UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
Washington, D.C. 20424

OALJ 25-2

DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
Respondent

And

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS 33, AFL-CIO
Charging Party

WA-CA-21-0436

Adryan J. Richardson
For the General Counsel

Debbie Stevens
For the Respondent

Richard Heldreth
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Two days after his inauguration, President Biden issued Executive Order 14003, 86 Fed. Reg. 7231, which (among other things) provides that agency heads "shall elect to negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1)." E.O. 14003 at § 4. The Order also, however, states that it "is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States" or its entities. *Id*. at § 7(c). The case at bar involves a union's effort to invoke the Executive Order to obtain an agency's staffing guidelines and reports that identify the numbers of positions authorized at each of the agency's many facilities, broken down by type and grade.

The union representing most employees at the correctional facilities operated by the Federal Bureau of Prisons (BOP) has long been concerned about the agency's attempts to reduce staffing levels at the facilities, on the belief that reduced staffing contributes to an increased risk of violence

and to other types of safety hazards. But Section 7106(b)(1) of our Statute allows bargaining over "the numbers, types, and grades of employees or positions assigned to any organizational subdivision" only "at the election of the agency." 5 U.S.C. § 7106(b)(1). After President Biden issued Executive Order 14003, the union cited the Order, sought to initiate bargaining on the staffing levels of agency facilities, and requested that the agency furnish it with documents detailing the staffing levels at all facilities. The agency refused to furnish the information, prompting the union to file this unfair labor practice charge.

Under our Statute, an agency is required to furnish a union with information that is necessary for the union to fully and properly negotiate "subjects within the scope of collective bargaining." 5 U.S.C. § 7114(b)(4)(B). Thus a threshold requirement for demanding information is that it is related to a subject over which the agency must bargain, or which it has elected to bargain. The Statute does not require the agency in our case to bargain over staffing levels, and the agency has not elected to do so. Although the agency may well have violated the Executive Order, that is a matter for the President and his cabinet officials to resolve, not for judicial or administrative enforcement.

STATEMENT OF THE CASE

This is an unfair labor practice (ULP) proceeding under the Federal Service Labor-Management Relations Statute (the Statute), Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101-7135, and the Rules and Regulations of the Federal Labor Relations Authority (the FLRA or the Authority), 5 C.F.R. part 2423.

On September 15, 2021, the American Federation of Government Employees, Council of Prison Locals 33, AFL-CIO (the Union or Charging Party) filed a ULP charge against the Department of Justice, Federal Bureau of Prisons (the Agency or Respondent), alleging that the Agency unlawfully denied the Union's request for the Agency's staffing guidelines and for data relating to the numbers of authorized positions at its facilities. Motion for Summary Judgment (MSJ), GC Ex. 3 at 3.[1] After investigating the charge, the Regional Director of the Washington Region of the FLRA issued a Complaint and Notice of Hearing, on behalf of the FLRA's General Counsel (GC), against the Respondent on June 21, 2023, alleging that the Respondent violated §§ 7114(b)(4) and 7116(a)(1), (5), and (8) of the Statute by refusing to provide the requested information to the Union. GC Ex. 4. On July 17, 2023, Respondent filed its Answer to the Complaint, admitting most of the factual allegations but denying that it had violated the Statute. GC Ex. 5.

On September 26, 2023, Respondent filed a Motion to Cancel the October 26, 2023 Hearing Based on the Lack of Any Material Issues of Fact. Respondent noted that in its Answer, it had admitted all factual allegations of the Complaint, and it asserted that only legal issues remained in dispute. *Id*. at 1-2. On September 28, the General Counsel filed a Motion for Summary Judgment, agreeing with Respondent that there are no material facts in dispute and that the case can be resolved without a hearing. MSJ at 1. On September 29, I issued an Order Postponing Hearing

[1] Hereafter, all exhibits will simply be referred to as "GC Ex. __," as they are all attached to the Motion for Summary Judgment filed by the General Counsel.

Indefinitely, and I set a schedule for the parties to file additional briefs and evidence. On October 31, the Respondent filed its own Motion for Summary Judgment and Response in Opposition to the General Counsel's Motion for Summary Judgment (Agency MSJ), along with exhibits. On November 6, 2023, the General Counsel filed a reply to the Agency MSJ (GC Reply), at which point the record was closed.

