IN THE MATTER OF ARBITRATION
BEFORE ARBITRATOR SEAN J. ROGERS

THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, COUNCIL 222, AFL-CIO Union, - and - U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, Agency.	:	ISSUE: FLSA OVERTIME

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT'S OPPOSITION TO THE UNION'S MOTION TO COMPEL RESPONSES

The United States Department of Housing and Urban Development ("Agency" or "HUD"), through counsel, respectfully responds to the Union's Motion to Compel dated October 5, 2006 (Motion #12) and requests that the Arbitrator rule that:

1. The Union is not entitled to any information in addition to what the Agency already has provided in response to the Union's September 7, 2006 request for information because the remaining information is neither "necessary" nor "reasonably available" within the meaning of 5 U.S.C. §7114(b) and other controlling legal authority.

2. Because the Union is not legally entitled to the information at issue, common sense and fairness dictate that HUD's inability and/or refusal to provide such information does not warrant an adverse inference.

By email dated November 17, 2006, the Union withdrew its second Motion to Compel (Motion #13).

I. PRELIMINARY STATEMENT

This opposition relates to a Union request for information dated September 7, 2006, which was submitted to HUD purportedly pursuant to 5 U.S.C. §7114(b). HUD

has already responded promptly to the request, providing information where appropriate and objecting where appropriate. Because the Union's right to information under 5 U.S.C. §7114(b) is not absolute, and because HUD's objections are based upon recognized grounds set forth in the statute, HUD respectfully requests that the Arbitrator deny the Union's motion to compel.

II. RESTRICTIONS ON THE UNION'S STATUTORY RIGHT TO REQUEST INFORMATION

Pursuant to the Federal Service Labor Management Relations Statute ("FSLMRS"), a union is entitled to receive from a Government agency only information which is both (1) normally maintained by the agency in the regular course of business ***and*** (2) reasonably available and necessary for discussion, understanding, and negotiation of subjects within the scope of collective bargaining. *See* 5 U.S.C. §7114(b)(4). In interpreting the terms of the Statute, the Federal Labor Relations Authority ("FLRA") has read into the law specific standards for determining whether the requested information is "necessary" and "reasonably available."

A. The Information Must be Necessary

In order to demonstrate that requested information is "necessary" under §7114(b)(4) of the Statute, 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. The requirement that a union establish such need will not be satisfied merely by showing that requested information is or would be relevant or useful to a union. Instead, a union must establish that requested information is required in order for the

union adequately to represent its members." *Internal Revenue Service, Washington, D.C.*, 50 FLRA 661, 669-70 (1995). In addition, "the union's responsibility for articulating its interests in the requested information requires more than a conclusory assertion and must permit an agency to make a reasoned judgment as to whether the disclosure of the information is required under the Statute." *Id.* at 670.

B. The Information Must be Reasonably Available

According to the FLRA, "the statutory requirement that data be reasonably available would exclude data which, although available, is available only through extreme or excessive means." *Department of Health and Human Services, Social Security Administration*, 36 FLRA 943, 950 (1990). A U.S. Circuit Court of Appeals has explained, "in evaluating the reasonable availability of documents, the FLRA should focus primarily on the efforts required to make the documents available, including costs and displacement of the agency's workforce" and "should at all times keep in mind Congress's stated goal of maintaining effective and efficient governmental operations." *Department of Justice, U.S. Border Patrol v. FLRA*, 991 F.2d 285, 292 (5th Cir. 1993); *see also* 5 U.S.C. §7101(b) ("The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.").

The FLRA and the courts have routinely rejected union requests for information where the costs of responding were excessive and hence the requested information was deemed not reasonably available. *See, e.g., United States Customs Service South Central Region New Orleans District*, 53 F.L.R.A. 789 (1997) (union's request for copies of materials covering a four-year period was not "reasonably available" where agency submitted evidence estimating it would cost over $19,000 and take more than 1,500 man-hours to produce the information); *Department of Air Force, HQ, Air Force*

Logistics Command & AFGE, 21 FLRA No. 71 (1986) (union's request for information relating to all agency disciplinary actions involving misuse of time-clocks was too broad, where the information sought would have required at least 3 months to produce and involved minimum screening expense of $30,000); *Department of Justice, U.S. Border Patrol v. FLRA, supra* (information requested by union was not reasonably available because "the Border Patrol would have to remove several employees from their regularly assigned duties for several weeks to search for, collect, collate, and redact thousands of pages of documents in various locations around the world.").

III. HUD IS NOT LEGALLY REQUIRED TO PROVIDE ADDITIONAL RESPONSIVE INFORMATION TO THE UNION'S SEPTEMBER 7, 2006 REQUEST BECAUSE SUCH INFORMATION IS NOT NECESSARY OR REASONABLY AVAILABLE

The Union's request for information dated September 7, 2006 contains 18 separate requests seeking various reports, records and HUD forms. The Union's motion to compel additional responses specifically addresses its requests for:

- All documents indicating travel on Saturday or Sunday by GS-360 grades 11-15 during hours corresponding to their normal tour of duty, since June 18, 2000;
- All documents indicating travel on Sunday by GS 10 and below during hours corresponding to their normal tour of duty, since June 18, 2000;
- All documents indicating travel on Sunday by all other bargaining unit employees during hours corresponding to their normal tour of duty, since June 18, 2000;
- All documents indicating travel by any GS-360 grades 11-15 on a weekday, prior to the beginning of their normal tour of duty, since June 18, 2000;
- All documents indicating travel by any GS-10 and below on a weekday, prior to the beginning of their normal tour of duty, since June 18, 2000;

- All documents indicating travel by all other bargaining unit employees on a weekday, prior to the beginning of their normal tour of duty, since June 18, 2000;
- HTMS records indicating time of Departure and time of arrival for GS-360 employees on travel since June 18, 2000;
- HTMS records indicating time of Departure and time of arrival for GS-10 and below employees on travel since June 18, 2000;
- HTMS records indicating time of Departure and time of arrival for all other bargaining unit employees on travel since June 18, 2000; and
- All HUD forms 25017 for each bargaining unit employee since May 1, 1998.

