAL LABOR RELATIONS AUTHORITY

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and amici
Appearing below in the administrative proceeding
before the Federal Labor Relations Authority were the U.S.
Department of

Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois and American Federation of Government Employees, Local 2343. The union is the petitioner in this court proceeding; the Authority is the respondent.

B. Rulings under review

The ruling under review in this case is the Authority's Decision and Order in U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois and American Federation of Government Employees, Local 2343, Case No. CH-CA-30849 on March 14, 1997. The Authority's decision is reported at 52 F.L.R.A. (No. 115) 1195.

C. Related Cases

This case has not previously been before this Court or any other court.

Counsel for the Authority is unaware of any cases pending before this

Court which are related to this case within the meaning of Local Rule

28(a)(1)(C).

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Overseas Educ. Ass'n v. FLRA, 858 F.2d 769
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Peoples Gas System, Inc. v. NLRB, 629 F.2d 35
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State of New York v. Reilly, 969 F.2d 1147
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DECISIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY

Department of the Air Force, Scott Air Force Base,
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Internal Revenue Service, Austin District Office
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GLOSSARY

AFGE - American Federation of Government
 Employees, AFL-CIO

Allenwood Prison - U.S. Dep't of Justice, Bureau of
 Prisons, Allenwood Federal Prison Camp, Montgomery,
 Pennsylvania, 988 F.2d 1267 (D.C. Cir. 1993)

ALJ - Administrative Law Judge

Br. - Brief

Bureau - Bureau of Prisons

FOIA - Freedom of Information Act

IRS, Austin - Internal Revenue Service, Austin
 District Office, Austin Texas, 51 FLRA 1166 (1996)

IRS, Kansas City - Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA 661 (1995)

IRS, Oklahoma City - U.S. Dep't of the Treasury, Internal Revenue Service, Washington, D.C. and U.S. Dep't of the Treasury, Internal Revenue Service, Oklahoma City District, Oklahoma City, Oklahoma, 51 FLRA 1391, (1996)

JA - Joint Appendix

Justice v. FLRA - U.S. Dep't of Justice v. FLRA, 991 F.2d 285, (5th Cir. 1993)

Local 2343 - The American Federation of Government Employees, Local 2343

National Park National Park Service, National Capital Service - Region, United States Park Police, 48 FLRA 1151 (1993)

NLRB V. FLRA - NLRB v. FLRA, 952 F.2d 523 (D.C. Cir. 1992)

OIA - Office of Internal Affairs at the Bureau of Prisons

Penitentiary - U.S. Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion, Illinois

Scott AFB - Department of the Air Force, Scott Air Force Base, Illinois, 51 FLRA 675, 677 (1995), enf'd 104 F.3d 1396 (D.C. Cir. 1997)

Scott AFB v. FLRA - Department of the Air Force, Scott Air Force Base v. FLRA, 104 F.3d 1396 (D.C. Cir. 1997)

Statute - Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135

ULP - Unfair Labor Practice

Union - The American Federation of Government Employees, Local 2343

VA v. FLRA - U.S. Dep't of Veterans Affairs v. FLRA, 1 F.3d 19, 23 (D.C. Cir. 1993)

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STATEMENT OF JURISDICTION

The final decision and order under review in this case was issued by the Federal Labor Relations Authority (Authority) in U.S. Department of Justice, Federal Bureau of Prisons, Marion, Illinois, 52 FLRA 1195 (1997). The Authority exercised jurisdiction over the case pursuant to section 7105(a) (2)(G) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (1994 & Supp. II 1996) (Statute).[1] This Court has jurisdiction to review the Authority's decisions and orders pursuant to section 7123(a) of the Statute. The American Federation of Government Employees, Local 2343 ("Local 2343" or "union") filed a petition for review within the 60-day time limit provided by 5 U.S.C. § 7123.

STATEMENT OF THE ISSUE

Whether the Authority properly concluded that the agency employer did not commit unfair labor practices when it refused to furnish the union with an investigative report, because the union had not demonstrated a particularized need for the information.

STATEMENT OF THE CASE

I. Nature of the case

This case arose as an unfair labor practice (ULP) proceeding under section

7118 of the Statute and involves an Authority adjudication of a complaint based on charges filed by Local 2343. The complaint alleged that the U.S.

Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary, Marion,

Illinois (Penitentiary) violated section 7116(a)(1), (5), and (8) of the

Statute when it failed to provide Local 2343 with information concerning an

investigation of a bargaining unit employee conducted by the Office of Internal Affairs (OIA) of the Federal Bureau of Prisons (Bureau). The Authority dismissed the complaint, finding that Local 2343 had not demonstrated the required particularized need for the information. Local 2343 has petitioned this Court for review of the Authority's order

dismissing the complaint.

II. Statement of the Facts

The American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive collective bargaining representative of a nationwide bargaining

unit of the Bureau's employees (JA 85).[2] Local 2343 is the agent of AFGE

for the purpose of representing employees at the Penitentiary, an activity

of the Bureau (id.).

On February 19, 1993, a prison inmate named Baptiste, who had been transferred the day before from segregated confinement into the general

prison population, was released into the prison's recreation area with approximately 17 other inmates. Baptiste immediately confronted another

inmate in a fighting stance. Several correctional officers, including Officer Aubrey Francis, removed Baptiste to another area of the prison.

Baptiste resisted the officers' attempts to remove him and had to be restrained (JA 28-29).