DISCUSSION OF MOTIONS FOR SUMMARY JUDGMENT

The Authority has held that motions for summary judgment filed under § 2423.27 of its Regulations, 5 U.S.C. § 2423.27, serve the same purpose, and are governed by the same principles, as motions filed in the U.S. District Courts under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). The parties in this case have submitted exhibits in support of their motions, and after reviewing these documents fully, I agree with counsel for both parties that there are no genuine issues of material fact in this case. Therefore it is appropriate to decide the case on the motions for summary judgment, and I hereby cancel the hearing. Below I will summarize the material facts that are not in dispute, and I will then make conclusions of law and recommendations.

FINDINGS OF FACT

The American Federation of Government Employees, AFL-CIO (AFGE), is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of nationwide consolidated units of BOP employees. The Union is an agent of the AFGE for the purpose of representing bargaining unit employees of the Respondent. The Respondent, an agency within the meaning of § 7103(a)(3) of the Statute, operates approximately 150 correctional institutions and other facilities around the country. During the events of this case, Christopher Wade was the Respondent's Chief of Human Resources, Management Division, and was an agent of the Respondent.

On January 22, 2021, President Biden issued Executive Order 14003, "Protecting the Federal Workforce." Section 4 of the Order states: "The head of each agency subject to the provisions of chapter 71 of title 5, United States Code, shall elect to negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1) and shall instruct subordinate officials to do the same." Section 7(c) of the Order states: "This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."

In February and March of 2021, Union officials received reports from local representatives and from Agency sources that staffing levels at some institutions were being reduced and that the Agency was in the process of "modernizing" its staffing guidelines. GC Ex. 9, Affidavit of Richard Heldreth at ¶¶ 4, 6, 8. Union officials held a meeting with Agency officials on February 11, 2021, and discussed their concerns about reduced staffing at several prisons. *Id*. at ¶ 5. At the meeting, the Union asked management what guidelines managers were using to staff their facilities, but the Agency told the Union that it does not share those guidelines. GC Ex. 1 at 3. On February 19, the Union submitted a demand that the Agency bargain over 7106(b)(1) subjects relating to staffing levels. *Id*. at 2, 3. On March 19, the Agency replied that it had no obligation to bargain, because it had not proposed any changes to conditions of employment that would substantially affect bargaining unit employees. GC Ex. 2 at 4.

On July 12, 2021, Heldreth, the Union's Mid-Atlantic Vice President, sent an information request, pursuant to § 7114(b)(4) of the Statute, to Wade. GC Ex. 1. The Union requested the following items:

1. The current staffing guidelines that the Agency uses to determine staffing levels at each Federal Bureau of Prisons work site and/or facility that the Agency operates, and the effective date of these guidelines.
2. Staffing reports that depict the following data for each Agency facility as of January 2021 and as of July 2021:
    a. The total number of authorized positions (to include the types and grades of positions).
    b. The total number of authorized positions filled.

Id. at 1. The Union stated that it needed this information in order to properly fulfill its statutory duty to ensure that the Agency was meeting its contractual obligations under the parties' collective bargaining agreement (CBA), particularly Articles 3 (parties obligated to follow all laws, rules, and government-wide regulations), 6 (employees must be treated in a fair and equitable manner), and 27 (Agency must lower the inherent hazards in the correctional environment to the lowest possible level). *Id*. at 4. The Union indicated that reduced staffing is directly tied to violence at the facilities, poses heightened safety risks, and contributes to staff suicides. *Id*. Citing Executive Order 14003, as well as directives issued by the Assistant Attorney General and the Office of Personnel Management directing agency heads to bargain over 7106(b)(1) subjects, the Union stated that it needed the requested information in order to prepare for such bargaining. *Id*. at 3, 5.

In a letter dated October 8, 2021, Wade denied the Union's information request on behalf of the Agency. GC Ex. 2. Wade stated that the Union had failed to articulate a particularized need for the information, as required by the Statute. He said the Union's justification that it needed the information to "determine if the Agency has met its obligations under the Contract and the Law" was too vague to adequately demonstrate the Union's need for the information. *Id*. at 4. Moreover, the Union's justification that it needed to prepare for bargaining over staffing and other 7106(b)(1) matters was insufficient, because such bargaining is appropriate only if the Agency has proposed to make changes in staffing matters that substantially affect bargaining unit employees. Since the Agency has not proposed any such changes, the Union does not need the requested information "to prepare for . . . non-existent negotiations." *Id*.

