UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

UNITED STATES AIR FORCE, HEADQUARTERS, 442ND FIGHTER WING (AFRES), RICHARDS-GEBAUR AIR FORCE BASE, MISSOURI

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2127

Charging Party

Case No. DE-CA-20896

Major David L. Frishberg
For the Respondent

Timothy Sullivan, Esquire
For the General Counsel

John B. Brown
For the Charging Party

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations promulgated thereunder.

Pursuant to an amended charge first filed on December 28, 1992, by American Federation of Government Employees, AFL-CIO, Local 2127, AFGE, (hereinafter called the Charging Party or Union), against the United States Air Force, Headquarters, 442nd Fighter Wing (AFRES), Richards-Gebaur Air Force Base, Missouri, (hereinafter called the Respondent), a Complaint and Notice of Hearing was issued on December 31, 1992 by the Regional Director for the Denver, Colorado Regional Office, Federal Labor Relations Authority. The Complaint alleges that

the Respondent violated Sections 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by refusing to furnish the Union an unsanitized copy of "the best qualified list of candidates for the WS-8 Munitions Loading Supervisor position" and "a list of the rating and ranking information for civil service personnel from 442 CAMS who had applied for the" WS-8 Munitions Loading Supervisor position.

A hearing was held in the captioned matter on May 11, 1993 in Mission, Kansas. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Respondent and the General Counsel submitted post hearing briefs on July 8 and 12, 1993, respectively, which have been fully considered.[1/]

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive bargaining representative of a bargaining unit composed of Wage grade civilian employees at Respondent's Richards-Gebaur Air Force Base in Missouri. The Union and the Respondent, at the time of the events herein, were parties to a collective bargaining agreement. Article 14 of the collective bargaining agreement sets forth a grievance procedure. Excluded, among other things, from the grievance procedure are "Nonselection for promotion from a group of properly ranked and certified candidates where nonselection is the only issue".[2/]

Sometime in June 1992, Mr. John Brown, who at the time was President of the Union, learned that Respondent had a vacancy for a WS-8 Munitions Loading Supervisor position.

1/ The General Counsel also submitted a Motion to Correct the Transcript of the Proceedings. In the absence of any objection, General Counsel's Motion to Correct Transcript should be, and hereby is, granted.

2/ According to the General Counsel a dispute concerning whether or not the so-called group from which a selection was made was properly ranked would be covered by the grievance procedure. Respondent does not appear to take issue with such conclusion or statement.

Shortly thereafter Mr. Don Shoop, Branch Manager for Munitions, informed the employees during a meeting that he had requested a list of 15 names on a register from which he would make a selection for the vacancy.

Several days following the above meeting, Mr. Rick Malone, an unsuccessful applicant for the vacancy, approached Mr. Brown and informed him that he wanted the Union to file a grievance over the selection because he felt that he had been rated too low on the Candidate Referral Roster, which hereinafter will be referred to as the register.

On June 23, 1992, Mr. Brown, Mr. Malone and Mr. Wallace Miller, the Union's Chief Steward, met with Ms. Carol Ketchum, Respondent's Chief of the Civilian Personnel Branch Office, to discuss the matter. Mr. Brown and Mr. Miller informed Ms. Ketchum that they were intending to file a grievance over the register because Mr. Malone felt that he had been rated too low on the register and that they were of the opinion that something was wrong with the register because it had 15 names on it.[3/] Mr. Brown and Mr. Malone then requested that Respondent supply the Union with an unsanitized copy of the register. Ms. Ketchum refused to release the register on the ground that it was covered by the Privacy Act.

On June 26, 1992 the Union filed a written grievance wherein it claimed that Mr. Malone should have been ranked higher on the register and again requested an unsanitized copy of the register. Ms. Ketchum responded to the grievance on July 9, 1992 and stated that Respondent would not release the unsanitized register because of the Privacy Act. Respondent did supply the Union with a sanitized register and various other documents.

Shortly after receiving the sanitized register, Mr. Brown met with Ms. Ketchum and explained that the sanitized register was of no use to the Union since it could not verify any of the information without the names of the employees associated therewith. When Ms. Ketchum continued to raise the Privacy Act in defense of Respondent's refusal to produce an unsanitized copy of the register the Union filed the unfair labor practice charge leading to the subject complaint.