Subsequently, Officer Francis was accused by a supervisory corrections officer of using excessive force while transporting Baptiste from the recreation area. The allegation of prisoner abuse was referred to the OIA

and Officer Francis was placed on home duty pending an investigation (JA 29).[3]

On March 9, 1993, Local 2343 filed a grievance alleging that the Penitentiary had been warned by prison staff that inmate Baptiste would

start a fight if he were released into the recreation area, and that by

releasing the inmate the Penitentiary had endangered the lives of prison

staff and other inmates in violation of the health and safety provisions of

the parties' collective bargaining agreement (JA 47-49). The grievance

stated that the Penitentiary's actions "force[d] staff into a position of

having to fight an inmate when there was no need" (JA 48).
The grievance alleged the Penitentiary's conduct violated Section a.1.
of
the "Health and Safety" provision of the parties' negotiated
collective
bargaining agreement (JA 47). As a remedy, the union sought a
complete
investigation by OIA of all supervisors involved in the incident and
the
transfer of various supervisory and managerial employees (id.). As
relevant
here, the Health and Safety article provides:
Section a. There are essentially 2 distinct areas of concern
regarding the
safety and health of employees in the Federal Bureau of Prisons:
1. the first, which affects the safety and well-being of employees,
involves the inherent hazards of a correctional environment
. . . .
With respect to the first, the Employer agrees to lower those inherent
hazards to the lowest possible level, without relinquishing its rights
under
5 USC 7106. The Union recognizes that by the very nature of the
duties
associated with supervising and controlling inmates, these hazards can
never
be completely eliminated.
(JA 5-6 n.4).
On March 26, 1993, the Penitentiary denied the grievance, asserting in
essence that its decision to release Baptiste from segregated
confinement
was justified (JA 50). In response, the union invoked arbitration on
April
7, 1993 (JA 51).
On July 7, 1993 the Union requested that the Penitentiary provide it
"copies
of any and all notes, memoranda, documentation, etc. of any internal
investigation conducted regarding . . . Baptiste and the incident
which
occurred on February 19, 1993" (JA 52). The request indicated the
information was being sought to prepare for the arbitration of the
grievance
then scheduled for August 4 and 5, 1993 (id.).
Not receiving a response from the Penitentiary, Local 2343 submitted a
second request on July 23, 1993, asking for all reports and other
documentation on the incident, as well as "all reports, findings,
conclusions, memo's [sic], affidavits and all concerned documents"
relating
to the investigation of Officer Francis (JA 57). Local 2343 clarified
that
"[t]his information is needed by the Union to prepare itself for the
up
coming [sic] arbitration case on the Safety issue" (JA 55). The union
added
that "[m]anagement has this information to present during the
arbitration
and the Union needs the same information so it may effectively present
its

case" (JA 56).

The Penitentiary responded on July 29, 1993, refusing to provide the union

with the information it requested (JA 58). The response, noting that the

union had requested a copy of the OIA investigative report on the Officer

Francis' alleged abuse of Baptiste, advised the union that the OIA report

substantiated "none of the allegations of staff misconduct" and, therefore,

"none of [the report's] contents would be information to resolve reasonably

any grievance" (id.). The Penitentiary also stated that since the investigation was conducted by OIA, OIA was in possession of all other materials (id.).

On August 12, 1993, the union filed ULP charges over the Penitentiary's

refusal to provide the requested information (JA 65).[4] The union continued to request the information at various levels of the Bureau, but it

has never been provided.[5]

III. Proceedings below

A. The ALJ's decision

The case was first heard by an Authority Administrative Law Judge (ALJ). In

addition to receiving testimony, the ALJ conducted an in camera examination

of the OIA report on Officer Francis, along with a second report on an allegedly false statement given by another officer during the OIA investigation of Officer Francis (JA 34-35). The ALJ found that the first

report on the correctional officer "did not focus specifically on . . . the

subject of the Union's grievance," but did contain statements supporting

"the Union's premise that Baptiste was a volatile individual" (JA 35-36).

The ALJ found that the second report tended to support "the Union's allegation that [the Penitentiary] was fully aware that Baptiste would start

a fight" upon being released into the recreation area (JA 36).

The ALJ determined that National Labor Relations Board v. FLRA, 952 F.2d 523

(D.C. Cir. 1992) (NLRB v. FLRA), and Authority decisions applying NLRB v.

FLRA required the Union to establish a particularized need for the OIA reports, as well as for their supporting documentation, because the information constituted "managerial advice, guidance, or counsel to [the

Penitentiary] concerning the matters under investigation within the meaning

of section 7114(b)(4)(B) of the Statute" (JA 38). The ALJ found that the

union had failed to establish a particularized need for the reports and

concluded, therefore, that the Penitentiary's refusal to disclose them or their supporting documentation did not violate the Statute (JA 38-39).[6]

B. The Authority's decision

In a 2-1 decision, the Authority dismissed the ULP complaint, finding that

the union was required to demonstrate a particularized need for the information and that it had failed to do so.

1. Analytical framework

The Authority first reviewed its relevant precedent issued subsequent to the

ALJ's decision. In *Internal Revenue Service, Washington, D.C. and Internal*

Revenue Service, Kansas City Service Center, Kansas City, Missouri, 50 FLRA

661 (1995) (*IRS, Kansas City*), the Authority held that, in order to effectuate the purposes of the Statute, it would apply the "particularized

need" standard introduced in *NLRB v. FLRA* to all requests for information

under section 7114(b)(4) "whether or not the information request involves

intramanagement guidance" (JA 10, quoting 50 FLRA at 669).

Accordingly, the

Authority required the union in this case to establish and articulate a

particularized need for the information it requested without regard to whether that information constituted advice, guidance, or counsel for management officials (JA 10-11).

The Authority noted that *IRS, Kansas City* held that a union requesting information under section 7114(b)(4) of the Statute must articulate, with

specificity, the uses to which the information will be put and why the information is required in order for the union to adequately discharge its

representational functions (JA 11). Further, the Authority stated that a

union must articulate its interests in disclosure of the information at or

near the time of the request -- not for the first time at an unfair labor

practice hearing (citing *Social Security Administration, Dallas Region*,

Dallas, Texas, 51 FLRA 1219, 1223-24 (1996) (*SSA, Dallas*)) (id.).

