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U.S. DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF PRISONS, FEDERAL CORRECTIONAL INSTITUTION, DUBLIN, CALIFORNIA AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3584, AFL-CIO

FEDERAL LABOR RELATIONS AUTHORITY

OALJ 16-35

Office of Administrative Law Judges

WASHINGTON, D.C. 20424

U.S. DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF PRISONS

FEDERAL CORRECTIONAL INSTITUTION

DUBLIN, CALIFORNIA

RESPONDENT

Case No. SF-CA-15-
0534

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3584, AFL-
CIO

CHARGING PARTY

Yolanda C. Shepherd

For the General Counsel

Steven R. Simon

For the Respondent

Before: SUSAN E. JELEN

Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On April 24, 2015, the American Federation of Government Employees, Local 3584, AFL-CIO (Union), filed an unfair labor practice (ULP) charge against the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin, California (Respondent). (G.C. Ex. 1(a)). On October 30, 2015, the Regional Director of the San Francisco Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1), (5), and (8) of the Statute by failing to provide the Union

with information requested pursuant to § 7114(b)(4) of the Statute. (G.C. Ex. 1(b)). The Respondent timely filed an Answer to the Complaint on November 20, 2015, in which it admitted certain allegations, but denied that it violated the Statute. (G.C. Ex. 1(c)).

On January 27, 2016, a hearing in this matter was held in San Francisco, California. The parties were afforded a full opportunity to be represented and heard, examine witnesses, introduce relevant evidence, and make oral arguments. The General Counsel and Respondent filed post-hearing briefs which were fully considered.

Findings of Fact

The U.S. Department of Justice, Federal Bureau of Prisons is an agency under 5 U.S.C. § 7103(a) (3). (G.C. Exs. 1(b) & 1(c)). At all times material, Kari Nelson occupied the position of Human Resources Manager at the Federal Correctional Institution in Dublin, California (FCI Dublin). (G.C. Exs. 1(b) & 1(c)). Gordon Castillo occupied the position of Correctional Service Captain. (G.C. Exs. 1(b) & 1(c)). Castillo and Nelson acted on behalf of the Respondent at all material times. (G.C. Exs. 1(b) & 1(c)).

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. § 7103(a) (4) and AFGE is the exclusive representative of units of employees appropriate for collective bargaining at FCI Dublin. (G.C. Exs. 1(b) & 1(c)). Local 3584 is an agent of AFGE for the purpose of representing employees at FCI Dublin. (G.C. Exs. 1(b) & 1(c)).

Overtime Procedures and Record-Keeping

Employees at FCI Dublin offer to work overtime by logging into a computer program and signing-up. (Tr. 15-16). Employees can select particular shifts and assignments. (Tr. 28). They can offer to work a shift on a particular day or they can offer to work certain shifts on certain days of the week for months in advance. (Tr. at 28-30).[1] The employees' names are then placed on overtime lists. (Tr. 30). The lieutenants or supervisors then select the appropriate person to work overtime based on the list. (Tr. 15-16, 28-29).

The Overtime Logs are maintained by FCI Dublin in its computer program and in a shared drive. (Tr. 16, 98). The computer program only retains information for two years. (Tr. 16, 39, 65). An employee can print the Overtime Logs sorted by the date when an employee logs into the system to make a change ("log date") or the date of the shift impacted by the employee's action ("shift date"). (Tr. 27). The Union has read-only access to these reports. (Tr. 37-38). Both reports provide similar information:

1. the date and time the employee logged into the system to take an action;
2. the action taken;
3. the name of the employee;
4. the post impacted;
5. the date; and
6. the shift

(R. Ex. 11 at 7-10, 12-16). Under the column entitled "actions", the Overtime Logs describe what happened. For example, an employee may sign-up or remove themselves from overtime consideration. Also, management may note that it did not give the employee overtime ("OT-bypass") or that it cancelled overtime. (Tr. 118; R. Ex. 11 at 7-10, 12-16). Also, the Overtime Logs indicate whether the employee accepted the overtime, refused the overtime, or was bypassed. (R. Ex. 11 at 7-10, 12-16). The Overtime Logs organized by log date contains more information about efforts to reach the employee. (R. Ex. 11 at 12-16). For example, it will note that the supervisor called the employee and left a message or that he or she did not call the employee because the employee is on sick leave.

