

**BEFORE
SEAN J. ROGERS
ARBITRATOR**

In the Matter of Arbitration between:

**AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
COUNCIL 222, AFL-CIO**

Union

and

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

Agency.

**DECISION AND ORDER
ON
UNION'S MOTION TO COMPEL DISCOVERY**

APPEARANCES:

On behalf of the American Federation of Government Employees, Council 222:

Michael J. Snider, Esq., Snider & Associates, LLC – *representing the Union and the Grievants.*

On behalf of the Department of Housing and Urban Development:

Norman Mesewicz, Esq., Deputy Director of Labor Relations – *representing the Employer.*

I. PROCEDURAL BACKGROUND

On June 18, 2003, pursuant to the collective bargaining agreement between the parties, the American Federation of Government Employees, Council 222, AFL-CIO (AFGE or Union) filed a Grievance of the Parties (GoP) challenging the Department of Housing and Urban Development's (Agency or HUD) alleged pattern and practice of directing bargaining unit employees to travel during non-duty hours without compensation (Travel grievance). As part of the Travel grievance and pursuant to 5 USC § 7114(b), the Union

bargaining unit employees to travel during non-duty hours without compensation (Travel grievance). As part of the Travel grievance and pursuant to 5 USC § 7114(b), the Union requested information which the Union believed would support its Travel grievance claims. On March 8, 2004 and April 15, 2004, the Union reiterated its Travel grievance information request.

On December 24, 2003, the Union filed a second GoP on behalf of all bargaining unit employee claiming that HUD failed to properly classify the bargaining unit employees under FLSA overtime provisions, and failed to properly and fully compensate these employees for overtime work (FLSA grievance). As part of the FLSA grievance and pursuant to 5 USC § 7114(b), the Union requested information which the Union believed would support its FLSA grievance claims.

The parties were unable to resolve the Travel and FLSA grievances through their collective bargaining agreement grievance process. The Union invoked arbitration and the parties agreed to join the two grievances for resolution by arbitration. I was selected as the Arbitrator to resolve the disputes from a panel of neutrals maintained by the parties.

On September 12, 2005, the parties and the Arbitrator participated in an initial pre-hearing conference call (IPHC) to agree on procedures for the orderly processing of the grievances through arbitration. On September 28 and 29, 2005, as a result of the IPHC, combined mediation session and arbitration hearing (med-arb) were held on the grievances. The parties agreed to devote September 28, 2005 to a mediated settlement effort and, failing resolution of the grievances, September 29, 2005 was to be devoted to an evidentiary hearing. Following these first two days of med-arb, the parties agreed to devote October 11, 2005 to med-arb as well. No resolution of the grievance was reached on October 11, 2005 and the parties agreed continue med-arb to November 3 and 4, 2005.

During the September 28, 2005-mediation session, the Union reiterated its information requests in both grievances. At the close of the mediation session, the Union submitted a Motion to Compel discovery of the requested information to the Agency and the Arbitrator.

On October 12, 2005, the Agency responded to the Union's Motion to Compel.

II. APPLICABLE STATUTORY PROVISIONS AND CASE PRECEDENT

The Union's information requests are based on 5 USC § 7114(b) which states, in pertinent part:

The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –

* * *

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data –

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding and negotiations of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advise, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . .

Federal Labor Relations Authority (FLRA) and Federal court precedent applying 5 USC § 7114(b) establish that an exclusive representative must show a particularized need for the information requested to trigger the agency's statutory duty to furnish that information.¹ An exclusive representative's information request must be stated with sufficient clarity to permit an agency to make a reasoned judgment whether the information must be disclosed under 5 USC § 7114(b). The exclusive representative must do more than assert that the information is relevant or useful. To establish particularized need for the information, the exclusive representative must establish the information is actually required for it to fulfill its representational responsibilities. The exclusive representative assertions of particularized need must establish that the information is required for it to adequately represent bargaining unit employees.² When an agency denies an information request, it must assert and establish countervailing disclosure interests and conclusory or bare assertions will not satisfy the agency's burden.

When investigating an agency's refusal to furnish information requested by an exclusive representative, the FLRA has articulated standards for establishing particularized need as follows:

1. Exactly why did the union need the requested information;
2. What would the union have used the requested information for if it had been furnished; and
3. How would that use of information relate to the union's role as the exclusive representative.³

¹ *Internal Revenue Service, Washington, DC and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA No. 86, 50 FLRA 338 (1995).

² *Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, Dallas, Texas*, 51 FLRA No. 49, 51 FLRA 545 (1995).

³ *Guidance on Investigating, Deciding and Resolving Information Disputes*, January 5, 1996

When investigating an agency's claim of countervailing disclosure interests supporting its refusal to furnish information despite the exclusive representative's particularized need, the FLRA has articulated standards as follows:

1. Whether the agency informed the union in response to the request that it was asserting a countervailing anti-disclosure interest; and
2. Whether the agency has established such an anti-disclosure interest.⁴

III. THE UNION'S INFORMATION REQUESTS AND HUD'S RESPONSES

A. Travel Grievance

The Union's information requests and HUD's responses are as follows:

Request 1.