POSITIONS OF THE PARTIES

General Counsel

In its brief in support of its Motion for Summary Judgment, the General Counsel asserts first that the Union demonstrated, in its information request, a particularized need for the staffing guidelines and staffing reports, and second that the Agency failed to identify any countervailing interests precluding disclosure. MSJ at 8-10. On the first point, the GC asserts that the Union demonstrated its need for the information by noting that it had received reports from both Union and Agency officials concerning staff reductions at several correctional institutions and that the Agency itself had advised Congress it was "modernizing" its staffing guidelines. *Id*. at 8. Reductions in staffing levels directly correlate with increased violence and safety hazards at the facilities and with increased staff suicides. Since the parties' CBA obligates the Agency to

minimize safety hazards and to distribute staff workloads equitably, the information requested by the Union was necessary for it to determine whether the Agency's staffing complied with these requirements. *Id*. Additionally, Executive Order 14003 requires the Agency to negotiate over permissive subjects such as staffing, and the Union needs the requested information to determine whether to invoke such bargaining, and if so, to fully prepare for it. *Id*.

Next, the GC asserts that the Agency never actually identified any countervailing anti-disclosure interests; instead, the Agency simply insisted the Union had not met its burden of showing particularized need. *Id*. at 9. But the GC also addresses the Agency's assertion that its staffing guidelines are merely internal guidance meant only for management, and thus exempt from disclosure. *Id*. In this regard, the GC insists that internal management guidance is not exempt from disclosure, under § 7114(b)(4)(C) of the Statute, unless it relates specifically to the collective bargaining process. GC Reply at 3. By its own description, the Agency's staffing guidelines relate to improving the management and operations at Agency facilities, not to collective bargaining; therefore, they are not exempt from disclosure. *Id*.

Inexplicably, the GC does not offer (in either its MSJ or its Reply) any explanation or justification as to how or why Executive Order 14003 is enforceable in a ULP proceeding under our Statute, even though the Union premised its information request on the Executive Order, the GC cited it in the "Background" portion of its motion, and the Respondent argued at length in its MSJ that the order is not enforceable.

Respondent

In the Agency MSJ, Respondent argues primarily that the Union failed to articulate a particularized need for the requested information, and it secondarily asserts that the Agency has an important countervailing interest against disclosure of confidential management guidance documents. Agency MSJ at 21-22. Respondent makes several arguments in support of its first theory. It notes first that the Union's information request was premature, as it cited the need to prepare for bargaining negotiations over staffing, despite the fact that such bargaining had not yet been formally invoked,[2] either through midterm bargaining or bargaining in response to management-initiated changes. *Id*. at 8-9.

More fundamentally, Respondent submits that by its very terms, the Executive Order, which the Union relies on as its basis for needing the staffing documents, is not enforceable in a ULP proceeding. *Id*. at 6-13. While the Agency's refusal to negotiate over staffing issues may indeed violate the Executive Order, Respondent insists that the Union's recourse for such a refusal is with the President and his delegated officers, not with the FLRA. *Id*. at 9-10. The Respondent cites the history of President Clinton's Executive Order 12871, issued in 1993, which contained language similar to E.O. 14003, and which was held by the Authority and the courts to be unenforceable by administrative or judicial means. *Id*. at 11 (citing *Am. Fed'n of Gov't Emp., AFL-CIO, Council 147 v. FLRA*, 204 F.3d 1272 (9th Cir. 2000) (*AFGE v. FLRA*), and *Nat'l Ass'n of Gov't Emp. v. FLRA*,

[2] The precise status of the Union's bargaining demand is not clarified in the record. Both parties acknowledge that such a demand was made in February 2021 and that the Agency denied it in March of that year, but it is not clear why no further action seems to have been taken on the matter.

179 F.3d 946 (D.C. Cir. 1999) (*NAGE v. FLRA*)). In those decisions, the courts noted that the E.O. ordered agency heads to elect to negotiate over permissive subjects, but that it did not constitute an actual election to negotiate by the agency heads. *NAGE v. FLRA*, 179 F.3d at 950. The E.O. expressly stated that it was "intended only to improve the internal management of the executive branch and is not intended to . . . create any right to administrative or judicial review . . . ." *Id*. at 951. Since the current E.O. is virtually the same as the 1993 order, Respondent insists that the Authority has no jurisdiction to get involved in this dispute. Agency MSJ at 13.