The Respondent also maintains archived Overtime Logs on a shared drive. (Tr. 98). These records were saved by log date from November 2011 through September 2012 and January 2013 through March 10, 2013. (Tr. 70). The Respondent does not have any Overtime Logs for August to October 2011 and October to December 2012. (Tr. 70).

There is another report, entitled “Overtime Signups” that lists who signed-up to work overtime for a particular shift and assignment. (R. Ex. 8 at 11 and 12). However, it does not show whether the employee accepted overtime or refused overtime or if the supervisor bypassed the employee. (Tr. 129-30; R. Ex. 8 at 11 and 12).[2]

The Respondent also maintains a Daily Assignment Roster which is a list of employees assigned to particular posts and assignments. (R. Ex. 8 at 2-6). It shows which posts were vacant and whether someone was selected to work overtime. (Tr. 61). However, it does not show who wanted to work overtime or who was available to work overtime.

Background

On August 24, 2011, the Union filed a grievance alleging that the Respondent violated the Master Agreement by failing to fill vacant posts. (Tr. 41; R. Ex. 4). At some point, someone told Kimberly Gempler, the Administrative Lieutenant at the time, to collect Overtime Logs because of the pending arbitration. (Tr. 100). Gempler saved the Overtime Logs to a shared drive. (Tr. 98). On May 8, 2014, the arbitrator ruled in favor of the Union and ordered the Respondent to give back pay to those employees who would have worked overtime when those posts were vacant from August 24, 2011, to the date of the award. (G.C. Ex. 2 at 47; R. Ex. 5 at 2). The arbitrator directed the parties to work together to determine which employees were owed back pay. The parties could not come to a resolution because the Respondent stated that the amount that the Union requested was excessive. (Tr. 63-64). Therefore, the Union decided it needed to collect overtime information to determine the appropriate amount of overtime owed.

On February 5, 2015, Susan Canales, the Union secretary, sent an e-mail to Castillo Gordon, Captain, asking for copies of the correctional services Overtime Logs from August 2011 to the current date of the request. (R. Ex. 1 at 2; G.C. Ex. 3). Canales acknowledged that the computer system does not contain information before February 2013. Nonetheless, she asked if this information was available. She concluded the e-mail by saying that she needed this information for the arbitration. Despite the fact that she knew that the computer system only retained information for two years, Canales believed that the Respondent had archived the data because of an arbitration decision in 2008. (Tr. 16-17, 52). On February 6, 2015, Castillo responded that Joseph Golden, the Administrative Lieutenant, would provide this information. (R. Ex. 1 at 1; G.C. Ex. 3).

On February 26, 2015, the Respondent gave a box of 1,693 pages of information to Canales. (Tr. 49; G.C. Ex. 3; R. Ex. 1). Later that day, Canales sent an e-mail to Castillo identifying two issues with the information. First, she explained that the box label indicated that the information included records from 2011 but the earliest record was only from February 19, 2013. Second, she stated that the information was “practically useless[]” because it

was printed in order of log date so it would not correspond to a particular Daily Assignment Roster. She concluded by requesting the Overtime Logs by shift date from August 2011 to May 2014, and offering to clarify her request.

Later, Canales discussed the information request with Castillo. (Tr. 18-19). According to Canales, she explained that the Union needed Overtime Logs by shift date starting from August 2011 in order to determine “what staff were available, what staff were skipped, what staff were trained and ready to work overtime.” Canales testified that she felt like Castillo understood what she wanted and that he had agreed to do it. On March 9, 2015, Canales sent another e-mail requesting an update on her request for information.

(G.C. Ex. 4). Later that day, Castillo responded by stating that he would get an update from Golden.

On March 23, 2015, Canales sent an e-mail to Castillo stating that she had received the Overtime Logs by shift date from March 11, 2013 to May 31, 2014; however, she still did not have information from August 2011 to March 10, 2013. (R. Ex. 1). She noted that those records should have been archived due to pending arbitrations. She asked Castillo to let her know when she could expect to receive the remaining information or whether the information was “permanently unavailable” *Id.* at 1.