3/ According to the record, a register usually has only 10 names. Further according to the record, when a tie occurs with respect to the 10th name, all the individuals involved in the tie are listed on the register.

According to Mr. Brown an unsanitized register would allow the Union to determine, among other things, whether the employees listed thereon worked in the munitions field, whether the person selected was in reach on the register, whether the Respondent properly applied the tie breaker elements, i.e. seniority, award points and appraisal, and whether to file a grievance. According to the uncontroverted testimony of Mr. Brown the Union had the right to file a grievance if it discovered an irregularity in the register.[4/] Further, according to Mr. Brown, while he could not verify the appraisal scores for the individual employees appearing on the register, if necessary he would have requested such appraisals for such purpose.

According to Ms. Nancy Stephenson who works in the Civilian Personnel Office at the 928th Air Lift Group in Chicago, the Civilian Personnel Office in charge of the Richards-Gebaur Air Force Base, the requested register is available in her office. Further, according to Ms. Stephenson who was instrumental in compiling the requested register, there were no errors in the register.

Conclusions

The General Counsel takes the position that Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute by failing to provide the Union with an unsanitized copy of the Candidate Referral Roster and Merit Promotion Certificate. In support of such position the General Counsel relies on a number of Authority decisions wherein the Authority has found that such information is necessary for the Union to carry out its representational responsibilities and police the collective bargaining contract. Additionally, the General Counsel has also submitted a number of cases wherein the Authority has concluded that the release of similar information is not prohibited by the Privacy Act and that the Union's need to know outweighs any countervailing privacy interests of the employees appearing thereon.

Respondent, on the other hand, takes the position that the Privacy Act and various Air Force Regulations prohibit the disclosure of the information in an unsanitized form and that, in any event, the General Counsel has not established the

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4/ Other than telling Ms. Ketchum that he needed the unsanitized register in order to validate it's accuracy, there was no showing that Mr. Brown went into any specifics with Ms. Ketchum with respect to what the Union would do with the unsanitized register.

necessity for such information. In this latter connection, Respondent points out that inasmuch as the Union had not timely moved the grievance predicated on the failure to fill the vacancy with Mr. Malone to the second step of the grievance procedure the grievance is now dead and there is no need for the requested information. Additionally, Respondent points out that the failure to be selected for a promotion from a group of properly ranked and certified candidates is not grievable under the collective bargaining agreement.

In agreement with the General Counsel I find that the Candidate Referral Roster is necessary for the Union to determine whether to file a grievance alleging a failure by Respondent to properly rank a unit employee for the WS-8 Munitions Loading Supervisor position. In reaching this conclusion I rely on the Authority's decisions in Department of the Army Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina, 34 FLRA 461; and Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 39 FLRA 298 wherein the respective respondents were found to be in violation of the Statute for failing to make available to the unions, there involved, certain information. In both the aforecited cases the unions requested information similar to that involved herein in order to determine whether a grievance should be filed concerning the non selection of employees for advertised positions. In concluding that the respective respondents violated the Statute by not making the requested information available the Authority noted, among other things, that the unions needed the information in order to determine whether the respondents had properly ranked all the applicants for the vacant positions.

In Department of Health and Human Services, supra, the Authority also reiterated its position, i.e. that "an agency's contention that a potential grievance is not grievable does not relieve an agency from its obligation to furnish requested data".

Having concluded that the requested information, i.e. unsanitized Candidate Referral Roster, is necessary for the Union to determine whether the Respondent had properly ranked the applicants and since there is no contention that the requested information is not readily available, the only issue remaining to be resolved is whether the Privacy Act prohibits the disclosure of the requested information.

In this connection the Authority in United States Department of Veterans Affairs Regional Office, San Diego, California, 44 FLRA 312, a case involving an agency's refusal

to make the individual production figures of unit employees available to the Union, set forth its position with respect to the interrelationship between the Privacy Act and Freedom of Information Act (FOIA) and their application to the Statute. Thus, the Authority stated:

