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SACRAMENTO AIR LOGISTICS CENTER

MCCLELLAN AIR FORCE BASE, CALIFORNIA

Respondent
and

AMERICAN FEDERATION OF

GOVERNMENT EMPLOYEES,

LOCAL 1857, AFL-CIO

Charging Party

Case Nos. SF-CA-20247

SF-CA-20536

(49 FLRA 1224)

Jennifer J. Kelley Counsel for the Respondent Stefanie Arthur Counsel for the General Counsel Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION ON REMAND

Statement of the Case

On June 10, 1994, the Authority remanded the instant consolidated unfair labor practice case to the undersigned in order to provide the parties an opportunity to address whether the Union has established a "particularized need" for a document, now entitled the Disciplinary Litigation Advice Form, which the Union had requested on three separate occasions in 1992 to represent a unit employee in connection with the employee's reprimand. The Authority found it appropriate to remand the case because, in National Park Service, National Capitol Region, United States Park Police, 48 FLRA 1151 (1993) (National Park Service), after issuance of my recommended decision herein, the Authority adopted the D.C. Circuit's decision in National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (NLRB v. FLRA), stating that "an agency is not obligated to provide a union with requested documents containing advice, guidance, counsel, or training materials provided for management

officials under section 7114(b)(4) of the Statute unless the union demonstrates a particularized need, as set forth by the court [in NLRB v. FLRA], for such information." The Authority concluded that in light of the nature of the requested information--a document that was prepared to provide managerial guidance with regard to an appropriate penalty--the case should be analyzed under the framework established in NLRB v. FLRA, and that the parties should be afforded an opportunity to address whether the Disciplinary Litigation Advice Form is disclosable under the Authority's current National Park Service test.

On remand, as the result of agreements reached during a conference call with the parties, the undersigned issued an Order dated September 12, 1994, stating that (1) no further hearing would be required; (2) the parties would submit as additional evidence the applicable collective bargaining agreement as a joint exhibit; and (3) the parties would be given an opportunity to submit additional argument addressing the issues posed by the Authority's remand. Thereafter, the applicable collective bargaining agreement was received and designated Joint Exhibit 2, and both parties submitted briefs dated October 28, 1994, addressing the issue(s) on remand, which have been carefully considered.

Findings of Fact

The underlying facts are set forth in my initial decision and the Authority's decision. See 49 FLRA at 1225-28; 1234-43. They will be repeated here only to the extent necessary to frame the issue(s) on remand.

On January 2, 1992, the Respondent issued a Notice of Proposed Reprimand to an employee--an active Union Steward--for an alleged 15 minutes AWOL in arriving late to work on November 19, 1991. On January 3, 1992, the employee's Union representative submitted a request for information, including the "Checklist for Disciplinary Action/ERS Disciplinary Action Advice Form for the subject notice of proposed reprimand," for the stated purpose of gaining a full and proper understanding of the proposed reprimand and whether the proper procedures had been followed in proposing the reprimand. Under the applicable Air Force Regulations, specifically AFR 40-750, the employee and his representative have the right to make an oral and/or written reply to the proposed discipline, and from 1988 to 1991 the information contained in that form--such as the names of the proposing and deciding officials, the dates of the offense, procedural actions taken, and the required written consideration by the proposing and deciding officials of the factors to be used in selecting the appropriate penalty

under AFR 40-750--had been turned over to an employee's Union representative upon request. On this occasion, however, the Respondent refused to provide the requested checklist for disciplinary action on the grounds that it was an attorney work product and not for release. Accordingly, the employee and his Union representative did not have the requested information in their possession before making their oral reply to the proposed reprimand.

Thereafter, on March 13, 1992, the Respondent issued its final Decision to Reprimand the employee for an AWOL on November 19, 1991, and a grievance was filed over the reprimand alleging that the employee was not tardy and that the decision to reprimand was based on anti-union animus. On March 18, 1992, the Union requested the same document concerning the Respondent's decision to reprimand the employee, stating that it needed the document for "full and proper understanding of the decision to reprimand" and to "determine if procedures used to substantiate the decision to reprimand were in accordance with all applicable laws, rules, and regulations." This time the Respondent replied that the requested form was no longer used and therefore was unavailable. On April 9, 1992, the Union requested, for the same reasons, "the form(s) used in lieu of the Checklist for Disciplinary Action/ERS Disciplinary Action Advice Form." The Respondent again refused, stating that if such a form existed, it "would be an internal management document not used for the purpose of processing a grievance."

