

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

.....
U. S. EQUAL EMPLOYMENT .
OPPORTUNITY COMMISSION .
Respondent .
and . Case Nos. 2-CA-10106
NATIONAL COUNCIL OF EEOC . 2-CA-10107
LOCALS #216, AMERICAN . 3-CA-10144-1
FEDERATION OF GOVERNMENT . 3-CA-10144-2
EMPLOYEES AND AFGE . 3-CA-10144-3
LOCAL 3614, AFL-CIO . 3-CA-10144-4
Charging Party .
.....

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On Brief: Thomasina V. Rogers, Esquire
Richard V. Roscio, Esquire
For the Respondent

Ana de la Torre, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-
Management Relations Statute, Chapter 71 of Title 5 of the
United States Code, 5 U.S.C. § 7101, et seq.^{1/}, and the

^{1/} For convenience of reference, sections of the Statute
hereinafter are, also, referred to without inclusion of the
initial "71" of the statutory reference, e.g., Section
7114(b)(4) will be referred to, simply, as "§ 14(b)(4)."

Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns information requests for data relied upon to issue FY '90 performance ratings for investigators in the Pittsburgh and Philadelphia, Pennsylvania, Baltimore, Maryland, Norfolk and Richmond, Virginia and the Washington, D.C., offices.

This case was initiated by a charge filed on December 7, 1990, in Case No. 3-CA-10144-1 (G.C. Exh. 1(a)) and a First Amended charge, filed on February 25, 1991 (G.C. Exh. 1(b)); by a charge filed on December 7, 1990, in Case No. 3-CA-10144-2 (G.C. Exh. 1(c)), with a First Amended charge therein filed on February 25, 1991 (G.C. Exh. 1(d)); by a charge filed on December 7, 1990, in Case No. 3-CA-10144-3 (G.C. Exh. 1(e)), with a First Amended charge therein filed on February 25, 1991 (G.C. Exh. 1(f)); and by a charge also filed on December 7, 1990, in Case No. 3-CA-10144-4 (G.C. Exh. 1(g)), and a First Amended charge therein filed on February 25, 1991 (G.C. Exh. 1(h)). Each of the foregoing original charges had alleged a violation only of § 16(a)(1) of the Statute, while each of the foregoing amended charges alleged violation of §§ 16(a)(1), (5) and (8) of the Statute. The Consolidated Complaint and Notice of Hearing in Case Nos. 3-CA-10144-1, 3-CA-10144-2, 3-CA-10144-3 and 3-CA-10144-4 issued on February 28, 1991 (G.C. Exh. 1(i)); alleged violations of §§ 16(a)(1), (5) and (8) of the Statute; and set the hearing for April 17, 1991. The charge in Case No. 2-CA-10106 was filed on December 7, 1990 (G.C. Exh. 1(k)), and alleged violation of § 16(a)(1) only; a First Amendment was filed on March 13, 1991 (G.C. Exh. 1(l)) and alleged violations of §§ 16(a)(1), (5) and (8) of the Statute. The charge in Case No. 2-CA-10107 was also filed on December 7, 1990 (G.C. Exh. 1(m)) and alleged violation of § 16(a)(1) only; and a First Amendment therein was also filed on March 13, 1991 (G.C. Exh. 1(n)) and alleged violations of §§ 16(a)(1), (5) and (8) of the Statute. The Consolidated Complaint and Notice of Hearing in Case Nos. 2-CA-10106 and 2-CA-10107 issued on March 13, 1991; alleged violations of §§ 16(a)(1), (5) and (8) of the Statute; set the hearing for April 17, 1991, in Washington, D.C. (G.C. Exh. 1(o)); and Ordered Case Nos. 2-CA-10106 and 2-CA-10107 be transferred to the Washington Regional Office (G.C. Exh. 1(q)). By Order dated April 10, 1991 (G.C. Exh. 1(s)) in Case Nos. 2-CA-10106, 2-CA-10107, 3-CA-10144-1, 3-CA-10144-2, 3-CA-10144-3 and 3-CA-10144-4, the hearing was rescheduled, on motion of Respondent, concurred in by General Counsel (G.C. Exh. 1(r)), for May 21, 1991, pursuant to which a hearing was duly held on May 21, 1991, in Washington, D.C., before the undersigned. At the hearing,

General Counsel moved to consolidate the 2-CA-10106 and 10107 Complaint and Notice of Hearing with the Complaint and Notice of Hearing in 3-CA-10144-1 through -4; there was no objection; and the cases were consolidated (Tr. 7).