On March 30, 2015, the Union and the Respondent had a Labor Management Relations (LMR) meeting. According to the meeting minutes, the Union reiterated that it wanted Overtime Logs by shift date from August 2011 to March 10, 2013, or an acknowledgement in writing that the information was permanently unavailable. (G.C. Ex. 5; R. Ex. 6). During the meeting, Donna Davis, the Acting LMR Chair, responded that the Respondent had “provided the Union documentation requested per [the] Master Agreement, Article 18, Section p(2)” (G.C. Ex. 5 at 4). She made this statement because Castillo told her that “everything [had been] provided for – per the request.” (Tr. 112). The Union responded that “The Union was informed that these rosters were not maintained by Management.” (G.C. Ex. 5; R. Ex. 6). On cross-examination, the Respondent asked Canales what she meant by that statement. (Tr. 24). Canales answered that a bargaining unit employee that works near the captain’s office stated that he or she believed that management no longer had the Overtime Logs, but the Union wanted management to state whether or not the Overtime Logs by shift date existed. According to Canales, at the end of the meeting, the Respondent promised to go back and see if it gave all the Overtime Logs to the Union. (Tr. 24).

Davis initially testified that she discussed the information request with Canales outside of the LMR meeting. (Tr. 111). Canales told her that the information she received was not in the correct format. She replied that the Respondent would provide what was available. However, Davis later contradicted herself when she said that

the only time she was “involved with any of the actual dealings with the Union in terms of the request and a response” was in the LMR meeting. (Tr. 112). Canales also stated that no one ever told her that the information did not exist. (Tr. 24).

Tonya Kyriss, the Administrative Lieutenant, met with Canales. (Tr. 66). Canales told Kyriss what she needed and explained how to print out the information in the correct format. Canales also told Kyriss that some of the information should have been archived. Kyriss printed out the Overtime Logs from the computer system and from the archived files. (Tr. 67). Kyriss then gave the information to Castillo and, on April 15, 2015, she sent an e-mail to Canales informing her that the information was ready. (Tr. 67; G.C. Ex. 6; R. Ex. 2). Kyriss acknowledged that she did not review the information thoroughly but she did know that it was missing several months of data. (Tr. 78-79). Castillo confirmed that Kyriss told him that some of the data was missing and some of it was not in the format requested by the Union. (Tr. 95).

Canales responded to Kyriss’s April 15, 2015, e-mail by asking whether the information was organized by shift date because anything else would be “useless” since it would “not correspond to a roster” and the Union would not be able to determine “overtime skips and overtime availability.” (G.C. Ex. 6; R. Ex. 2). On April 21, 2015, Canales noted that her previous e-mail had not been answered and reiterated that she needed the Overtime Logs by shift date. On April 22, 2015, Kyriss responded that Castillo told her that he had delivered the Overtime Logs to Canales the day before. On April 23, 2015, Canales stated that the information that Castillo provided was incorrect. She stated that she wanted the

Overtime Logs by shift date or confirmation that they were destroyed. Canales testified that she wanted to know if the information was unavailable because, in a previous arbitration, an arbitrator ruled that the Union could get “full monetary compensation” when the Respondent did not provide data. (Tr. 31).

At the time the Union filed this charge, the Union had not received any Overtime Logs for August, 24, 2011 to October 2011 and October 2012 to December 2012. (Tr. 33; G.C. Ex. 7). According to Kyriss, the previous administrative lieutenant did not archive this information. (Tr. 70). The Union received Overtime Logs by log date for November 2011 through September 2012 and January 2013 through March 10, 2013. (Tr. 33). Canales stated that the Respondent satisfied part of the information request by providing the Overtime Logs by shift date from March 11, 2013, to May 2014. (Tr. 33, 53).

Canales explained that the Union did not request the information when the grievance was arbitrated because the Union believed that the Respondent was archiving this information and it needed the arbitrator’s decision before it could find out how much information it needed. (Tr. 53). Also, she stated that the Union did not

request the information immediately after the arbitrator issued the decision because the parties were supposed to work together to come up with a resolution. (Tr. 54). The Union requested the information after it realized that the parties would not be able to resolve the matter and so it needed documentation. (Tr. 14).