The record indicates, as the Authority found, that the new "Disciplinary Litigation Advice Form," which replaced the "Checklist for Disciplinary Action/ERS Disciplinary Action Advice Form," requires the proposing and deciding officials to address virtually the same questions as were contained in the prior forms regarding the factors considered in choosing the appropriate penalty. There are differences, however. Thus, the Disciplinary Litigation Advice Form contains a prefatory paragraph which declares that it is an attorney work product "prepared . . . in direct or indirect anticipation of litigation[]" and "not subject to release or discovery" under the Freedom of Information Act. It also differs from the earlier forms by calling for the disciplining officials to "offer any other opinions you may have on the subject." Unlike the earlier forms, the Disciplinary Litigation Advice Form is not kept in the employee's disciplinary case file or official personnel folder, and is not used as a "statement of management reasoning as to the appropriateness of the penalty imposed . . . ." Instead, a short "blurb" is prepared and used as such a statement.[(1)] However, if a grievance or appeal of the disciplinary action is subsequently filed, the form is forwarded to the Staff Judge Advocate for use during litigation but, according to the Respondent, is still not releasable to the Union under these circumstances.[(2)]

The record, as supplemented on remand by the Master Labor Agreement (MLA) between the Respondent and the Union, further indicates that the parties in Article 5 of the MLA entitled "DISCIPLINE," have set forth (in Sec. 5.01a) "the criteria and comprehensive procedures by which the Employer shall impose discipline [defined to include reprimands] upon employees of the bargaining unit." The parties further agreed (in Sec. 5.06 entitled "WRITTEN REPRIMANDS") that "the Employer shall, in accordance with Section 5.04 above, prepare and serve to the employee a proposed notice of such actions stating in detail the reasons for the proposed action," and that "[t]he employee may respond orally or in writing or both to the supervisor designated to hear the reply . . . ."[(3)] Also in Section 5.06, the parties agreed that within 21 days after receipt of the disciplinary action, the affected employee may contest the action by filing a written grievance under step 2 of the parties' negotiated grievance procedure. That procedure, embodied in Article 6 of the MLA entitled "GRIEVANCE PROCEDURE," provides in Section 6.01 ("SCOPE AND COVERAGE"):

This Article shall constitute the sole and exclusive procedure available to the Employer, the Union, and employees of the bargaining unit for the resolution of grievances subject to the control of the Employer applicable to any matter involving the interpretation, application, or violation of this Agreement or local supplements thereto, any matter involving working conditions, or any matter involving the interpretation and application of policies, regulations, and practices of the Air Force, AFLC, and subordinate AFLC activities not specifically covered by this Agreement.

Positions of the Parties on Remand

As previously indicated, the parties on remand were given the opportunity to submit their positions regarding whether the Union has a "particularized need" for the requested information contained in the Disciplinary Litigation Advice Form. Those positions are set forth below.

A. The General Counsel's Position

According to the General Counsel, the Respondent is required by AFR 40-750 to follow certain procedures in deciding to propose discipline and to issue the final decision; the form requested by the Union is Respondent's procedure for insuring compliance with the regulation by requiring the supervisor to analyze specific factors in considering whether and how severely to recommend discipline for an employee; and the regulation requires the Respondent to furnish a copy of the form to the employee and his/her representative. The regulation also provides that an employee proposed for discipline has the right to an oral and written

reply, at which time the reasoning of the supervisor in proposing the discipline is subject to challenge before the deciding official takes final action. If the employee is denied a copy of the requested form, as in this case, the Respondent thereby has failed to comply with the procedures of AFR 40-750. Under Articles 5 and 6 of the parties' negotiated agreement, an employee has the right to grieve discipline and raise the Respondent's failure to comply with the regulation or to properly consider the factors identified in the regula-tion in deciding whether and how severely to discipline the employee. Since the Union has the right to challenge the Respondent's failure to comply with the regulation, the Union has a right to the documents which demonstrate whether the Respondent has complied with the regulation's requirements.