As shown below, this information is neither "necessary" nor "reasonably available."

Regarding the Union's alleged need for this information, it should first be noted that the Union appears to already possess many of the requested documents. Indeed, copies of travel records were introduced in connection with the live testimony in the 360s hearing and also were attached to the 26 affidavits that the Union submitted in the 360s hearing.

Also, the last request above is for a type of documents that has already been provided or made available to the Union; however, this specific request is for a time that is outside the scope of the present grievance and arbitration. The Union has no need for such information since the statute of limitations on work in 1998 and 1999 ran many years ago. The Union also does not need some of the other requested travel records which have already been provided by HUD to the Union.

Finally, and most importantly, the requested information is not necessary because it relates to potential damages that might be due bargaining unit members if and when, but only if and when, the employees are found to be nonexempt. To date, there has not been a single finding by the arbitrator that any employee at any level is

nonexempt, nor has HUD agreed to reclassify any employee above the GS-10 level, with the possible exception of paralegals. Accordingly, any claimed need for this information is premature and the information is not presently "necessary."

Nor is the information "reasonably available." It is impossible to know precisely how many pages of information the Union is requesting until the collection process is complete. However, an estimate can be made based on the travel records attached to the 26 affidavits submitted by the Union for the 360s hearing. Those 26 affidavits claim about three to five trips per year per employee, with travel documentation totaling up to twenty pages. Extrapolating to the more than 9,300 employees who have been in the bargaining unit at one time or another since the year 2000--a number of employees taken from the Union's so-called "super-duper-combo-list"--and assuming only 10 pages of travel documentation per employee, the request may generate 93,000 or more photocopies. Based on the costs incurred for prior requests, as set forth below, this would cost the agency at least $100,000. If, as may be possible, the average is 25 or 30 pages per employee, the page count may be nearly a quarter of a million. These quarter million pages would have to be found and copied at a cost to the taxpayer of as much as $300,000. These figures are reasonable estimates based on the HUD Office of Chief Financial Officer's estimate that, in connection with Union requests for information relating to the present grievance and arbitration proceedings, HUD has utilized more than two thousand three hundred sixty (2,360) hours of twenty seven (27) employees to make more than seventy thousand eight hundred (70,800) photocopies at

a salary cost of more than seventy three thousand nine hundred ninety one dollars ($73,991).[1] The types of documents copied include:

- HUD 25012 Time and Attendance Record Worksheets;
- SF 71 Leave Slips;
- HUD 260 Leave Records;
- HUD 25020 Employee Record and Certification of Extra hours of Work Forms;
- HUD 25018 Notification of Intent to Work Credit Hours Forms;
- HUD 25017 Work Schedule Request Form;
- HUD 1040 Overtime Authorization Forms;
- STARWEB Printouts;
- PC-Tare Printouts;
- Medical Documentation;
- Donated Leave Forms;
- Advanced Sick Leave Documentation;
- Leave Audits;
- eMail Documenting Leave Requested or Taken; and
- Voluntary Leave Forms.

These have been provided or made available to the Union. It should be noted that the above time and costs for copying are in addition to the eighteen (18) days that two HUD employees spent retrieving the records to be copied. The above costs to HUD and the taxpayer also do not take into account the "regular" work that was not performed while the above retrieval and copying was being performed, thus interfering with Congress's

[1] These figures are believed to be incomplete. Time and attendance records for GS-360s alone likely number more than 100,000 pages.

stated goal of maintaining effective and efficient governmental operations. In short, to require HUD to expend another $100,000-$300,000 responding to the Union's requests is unreasonable.

Accordingly, the Union's motion to compel should be denied.

IV. THE UNION IS NOT ENTITLED TO AN ADVERSE INFERENCE RULING

The Union is not entitled to an adverse inference ruling because, for the reasons set forth above, the Union is not legally entitled to the information requested in its motion to compel responses. Common sense and fairness dictate that a party cannot be penalized for not doing that which it has no obligation to do.

V. CONCLUSION

For the forgoing reasons, the Agency respectfully requests that the Arbitrator deny the Union's Motion to Compel Responses and issue a written ruling stating that:

(1) the Union is not entitled to any additional information in response to the requests set forth in its September 7, 2006 request for information because such information is neither "necessary" nor "reasonably available"; and

(2) the Union is not entitled to an adverse inference ruling because it is not legally entitled to any of the information which it seeks to compel.

Dated: November 20, 2006

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of this United States Department of Housing and Urban Development's Opposition to the Union's Motion to Compel Responses was sent to Michael J. Snider, Esquire on November 20, 2006 by email to mike@sniderlaw.com and carolyn_federoff@hud.gov.

/s/ Shlomo D. Katz
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