Aside from the enforceability of the Executive Order, Respondent still insists that the Union never showed that it had a particularized need for the staffing guidelines and other documents. Citing the Authority's decision in *NLRB v. FLRA*, 952 F.2d 523, 525 (D.C. Cir. 1993), the Respondent emphasizes that the Union must show that the information is "necessary," and not merely "relevant," to the Union's stated purposes – a burden the Union here did not meet. Agency MSJ at 16. In this regard, Respondent insists that even if it were to engage in 7106(b)(1) bargaining with the Union, the Union has sought far more information than it has justified. Specifically, while the Union cited complaints from local officials regarding staff reductions at five facilities, it now seeks detailed information on staffing levels at all Agency facilities nationwide. *Id*. By failing to tailor its request narrowly to the facilities that have allegedly had staff reductions, the Union demonstrated that it was actually engaged in a fishing expedition, according to the Respondent. *Id*. at 17-18.

Next, the Respondent asserts that the Union's purported need to determine whether the Agency has fulfilled its obligations under various articles of the CBA is inadequate to justify disclosure. *Id*. at 19-22. Article 3 of the CBA is based on the Union's mistaken premise that it can enforce E.O. 14003 and require bargaining over staffing issues; the safety provisions of Article 27 do not justify the production of staffing information for every Agency facility in the country; and the "fair and equitable" language of Article 6 is so broad and ambiguous that it would justify the production of any information whatsoever. *Id*. at 21.

The Respondent submits that the Union's failure to show a particularized need for the information absolved the Agency of any obligation to articulate its own countervailing interests against disclosing the staffing information. *Id*. at 21 (citing *Nat'l Labor Rel. Bd*., 60 FLRA 576, 581 (2005)). Nonetheless, Respondent asserts that it is "clear" that it has a "countervailing interest in keeping its guidance, best practices and aspirational goals written by management to management relating to staffing private." *Id*. at 21-22.

ANALYSIS AND CONCLUSIONS

The parties in our case are not in disagreement regarding the analytical framework for evaluating information requests; they have both summarized the case law, but I will restate it. Under § 7114(b)(4) of the Statute, an agency is required to furnish a union, upon request, and to the extent not prohibited by law, data which (1) is normally maintained by the agency in the regular course of business; (2) is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (3) does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. 5 U.S.C. § 7114(b)(4). An agency's failure to provide information meeting these criteria is a violation of § 7116(a)(1), (5), and (8) of the Statute. *Internal Revenue Serv*., 50 FLRA 661 (1995).

The Authority has held that § 7114(b)(4) requires a union requesting information to first establish a "particularized need" for the information. This means that at or near the time of the request, the union must articulate with specificity why it needs the information, including the uses to which the information will be put, and the connection between those uses and the union's representational responsibilities under the Statute. *Id*. at 669. The agency, in turn, must assert and establish any countervailing anti-disclosure interests at or near the time of the union's request, and both the agency and the union must state their reasons in more than conclusory terms. *Id*. at 670; *see also Pension Benefit Guar. Corp., Wash., D.C.*, 69 FLRA 323, 330 (2016). The Authority envisioned that this process of articulating and exchanging respective interests would enable the parties to "consider, and as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information must be disclosed." 50 FLRA at 670-71. Where the parties are unable to agree, the Authority will find an unfair labor practice if the union has established a particularized need for the information and either (1) the agency has not established a countervailing interest, or (2) the agency has established such an interest but it does not outweigh the union's demonstration of particularized need. *Id*. at 671.

In their respective pleadings, the Union, the GC, and the Respondent raise a number of issues that arise in litigation over information requests: the persuasiveness of the Union's stated need for the information; the connection between the Agency's alleged staff reductions and workplace safety; the portions of the CBA that may have been violated by the Agency, and which demonstrated the Union's need for the information; whether the Agency's staffing guidelines were "mere guidance" or Agency policy; and whether the staffing guidelines are exempt from disclosure under § 7114(b)(4)(C). But none of these issues are necessary for the resolution of this case, because the information request is not enforceable in an unfair labor practice proceeding.