2. Application of the framework in this case

Applying this framework in the instant case, the Authority found that the

union had not demonstrated a particularized need for the requested information and, therefore, concluded that the Penitentiary had not violated

the Statute by refusing to furnish the information. The Authority noted

that on both occasions when Local 2343 requested the information developed

by the OIA investigation, the union's only explanation was its conclusory

assertion that it needed the information to prepare for arbitration of its previously filed grievance (JA 11). Because this assertion did not, on its own, meet the standard established by IRS, Kansas City, the Authority found it appropriate to examine the grievance itself to determine whether the Union's requests were sufficient to permit the Respondent to make a reasoned judgment about its obligation to disclose the information (id.). In examining the grievance for this limited purpose, the Authority noted that the union testified at the hearing that the grievance raised two separate issues: "the fact that [Officer Francis] was being put on home-duty status," and the "health and safety issue" resulting from the inmate's release into the recreation area (JA 12; 93). With respect to the first issue -- the correctional officer's placement on home duty -- the Authority found that the Penitentiary had no reason to know that issue was part of the arbitration for which the Union requested information (JA 12). As to the second issue -- the effect on health and safety of the inmate's release into the recreation area -- the Authority concluded that the union never explained why it needed the information developed by the OIA investigation of Officer Francis in order to show that Baptiste's release adversely affected health and safety (id.). Concerning the issue of Officer Francis' assignment to home duty, the Authority noted that the grievance only mentioned his placement on home duty as a consequence of the incident involving Baptiste (JA 12). The Authority found that the grievance did not contest the home-duty assignment, nor did it address the allegations against Officer Francis. Further, the Authority noted that the grievance sought no remedy with respect to Officer Francis and the Authority pointed out that prior to the information request, the officer had been cleared of the allegations against him (JA 12-13). Moreover, the Penitentiary's response to the grievance, which addressed only the propriety of releasing Baptiste from segregated confinement and did not even mention Officer Francis, confirmed that the grievance was limited to the effect on health and safety. Thus, the Authority concluded that neither the union's information request, nor the grievance itself provided the Penitentiary reason to be aware that the allegations against Officer Francis

and his placement on home duty were at issue in the arbitration (JA 10).

In contrast, the Authority found that both parties clearly understood that

the issue of whether the Penitentiary had endangered health and safety by

improperly releasing Baptiste into the recreation area was raised in the

grievance (JA 14). However, according to the Authority, the Union at no

time explained why it needed the information from the OIA investigation into

the correctional officer's conduct or what it planned to do with that information concerning its grievance over health and safety. The

Authority

found nothing in the record which demonstrated the connection between the

investigation of Officer Francis' alleged misconduct and arbitrating the

health and safety issue in the Union's grievance. In this regard, the Authority noted that even the union's testimony at the hearing

indicated

only that it sought the investigation material in order to discover "exactly

what happened . . . exactly who has been charged [and] why they were charged[,] and not information about Baptiste's release from

confinement

(JA 14; 97). The Authority concluded that the union had not properly articulated its need for the OIA report to prepare for the arbitration of

the safety and health issue (JA 14).

Finally, the Authority distinguished this case from others where it had

found that a union established a particularized need for information in

order to discharge its representational responsibilities because in those

cases the record established that the union had communicated to the agency

why it needed certain information. In contrast here, the Authority found

that Local 2343 communicated nothing to the Respondent at or near the time

of its information requests to explain why it needed the information developed by the OIA investigation of the correctional officer to

prepare

for or present its grievance over the safety and health issue (JA 16-17).

In conclusion, the Authority held that the record failed to establish that

the Union had communicated a particularized need for the information described in the complaint such that the Respondent's refusal to

furnish

that information violated the Statute. Accordingly, the ULP complaint was

dismissed (JA 18).[7]

STANDARD OF REVIEW

The standard of review of decisions of the Authority is narrow: Authority action shall be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. §§ 7123(c) and 706(2)(A). *Overseas Educ. Ass'n v. FLRA*, 858 F.2d 769, 771-72 (D.C. Cir. 1988); *EEOC v. FLRA*, 744 F.2d 842, 847 (D.C. Cir. 1984), cert. dismissed, 476 U.S. 19 (1986). Under this standard, unless it appears from the Statute or its legislative history that the Authority's construction of its enabling act is not one that Congress would have sanctioned, the Authority's construction should be upheld. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). See also *Fort Stewart Sch. v. FLRA*, 495 U.S. 641 (1990). Further, factual findings of the Authority that are supported by substantial evidence on the record as a whole are conclusive. 5 U.S.C. § 7123(c); *National Treasury Employees Union v. FLRA*, 721 F.2d 1402, 1405 (D.C. Cir. 1983) (*NTEU v. FLRA*). The Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached a different view had the matter been before it *de novo*. See *AFGE Local 2441 v. FLRA*, 864 F.2d 178, 184 (D.C. Cir. 1988) (*AFGE Local 2441*); see also *Peoples Gas Sys., Inc. v. NLRB*, 629 F.2d 35, 42 (D.C. Cir. 1980). Finally, as the Supreme Court has stated, the Authority is entitled to "considerable deference when it exercises its 'special function of applying the general provisions of the [Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983).

SUMMARY OF ARGUMENT

I. Applying the standards first enunciated in this Court's decision in *NLRB v. FLRA*, and further developed in the Authority's *IRS, Kansas City* decision, the Authority properly determined that *Local 2343's* request for data developed in the investigation of Officer Francis was insufficient to establish a particularized need for the information. Under *IRS, Kansas City*, a union requesting information under section 7114(b)(4) of the Statute must inform the

agency employer, with specificity, the uses to which the information will be put and why the information is required in order for the union to adequately discharge its representational functions.

II. In this case, the union's requests for information stated only that it

needed the information to prepare for arbitration of a previously-filed grievance. It is well established that such conclusory statements are insufficient to demonstrate the requisite particularized need.

The Authority's examination of the grievance referenced in the information

request revealed no further grounds for concluding that the Penitentiary was

adequately informed of the union's need for the information. In this regard, the grievance filed by the union, and the agency's response, clearly

indicate that the grievance concerned the safety and health implications of

the Penitentiary's decision to release inmate Baptiste into the general

prison population. The grievance cannot be reasonably construed to concern

subsequent events, including the prisoner abuse allegations against Officer

Francis and his assignment to home duty.

On the other hand, the information requested by the union consisted solely

of the OIA reports and supporting data developed in the investigation into

the alleged prisoner abuse by Officer Francis. Nothing in the record demonstrates that the union ever articulated how these investigations would

be necessary to prepare for the arbitration of the grievance over the safety

and health implications of the Penitentiary's decision to release inmate

Baptiste.

Nor is the need "self-evident" as claimed by the union. The union has neither shown that the need is self-evident nor has it cited authority of a

rationale for the existence of a "self-evident" exception to the requirement

that the union specifically articulate its need for information.

