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**Department of Housing and Urban
Development and AFGE, Council 222**

71 FLRA 616

Federal Labor Relations Authority

71 FLRA No. 116

0-AR-5505

March 6, 2020

Judge / Administrative Officer

**Colleen Duffy Kiko, Chairman, and Ernest
DuBester and James T. Abbott, Members**

Ruling

The FLRA upheld an arbitration award ruling that the agency committed an unfair labor practice by failing to provide the information contained in the union's eight-part information request.

Meaning

A union's burden of establishing a particularized need for information includes the burden of establishing the necessity of the scope of the request. Thus, when an arbitrator finds that the union established a particularized need, the arbitrator also finds that the union established a particularized need for the scope of the information request.

Case Summary

While the parties were bargaining ground rules for renegotiating their bargaining agreement, the union submitted information requests regarding an agency proposal that each party would pay its own expenses for the renegotiation sessions. The agency denied the requests, asserting that the union failed to establish a particularized need for the items, especially considering the large scope of information requested in two of the eight items. The union's grievance alleged that the agency violated the statute by denying the information requests and by failing to bargain in good faith. The arbitrator determined that the union established a particularized need for all eight items in the third information request, in which it explained that it needed the information to draft

proposals, perform a cost analysis, and make other decisions. He concluded that the agency's failure to supply the information violated the statute. Denying the agency's exceptions, the FLRA upheld the award.

Before the FLRA, the agency argued that the information request was moot because it concerned an article that was imposed by the FSIP (requiring each party to pay its own travel expenses for the negotiations). The agency shouldn't have to comply with the remedy requiring it to answer the information request, the agency argued.

The FLRA explained that the party urging mootness generally meets its burden of showing mootness by demonstrating: 1) that there is no reasonable expectation that the alleged violation will recur; and 2) interim relief or events have irrevocably eradicated the effects of the alleged violation. The FLRA further explained that a ULP doesn't become moot even if the grievant no longer has any complaints regarding the underlying dispute.

Here, the agency didn't argue that the violation wouldn't recur or that the FSIP's decision altered the finding that the agency committed a ULP. Furthermore, the information pertained to an ongoing ULP that could recur. Accordingly, the FLRA concluded that the information request wasn't moot.

According to the agency, the award was based on nonfacts because: the arbitrator wrongly found that the agency "failed to suggest an alternative" to denying the union's three information requests; and at least one of the requested and ordered items didn't exist. The FLRA denied these exceptions because the agency didn't show that these findings were central facts.

The agency also argued that the award was contrary to law. According to the agency, arbitrator erred by concluding that the union established a particularized need for the scope of the information requested in items one and three. The FLRA noted that a union's burden of establishing particularized need includes the burden of establishing the necessity of the scope of the request. Thus, by determining that

the union established a particularized need, the arbitrator found that the union established a particularized need for the scope of the information request. Consequently, the FLRA rejected this assertion.

The FLRA also rejected an argument that the arbitrator erred by not addressing whether the requested information was protected by the deliberative-process privilege.

Full Text

DECISION

1. Statement of the Case

In this case, we reiterate the standards for determining whether an information request establishes a particularized need pursuant to § 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute).[1]

Arbitrator Edward J. Gutman found that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by failing to provide the information contained in the Union's eight-part information request and, therefore, failed to bargain in good faith.[2]

The Agency argues that the information request is moot because the underlying dispute surrounding the information request is resolved. We find that the Union's information request is not moot because the Agency failed to demonstrate that the unfair labor practice (ULP) will not recur. The Agency also argues that the award is based on nonfacts. Because the Agency fails to challenge central facts underlying the award, we deny the Agency's nonfact exception.

Lastly, the Agency argues that the Arbitrator's finding that the Union established a particularized need for all eight parts of the information request is contrary to § 7114(b)(4) of the Statute. Because the Arbitrator's factual findings demonstrate that the Union established a particularized need with its third and final information request, we deny this exception. Accordingly, we deny the Agency's exceptions.