All parties were represented at the hearing. General Counsel introduced the formal documents and fifteen Joint Exhibits. During the course of the parties' opening statements and introduction of the Joint Exhibits, it appeared that there was no genuine issue of material fact in dispute and General Counsel moved for summary judgment. Respondent stoutly contended that there were genuine issues of material fact in dispute and, while unable to articulate them, at least to my satisfaction, further contended that he would show these issues through testimony. I deferred decision on General Counsel's motion and Respondent called Ms. Patricia Cornwell Johnson, Respondent's Director of the Labor-Management Relations Division. Having heard Respondent's witness and entertained further oral argument, it clearly appeared to me that, while the parties disagree totally on the right of the Union to receive and the duty of Respondent to furnish, pursuant to § 14(b)(4) of the Statute, the data requested, there were no genuine issues of material fact in dispute and, accordingly, I informed the parties that I was granting General Counsel's Motion for Summary Judgment, subject, however, to Respondent's convincing me otherwise in its post-hearing brief. General Counsel was also requested to submit a proposed decision. General Counsel timely filed its proposed decision on June 21, 1991, and Respondent timely mailed its Brief in Opposition to the Grant of Summary Judgment on June 21, 1991, which was received on June 24, 1991. Upon the basis of the entire record, including the post-hearing submissions of the parties, which have been carefully considered, I adhere to the ruling made at the hearing that there are no genuine issues of material fact in dispute, and, for the reasons set forth hereafter, grant General Counsel's Motion for Summary Judgment.

Findings

1. The American Federation of Government Employees (hereinafter referred to as "AFGE") is the certified representative of a nationwide consolidated unit of employees of Respondent. AFGE, through its National Council of EEOC Locals #216, entered into a National Agreement with Respondent (Jt. Exh. 13). Local 3614 (hereinafter referred to as the "Union") is a constituent local of the National Council of EEOC Locals #216 and is an agent of AFGE for

representing unit employees in Respondent's Philadelphia and Pittsburgh, Pennsylvania, Baltimore, Maryland, Washington, D.C., and Richmond and Norfolk, Virginia offices.

2. Article 22 of the Agreement of the parties (Jt. Exh. 13) is entitled "General Performance Appraisal and Development System" (GPAD) and outlines the framework for appraising and/or evaluating bargaining unit employees. Article 22 provides that the GPAD system will be, "applied to provide a fair, accurate, and objective evaluation of job performance. Appraisals of all employees shall be accomplished in a fair and equitable manner." (Jt. Exh. 13, Art. 22, p. 36).

3. Article 47 of the Agreement of the parties is the negotiated grievance procedure and Section 47.07, Step 1., provides, in part, as follows:

". . . Written grievances must be presented within 25 calendar days after the incident occurs or the employee who initiates the grievance or the UNION becomes aware of the incident. . . ." (Jt. Exh. 13, Art. 47, Section 47.07, Step 1., p. 77).

4. It is undisputed that on November 5 and November 6, 1990, the Union requested that the Respondent furnish it with data relied upon to formulate performance ratings for Fiscal Year 1990 for Investigators in the Respondent's Philadelphia, Pennsylvania, District Office in order to prepare for a potential grievance and/or third party proceeding (Jt. Exhs. 1(a) and 2(a)).

5. It is undisputed that on November 19, 1990, the Union requested that the Respondent furnish it with data relied upon to formulate performance ratings for Fiscal Year 1990 for Investigators in Respondent's Pittsburgh, Pennsylvania, Area Office, Baltimore, Maryland, District Office, Washington, D.C., Field Office, Norfolk, Virginia, Area Office and the Richmond, Virginia, Area Office in order to prepare for a potential grievance and/or third party proceeding. (Jt. Exhs. 3, 4, 5, 6, 7, and 8).

6. It is undisputed that since November 19, 1990, Respondent has refused to furnish the Union with the information requested for the Pittsburgh, Pennsylvania, Area Office, Baltimore, Maryland, District Office, Washington, D.C., Field Office, Norfolk, Virginia, Area Office and Richmond, Virginia, Area Office.

7. In refusing to provide the data requested by the Union for the Pittsburgh, Pennsylvania, District Office, Baltimore, Maryland, District Office, Washington, D.C., Field Office, Norfolk and Richmond, Virginia, Area Offices, Respondent has asserted that no grievances had been filed in those offices and that no grievances could be filed as they would be untimely under the parties' negotiated grievance procedure. In refusing to provide the data requested, Respondent also asserted that the requests were burdensome (see, for example, Jt. Exh. 9) to which the Union responded that the request was, ". . . neither burdensome nor voluminous . . . the information . . . is computerized and/or readily available to the offices. . . ." (Jt. Exh. 10). General Counsel stated, and Respondent did not challenge or dispute, that there was a total of 30 to 35 Investigators in all the offices involved (Tr. 13).