III. The union's arguments in brief provide no other reason why the Authority's decision should not be affirmed. Contrary to the union's suggestions, the decision in this case is consistent with other decisions of

this Court and the Authority. Although the union correctly cites this Court's

decision in *Scott AFB v. FLRA* for the proposition that information may be

necessary even where it does not support the position espoused by the union,

that case fails to advance the union's position here. The basis for the Authority's decision in this case was that the union had failed to meet its

burden of articulating the necessity for the information, not that the

information would fail to support the union's litigation position in arbitration. In any event *Scott AFB v. FLRA* is distinguishable from this case

because as the Court found, the union in *Scott AFB v. FLRA* adequately articulated its particularized need.

Finally, the Authority's particularized need standard does not impose an

undue burden on unions. Contrary to Local 2343's suggestion, the Authority

has never required a union to detail how the specific content of a document

will be used by the union where the content is unknown, nor does it do so

here. The Authority requires only that the union articulate how the information will function in the performance of the union's representational

activities. For example, where a union is representing an employee who is

subject to discipline for misconduct, and it requests data relevant to discipline of other employees, the Authority has found a

particularized need

where the union has stated that it needs to compare disciplinary sanctions

to determine the appropriateness of the penalty imposed on the represented

employee. In such a case, the union need not, and normally does not, know

the specific content of the documents requested, i.e., whether previous

disciplinary actions are more or less harsh than the current case.

The problem for the union in this case was that it offered virtually no

explanation as to why it needed the information. Accordingly, the Authority

properly found that it had not met its burden of articulating its particularized need for the information.

ARGUMENT

THE AUTHORITY PROPERLY CONCLUDED THAT THE AGENCY EMPLOYER DID NOT COMMIT UNFAIR

LABOR PRACTICES WHEN IT REFUSED TO FURNISH THE UNION WITH AN INVESTIGATIVE

REPORT, BECAUSE THE UNION HAD NOT DEMONSTRATED A PARTICULARIZED NEED FOR THE

INFORMATION

I. The particularized need standard

A. Precedent of this Court

In *NLRB v. FLRA*, this Court determined that pursuant to section 7114(b)(4)

(B), unions are entitled to information that is "necessary" -- not merely

relevant -- to subjects within the scope of collective bargaining. 952 F.2d

at 531. Unions can obtain disclosure of such information only if they can

demonstrate a particularized need and no countervailing anti-disclosure interests outweigh the union's need. 952 F.2d at 531-32. NLRB v. FLRA

concerned a union request for predecisional intramanagement communications.

952 F.2d at 525.

In subsequent cases, this Court further developed, clarified, and broadened the concept of "particularized need." In United States Dep't

of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania v. FLRA, 988 F.2d 1267 (D.C. Cir. 1993) (Allenwood Prison Camp v. FLRA), the Court required the union to demonstrate a particularized need for information other than predecisional "intramanagement guidance." The Court concluded that the

Statute does not distinguish between "predecisional, deliberative" data from other sorts of information. 988 F.2d at 1270. The Court found the

necessity requirement of section 7114(b)(4) of the Statute to be "uniform." Id. Further, the Court clarified that it was the union's burden to properly articulate its "particularized need," noting that a "mere assertion that it needs data to process a grievance" does not suffice to guarantee access to data. 988 F.2d at 1271; see also U.S. Dep't of Veterans Affairs v. FLRA, 1 F.3d 19, 23 (D.C. Cir. 1993) (VA

v. FLRA) ("This court's decisions require a showing by the union of 'particularized need[.]'").[8]

B. Authority precedent

On remand from NLRB v. FLRA, the Authority agreed that a union must establish a particularized need as defined by the Court when seeking information that can be characterized as intramanagement guidance.

National

Park Service, National Capital Region, United States Park Police, 48 FLRA

1151 (1993) (National Park Service). In IRS, Kansas City, after noting this

Court's decisions in Allenwood Prison Camp v. FLRA and VA v. FLRA, the Authority determined that the purposes of the Statute would not be served by

establishing different approaches based on the type of information requested

and adopted a particularized need standard for all information requests

regardless of the type of information sought. 50 FLRA at 668-69.

IRS, Kansas City also provided the Authority an opportunity to further explain how the particularized need standard would be applied. The Authority first clarified that "particularized need" referred not to a "heightened level of need" for certain documents, but rather to the specificity required in the union's showing of need in their request for

data under section 7114(b)(4) of the Statute. 50 FLRA at 669 n.11. A particularized need is demonstrated when the union "articulate[s] with specificity, why it needs the requested information, including the uses to

which the union will put the information and the connection between those

uses and the union's representational responsibilities under the Statute."

50 FLRA at 669. The union must show that the information is "required for

the union to adequately represent its members." 50 FLRA at 669-70 (citing

Justice v. FLRA, 991 F.2d at 290).

The burden for articulating a particularized need rests on the union. 50

FLRA at 670. A request for information satisfies this burden only where it

is sufficient to permit an agency to make "a reasoned judgment" as to whether the information is necessary within the scope of section 7114(b)(4)

of the Statute. Id. On the other hand, a request need not be so specific as

to reveal a union's strategies or compromise the identity of potential grievants. 50 FLRA at 670 n. 13.

II. Local 2343 failed to establish and articulate a particularized need for the

OIA investigation concerning Officer Francis' alleged misconduct

A. The acknowledged focus of the union's information request was a grievance alleging that releasing inmate Baptiste into the general prison

population violated the safety and health provisions of the parties' collective bargaining agreement

Both the union's initial request for information (JA 52) and its follow-up

request (JA 54) cite as a justification only that the information was necessary to prepare for a scheduled arbitration hearing. As is well-established, such conclusory statements are insufficient by themselves to

establish a particularized need. See IRS, Kansas City, 50 FLRA at 670.

However, since the request clearly referenced a specific grievance arbitration case, the Authority properly looked beyond the face of the information request and considered the grievance referenced therein.

The union filed a grievance over an alleged violation of the safety and

health provisions of the parties' collective bargaining agreement.

See JA

at 47-49. The grievance describes in detail the events leading up to inmate

Baptiste's release from segregated confinement into the general prison population, specifically his release into the recreation area where he immediately started a fight with another inmate. JA 47-48. The relevant

collective bargaining provision obligates the Penitentiary to minimize the

inherent hazards connected with the supervision of inmates. The grievance

alleges that prison management knew that a fight would develop and thereby

management "force[d] staff into the position of having to fight an inmate

where there was no need." JA 48.