1. Background and Arbitrator's Award

In June 2018, the Agency began negotiating ground rules for renegotiating the collective-bargaining agreement (CBA) by sending a memorandum of understanding (MOU) to the Union. The Union responded to the MOU by submitting three information requests to the Agency regarding one of the Agency's proposals, which would have required each party to pay its own expenses for the renegotiation of the updated CBA. The Union requested the following eight items in all three of its information requests:

1. Any and all ground rules negotiated with non-AFGE bargaining units which provide for the payment of any travel and/or per diem of bargaining, including over grounds rules; and

2. Any and all [Agency] documents, policies, memorandum case law, instruction, correspondence or position papers regarding anticipated budget allocations for FY 2018 and 2019, including but not limited to projected reductions, allocations[,] and reorganizations resulting from budget changes; and

3. All financial/budgetary information regarding actual expenditures/costs incurred by [the Agency's]'s Office of Employee and Labor Relations over the past five fiscal years, as well as budget amounts for the current and preceding fiscal year; and

4. All financial/budgetary information regarding any/all current and projected negotiations with the Union (term and mid-term). The data on actual (and budgeted) expenditures should include dollar amounts by detailed category, including bargaining unit and non-bargaining unit employee salaries and benefits, travel costs, etc. A budgetary breakdown for each member of the Management Negotiating Team is also requested.

5. Any and all contracts, including costs and terms of engagement, for consultants, advisors, assistants, and support during negotiations and Ground Rules preparation; and

6. The number of management [Agency] staff that were utilized to craft the proposed Management

#1 Ground Rules (broken down by GS level and time)[.]

7. The number of non-[Agency] staff that were utilized to craft the proposed Management #1 Ground Rules (broken down by GS level and time if federal employees, approximate salary for non-Federal employees[]); and

8. The number of staff hours ([Agency], Federal, Non-Federal) utilized to craft Management's initial Ground Rules proposals, including the number of months it took to complete the proposals, and the number of hours spent each week during that time period by each staff member participating in the preparation of Management's initial Ground Rules proposals.[3]

The Agency denied the Union's first two information requests and asserted that the Union had failed to establish a particularized need for any of the eight items. Specifically, the Agency contended that "[the Union] did not articulate a relationship between the information requested" and the proposals that required each party to pay its own expenses for the CBA negotiations.[4]

After the Agency's denials, the Union sent a third information request to the Agency for the same eight items and amended the information request. The Union explained that it needed the requested information to determine whether it was fair and equitable for each party to pay its own expenses for the forthcoming CBA negotiations. Furthermore, the Union provided a specific particularized need statement for five of the requested items and argued that it needed the information to draft

proposals, perform a cost analysis, determine whether it was necessary for the Union to make concessions in the CBA negotiations, and determine whether it was being treated similarly to other unions.

The Agency denied the Union's third request for information, asserting that the Union did not respond to the Agency's request for a particularized need for items five through seven and that the Union did not

establish a particularized need for the large scope of information requested in items one and three. The Agency also asserted that the Union failed to establish a particularized need for the remainder of the requested items. Due to the Agency's denial of the third information request, the Union filed a grievance alleging that the Agency failed to bargain in good faith and violated

§ 7116(a)(1), (5), and (8) of the Statute. The Agency denied the grievance and the matter proceeded to arbitration.

The Arbitrator determined that the Agency violated the Statute and committed a ULP by denying the Union's information requests in an award dated April 9, 2019. He found that the Union established a particularized need for all eight items by providing the Agency with the third information

request. While he determined that the Agency arguably had reasonable cause to deny the first two information requests, he found that the Union remedied any deficiencies in the previous requests by highlighting that it needed the information to determine whether it was being treated similarly to other bargaining units and that it needed the information to determine whether the Agency's proposals were fair and equitable for both parties. The Arbitrator also found that the Agency's failure to suggest an alternative to the third information request and denying the Union's three information requests evidenced an unfair-labor-practice. Accordingly, he concluded that the Union established that it needed the information to carry out its representational duties during the impending CBA negotiation, that the Agency violated § 7116(a)(1), (5), and (8) of the Statute by denying the information requests, and that the Agency failed to bargain in good faith with the Union. Therefore, the Arbitrator ordered the Agency to respond to the information request and ordered both parties to engage in mediation-type discussions to determine what items were prohibited from disclosure under § 7114(b)(4) of the Statute.

The Agency filed exceptions to the award on May 7, 2019, and the Union filed an opposition on

June 5, 2019.