The General Counsel asserts that this case is similar to National Park Service, in which the parties' agreement gave the union a right to supervisory recommendations concerning disciplinary actions taken against two employees, documents which were in the employees' files. Here, AFR 40-750 gives the employee the right to the supervisor's reasoning in proposing disciplinary action rather than the parties' agreement, but the General Counsel asserts that the result here should be the same as in National Park Service.

B. Respondent's Position

Respondent contends that the Union has no particularized need for the requested information under either of the examples identified by the D.C. Circuit in National Labor Relations Board v. FLRA, 952 F.2d 523 (D.C. Cir. 1992) (NLRB v. FLRA) and adopted by the Authority in National Park Service.

With respect to the first example, the Respondent asserts that the Union has no grievable complaint covering the requested pre-decisional deliberations. In this regard, the Respondent claims that neither the parties' agreement nor any law, rule or regulation establishes a procedure which imposes a duty on the Respondent to collect or maintain the information found in the requested form or to provide the Union with the information thus collected. Respondent further notes that the parties' agreement excludes proposed reprimands from the grievance procedure and thus asserts that the Union has no grievable claim for the document at that stage.

Respondent further argues that the requested form is not maintained in the employee's disciplinary case file or official personnel folder; is

not used as a statement of reasoning concerning the appropriateness of the penalty imposed, but that a "blurb" is prepared for that purpose; and that there is no evidence that the supervisors' deliberations contained in the form are considered by the agency or used to support the disciplinary action taken.

Concerning the second example identified in NLRB v. FLRA, the Respondent recognizes that disclosure might be warranted if the parties' agreement or existing practices make it clear that the requested pre-decisional materials are used to determine subsequent disciplinary action. Here, however, the Respondent asserts that nothing in the record suggests that the form is a confirming memo or is used to determine whether or not to take any disciplinary action, and that there is no existing agreement or practice concerning disclosure of the form.

Finally, with regard to "countervailing interests," the Respondent states that its prior submissions demonstrate management's anti-disclosure interests in preserving the confidentiality of its pre-decisional deliberations.[(4)]

Discussion and Conclusions

In remanding the instant case to the undersigned, the Authority concluded that the nature of the requested information--a document which was prepared to provide managerial guidance with regard to an appropriate penalty--required analysis under the framework established by the D.C. Circuit in NLRB v. FLRA and adopted by the Authority in National Park Service. As the Authority observed in remanding this case:

In National Park Service, we noted that the court in NLRB v. FLRA set forth two examples of instances where a union could meet the standard. In particular, the court stated that a union might establish a particularized need for information involving managerial guidance, advice, counsel, or training "where the union has a grievable complaint covering the information." 952 F.2d at 532 (Emphasis omitted). As an example of such a demon-stration, the court posited a situation where a statute or a bargaining agreement "may impose a duty on the agency regarding predecisional deliberation, and the duty may then ground a grievable claim of right in the employee or union." Id. at 532-33. In such a case the agency's "recommendations should normally be disclosed to the union, assuming the union could grieve the agency's failure to follow the procedure." Id. at 533. The court also stated that particularized need for information could be established "when the disputed document creates a grievable action." Id. In this connection, the court stated that disclosure might be warranted if "the parties' agreement or existing practices make it clear" that requested predecisional materials are used "to determine subsequent disciplinary action . . . ." Id. Conversely, the court stated that "where the union has no grievable complaint covering information on 'guidance,' 'advice,' 'counsel,' or 'training,' § 7114(b)(4) normally will not require disclosure." Id.

49 FLRA at 1229.

With respect to the first example of a particularized need set forth above, the General Counsel asserts that the Air Force regulation governing disciplinary matters specifically provides that the pre-decisional documentation requested by the Union here must be disclosed to the employee and his/her Union or other representative, and that the parties' agreement permits the filing of grievances over management's failure to abide by its own regulations. Therefore, the General Counsel contends, the Union has a particularized need for the Disciplinary Litigation Advice Form at issue in this case. For the reasons set forth below, I agree.