As the Authority found, the grievance did not concern any allegations

against Officer Francis or his assignment to home duty. In that regard, the grievance's sole reference to Officer Francis noted only that as a consequence of the incident resulting from Baptiste's release, one officer was injured and another was placed on home duty.[9] JA 48. However, the grievance does not further discuss the injury, or question the reason for or the propriety of the assignment to home duty. The grievance neither identifies the reason for the home-duty assignment nor questions the propriety of the assignment. Further, as specific remedies the union requested an investigation of all supervisors involved in the incident and the transfer of certain specified supervisors named in the grievance. No remedy was requested with respect to the home-duty assignment. Accordingly, it is evident from the grievance document that the union was challenging only the Penitentiary's determination to release Baptiste from segregated confinement and not the allegations against Officer Francis nor his subsequent assignment to home duty. Moreover, Penitentiary management interpreted the grievance as concerning only the safety and health issue raised by releasing Baptiste from segregated confinement. In its response characterizing the grievance as "concerning health and safety," the Penitentiary addressed only the propriety of Baptiste's release and did not mention the subsequent allegations against Officer Francis. JA 50. When it invoked arbitration, the union stated that the Penitentiary's rejection of the grievance "was not for just and sufficient cause" and that "all supervisors involved should be given adverse action." JA 51. The union did not object to the fact that management's response limited the scope of the grievance to the propriety of Baptiste's release.[10] The record is clear that the grievance concerned only management's determination to release Baptiste from segregated confinement and that neither the subsequent allegations of prisoner abuse against Officer Francis nor the propriety of his assignment to home duty were to be arbitrated.[11] Accordingly, the only need the union articulated for the information requested related to management's decision to release Baptiste from segregated confinement. As we demonstrate below, the union at no time explained why it needed the OIA investigation into Officer Francis' alleged misconduct to prepare for arbitration of the safety and health issue. B. The data requested by the union consisted of the OIA investigation and supporting documents concerning allegations of misconduct on Officer

Francis' part

The most detailed request for information was the union's follow-up request

dated July 23, 1993.[12] There the union specifically requested:

[1] All documentation obtained by the S.I.S. department at USP., Marion,

Ill. in connection with the investigation of Officer Aubrey Francis and the

Baptiste incident.[13]

[2] All reports, documentation and memo's written by everyone who was interviewed by the S.I.S. department at USP., Marion Ill., concerning this

incident.

[3] Any final reports written by the S.I.S. department at USP., Marion,

Ill., concerning this incident.

[4] Any and all reports findings, conclusions, memo's affidavits and all

concerned documents obtained by the Office of Inspection concerning the

investigation of Officer Aubrey Francis.

JA 57 (emphasis added). Each of the paragraphs of the union's request references the incident concerning Officer Francis. It is reasonable therefore

to conclude, as the Penitentiary did, that the union's request was for data

developed in investigating the conduct of Officer Francis. Management's formal

denial of the union's request confirms its understanding. There the Penitentiary stated, "Specifically, you [the union] requested a copy of an

Office of Internal Affairs investigation of Physical Abuse of an Inmate, (subject: Aubrey Francis, Correctional Officer), at USP Marion." [14] JA 58.

Significantly, the union has never claimed that its request was broader than

that. In that regard, the ULP complaint issued by the Authority's General

Counsel states that "AFGE Local 2343 requested the [Penitentiary] to furnish

data pertaining to the Office of Internal Affairs investigation of bargaining

unit employee, Aubrey Francis." JA 42.

C. The union failed to articulate to the Penitentiary how the investigative

reports concerning Officer Francis were required to prepare for arbitration

of the safety and health issue

As discussed above, the record in this case shows that the information requested consisted of OIA reports and related materials arising from the

investigation of Officer Francis. The union's stated purpose in requesting

the information was to prepare for the arbitration of a previously-filed

grievance, which alleged that the Penitentiary violated the safety and

health provisions of the collective bargaining agreement when it released inmate Baptiste from segregated confinement into the general prison population. However, applying the standard first enunciated in IRS, Kansas City, the Authority properly found that the union had not articulated a particularized need for the information requested and therefore, the Penitentiary was not obligated to furnish the information.[15] The union's information requests cite only the general need to prepare for arbitration. As this Court emphasized, bare and conclusory assertions such as a "mere assertion that it needs data to process a grievance" are insufficient to establish particularized need. Allenwood Prison Camp v. FLRA, 988 F.2d at 1271. In following this Court's admonition, the Authority has consistently found that similar assertions do not satisfy the standard. See U.S. Dep't of the Treasury, Internal Revenue Service, Washington, D.C. and U.S. Dep't of the Treasury, Internal Revenue Service, Oklahoma City District, Oklahoma City, Oklahoma, 51 FLRA 1391, 1396 (1996) (IRS, Oklahoma City). Such assertions cannot permit agencies to make reasoned judgments as to their obligations to furnish data under section 7114(b)(4) of the Statute. Further, the union can point to nothing in the record which constitutes a further statement of its need for the information.[16] The union claims (Br. 26), however, that its need for the information was "self-evident," i.e., no further explanation was necessary.[17] The union is mistaken for a number of reasons. First, it was not, in fact, self-evident to Penitentiary management that investigative reports of incidents that occurred on the day Baptiste was released into the general population were necessary for the union's preparation for arbitration of the health and safety grievance. See JA 115 (Penitentiary human resource manager testified that he saw no relation between OIA report and the grievance filed by the union). Second, there is no authority for the proposition that a union is excused from the requirement to articulate its particularized need because such need is "self-evident." To the contrary, in applying the IRS, Kansas City analysis, the Authority has consistently required unions to expressly articulate the need for the information requested. For example, in IRS,