It is undisputed that the Union is asking for documents relating to "the numbers, types, and grades of employees or positions assigned" to each of the Agency's facilities – precisely the type of information that is encompassed by § 7106(b)(1) of the Statute. The information request itself uses virtually the same language as the text of the Statute cited above, and immediately thereafter it segues to E.O. 14003 and the directives from OPM and from the Assistant Attorney General requiring agencies to elect to negotiate on permissive subjects. GC Ex. 1 at 2,3. Thus the Union's information request is inextricably tied to the Order itself, and its enforceability is entirely dependent on the force of the Order.

This is not a novel issue. As the Respondent has noted, the Authority held that it could not enforce President Clinton's Executive Order 12871, and the U.S. Courts of Appeals for both the District of Columbia and Ninth Circuits affirmed that holding. *U.S. Dep't of Commerce, Patent & Trademark Office*, 54 FLRA 360 (1998) (*Commerce*), *aff'd*, *NAGE v. FLRA*, *supra*; *Soc. Sec. Admin., Santa Rosa Dist. Office, Santa Rosa, Cal*., 54 FLRA 444 (1998), *aff'd, AFGE v. FLRA, supra*. The Authority stated there that the Order's language that agency heads "shall . . . negotiate" over 7106(b)(1) matters did not effectuate an election to negotiate. 54 FLRA at 378. Giving someone else an order to negotiate is not equivalent to negotiating yourself. As the Authority put it, "Not every order from a superior to a subordinate amounts to a requirement that is enforceable by administrative agencies and/or the courts." *Id*. Moreover, additional language in the Order emphasized that it was intended only to improve the management of the executive branch, and that

it did not create any right to administrative or judicial review; such language made it clear that an agency's violation of the Order was not enforceable through the ULP procedures of the FLRA. *Id*. at 380-81.[3]

Executive Order 14003 is not a carbon copy of E.O. 12871, but their relevant portions are quite similar. Unlike the 1993 order, the 2021 order does not create labor-management partnership councils[4] for unions and agencies to address a wide range of issues, nor does it strive to "chang[e] the nature of Federal labor-management relations."[5] But the language of § 4 of E.O. 14003 ("The head of each agency subject to the [Statute] shall elect to negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1) and shall instruct subordinate officials to do the same.") is nearly identical to that of § 2(d) of E.O. 12871 ("The head of each agency subject to the [Statute] shall . . . negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and shall instruct subordinate officials to do the same.") The only difference here is that the 2021 order says "shall elect to negotiate," while the 1993 order said "shall negotiate." The final provisions of both orders (§ 7(c) of E.O. 14003, § 3 of E.O. 12871) state (using slightly different words) that they are not intended to create any substantive or procedural right "enforceable . . . against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person." The only noticeable difference here is that the 2021 order omits the language that it is "intended only to improve the internal management of the executive branch."

So, are these differences significant enough to render the 2021 order enforceable by the FLRA in a ULP proceeding (as the GC seeks), where the 1993 order was not? It might have been useful if the GC had weighed in on this question, but it chose not to. The GC explicitly cites E.O. 14003 as the basis for the Union's right to the requested information, but it seems to assume that the issuance of the Order makes the staffing issues negotiable. It simply asserts in its MSJ that the Union "needed the requested information to represent its members and to determine if Respondent met its contractual obligations under the parties' collective bargaining agreement and EO 14003." MSJ at 8. It further argues that the Union needed the information "to determine what, if any, changes Respondent made with respect to the numbers, types, and grades of employees, to decide whether to invoke bargaining under 5 U.S.C. § 7106(b)(1)." *Id*. Even after the Respondent wrote at length, in the Agency MSJ, about the unenforceability of E.O. 14003, the GC Reply did not address this issue at all.

---

[3] Outside the realm of our Statute, courts have generally, but not universally, held that executive orders are not judicially or administratively enforceable; the outcome usually turns on whether the text of the order reflects an intent to create a legally enforceable right. *See generally*, Matthew Chou, *Agency Interpretations of Executive Orders*, 71 Admin. L. Rev. 551, 564-65 (2019); *see, e.g., In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1357 (D.C. Cir. 1980) (EO requiring regulations to contain "inflationary impact statements" is not enforceable). A similar holding was issued in a case involving Executive Order 10988 (1962), a precursor to our Statute: in *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451, 456-57 (D.C. Cir. 1965), the court held that since the order was not grounded in any statute and was simply intended as a means of improving the efficiency of federal employment relations, a violation of the order could not be judicially enforced. *But see Legal Aid Society of Alameda County v. Brennan*, 608 F.2d 1319, 1329-30 (9th Cir. 1979), where the court held that regulations issued by the Department of Labor pursuant to Executive Order 11246 were judicially enforceable, because the text of the Order suggested the availability of enforcement remedies.