Canales also stated that management told the Union, during previous arbitrations, that the Union was not allowed to print the Overtime Logs because they contained sensitive information such as whether an employee was AWOL or on sick leave. (Tr. 61, 116-17). Instead, the Union had to rely on the Respondent to provide the information. (Tr. 61). According to Kyriss, the Overtime Logs do not contain any sensitive information such as disciplinary actions or AWOL. (Tr. 76-77). Brian Guimond, the Captain at FCI Dublin from December 2012 to April 2014, initially stated that the Overtime Logs did not have sensitive information, but later stated he was not sure. (Tr. 107-08). The Overtime Logs provided by log date did include information about whether employees were on sick leave; the Overtime Logs provided by shift date did not include this information. (R. Ex. 11 at 7-10, 12-16

at 7-10, 12).

Canales stated that the Overtime Logs by log date would be “virtually impossible[]” to use. (Tr. 60). She explained that she would have to look at years of records to find each record that correlated to a particular shift. (Tr. 121). Kyriss stated that “it would just take a little bit longer to find” the information that Canales wanted using the Overtime Logs by log date compared to the Overtime Logs by shift date. (Tr. 74).

Kyriss and Golden stated that the Overtime Signups report is available to the Union using its read-only rights. (Tr. 76-77, 88). However, Canales stated that this information was not available to the Union. (Tr. 57). Canales also stated this information would not satisfy her request for information for two reasons. First, the list would not indicate whether the employee was selected for overtime or why they were bypassed. (Tr. 114). Kyriss stated that the Union could have looked at the Daily Assignment Roster to see if the employee was selected for overtime. (Tr. 126). Second, Canales stated that this report would not indicate whether an employee took their name off the list before or after the report was printed. (Tr. 114). Kyriss acknowledged that employees could remove their name from the report after the date of the overtime, but she didn’t know why they would do so. (Tr. 127). Kyriss also indicated that employees’ names are removed from the system when they retire or otherwise leave the institution. (*Id.*). However, she does not delete their past overtime records. (*Id.*). However, she did not indicate whether this is a general policy or whether other administrative lieutenants may have deleted the past overtime records from the system. The Respondent never offered this information to Canales. (Tr. 114). Finally, there is no evidence that this information was available for the entire time period requested by the Union.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) alleges that the Respondent violated § 7116(a) (1), (5), and (8) of the Statute by refusing to provide the Union with the requested information.

First, the GC states that the Union established a particularized need for the Overtime Logs by shift date. (G.C. Br. at 12).

Second, the GC asserts that the Respondent failed to assert that this information was not reasonably available until the hearing. (G.C. Br. at 15). Therefore, the Respondent effectively waived its right to raise this defense. See *U.S. Dep't of Justice, INS, W. Reg'l Office, Labor Mgmt. Relations, Laguna Niguel, Cal.*, 58 FLRA 656, 659-660 (2003) (*INS*).

Third, the GC contends that if the information does not exist, then the Respondent violated its duty to notify the Union that the information does not exist. *U.S. Naval Supply Ctr., San Diego, Cal.*, 26 FLRA 324, 326-327 (1987). GC contends that the Respondent never actually told the Union that it did not have the Overtime Logs by shift-date.

(G.C. Br. at 17).

Fourth, the GC asserts that the Respondent's argument that the information was available in a different format should be rejected and this case should be distinguished from *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Forrest City, Ark.*, 57 FLRA 808 (2002) because the Overtime Logs by log date are not the same as the Overtime Logs by shift date.

(G.C. Br. at 19).

Fifth, the GC contends that the Respondent did not satisfy the information request by providing the Overtime Logs by log date because it would not contain the lieutenants' notations concerning whether an employee was unavailable for overtime and the information would not correlate to the Daily Assignment Roster. (G.C. Br. at 21-22).

Finally, the GC states that the Union did not clearly and unmistakably waive its right to the information. *USDA, FDA, Region VII, Kansas City, Mo.*, 19 FLRA 555, 557 (1985). GC asserts that Article 18(P)(2) of the MLA merely states that the Respondent must maintain the information for two years, it does not say that the Union cannot request more than two years of information. (G.C. Br. at 22-23).

For a remedy, the GC requests an order directing the Respondent to post a Notice signed by the Warden on all bulletin boards throughout the facility, and send a copy of the Notice by electronic mail to all bargaining unit employees. Further, the order should direct the Respondent to disclose the Overtime Logs by shift date if the information is available.

Respondent

The Respondent denies that it violated the Statute. First, the Respondent asserts that it provided the information in electronic form through the computer program. (R. Br. at 7). Second, the Respondent contends that the Union did not timely request the Overtime Logs by shift date because it first mentioned that it wanted the information in this format when Canales spoke with Kyriss. (*Id.*).