8. It is undisputed that on November 19 and 20, 1990, the Union filed three grievances under the negotiated grievance procedure on behalf of three unit employees in the Philadelphia, Pennsylvania, District Office alleging violations of Article 22 of the parties' collective bargaining agreement based on the employees' performance evaluations (Jt. Exhs. 14(a), (b) and (c)).

9. It is undisputed that based upon the grievances filed in the Philadelphia, Pennsylvania, District Office, Respondent, on, or about, March 13, 1991, provided the Union with the data requested for the Philadelphia, Pennsylvania, District Office (Jt. Exh. 15, Tr. 38, 43-44).

10. It is undisputed that Respondent asserts that the case management and assignment sheets requested by the Union for all the offices exist only in the Philadelphia District Office and the Pittsburgh Area Office but Respondent at no time prior to the hearing informed the Union of this assertion.

Conclusions

It is well established that the broad requirement of § 14(b)(4) of the Statute for an agency to provide a union data "to the extent not prohibited by law" and "which is reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining" is a statutory right not conditioned on the union first filing a grievance. Rather, the Authority has held that an exclusive representative has the right to receive data necessary to investigate and

evaluate potential grievances, Veterans Administration Regional Office, Denver, Colorado, 7 FLRA 629 (1982); U.S. Army Reserve Components Personnel and Administration Center, St. Louis, Missouri, 26 FLRA 19 (1987); U.S. Department of the Air Force Logistics Command, Sacramento Air Logistics Center, McClellan Air Force Base, California, 37 FLRA No. 82, 37 FLRA 987, 995 (1990); U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, El Paso, Texas, 37 FLRA No. 110, 37 FLRA 1310, 1319, 1320 (1990); U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania, 40 FLRA No. 42, 40 FLRA 449, 456, 457, 458 (1991), and potential unfair labor practices, Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, 30 FLRA 127, 142 (1987). Of course, as § 14(b)(4)(B) specifically states, the right of a union to receive such data is not in any sense limited to actual or potential grievances or unfair labor practices but broadly encompasses all matters necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, *i.e.*, ". . . information necessary to enable it to carry out effectively its representational responsibilities . . .", Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Region X, Seattle, Washington, 39 FLRA No. 23, 39 FLRA 298, 308, (1991). As the Authority has made clear, ". . . where a union requests information under section 7114(b)(4) of the Statute, and an agency refuses to furnish the requested information, the agency acts at its peril. If the information requested . . . is found to meet the requirements of section 7114(b)(4) . . . the agency will be found to have violated section 7116(a)(1), (5) and (8). . . ." *Id.*

It is quite true that Respondent in its Answers denied that the data requested was normally maintained in the regular course of business; that it was reasonably available; that it was necessary; that it does not constitute guidance, etc., and that it was not prohibited from disclosure by law (G.C. Exh. 1(i), Pars. 12-16; G.C. Exh. 1(p), Pars. 17-21). But saying the world is flat does not make it so. More important, determination is made on the basis of the entire record. Thus, the record shows, *inter alia*, that: (a) Respondent made no such representation in its response to the Union. To the contrary, Respondent stated, ". . . before we will respond, you must clarify why the Union has requested confidential

information concerning the Investigators' GPAR rating, and explain how such information is necessary . . . I am insisting upon such clarification and justification because . . . no employee filed a grievance challenging the GPAR ratings in the majority of the Offices from which you are seeking data. . . ." (Jt. Exh. 9) (Emphasis supplied).

(b) The Union responded, in part, that the, ". . . request is neither burdensome nor voluminous . . . The information . . . is computerized and/or readily available . . . The information requested is not 'confidential'." (Jt. Exh. 10),

(c) Respondent, as previously noted, provided the data requested for the Philadelphia District and Baltimore District Office (but not data for Investigators at Baltimore) (Tr. 72) where grievances had been filed (Jt. Exhs. 11, 15; Tr. 38, 43-44, 52). (d) Respondent's Director of Labor-Management Relations Division testified that the data was maintained and available on a quarterly if not monthly basis (Tr. 57), that it was reasonably available (Tr. 55). Accordingly, there is no dispute that the data is maintained and is readily available. Nothing in the record shows or even suggests that the data constituted advice, counsel, etc., within the meaning of § 14(b)(4)(C) and the requested data, by its very nature was not advice, counsel, etc., Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas, 41 FLRA No. 15, 41 FLRA 137, 141-143 (1991).