[4] E.O. 12871, Section 2(a).

[5] E.O. 12871, Preamble.

I do not see any differences between the two executive orders that are significant enough to show that the 2021 order was intended to be administratively or judicially enforceable. Stating (as does the 2021 order) that agency heads "shall elect to negotiate" – rather than that they "shall negotiate" – does not alter the fact that it is the agency head, not the President, who is supposed to take the action of "electing" to negotiate. The Authority emphasized the distinction between a person actually doing something himself and ordering someone else to do it. 54 FLRA at 378. The 2021 order places additional emphasis on the word "elect," echoing the text of 7106(b)(1), but it still places the responsibility for negotiating, or electing to negotiate, on the agency head. And in our case, the Respondent has not elected to negotiate staffing levels or related issues. Furthermore, the final section of both orders explicitly states that it does not create any right enforceable against the United States or any of its agencies. The exact wording is slightly different, and the 2021 order omits the clause regarding "improving the internal management of the executive branch," but the conclusion remains inescapable that the Union cannot utilize the Executive Order to force the Agency – at least not through administrative or judicial proceedings -- to negotiate on 7106(b)(1) subjects.

It might be argued that the Union is not seeking to enforce E.O. 14003 itself, but rather is simply seeking to enforce the information-request requirements of § 7114(b)(4); therefore, the holdings in the E.O. 12871 cases are not applicable. The GC made a similar argument in the prosecution of its complaint in *Commerce*, but the Authority was unconvinced. The cases consolidated in *Commerce* involved several different types of alleged violations of the agencies' duty to bargain in good faith: they involved either direct refusals to negotiate over 7106(b)(1) subjects or unilateral changes in working conditions relating to such subjects. The Authority summarized the GC's argument there as follows: "[T]he General Counsel argues that the case concerns only the Respondent's refusal to fulfill a statutory bargaining obligation prior to effectuating a change in conditions of employment, not a failure to comply with the Executive Order." 54 FLRA at 366. In rejecting this argument, the Authority reasoned that enforcement of the statutory duty to bargain under § 7116(a)(5) – when that duty is based on an executive order – unavoidably leads to administrative and judicial enforcement of the order itself. *Id.* at 380-81; *see also* the Authority's earlier, partial decision in the same case, *U.S. Dep't of Commerce, Patent & Trademark Office*, 53 FLRA 858 at 875-77 (1997).

In our case, the only reason the Union **needs** the information sought here is to prepare for negotiations over the numbers, types, and grades of employees or positions assigned at various levels of the Agency – in other words, to engage in bargaining that is permitted only at the election of the Agency. And since the Agency has not elected to engage in such bargaining here, its refusal to furnish the requested information would (under the GC's complaint) inherently require me, the Authority, and ultimately the courts, to enforce the Executive Order. It seems to me that if the Agency cannot be forced in a ULP proceeding to negotiate over these permissive subjects, then there is no basis on which to force the Agency to provide information to enable the Union to prepare for such negotiations. Mr. Wade put it most aptly (albeit ungrammatically) when he told the Union, "[A]ny need to prepare for or participate in non-existent negotiations are itself non-existent." GC Ex. 2 at 4.