Oklahoma City, the union had grieved an employee's performance appraisal, alleging among other things "sexual discrimination and disparate treatment." 51 FLRA at 1392. The union then requested performance appraisals of other employees in the grievant's work unit, stating that "although the grievant is performing a different job function, it is the position of the union that the aforementioned appraisals are necessary in order to support our allegations." Id. The Authority found the union's request insufficient to establish particularized need, stating that the union should have explained precisely how the requested appraisals would support the claim of disparate treatment. 51 FLRA at 1396. Significantly, the Authority was unpersuaded by the argument that the reasons for the request "should have been reasonably obvious to the [agency.]" Id.; Cf. Internal Revenue Service, Austin District Office, Austin, Texas, 51 FLRA 1166, 1178 (1996) (IRS, Austin) (union established particularized need for disciplinary notices where it expressly stated that it needed to compare actions taken with respect to misconduct similar to that alleged against employee to analyze propriety of proposed action). Further, it is prudent policy for the Authority to require that the union express its need for information rather than rely on the "self-evident" nature of the need in certain circumstances. Judgments as to what is "obvious" or "self-evident" are by their very nature subjective and could well eventuate in charges of arbitrariness in decision making. Moreover, it is unclear under the union's proposed "self-evident" standard just who is to determine what is self-evident -- the union, the agency, the Authority, or the reviewing court of appeals. Although in hindsight one can speculate about ways in which a report concerning the aftermath of Baptiste's release might have touched on matters leading up to Baptiste's release, such speculation cannot be the basis of a particularized need finding. It remains the burden of the union to articulate its need, and it must do so at the time of the request.[18] See Allenwood Prison Camp v. FLRA, 988 F.2d at 1271. Here the union failed to meet that burden.[19] The Authority reasonably determined that: 1) the stated purpose of the

information request was to prepare for arbitration of the union's grievance;

2) the grievance concerned only whether management's decision to release

Baptiste violated the Safety and Health article of the agreement and did not

raise issues concerning Officer Francis' home-duty assignment; and 3) the

union did not articulate with any specificity why it needed the reports to

prepare for arbitration of the safety and health issue. These findings

resulted from the Authority's evaluation of the factual record in this case

and are supported by substantial evidence, i.e., "relevant evidence as a

reasonable mind might accept as adequate to support a conclusion." State of

New York v. Reilly, 969 F.2d 1147, 1150 (D.C. Cir. 1992) (quoting Universal

Camera v. NLRB, 340 U.S. 474, 477 (1951)).[20] From these findings the

Authority reasonably concluded that the union had not established a particularized need for the information and therefore properly

dismissed the

ULP complaint.

III. The union's remaining contentions are without merit

A. This Court's decision in Scott AFB is inapposite

Citing Department of the Air Force, Scott Air Force Base v. FLRA, 104 F.3d

1396 (D.C. Cir. 1997) (Scott AFB v. FLRA), the union argues (Br. 24) that

unions have a right to information that will assist them in evaluating the

desirability of arbitration, including information that does not support

their position. Thus, the union asserts that the Penitentiary's contention

that the information sought would not support the union's grievance is irrelevant. Although the union's statements of the relevant

principles are

essentially accurate, they do not advance the union's position in this case.

Although the Penitentiary may have denied the information request because in

the Penitentiary's view the documents would not support the union's arbitration position, this rationale was not relied upon by the

Authority in

dismissing the ULP complaint. Rather, the Authority's sole basis for dismissing the complaint was that the union had not met its burden of

articulating the necessity of the OIA reports in connection with arbitrating

the safety and health issue.

Nor does Scott AFB v. FLRA support Local 2343's position because the union

in Scott AFB v. FLRA articulated a particularized need for the information

requested and thus met its burden. In *Scott AFB v. FLRA*, the union had filed a grievance over a supervisor's alleged physical assault on a bargaining unit employee, and requested that the employer take certain steps to remedy the situation, including action against the supervisor. 104 F.3d at 1398. The union asked for copies of any disciplinary letter issued to the supervisor over the incident, stating that "we need this information to determine if the requested remedy of disciplinary action was in fact taken and what that action was. Upon review of this information, we may conclude that no further action i[s] warranted in this case." Department of the Air Force, *Scott Air Force Base, Illinois*, 51 FLRA 675, 677 (1995), enforced *Scott AFB v. FLRA* 104 F.3d 1396 (Scott AFB). As this Court found, the union articulated the specific connection between the disciplinary letter requested and preparation for arbitration, and also showed how the information would be used, namely, to determine if management's actions were sufficient to permit the grievance to be withdrawn. *Scott AFB v. FLRA*, 104 F.3d at 1400. Here, by contrast, the union offered virtually no explanation of why it needed the information.

B. The Authority's decision does not place an undue burden on the union

The union contends (Br. 27) that the Authority has imposed an impossible standard because the union could not identify how the OIA reports would be used when the union was not aware of their contents. The union misinterprets the Authority's decision. The Authority has never required that a union specify how the specific content of a document will be used where the content is unknown, nor does it do so here. That is, the Authority does not require that a union predict the content of or likely results to be obtained from the requested information. Rather, the Authority requires only that, as a minimum, the union articulate how the document will be used and why the information is necessary in performing a representational function. Cases like those cited by the union (Br. at 27) demonstrate that a union's projected use of documents can be made clear even though the precise content of the information is unknown. In *IRS, Austin*, the union was representing

an employee against whom adverse action was proposed. The union had requested, in connection with that representation, documentation of previous discipline taken against other employees in the Austin District Office. The Authority found that the union met the particularized need requirement because it had expressly explained why it needs the information (to ascertain whether there was disparate treatment of an employee), the uses to which the information will be put (to determine the appropriateness of the proposed penalty); and the connection between the uses and the Union's representational responsibilities under the Statute (to represent an employee against whom an adverse action was proposed). 51 FLRA at 1178. The union's use for the information was sufficiently articulated regardless of the specific content of requested information. If, for example, the documents showed less harsh sanctions for offenses similar to that in its current case, the union could argue that the proposed punishment was too severe. If, on the other hand, the documents showed the opposite, the union would know that such a defense would be inappropriate.[21] Similarly, in *Scott AFB v. FLRA*, although the union did not know the content of the disciplinary letter requested, it nonetheless was able to articulate how the letter was necessary, irrespective of its specific content, in determining whether to pursue arbitration. See *Scott AFB*, 51 FLRA at 682-84.

Further, the union's attempts to distinguish *IRS*, *Austin* and similar cases on the ground that in those cases the union was aware of "the general form and content" of the documents requested are unavailing. For here, as in those cases, the union was aware of the "general form and content" of the requested OIA reports. Local 2343 knew, at a minimum, the reports would contain information about the charges against Officer Francis and the findings of the investigation. See *JA 97*. Further, the union might have suspected that the reports contained information concerning events leading up to Baptiste's release. See *JA 35* (ALJ decision). But what the union failed to do was inform the Penitentiary as to what use the general sort of information it suspected was in the documents would be in its preparation

for arbitration. The union's bare assertion that it was needed to "prepare for arbitration" was not enough and properly found insufficient by the Authority.