> With certain enumerated exceptions, the Privacy Act prohibits the disclosure of any record concerning a Federal employee if the record is contained in a system of records and the individual to whom that record pertains has not consented to the disclosure. 5 U.S.C. § 552a(b). Section (b)(2) of the Privacy Act provides that the prohibition against disclosure is not applicable if disclosure of the information would be required under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA). Section (b)(3) of the Privacy Act permits disclosure "for a routine use," which is defined in 5 U.S.C. § 552a(a)(7) as "the use of such record for a purpose which is compatible with the purpose for which it was collected."
>
> In order to determine whether disclosure of the requested information in this case is permitted by section (b)(2) of the Privacy Act, we must determine whether it is disclosable under Exemption (b)(6) of the FOIA. That section provides that information contained in personnel files, in addition to medical and other similar files, may be withheld if disclosure of the information would constitute a "clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).
>
> To determine whether disclosure of the requested information would constitute a clearly unwarranted invasion of personal privacy, we must balance the employee's right to privacy against the public interest in disclosure.

Balancing the employee's right to privacy against the public interest in disclosure the Authority concluded that the Union's need for the requested information, i.e. documents which gave production figures for individual employees as well as certain other data that was used to evaluate the employees' work performance, outweighed the employees' privacy interest. In reaching this conclusion the Authority adopted the Administrative Law Judge's finding that the requested material was necessary to assess a potential grievance and was consistent with the Union's obligation to perform its representational responsibilities. Finally, the Authority concluded "consistent with our precedent, that such

representational responsibilities are in the public interest and also safeguard the public interest".

With respect to the "invasion of privacy" of the affected employees, the Authority noted that there was no indication that the Union envisioned public disclosure of the information; nor was it asserted that the information was stigmatizing or that it might be used to embarrass the employees involved.

Inasmuch as the information requested herein is of the same type as requested in United States Department of Veterans Affairs, supra, and the cases cited therein, and clearly necessary in order for the Union to assess a potential grievance and perform its representational responsibilities, I find such cases to be controlling and that the employee's privacy interests are outweighed by the public interest embodied in the Statute. Accordingly it is concluded that, as disclosure of the Candidate Referral Roster is not prohibited by law and meets all the other requirements for disclosure set forth in Section 7114(b)(4) of the Statute, Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute by failing and refusing to furnish an unsanitized copy of the Candidate Referral Roster to the Union.[5/]

Having found that Respondent violated Sections 7116(a)(1), (5) and (8) of the Statute it is hereby recommended that the Authority issue the following Order designed to effectuate the purposes and policies of the Statute:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the United States

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5/ Although the Complaint and General Counsel's Post Hearing Brief allege that Respondent also violated the Statute by failing to supply to the Union an unsanitized copy of the Merit Promotion Certificate, the record contains little or no discussion of such Merit Promotion Certificate and/or no showing whatsoever of the necessity for such certificate. Accordingly, I find that the General Counsel has not established by a preponderance of the evidence that the Respondent violated the Statute by failing to give the Merit Promotion Certificate to the Union and therefore will not order that Respondent make a copy of such certificate available to the Union.

Air Force, Headquarters 442nd Fighter Wing (AFRES), Richards-Gebaur Air Force Base, Missouri, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, AFL-CIO, Local 2127 (AFGE), the exclusive representative of certain of its employees, an unsanitized copy of the Candidate Referral Roster for the WS-8 Munitions Loading Supervisor position which was requested by the AFGE on June 23, 1992.

(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

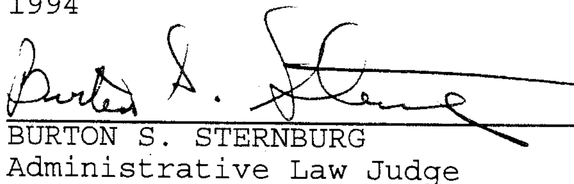
2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Upon request, furnish the AFGE an unsanitized copy of the Candidate Referral Roster for the WS-8 Munitions Loading Supervisor position which was requested by the AFGE on June 23, 1992.

(b) Post at its facilities in Richards-Gebaur Air Force Base, Missouri, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of Richards-Gebaur Air Force Base, Missouri, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Region, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 10, 1994



BURTON S. STERNBURG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, AFL-CIO, Local 2127 (Union), the exclusive representative of certain of our employees, the information requested by the Union on June 23, 1992, namely an unsanitized copy of the Candidate Referral Roster for the WS-8 Munitions Loading Supervisor position.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL upon request, furnish to the Union the information requested on June 23, 1992.

____
(Activity)

Date: ____________________ By: ______________________________
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Denver Regional Office, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: (303) 844-5224.