As quoted and described at length in my initial decision (49 FLRA at 1234-38), Air Force Regulation (AFR) 40-750, which governs disciplinary and adverse actions throughout the Air Force and covers the Respondent and its employees involved herein, specifically provides for certain procedures to be followed when discipline--defined to include written repri-mands--is proposed. Thus, the supervisor proposing such action must prepare a comprehensive written justification (¶22) which includes an analysis of enumerated factors that the Air Force has identified in the regulation as relevant in the selection of an appropriate penalty (¶34), and all material relied on to support the reasons for the proposed action must be furnished to the employee and his/her representative (¶27). From 1988 through 1991, as I have previously found (49 FLRA at 1238-39), the material that management had furnished under the regulation uniformly included a copy of the written form prepared by the supervisor proposing the discipline, and the information contained in that form was virtually identical to the information included in the differently named form currently in use. Such information is clearly necessary to enable the employee and his/her representative to prepare an oral and/or written reply to the proposed discipline, a right specifically embodied in AFR 40-750 as part of the process whereby the deciding official determines whether to impose discipline and, if so, what the appropriate penalty should be. While it is true that a grievance may be filed under the parties' negotiated grievance procedure only after a final decision has been made on the proposed action and a final notice of discipline has been issued (Jt. Exh. 2 at Art. 5.06), it is equally clear that the failure to follow the procedures of AFR 40-750 at any stage in the process may be challenged through the negotiated grievance procedure (Jt. Exh. 2 at Art. 6.01). Indeed, even if the parties' agreement did not cover grievances over "the interpretation and application of policies, regulations, and practices of the Air Force," the Respondent's failure to comply with AFR 40-750 would have been actionable because "[i]t is a familiar rule of administrative law that an agency must abide by its own regulations." Fort Stewart Schools v. FLRA, 495 U.S. 641, 654 (1990), citing Vitarelli v. Seaton, 359 U.S. 535 (1959) and Service v. Dulles, 354 U.S. 363 (1957). See also U.S. Department of Defense, Office of Dependents Schools and Overseas Education Association, 45 FLRA 1411, 1420 (1992) and U.S. Department of Defense, Army and Air Force Exchange Service and American Federation of Government Employees, 45 FLRA 674, 690 (1992).

Based upon all of the foregoing, I conclude that the Union had the right to receive the requested information under the applicable Air Force regulations and that such right was enforceable through the parties' negotiated grievance procedure.[(5)] Accordingly, I further conclude that the Union had a particularized need for the requested information within the meaning of the D.C. Circuit's first example in NLRB v. FLRA as adopted by the Authority in National Park Service. That is, I conclude that the Union had a "grievable complaint covering the information."

In reaching this conclusion, I reject the Respondent's specific arguments against disclosure. Thus, inasmuch as the Air Force regulation governing discipline and adverse actions requires any proposed discipline to be supported by a written justification which specifically addresses a number of factors and requires management to turn such materials over to the affected employee and his/her representative, I reject the Respondent's assertion (Br. on remand at 2) that "[n]either the parties' . . . agreement, nor any . . . regulation establishes a procedure which imposes a duty on the [Respondent] to collect or maintain the information found in the Disciplinary Litigation Advice Form or to provide the Union with [such] information . . . ." Moreover, while the Respondent is correct that the parties' agreement excludes proposed reprimands from their negotiated grievance procedure, it does not follow that the Union has no grievable complaint for the requested document at that stage. Thus, it is entirely consistent to require employees to wait until final disciplinary action has been taken against them before filing grievances, given that proposed disciplinary action may never become final, and yet to permit them to file grievances over the failure to furnish necessary information concerning the proposed discipline, where such failure to comply with agency regulations creates an immediate harm to the employees.(6) In any event, once final disciplinary action is taken against a bargaining unit employee, as here, and the matter therefore becomes grievable, the Respondent's failure to provide information required by the regulation at an earlier stage in the process would also become grievable and might result in the rescission of the discipline imposed on the employee. Otherwise, an employee's right under the Air Force regulation to reply orally and in writing to the proposed discipline would be rendered virtually meaningless, since the affected employee and his/her representative would be unable to rebut the supervisor's specific reasons for proposing discipline and would thereby be denied any real opportunity to influence the Respondent's deciding official.