Third, the Respondent states that it provided all the reasonably available information when it gave the Union the Overtime Logs by shift date from March 11, 2013 to May 2014, and printed the archived data. (R. Br. at 8). Further, the Respondent told the Union that it provided all the reasonably available data during the LMR meeting. (R. Br. at 8-9). In support, the Respondent notes that the Union stated, in the LMR meeting minutes, that the “Union was informed that these rosters were not maintained by Management”

Finally, the Respondent contends that the Union waived its rights to the information by waiting more than two years to request the information. (R. Br. at 9). It notes that the Master Agreement only requires the Respondent to retain information for two years and there is no evidence of an agreement that required the Respondent to retain Overtime Logs for a longer period of time.

Analysis and Conclusions

Section 7114(b)(4) of the Statute requires an agency to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, information: (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and

necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective

bargaining; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.[3] 5 U.S.C. § 7114(b)(4).

In *IRS*, the Authority set forth the analysis for determining whether information is “necessary” under § 7114(b)(4) of the Statute. *IRS, Wash., D.C.*, 50 FLRA 661, 669-71 (1995) (*IRS*). To demonstrate that information is “necessary,” a union “must establish a particularized need for the information by articulating, with specificity, why it needs the requested information, including the uses to which the union will put the information and the connection between those uses and the union’s representational responsibilities under the Statute.” (*Id.* at 669-70) (footnote omitted). A union’s responsibility for articulating its interests requires more than a conclusory or bare assertion. (*Id.* at 670). The request must be sufficient to permit an agency to make a reasoned judgment as to whether information must be disclosed under the Statute. (*Id.*).

If an agency denies an information request, it must “assert and establish any countervailing anti-disclosure interests.” (*Id.*). An agency does not satisfy its burden by making conclusory or bare assertions. (*Id.*). Countervailing disclosure interests must be raised at or near the time of the union’s request, not for the first time at the ULP hearing. *Fed. Aviation Admin.*, 55 FLRA 254, 260 (1999) (*FAA*). Indeed, the Authority has repeatedly refused to consider countervailing interests that were not raised at or near the time of the information request. See e.g., *INS*, 58 FLRA at 659-60 (upholding a judge’s ruling that prohibited the agency’s witnesses from bringing up whether the information was reasonably available because it was not raised until the hearing); *Pension Benefit Guar. Corp., Wash. D.C.*, 69 FLRA 323 (2016) (finding that the agency failed to notify the union that the information was not reasonably available at the time of the information request; therefore, “it is not necessary for us to consider the Agency’s argument that the judge erred when he nonetheless concluded that the Agency failed to demonstrate that the phone logs were not reasonably available.”).

One anti-disclosure interest is that the information is not reasonably available. The agency has the burden to show that the information could only be obtained through “extreme or excessive means.” *Dep’t of HHS, SSA*, 36 FLRA 943, 950 (1990). An agency must describe the costs and effort required to obtain the information. *Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1254-55 (2000). The Authority has found information to be reasonably available when retrieval would have taken 350 hours and involved approximately 10,000 documents. *DOJ, U.S. INS, U.S. Border Patrol, El Paso, Tex.*, 40 FLRA 792, 804-05 (1991). On the other hand, the Authority found that data was not reasonably available when the agency would have to collect data from over 6,000 first-level supervisors and hundreds of disciplinary files from various personnel offices. *Dep’t of the Air Force Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 21 FLRA 529, 532 (1986).

The Authority has repeatedly found that data is normally maintained and reasonably available even when the agency needed to create a new computer program to reorganize data. *Dep't of the Navy, Naval Submarine Base, New London, (New London, Conn.)*, 27 FLRA 785, 797 (1987); *U.S. Dep't of the Air Force, Air Force Logistics Command, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 37 FLRA 987, 993 (1990); *Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 28 FLRA 306 (1987) (information reasonably available even though it would take three to four weeks to write a new computer program to retrieve the data).

If the parties cannot agree on disclosure, the agency will have committed a ULP if the union has established a particularized need for the requested 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 a particularized need.

IRS, 50 FLRA at 671.