The Respondent cites the Authority's decision in *U.S. Dep't of Veterans Affairs, Wash., D.C.*, 34 FLRA 182 (1990), in further support of its position that the FLRA is without authority to enforce the Executive Order. Agency MSJ at 9. In that case, a union representing professional employees of the Veterans Administration sought information relevant to the processing of an employee's grievance. A special provision of Title 38 of the U.S. Code, however, gave the VA Administrator unfettered control over the conditions of employment of these professional employees, and both a court and the Authority had previously held that the VA had no duty to bargain with the union concerning them. 34 FLRA at 186. The Authority stated: "An agency's obligation under section 7114 to provide information which is necessary for unions to evaluate and process grievances flows from the agency's obligation to bargain collectively under the Statute." *Id*. Since the agency had no duty to bargain with the union concerning these employees, the Authority held that it had no duty to provide the union with information relating to their grievances, even though the agency had negotiated an agreement with the union that included a grievance procedure. *Id.* at 186-87. Any such negotiations between the VA and the union did not constitute "collective bargaining" within the meaning of the Statute: because the agreement resulted from the VA Administrator's exercise of discretion under Title 38, "it falls outside the framework of rights and obligations established by the Statute and is not covered by the Statute's mechanisms for the enforcement of those rights and obligations." *Id*. at 187-88.

I discuss this decision in detail, because those details are important in understanding what aspects of the case are applicable to our case, and what aspects are not. The *VA* case involved an entire category of employees who are not covered by our Statute, and therefore that union had no bargaining rights at all under the Statute; in our case, Bureau of Prisons employees are fully protected by our Statute. Therefore, unlike the situation in the *VA* case, relations between the Agency and the Union fall within "the framework of rights and obligations established by the Statute." Nonetheless, the Union's right to bargain is constrained by provisions of the Statute, including § 7106(a) and (b). Thus the Authority's statement in *VA* – that the Agency's obligation under § 7114 to provide information to the Union flows from the Agency's obligation to bargain collectively – applies in our case as well. 34 FLRA at 186. While the Union has the ability to utilize the framework of the Statute to enforce violations of the Agency's obligations, it cannot utilize the Statute to enforce violations of an executive order, and it cannot force the Agency to furnish information about matters that are not negotiable. If the Agency doesn't elect to bargain over a permissive subject, then the Union cannot require the Agency to provide information on that subject. To the extent that the Agency has violated the Executive Order, that is not something that can be remedied through the Statute.

Finally, both the Union and the General Counsel have justified the information request as necessary "to determine if the Agency has met its contractual obligation under the Contract and the Law." GC Ex. 1 at 4. The Union's information request went on to cite articles of the CBA relating to safety and to fair and equitable treatment, among other things. *Id*. at 4-5. The GC summarized the Union's particularized need for the staffing data "to determine if Respondent met its contractual obligations under the parties' collective bargaining agreement and EO 14003." In this case, however, the cited provisions of the CBA cannot stand alone to require the Agency to furnish the requested information, because the target of the request is on information relating to the numbers, types, and grades of employees or positions assigned to various facilities. The Union may, hypothetically, be entitled to other types of information concerning workplace safety, but that contractual provision does not entitle it to information on permissive 7106(b)(1) matters.

I recognize that my decision here conflicts with the decision in another, similar case involving related parties. In *Fed. Bureau of Prisons, Fed. Corr. Inst., Cumberland, Md*., Case No. WA-CA-22-0409, OALJ No. 24-13, 2024 WL 2860890 (May 23, 2024), a fellow Administrative Law Judge ordered the agency to furnish AFGE Local 4010 with its current staffing guidelines. There are some differences between our case and the *FCI Cumberland* case: in the latter case, the union did not ask for staffing data at the agency's facilities; the agency did not defend its refusal to provide the information on the grounds that the Executive Order is unenforceable; and the decision primarily focused on the agency's insistence that the staffing guidelines are exempt from disclosure under § 7114(b)(4)(C). The judge's decision there touched on the enforceability of E.O. 14003 only in a footnote, saying that the information request does not require the agency to bargain over 7106(b)(1) issues and simply enables the union to prepare for permissive bargaining. *Id.,* slip op. at 12 n.4. In our case, unlike *FCI Cumberland*, the union has explicitly demanded to bargain over permissive issues, the Agency has refused, and the Agency has explicitly argued that its refusal does not constitute an unfair labor practice. While I agree that a union frequently needs information in order to properly prepare for bargaining, I disagree that it is entitled to information on non-negotiable subjects.

For all of these reasons, the Union's information request failed to articulate a particularized need for the staffing data, and the Agency was warranted in denying the request. While the Agency's refusal to negotiate on these permissive subjects may have violated Executive Order 14003, that refusal is not an unfair labor practice that the FLRA can remedy. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed in its entirety.

Issued, Washington, D.C., November 14, 2024

_____

RICHARD A. PEARSON
Administrative Law Judge