Similarly, I reject the Respondent's contention that the Union has no particularized need for the requested document because it is not maintained in the employee's disciplinary case file or official personnel folder and is not used as the statement of reasons supporting the appropriateness of the penalty recommended or imposed. The record reflects that the Disciplinary Litigation Advice Form is not kept in the applicable personnel folder as its predecessor was, and that the form itself is not used as the statement of reasons for imposing discipline because a short, generalized "blurb" is prepared for that purpose. However, the record further reflects that once the affected employee files an appeal or a grievance challenging the disciplinary action taken, the Disciplinary Litigation Advice Form is included along with the rest of the disciplinary file forwarded to the official responsible for defending the Respondent's final decision to impose discipline. Moreover, while the "blurb" is used by the Respondent as a statement of reasons for imposing discipline if no appeal or grievance is filed by the employee or his/her representative, it is no longer used for that purpose once the Respondent's action becomes the subject of litigation. In these circumstances, I attach no significance to Respondent's distinctions.

Finally, I have carefully considered whether Respondent has any countervailing interests against disclosure and, if so, whether they outweigh the Union's need for the requested information. Respondent's brief on remand (at p.5) does not identify any countervailing interests, but refers to its prior briefs regarding its need to preserve the confidentiality of pre-decisional deliberations. The reference to prior briefs cannot include the Respondent's brief in support of its exceptions to my recommended decision, because countervailing interests simply were not raised in that document. The only reference I have been able to discover is in the Respondent's brief to the Administrative Law Judge in which certain interests against disclosure are noted concerning the argument that the requested document constituted an attorney work product. Since I had previously rejected the assertion that the form at issue was exempt from disclosure as an attorney work product, the Respondent was ill advised to rely upon a few conclusionary sentences in that context when given the opportunity on remand to address that issue. In any event, for the reasons stated below, I find the Respondent's stated interests against disclosure to be unpersuasive.

The claim that disclosure of the Disciplinary Litigation Advice Form would have a chilling effect on the disciplinary process because supervisors might be reluctant to candidly state their thoughts, even if true, is beside the point. Thus, the controlling Air Force regulation requires complete and candid statements from supervisors in support of their recommendations for disciplinary action, and further provides that such supporting material be furnished to the affected employee and his/her representative. Accordingly, there is no expectation of confidentiality when a supervisor recommends that disciplinary action should be taken. Indeed, the nature of the proposal is such that the supervisor would want to make the strongest case possible for the action being recommended.(7)

Similarly, the Respondent's assertion that the form will not be used in the future if disclosure is required again misses the mark. That is, the applicable Air Force regulation requires a supervisor to fully support any recommendation for the imposition of disciplinary action and to furnish such supporting materials to the affected employee. Accordingly, the Respondent simply is not at liberty to recommend or take disciplinary action without complying fully with those procedures. If the Respondent is merely suggesting that the Disciplinary Litigation Advice Form which it created and is currently using will be modified in the future as a consequence of the required disclosure, the decision to modify the form is within the Respondent's discretion as long as the form it adopts is in conformance with the requirements of AFR 40-750.(8)

In view of the foregoing, I conclude that the Union has a particularized need for the requested information as sanitized. It would provide the Union a fair opportunity on behalf of the affected employee to respond to the alleged factors considered by the proposing official before the deciding official takes final action and, in processing a subsequent grievance, the Union would be able to contest the weight given to those factors in the Respondent's final decision. I further conclude that the requested information must be furnished to the employee and his representative under AFR 40-750 (and alternatively under the parties' agreement), and that the failure to do so is grievable under the parties' negotiated grievance procedure. Finally, I conclude that the Respondent has failed to demonstrate any countervailing interests which would make disclosure of the requested information inappropriate in this case. Therefore, as the Union has a grievable complaint covering the information under the court's first example of particularized need in NLRB v. FLRA, I recommend that the Authority adopt the order, previously recommended in this case, 49 FLRA at 1250-1252.(9)

Issued, Washington, DC, June 28, 1995

GARVIN LEE OLIVER

Administrative Law Judge

1. It is undisputed, as I have previously found, that the "blurb" would not satisfy the Union's request for information in this case.