CONCLUSION

Local 2343's petition for review should be denied.

Respectfully submitted.

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DATE: January 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2343,
Petitioner

v.

No. 97-1355

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

CERTIFICATE OF SERVICE

I certify that copies of the Brief of The Federal Labor Relations Authority have been served this day, by mail, upon the following:

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January 21, 1998

I certify that the Brief of the Federal Labor Relations Authority does not exceed 12,500 words, the maximum amount allowed under Circuit Rule 28(d).

James F. Blandford
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January 21, 1998

§ 7105. Powers and duties of the Authority

* * * * *

(a)(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority-

* * * * *

(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

* * * * *

§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall

affect the authority of any management official of any agency-
(1) to determine the mission, budget, organization, number of employees, and

internal security practices of the agency; and

(2) in accordance with applicable laws-

(A) to hire, assign, direct, layoff, and retain employees in the agency, or

to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out,

and to determine the personnel by which agency operations shall be

conducted;
(C) with respect to filling positions, to make selections for appointments from-
(i) among properly ranked and certified candidates for promotion; or
(ii) any other appropriate source; and
(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.
(b) Nothing in this section shall preclude any agency and any labor organization from negotiating-
(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;
(2) procedures which management officials of the agency will observe in exercising any authority under this section; or
(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

7114. Representation rights and duties

* * * * *

(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation-

* * * * *

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data-
(A) which is normally maintained by the agency in the regular course of business;
(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and
(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.
(c)(1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency. § 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice

for an agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

§ 7118. Prevention of unfair labor practices

(a)(1) If any agency or labor organization is charged by any person with

having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served

upon the agency or labor organization a complaint. In any case in which the

General Counsel does not issue a complaint because the charge fails to state

an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

(2) Any complaint under paragraph (1) of this subsection shall contain a

notice-

(A) of the charge;

(B) that a hearing will be held before the Authority (or any member thereof

or before an individual employed by the authority and designated for such

purpose); and

(C) of the time and place fixed for the hearing.

(3) The labor organization or agency involved shall have the right to file

an answer to the original and any amended complaint and to appear in person

or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

(4)(A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in

subparagraph (A) of this paragraph by reason of-

(i) any failure of the agency or labor organization against which the charge

is made to perform a duty owed to the person, or

(ii) any concealment which prevented discovery of the alleged unfair labor

practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was

filed during the 6-month period beginning on the day of the discovery by the

person of the alleged unfair labor practice.

(5) The General Counsel may prescribe regulations providing for informal

methods by which the alleged unfair labor practice may be resolved prior to

the issuance of a complaint.

(6) The Authority (or any member thereof or any individual employed by the

Authority and designated for such purpose) shall conduct a hearing on the

complaint not earlier than 5 days after the date on which the complaint is

served. In the discretion of the individual or individuals conducting the

hearing, any person involved may be allowed to intervene in the hearing and

to present testimony. Any such hearing shall, to the extent practicable, be

conducted in accordance with the provisions of subchapter II of chapter 5 of

this title, except that the parties shall not be bound by rules of evidence,

whether statutory, common law, or adopted by a court. A transcript shall be

kept of the hearing. After such a hearing the Authority, in its discretion,

may upon notice receive further evidence or hear argument.

(7) If the Authority (or any member thereof or any individual employed by

the Authority and designated for such purpose) determines after any hearing

on a complaint under paragraph (5) of this subsection that the preponderance

of the evidence received demonstrates that the agency or labor organization

named in the complaint has engaged in or

§ 7118. Prevention of unfair labor practices (Continued):

is engaging in an unfair labor practice, then the individual or individuals

conducting the hearing shall state in writing their findings of fact and shall

issue and cause to be served on the agency or labor organization an order-

(A) to cease and desist from any such unfair labor practice in which the

agency or labor organization is engaged;

(B) requiring the parties to renegotiate a collective bargaining agreement

in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

(C) requiring reinstatement of an employee with backpay in accordance with

section 5596 of this title; or

(D) including any combination of the actions described in subparagraphs (A)

through (C) of this paragraph or such other action as will carry out the

purpose of this chapter.

If any such order requires reinstatement of any employee with backpay, backpay

may be required of the agency (as provided in section 5596 of this title) or of

the labor organization, as the case may be, which is found to have engaged in

the unfair labor practice involved.

(8) If the individual or individuals conducting the hearing determine that

the preponderance of the evidence received fails to demonstrate that the

agency or labor organization named in the complaint has engaged in or is

engaging in an unfair labor practice, the individual or individuals shall

state in writing their findings of fact and shall issue an order dismissing

the complaint.

(b) In connection with any matter before the Authority in any proceeding

under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office

of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by

the Office of Personnel Management.

§ 7123. Judicial review; enforcement

(a) Any person aggrieved by any final order of the Authority other than an order under-

(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

(2) section 7112 of this title (involving an appropriate unit determination), may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a

whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that

the additional evidence is material and that there were reasonable grounds

for the failure to adduce the evidence in the hearing before the Authority,

or its designee, the court may order the additional evidence to be taken

before the Authority, or its designee, and to be made a part of the record.

The Authority may modify its findings as to the facts, or make new findings

by reason of additional evidence so taken and filed. The Authority shall

file its modified or new findings, which, with respect to questions of fact,

if supported by substantial evidence on the record considered as a whole,

shall be conclusive. The Authority shall file its recommendations, if any,

for the modification or setting aside of its original order. Upon the filing

of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the

United States upon writ of certiorari or certification as provided in section 1254 of title 28.

(d) The Authority may, upon issuance of a complaint as provided in section

7118 of this title charging that any person has engaged in or is engaging in

an unfair labor practice,

§ 7123. Judicial review; enforcement (Continued):

petition any United States district court within any district in which the

unfair labor practice in question is alleged to have occurred or in which such

person resides or transacts business for appropriate temporary relief (including

a restraining order). Upon the filing of the petition, the court shall cause

notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining

order) it considers just and proper. A court shall not grant any temporary

relief under this section if it would interfere with the ability of the agency

to carry out its essential functions or if the Authority fails to establish

probable cause that an unfair labor practice is being committed.