III. Analysis and Conclusions

In general, after a union makes a request under § 7114(b)(4), the agency must either furnish the information, ask for clarification of the request, or identify its countervailing or other anti-disclosure interests, or inform the union that the information requested does not exist or is not maintained by the agency.[5] Additionally, when an agency reasonably requests clarification of a union's information request, the union's failure to respond to the request is taken into account, but is not necessarily determinative of whether the union has established a particularized need for the information.[6]

1. The Union's information request is not moot.

The Agency argues that the underlying information request is moot due to the Federal Service Impasses Panel's (the Panel) decision in U.S. Department of HUD and AFGE, Local 222 (HUD).[7] In HUD, the Agency filed a request for Panel assistance concerning the aforementioned ground rules negotiations.[8] The Panel ultimately imposed a number of articles on the parties, including one that required each party to pay its own travel expenses for the CBA negotiations.[9] Consequently, the Agency argues that it should not have to comply with the remedy requiring it to answer the information request because the request is moot and concerns an article that was imposed by the Panel.[10]

Generally, a dispute becomes moot when the parties no longer have a legally cognizable interest in the outcome.[11] The party urging mootness meets its high burden of demonstrating that neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law, upon satisfaction of two conditions: (1) that "there is no reasonable expectation . . . that the alleged violation will recur,"; and (2) "interim relief or events have completely [or] irrevocably eradicated the effects of the alleged violation."[12]

However, the Agency does not argue that the

violation will not recur or that the Panel's decision alters the finding that the Agency committed an unfair-labor-practice.[13] The Authority has held that a ULP does not become moot even if the grievant no longer has any complaints regarding the underlying dispute.[14] Accordingly, the Union's information request is not moot because the disclosure of the information pertains to an ongoing ULP that may recur.[15] Therefore, we deny this exception.

1. The Agency has failed to demonstrate that the award is based on nonfacts.

The Agency argues that the award is based on a nonfact because the Arbitrator found that the Agency "failed to suggest an alternative" to denying the Union's three information requests.[16] The Agency claims that this finding is a nonfact because it suggested some alternatives to the Union's second

information request.[17] The Agency also contends that the award is contrary to the Statute and based on nonfacts because the Arbitrator orders it to provide information that does not exist.[18] Specifically,

the Agency argues that it demonstrated at the hearing that it notified the Union that the information requested in item eight does not exist.[19] To establish that an award is based on a nonfact, the excepting party must show that a central fact underlying the award is clearly erroneous, but for which the arbitrator would have reached a different result.[20]

Based on the entire record and award, the Agency's arguments are unpersuasive.[21] Contrary to the Agency's claims, the Arbitrator found that the Agency failed to offer any alternatives to the Union's final information request, which he found to be the curative and essential information

request.[22] Furthermore, the Arbitrator did not determine whether the Agency established that the information requested in item eight exists.[23] While he ordered the Agency to respond to the information request, he provided the opportunity for both parties

to continue to make arguments as to what may or may not exist, and what may or may not be disclosed, when he also ordered both parties to engage in mediation-type discussions to determine what items were prohibited from disclosure under § 7114(b)(4) of the Statute.[24] Most importantly, the Agency has not demonstrated that these findings are central facts, but for which the Arbitrator would have reached a different conclusion regarding whether the Union established a particularized need for the requested items.[25] Consequently, the Agency has failed to demonstrate that the award is based on nonfacts and we deny these exceptions.[26]

1. The award is not contrary to § 7114(b)(4) of the Statute.

The Agency argues the Arbitrator erred by concluding that the Union established a particularized need for all the items in the information requests.[27] The Authority has found that in order to demonstrate that requested information is "necessary" within the meaning of § 7114(b)(4), such that an agency may violate the Statute when it fails to provide that information, the union must establish a "particularized need" by articulating, with specificity, why it needs the requested information and how its use of the information relates to the union's representational responsibilities under the Statute.[28]

1. The Arbitrator correctly determined that the Union established a particularized need for the entire information request.