It is true that a union's bare assertion that it needs data to process a grievance does not automatically oblige the agency to supply such data, Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado, 17 FLRA 624, 626 (1985); but, here, the data requested was clearly relevant to the Union's evaluation of performance ratings given, the Union had challenged performance ratings of Investigators, and the record shows the data was necessary within the meaning of § 14(b)(4)(B). Indeed, Respondent stated at the hearing, as it had in its prior responses to the Union, that the reason it did not supply the data was because no grievance had been filed (Tr. 52, 72).

An agency is obligated to timely respond to a request for data pursuant to § 14(b)(4), even if the information sought does not exist. U.S. Naval Supply Center, San Diego, California, 26 FLRA 324, 326-327 (1986); Veterans Administration, Washington, D.C. and Veterans Administration Regional Office, Buffalo, New York, 28 FLRA 260, 266-267 (1987). With respect to the Union's November 19, 1990, requests for case management and assignment sheets, Respondent did not disclose to the Union until its Director of Labor-Management

Relations testified at the hearing that such data existed only in the Philadelphia and Pittsburgh Offices. Likewise, at the hearing, for the first time, Respondent asserted that certain data might not be available monthly, as requested, but only quarterly and annually (Tr. 53, 57). The data requested was necessary within the meaning of § 14(b)(4)(B) and was the type data the Authority has held must be released to unions. Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Omaha District, Omaha, Nebraska, 25 FLRA 181 (1987), Social Security Administration, 17 FLRA 837 (1985).

Respondent failed to comply with § 14(b)(4) of the Statute and by such conduct violated §§ 16(a)(1), (5) and (8) of the Statute. Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R. § 2423.23, it is hereby ordered that the U.S. Equal Employment Opportunity Commission shall:

1. Cease and desist from:

(a) Refusing to provide American Federation of Government Employees Local 3614, AFL-CIO, National Council of EEOC Locals #216 (herein after referred to as the ("Union"), the employees' exclusive representative, with all requested data reasonably available for it to properly perform its representational functions, including grievances and potential grievances, concerning performance appraisal ratings of Investigators in the U.S. Equal Employment Opportunity Commission's Pittsburgh, Pennsylvania, Area Office, Baltimore, Maryland, District Office, Washington, D.C., Field Office, Norfolk and Richmond, Virginia, Area Offices, and, to the extent not already furnished, in our Philadelphia, Pennsylvania, District Office.

(b) In any like or related manner interfering with, restraining or coercing 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 Statute:

(a) Upon request, provide the Union all requested data reasonably available for it to properly perform its

representational functions including grievances and potential grievances, concerning performance appraisal ratings of Investigators in the Pittsburgh, Pennsylvania, Area Office, Baltimore, Maryland, District Office, Washington, D.C., Field Office, Norfolk and Richmond, Virginia, Area Offices; and, to the extent not already furnished, in the Philadelphia, Pennsylvania, District Office.

(b) Post at its facilities at its Philadelphia, Pennsylvania, District Office, Pittsburgh, Pennsylvania, Area Office, Baltimore, Maryland, District Office, Washington, D.C., Field Office, Norfolk and Richmond, Virginia, Area Offices, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chairman of the U.S. Equal Employment Opportunity Commission, and shall be posted and maintained for or 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to 5 C.F.R. § 2423.30, notify the Regional Director, Federal Labor Relations Authority, Washington Regional Office, 1111 18th Street, NW, P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.


WILLIAM B. DEVANEY
Administrative Law Judge

Dated: August 14, 1991
Washington, D.C.

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 refuse to provide American Federation of Government Employees Local 3614, AFL-CIO, National Council of EEOC Locals #216 (hereinafter referred to as the ("Union")), the employees' exclusive representative, with all requested data reasonably available for it to properly perform its representational functions including grievances and potential grievances concerning performance appraisal ratings of Investigators in our Pittsburgh, Pennsylvania, Area Office, Baltimore, Maryland, District Office, Washington, D.C., Field Office, Norfolk and Richmond, Virginia, Area Offices, and to the extent not already furnished, in our Philadelphia, Pennsylvania, District Office.

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

WE WILL forthwith, upon request of the Union, furnish all requested data reasonably available for the Union to properly perform its representational functions, including grievances and potential grievances, concerning performance appraisal ratings of Inspectors in our Pittsburgh, Pennsylvania, Area Office, Baltimore, Maryland, District Office, Washington, D.C., Field Office, Norfolk and Richmond, Virginia, Area Offices; and, to the extent not already furnished, in our Philadelphia, Pennsylvania, District Office.

(Agency)

Dated: _____ 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, Washington Regional Office, whose address is: 111 18th Street, NW, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.