The Union Established a Particularized Need for the Information by Shift Date

The Union established a particularized need for the Overtime Logs. The arbitrator ruled that employees were entitled to overtime any time the Respondent improperly left a post vacant starting from August 24, 2011 to May 8, 2014. (G.C. Ex. 2 at 47; R. Ex. 5 at 2). The arbitrator directed the parties to work together to "identify bargaining unit employees who would have worked overtime" on those occasions. In her initial request, Canales stated that she needed the Overtime Logs for the arbitration decision. (R. Ex. 1; G.C. Ex. 3). Therefore, it is readily apparent that the Union needed this information to determine who was available to work overtime on a particular day and who was entitled to work overtime on that day.

Also, Canales clearly indicated that the Union wanted the Overtime Logs organized by shift date on February 26, 2015. She repeated that she wanted the information by shift date when she spoke to Castillo and Kyriss and during the March 30, 2015, LMR meeting. (Tr. 18-19, 66; R. Ex. 1, 6; G.C. Ex. 5). Canales explained that she could not use the Overtime Logs by log date because they did not correlate to the Daily Assignment Roster. (R. Ex. 1, 2; G.C. Ex. 5, 6). The Union would have to review hundreds of pages of documents just to determine who was entitled to work overtime for a particular shift. This task would have to be replicated for every post that was left vacant by the Respondent. On the other hand, the Overtime Logs by shift date were already organized appropriately. It would be like looking for the phone number for everyone named John Smith in the phone book. If the phone book is organized by name, then it is fairly easy to find the right phone numbers. If the phone book is organized by phone number, one would spend days searching through hundreds of pages of documents to compile everyone's phone number that is named John Smith. This is not merely a case of convenience; the Union is also more likely to overlook records which may result in the wrong people getting back pay. Despite Canales's repeated requests for information in this specific format, the Respondent never questioned why the Union wanted this information by shift date.

The Union adequately explained why it needed the information (to determine who was entitled to back pay), the uses for which it would put the information (to ensure the proper people received back pay), and the connection between those uses and the Union's representational responsibilities under the Statute (to substantiate its request for overtime based on the arbitration decision). It also explained that it needed Overtime Logs organized by shift date so that it could be correlated to the vacant posts on the Daily Assignment Roster. The Respondent never challenged or requested clarification of the request. Therefore, the Union established a particularized need for Overtime Logs by shift date.

The Respondent Did Not Offer a Countervailing Interest

Once the Union established a particularized need, the Respondent had the obligation to raise any anti-disclosure interests. The Respondent now asserts that it provided all the reasonably available data to the Union. (R. Br. at 8). However, the evidence shows that the Respondent never told the Union that it had provided all reasonably available data until the hearing, despite the fact that the Union repeatedly asked the Respondent whether the information was available. (R. Exs. 1, 2, 6; G.C. Exs. 4, 5, 6).

Canales insisted that the Respondent never told her that there was no more reasonably available information. (Tr. 24). Davis asserted that she told Canales, outside of the LMR meeting, that the Respondent would provide all the information available. (Tr. 111). However, Davis later contradicted herself by saying she did not discuss anything with the Union outside of the LMR meeting. (Tr. 112). Even if she had made this statement; the Union could not assume that the Respondent's later disclosure included all the reasonably available data. This is particularly true since Davis acknowledged she was not involved in the information gathering process. (*Id.*).

The Respondent contends that the LMR meeting minutes prove that the Union already knew that there was no other information available, because it stated that it had heard that management did not have any more data. (R. Br. at 6-7). However, Canales explained that she had only heard, from a bargaining unit employee, that there was no additional information. (Tr. 24). Canales would not have repeatedly asked the Respondent to confirm whether the information was unavailable if she already knew it was not available. (R. Ex. 2, 6; G.C. Ex. 5, 6). Also, Kyriss ended up disclosing additional information after the LMR meeting (Tr. 50, 73). Therefore, at the time of the LMR meeting, the Respondent had not disclosed all the reasonably available data even if one accepts that information by log date is the only reasonably available data. Consequently, the Respondent did not inform the Union that the information was not reasonably available until the hearing.

The Respondent waived its right to argue that the Overtime Logs by shift date was not reasonably available. Nonetheless, even if it properly raised this countervailing interest, the Respondent failed to show that the information was not reasonably available. Disclosure may require the Respondent to create a new computer program to reorganize the information on the shared drive or to collect information from other sources. The Respondent failed to offer any evidence concerning the time, effort, or cost to reorganize the information from log date to shift date format. As such, I find that the Respondent is obligated to give the Union the Overtime Logs by shift date from November 2011 through September 2012, and from January 2013 through March 10, 2013.