The Agency claims that the award is contrary to law because the Arbitrator failed to address whether the Union established a particularized need for the scope of the information requested in items one

and three.[29] In particular, the Agency claims that the Union did not establish a particularized need for "[a]ny and all ground rules negotiated" with other unions that "provide for the payment of any travel" during ground rules bargaining,[30] and all budgetary information incurred by the Agency's labor relations office for the past five years.[31] Additionally, the

Agency argues the award is contrary to law because the Union's third information request failed to respond to the Agency's request for a clarification for items five through eight.[32]

The Authority has previously found that a "a union's burden of establishing particularized need includes the burden of establishing the necessity of the scope of the request," including the time period covered by the request." [33] Therefore, by determining that the Union established a particularized need, the Arbitrator already found that the Union established a particularized need for the scope of the information request.[34] Moreover, arbitrators are not required to address every argument that is raised by the parties.[35] Consequently, the Agency's assertion that the Arbitrator failed to address the scope of the Union's information request is without merit.

Additionally, the Arbitrator found that any deficiencies previously raised by the Agency were cured by the detailed third request.[36] Therefore, the Agency has failed to demonstrate that the award is contrary to law and we deny this exception.

1. The award is not deficient because the Arbitrator did not determine whether the Agency established the deliberative process privilege.

The Agency argues that the award is contrary to § 7114(b)(4) of the Statute[37] because the Arbitrator failed to address whether the requested information is protected by the deliberative process privilege.[38] However, as stated above,[39] the Arbitrator never determined whether the Agency established any anti-disclosure interests and instead, ordered the parties to engage in mediation-type discussions to settle any differences regarding what information was prohibited from disclosure under § 7114(b)(4) of the Statute.[40] Consequently, the Agency has failed to demonstrate that the award is contrary to law and we deny this exception.

IV. Decision

We deny the Agency's exceptions.

Member DuBester, concurring:

I agree with the Decision to deny the Agency's exceptions.

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5 U.S.C. § 7114(b)(4).

[21 Id. § 7116(a)(1), (5), (8).

[31 Exceptions, Ex. C, Joint Ex. 2 at 1-2.

[41 Id. at 2.

[51 See FAA, 55 FLRA 254, 260 (1999).

[61 SSA, 64 FLRA 293, 297 (2009) (SSA).

[71 18 FSIP 075 (2019).

[81 Id. at 1.

[91 Id. at 6.

[101 Exceptions at 18-19.

[111 U.S. Small Bus. Admin., 55 FLRA 179, 183 (1999) (SBA) (noting that the party asserting mootness has a high burden).

[121 Id. (quoting *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979)).

[131 See U.S. DHS, CBP, 64 FLRA 989, 997-98 (2010) (holding that an arbitrator's finding of a ULP and his order to bargain were not rendered moot by a change in the grievants' representation when the excepting party failed to argue that the violation will not recur); SBA, 55 FLRA at 183 (finding that an award, which moved the grievant to another position in the agency, was not moot when the grievant was no longer employed with the agency because the grievant could be reinstated to employment in a future proceeding).

[14] U.S. DOJ, INS, N. Region, Twin Cities, Minn., 52 FLRA 1323, 1336-37 (1997) (INS) ("[E]ven when the individual parties resolve the matter that gave rise to the ULP, such cases do not generally become moot because of the potential need for an enforcement decree barring the unfair practice." (citing *NLRB v. Raytheon Co.*, 398 U.S. 25, 27 (1970))).

[15] See INS, 52 FLRA at 1336-37.

[16] Exceptions at 7.

[17] Id.

[18] Id. at 15-16.

[19] Id.; Exceptions, Ex. C, Joint Ex. 2 at 2 ("The number of staff hours ([Agency], Federal, Non-Federal) utilized to craft Management's initial Ground Rules proposals, including the number of months it took to complete the proposals, and the number of hours spent each week during that time period by each staff member participating in the preparation of Management's initial Ground Rules proposals.").

[20] SSA, Office of Hearing Operations, 71 FLRA 177, 178 (2019) (SSA, OHO).

[21] Member Abbott notes that the Agency's unrelenting position here runs counter to the intent of Executive Order 13,836. Exec. Order No. 13,836, Developing Efficient, Effective, and Cost-Reducing Approaches to Federal Sector Collective Bargaining, 83 Fed. Reg. 25,329, 25,329, 25,331 (May 25, 2018) (mandating various procedures and timeframes that promote an effective and efficient means of accomplishing agency missions, "[to] reduce the cost of agency operations, including with respect to the use of taxpayer-funded union time," and "to negotiate ground rules that minimize delay [and] set reasonable time limits for good-faith negotiations."). The overarching purpose of Executive Order 13836 is to expedite the bargaining of collective bargaining agreements, and the expectations imposed by the Executive Order apply equally to agencies and unions alike. See id.