2. As previously noted by the Authority (49 FLRA at 1226-27 n.3) and the undersigned (49 FLRA at 1237), however, Paragraph 27 of AFR 40-750 provides that management is required to assemble the material

supporting the imposition of discipline and to make the file available to the employee. It further provides that since "all supporting material must be open to review by the employee [or] the employee's representative," any material which cannot be disclosed to them "cannot be used to support reasons for the action."

3. Article 5, Section 5.04, entitled "NOTICES OF PROPOSED ACTIONS AND NOTICES OF FINAL DECISIONS," provides generally that all such notices shall be served on the affected employees in duplicate (so the Union can have one if they desire), and further provides that such notices shall advise the employees of their rights to reply and in what form, and that final decisions shall advise the employees of their rights to appeal or grieve the action taken.

4. Respondent's exceptions to the Authority which resulted in the instant remand did not address management's counter-vailing interests against disclosure. However, in its initial brief to the undersigned, the Respondent claimed that disclosure of the form would have a "chilling effect" on the disciplinary process because the proposing and deciding officials "arguably" would not be candid in their thoughts if they knew that the information would be disclosed to the Union; and that if the Respondent is required to disclose the document, it will no longer be used and thus directly affect the efficiency of litigating disciplinary actions.

5. Alternatively, although not relied upon by the General Counsel, I conclude that under Article 5, Sec. 5.06a of the parties' MLA, an employee is entitled to a proposed notice of reprimand which "stat[es] in detail the reasons for the proposed action." Accordingly, as I interpret the parties' agreement within the scope of my authority to do so, see Internal Revenue Service, Washington, D.C., 47 FLRA 1091, 1103 (1993), the Disciplinary Litigation Advice Form should be disclosed on request of the employee or his/her Union representative because that is the only detailed written expression of the supervisor's reasons for recommending that the employee be issued a written reprimand. Since the parties' negotiated grievance procedure (Article 6.01) permits a grievance to be filed over "any matter involving the . . . violation of this Agreement," I find that the Respondent's denial of the Union's request for the information--a violation of Article 5, Sec. 5.06a--is within the scope of the parties' negotiated grievance procedure.

6. Indeed, as previously noted (see n.5), Sec. 5.06a of the parties' MLA specifically provides that detailed reasons for the proposed discipline be furnished to the employee and his/her representative, and subsequently provides in Sec. 5.06f that the disciplinary action may be grieved within 21 days after such action has been taken. Accordingly, the parties themselves recognized that there were two separate but related rights involved: the employee's right to a detailed statement of reasons for the proposed written reprimand, and the employee's right to grieve the issuance of a written reprimand.

7. Of course, disclosure would not extend to those portions of the form which contain truly confidential information such as whether the employee had been referred to Social Actions for alcohol or drug abuse counselling. When the Union requested the form at issue in this case, it had no idea that the new form contained such information, because the earlier forms released routinely to the Union did not contain it and the Respondent never informed the Union that the new form did. Such information, as I previously concluded (49 FLRA at 1246), should be excised from the form before being provided to the Union. Similarly, information on page one of the form, such as the names of potential witnesses, which I have found unnecessary for the Union to have (49 FLRA at 1248), may be sanitized. However, as I previously found (49 FLRA at 1247-48), the supervisor's comments about the employee's relationships with co-workers and his other considerations concerning the employee are necessary for the Union to have, particularly where the Union is contending that the supervisor recommended disciplinary action against the employee because of the employee's union activities.

8. The form devised by the Respondent also states that it constitutes attorney work product and is not to be released without the specific approval of the originator or higher authority. These cautionary statements by the Respondent in adopting the form are not dispositive of whether the form is disclosable under the Statute.

9. In view of my conclusion that the Union has a particularized need for the requested information under the first example discussed by the court in NLRB v. FLRA, I find it unnecessary to determine whether the Union also has a particularized need for the information under the second example identified by the court therein, i.e., whether "the disputed document creates a grievable action."