The Respondent Failed to Disclose that the Missing Information Did Not Exist

The Respondent does not appear to have maintained any Overtime Logs, in any format, from August 2011 to October 2011, and from October 2012 to December 2012. (Tr. 70). There is no evidence that the Respondent notified the Union that this information

did not exist despite the fact that the Union repeatedly requested to know if more information was available. (R. Exs. 1, 2, 6; G.C. Exs. 4, 5, 6).[4] Therefore, the Respondent violated the Statute by failing to notify the Union that this information did not exist.

The Respondent Did Not Disclose the Information and the Union Did Not Waive
its Right to the Information

The Respondent asserts that it satisfied its duty to disclose the overtime information because the Union had access to the information by shift date through the computer program. (R. Br. at 8). In support of this, Respondent stated that the National Labor Relations Board has found that companies were not required to disclose information that they had already provided to the unions on a regular basis. *Aerospace Corp.*, Case 31-CA-19441, 1993 WL 1609525 (Nov. 17, 1993, Litvack, ALJ); *Food Emp'r Council, Inc.*, 197 NLRB 651 (1972); *Old Line Life Ins. Co.*, 96 NLRB 499 (1951). However, there is no evidence that the unions in those cases no longer had access to the information provided by the companies. In this case, the Union could not use the computer system to obtain the information it needed, because the computer system only retained two years of information. It is clear, that the Union needed the Respondent to provide this information.[5]

The Respondent's remaining two arguments are similar. It asserts that the Union failed to request the Overtime Logs by shift date in a timely manner. (R. Br. at 7). Also, the Respondent asserts that the Union waived its right to the information because Article 18, Section P(2) states that the Respondent is only required to maintain two years of data and the Union waited too long to request the information. (R. Br. at 9). A waiver of a statutory right must be clear and unmistakable. *U.S. Dep't of the Navy, U.S. Marine Corps (MPL), Wash., D.C.*, 38 FLRA 632, 636 (1990). To determine whether a provision in a collective bargaining agreement constitutes a clear and unmistakable waiver, the wording of the provision at issue, and other relevant provisions, should be considered along with the parties' bargaining history. (*Id.* at 636).

According to Article 18, Section P(2), the Respondent must maintain two years of overtime information.[6] (R. Ex. 9). The plain language of the provision does not prohibit the Respondent from maintaining more than two years of information. Indeed, the Respondent actually maintained more than two years of Overtime Logs. It also does not prohibit the Respondent from giving the Union more than two years of information if, as in this case, it exists. The Respondent did not offer any other evidence to support its position that the Union clearly and unmistakably waived its right under § 7114(b)(4) to obtain more than two years of information.

Finally, the Union did not unreasonably delay requesting the information. The Union did not know how much information it needed until after the arbitrator ruled in its favor on May 8, 2014. Moreover, the Respondent also knew that this information would be relevant for the arbitration and that the information would be lost after two years. Indeed, Gempler testified that she was told to start archiving data because of the arbitration. (Tr. 100). Canales had no reason to request the information earlier because she believed, correctly, that the Respondent was collecting Overtime Logs. (Tr. 16-17, 52). The Respondent's decision to collect the information by log date, instead of shift date, cannot be explained. Clearly, the overtime information organized by shift date would be much more useful to any party trying to determine who is available to work overtime on a particular shift. Therefore, the Union did not unreasonably delay its request for information.

REMEDY

The General Counsel requested an order directing the Respondent to furnish the Union with Overtime Logs by shift date from August 2011 through February 2013, to the extent that the information exists. There is no evidence that the information from August 2011 through October 2011, and October 2012 through December 2012, exists. Therefore, I cannot order the Respondent to provide this information. The information is available, although in a format different from what was requested by the Union, and which appears to be unusable for

the Union's purposes, from November 2011 through September 2012, and January 2013 through March 10, 2013. Therefore, I will order the Respondent to furnish the Overtime Logs by shift date from November 2011 through September 2012, and January 2013 through March 10, 2013.

The General Counsel requested that the Notice be distributed via email and physically posted. I will incorporate the electronic dissemination into the Order in accordance with the Authority's decision that ULP notices should, as a matter of course, be posted both on bulletin boards and electronically. See *U.S. DOJ, Fed. BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014).