[22] See SSA, OHO, 71 FLRA at 178 ("The Authority rejects nonfact exceptions that challenge alleged findings that an arbitrator did not actually make." (citing *NLRB Prof'l Ass'n*, 68 FLRA 552, 554 (2015)); Award at 17-18.

[23] Award at 18 n.6.

[24] Id.

[25] AFGE, Local 1101, 70 FLRA 644, 646 (2018) ("[T]he [u]nion has not established that any of

these alleged misstatements are central facts underlying the award, but for which the [a]rbitrator would have reached a different result.").

[26] *Id.*

[27] Exceptions at 8-18. Section 7114(b)(4) of the Statute requires an agency, upon request and to the extent not prohibited by law, to provide a union with data that is: (1) normally maintained by the agency; (2) reasonably available; (3) necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and (4) not guidance, advice,

counsel, or training to management. See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Fort Dix, N.J., 64 FLRA 106, 108 (2009).

[28] U.S. DOJ, Fed. BOP, Fed. Corr. Inst. Ray Brook, Ray Brook, N.Y., 68 FLRA 492, 495 (2015) (Ray Brook) (citing IRS, Wash., D.C., & IRS, Kan. City Serv. Ctr., Kan. City, Mo., 50 FLRA 661, 669 (1995) (IRS)). The Agency also argues that the award is contrary to law because the Arbitrator used the incorrect legal standard when he stated that "as long as the information is relevant to one of a union's 'full range' of responsibilities, it will meet the particularized need standard." Award at 17-18; Exceptions at 8-9. As stated above, the Union needs to show how its use of the information relates to the union's representational responsibilities under the Statute. Ray Brook, 68 FLRA at 495. Consequently, this recitation of the law accords with Authority precedent. See *id.* However, the Arbitrator also stated that the Union needed to show that the information was "necessary" and he made several specific findings in this regard. Award at 13-15. Therefore, the Agency's argument is without merit and we deny this exception.

[29] Exceptions at 10-13.

[30] Exceptions, Ex. C, Joint Ex. 2 at 1 (emphasis added).

[31] *Id.* at 2 (emphasis added).

[32] Exceptions at 14, 16. The Agency also

argues that the award is contrary to § 7114(b)(4) of the Statute because it communicated to the Union that its ground rules proposals were "not motivated by financial constraints." *Id.* at 13. In its exceptions, the Agency fails to cite to any instance in which the Arbitrator found that the Agency's denials of the information requests were based on financial constraints. *Id.* Absent a nonfact exception, this exception is an unsupported disagreement with the Arbitrator's legal conclusions. *Id.*; see also 5 C.F.R. § 2425.6. Because this argument does not support a ground for review listed in § 2425.6(a)-(c) of the Authority's Regulations or otherwise demonstrate a legally recognized basis for setting aside the award, we dismiss. 5 C.F.R. § 2425.6(e)(1).

[33] SSA, 67 FLRA 534, 538 (2014) (citation omitted).

[34] See *id.* (holding that a finding of particularized need necessitates a finding of appropriate scope).

[35] See Haw. Fed. Emps. Metal Trades Council, 70 FLRA 324, 325 (2017); AFGE, Local 3911, 64 FLRA 686, 687-88 (2010) (finding that an arbitrator did not exceed his authority because he was not required to address every argument raised by the parties when he found that the agency did not violate the Statute).

[36] Award at 17.

[37] To demonstrate that disclosure is not necessary under the Statute, an agency must explain its anti-disclosure interests in more than a conclusory way, and the agency must raise these interests at or near the time of the request. See SSA, 64 FLRA at 295-96. However, the Authority has also stated that it "expect[s] the parties to consider, as we will in determining whether and/or how disclosure is required, alternative forms or means of disclosure that may satisfy both a union's information needs and an agency's interests in information." IRS, 50 FLRA at 671.

[38] Exceptions at 17. The deliberative process

privilege exempts the disclosure of documents that are "inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested." 5 U.S.C. § 552(b)(5).

[39] See Part III.B.

[40] See Award at 18 n.6.