[1] Pertinent statutory provisions are set forth in Addendum A to this brief.

[2] "JA" references are to the Joint Appendix filed with the union's brief.

[3] Placement on home duty meant that the officer was restricted to his home during normal work hours, with full pay, while the investigation took place. No disciplinary action against the officer followed the investigation.

[4] The arbitration hearing scheduled for August 4 and 5, 1993 was apparently postponed (JA 7 n.5). Nothing in the record indicates that it has ever been held.

[5] The Penitentiary referred a subsequent request dated August 19, 1993, to the OIA (JA 61). OIA responded by informing the union that the request must be processed under the Freedom of Information Act (FOIA) (JA 63). Local 2343 filed a FOIA request. The record does not contain any response to the FOIA request.

[6] Although the Judge recommended dismissal of the complaint on these grounds, he also expressly rejected the Penitentiary's arguments that it need not disclose the information because the union's grievance was not arbitrable and that disclosure was barred by the FOIA (JA 33-34). In light of the Authority's disposition of the case, these matters were not addressed further and are not before the Court (JA 18 n.14).

[7] Member Wasserman dissented, stating that he would have found that the union had established a particularized need for the requested information (JA 19-26).

[8] The Fifth Circuit has also adopted the "particularized need" approach. *U.S. Dep't of Justice v. FLRA*, 991 F.2d 285, 290-91 and n.3 (5th Cir. 1993) (*Justice v. FLRA*).

[9] Though the grievance does not identify Officer Francis as the employee placed on home duty, it is reasonable to assume that he was the officer to whom the union was referring.

[10] Thus the union's contention (Br. at 22) that the Penitentiary was aware that the grievance concerned not only Baptiste's release into the prison population but also "the events that occurred in the aftermath of that decision,

including the placement of Officer Francis on home duty[,]" is belied by the record. Further, there is nothing in the record to indicate that after the Penitentiary's response the union attempted to clarify the scope of the grievance.

[11] At the hearing before the ALJ, the union representative testified that there were two issues in the grievance, namely the safety and health issue, and the fact that Officer Francis was put on home-duty status (JA 93). However, even if that was the union's subjective intent, such an intent was neither conveyed during the processing of the grievance nor apparent to the Penitentiary. The Penitentiary properly relied on the presentation of the grievance provided by the union at the time the grievance was filed. As the Authority has properly held, an information request must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed. Therefore, reasons supporting release offered for the first time at the ULP hearing and unavailable to the agency at the time of the request are not considered in the Authority's analysis. See SSA, Dallas, 51 FLRA at 1223-24.

[12] The union's initial request (JA 52), to which the Penitentiary never responded, was for "notes, memoranda, documentation, etc. of any internal investigation conducted regarding Etienne Baptiste and the incident which occurred on February 19, 1993."

[13] "S.I.S." apparently stands for "Special Investigative Supervisor" (JA 86).

[14] Although the Penitentiary's response referred to one OIA report, there were actually two reports generated from the investigation into Officer Francis' misconduct. The second report arose from an allegation that another officer gave a false statement during the investigation of Officer Francis. JA 34-35.

As we discuss below, however, the union's request was insufficient with respect to both reports.

[15] Having found that Officer Francis' assignment to home duty was not an issue in the grievance to be arbitrated, the Authority did not consider whether the union's request would have satisfied the particularized need test if this had been an issue. JA 13.

[16] The union vice-president's hearing testimony (JA 97) as to the union's need is unavailing. He testified that "We need to know exactly who was charged. We need to know why they were charged. . . . We need to know why Mr. Francis was put on home duty status, why they decided to bring him back." Reasons presented for the first time at a ULP hearing may not be relied upon to establish particularized need. See SSA, Dallas, 51 FLRA at 1223-24. Additionally, the reasons the vice president articulated would be relevant only if the grievance to be arbitrated concerned Officer Francis' home-duty assignment.

[17] The union's claim with respect to the self-evident nature of the union's need is somewhat ambiguous. Because it had previously contended (Br. 22) that the grievance included Officer Francis' situation, the union may be asserting that the need for the reports under that broader interpretation of the grievance is "self-evident." However, as noted in § II.A., supra, the Authority reasonably interpreted the grievance to concern only the safety and health issue.

[18] The union criticizes (Br. 22 n.3) the Authority's reliance on the union's failure to communicate its need for the information by pointing out that the Penitentiary never asked for clarification of the request. However, when the union was informed by the Penitentiary (JA 58) that the union had not provided a particularized need, the union could have resubmitted its request with a more detailed explanation of its particularized need. Indeed, as the Authority noted (JA 18-19 n.13), nothing prevents the union from clarifying its request for information.

[19] As a result of his in camera inspection, the ALJ found that the second report did contain information which might have shed light on the circumstances leading up to Baptiste's release, specifically possible motives for his release and the extent to which management was aware that Baptiste would cause trouble upon release. JA 36. But as the Authority carefully explained, these findings are irrelevant because the union did not inform the Penitentiary why it needed the documents.

[20] Further, even if evidence supports both sides of an issue, a reviewing

court will sustain an administrative agency "if a reasonable person could come to either conclusion on the evidence." State of New York, 969 F.2d at 1150.

Factual findings of the Authority that are supported by substantial evidence on the record as a whole are conclusive. 5 U.S.C. § 7123(c); NTEU v. FLRA, 721

F.2d at 1405. The Authority is entitled to have reasonable inferences it draws from its findings of fact not be displaced, even if the court might have reached

a different view had the matter been before it de novo. See AFGE Local 2441, 864 F.2d at 184.

[21] The Authority applied the same analysis in U.S. Dep't of Justice, Immigration and Naturalization Serv., Northern Region, Twin Cities, Minnesota, 51 FLRA 1467 (1996), reconsideration denied, 52 FLRA 1323 (1997), petition for review filed, No. 97-1388 (D.C. Cir., oral argument scheduled March 12, 1998), finding the union had articulated a particularized need for disciplinary records to be used to determine the appropriateness of a proposed disciplinary sanction.

In that case, the union advised the agency "that the disciplinary records had been requested to ensure that [a represented employee] received fair and equitable treatment as compared with other employees who had committed similar offenses." 51 FLRA at 1470.