CONCLUSION

The Union established a particularized need for the Overtime Logs by shift date from August 24, 2011 to May 8, 2014. The Respondent satisfied its obligation to provide Overtime Logs by shift date from March 11, 2013 to May 8, 2014. However, the Respondent failed to notify the Union that the overtime records from August 24, 2011 through October 2011, and October 2012 through December 2012, did not exist. The Respondent failed to provide the Union with overtime records by shift date from November 2011 through September 2012, and January 2013 through March 10, 2013. The Respondent did not inform the Union of any countervailing interest in disclosing this information. Therefore, I find that the Respondent violated § 7116(a) (1), (5), and (8) of the Statute.

Accordingly, I recommend that the Authority adopt the following order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin, California, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 3584, AFL-CIO (Union) with the Overtime Logs by shift date from November 2011 through September 2012, and January 2013 through March 10, 2013.

(b) Failing and refusing to notify the Union that Overtime Logs from August 24, 2011 through October 2011, and October 2012 through December 2012 did not exist.

(c) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Furnish the Union with the Overtime Logs by shift date from November 2011 through September 2012, and January 2013 through March 10, 2013.

(b) Post at all facilities where bargaining unit employees represented by the Union are located, 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 Warden, Federal Correctional Institution in Dublin, California, and shall be posted and maintained for sixty (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) In addition to physical posting of paper notices, on the same day, Notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

(d) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, San Francisco Region, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., July 26, 2016

SUSAN E. JELEN

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Dublin, California, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to furnish the American Federation of Government Employees, Local 3584, AFL-CIO (Union) with Overtime Logs by shift date.

WE WILL NOT fail and refuse to notify the Union if the information does not exist.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured by the Statute.

WE WILL furnish the Union with Overtime Logs by shift date from November 2011 through September 2012, and January 2013 through March 10, 2013.

(Respondent/Agency)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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, San Francisco Region, Federal Labor Relations Authority, whose address is: 901 Market Street, Suite 470, San Francisco, CA 94103, and whose telephone number is: (404) 331-5300.

[1] For example, employees can offer to work overtime during the morning shift every Thursday for the next three months. (Tr. 28).

[2] As discussed below, the Union repeatedly requested “overtime sign-up” lists. (R. Ex. 1, 2, 6; G.C. Ex. 3, 4, 5, 6). However, Susan Canales, the Union’s representative, testified that she did not want the Overtime Sign-ups reports. (Tr. 113). Instead, she wanted the report entitled “Overtime Logs” organized by shift date. (Tr. 119-20; R. Ex. 11 at 7-10). The Respondent must have known that Canales meant Overtime Logs because it never offered the Union the Overtime Sign-up lists. (Tr. 114).

[3] The Respondent admitted in its Answer to the Complaint that the requested information does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining. (G.C. Exs. 1(b) & 1(c)).

[4] The Union initially asked if any overtime information was available. (R. Ex. 1; G.C. Ex. 4). Later, the Union asked whether the Overtime Logs by shift date were available during the LMR meeting and in April of 2015. (R. Exs. 2, 6; G.C. Exs. 5, 6). The Respondent still should have notified the Union that no information was available, in any format, from August 2011 to October 2011, and from October 2012 to December 2012.

[5] At hearing, the Respondent presented evidence that the Sign-up reports provided similar information. (Tr. 76; R. Ex. 8 at 11, 12). However, the Respondent did not raise this argument in its post-hearing brief. Witnesses for both the Union and Respondent disputed whether the Union had access to this data. (Tr. 57, 76-77). Canales stated that this information would not be useful or reliable because it did not contain information about why the person was selected and it could be changed retroactively. (Tr. 114-15; 129-30). The Respondent also never offered this information to the Union. (Tr. 114). Finally, the Respondent did not offer evidence to show that this information is available for the entire time period requested by the Union.

[6] Article 18, Section P(2) provides that:

[O]vertime records, including sign-up lists, offers made by the Employer for overtime, and overtime assignments, will be monitored by the Employer and the Union to determine the effectiveness of the overtime assignment system and ensure equitable distribution of overtime assignments to members of the unit. Records will be retained by the Employer for two (2) years from the date of said record.

(R. Ex. 10 at 38).