The Union requests:

[A] list of all persons who traveled on May 4, [2003] including their name, position, series, grade and FLSA status, and advise if they were compensated for non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, please provide a copy of the person's position description.

HUD responds as follows:

The Agency responded to this item on April 4, 2004 (Attachment 2).

Request 2.

The Union requests:

For the last three years, . . . provide a complete list of all employees who traveled during non-duty hours.

HUD responds as follows:

This data is not reasonably available under 5 U.S.C. 7114(b)(4). It would require a manual search of each individual travel order. This response was conveyed to the Union prior to it filing of the GoP FLSA Overtime. If the

⁴ *Ibid.*

Union elects to submit additional justification for its request, Management will reconsider its decision.

Request 3.

The Union requests:

For each employee identified, . . . provide his/her name, position, series, grade and FLSA status, and advise if s/he was compensated of non-duty hour travel. If any person is GS-11 or below and the agency has determined that s/he is FLSA exempt, . . . provide a copy of the person's position description.

HUD responds as follows:

This data is not reasonably available under 5 U.S.C. 7114(b)(4). It would require a manual search of each individual travel order. This response was conveyed to the Union prior to it filing of the GoP FLSA Overtime. If the Union elects to submit additional justification for its request, Management will reconsider its decision.

B. FLSA Grievance

Request 1.

The Union requests:

A list of bargaining unit employees represented by the Union, including first and last name, position title, Agency position number, job series, grade and step, FLSA exempt or non-exempt status, e-mail address, business phone number and business address (in hard copy **and electronic format**)

HUD responds as follows:

The data was provided to the Union in hard copy in January, 2004 and updated in September 2005.

Request 2.

The Union requests:

A copy of each employee's position description.

HUD responds as follows:

This data is neither reasonably available nor necessary in bulk under 5 U.S.C. 7114(b)(4). The Agency will provide position descriptions, as appropriate to promote settlement discussions or, alternatively, for the arbitration process. If the union elects to submit additional justification for this request, Management will reconsider its decision.

Request 3.

The Union requests:

A copy of one SF-50 for each employee since 12/24/00.

HUD responds as follows:

This data is neither reasonably available nor necessary in bulk under 5 U.S.C. 7114(b)(4). The Agency will provide position descriptions, as appropriate to promote settlement discussions or, alternatively, for the arbitration process. If the union elects to submit additional justification for this request, Management will reconsider its decision.

Request 4.

The Union requests:

A copy of all information relied upon to classify each bargaining unit employee.

HUD responds as follows:

This data is not available under 5 U.S.C. 7114(b)(4)(A) and (B).

Request 5.

The Union requests:

A copy of any FLSA worksheets for each employee since 1/1/90.

HUD responds as follows:

Available worksheets were provided to the Union prior to the September 28, 2005 mediation session.

Request 6.

The Union requests:

The name of the individual(s) who made the determination to exempt each FLSA exempt employee, the date the decision was made, and a copy of all information relied upon to make the determination.

HUD responds as follows:

The names of the individuals who produced the FLSA determinations referred to in #5 above are; Gary Lyman, Ed Silver and Marlene Thrash.

Request 7.

The Union requests:

A copy of any Agency FLSA consistency review since 1980.

HUD responds as follows:

This data is not available under 5 U.S.C. 7114(b)(4)(A). The Agency previously advised the Union of this fact.

Request 8.

The Union requests:

A list of all overtime worked by each bargaining unit employee since January 1, 1999, by employee.

HUD responds as follows:

This data is not available under 5 U.S.C. 7114(b)(4)(A). The Agency previously advised the Union of this fact.

Request 9.

The Union requests:

A list of all comp time worked by each bargaining unit employee since January 1, 1996.

HUD responds as follows:

This data is not available under 5 U.S.C. 7114(b)(4)(A). The Agency previously advised the Union of this fact.

IV. THE UNION'S PARTICULARIZED NEED; HUD'S RESPONSES; AND DISCUSSION AND FINDINGS

The record establishes that AFGE's June 18, 2003 Travel grievance stated that it had a particularized need for the information as follows:

in order to determine the full extent of the problem, including the possibility of additional violations [and] . . . to establish that this is part of a pattern and practice and . . . to secure monetary relief . . .

The record further establishes that HUD did not provide the requested information and AFGE repeated its request in writing on March 8 and April 15, 2004.

AFGE's December 24, 2004 FLSA grievance stated that it had a particularized need for the information as follows:

to prove the underlying facts and contentions in its Grievance. In particular, the Union needs the information to show that the Agency improperly exempt many bargaining unit employees under the FLSA, underpaid or failed to pay proper overtime to those employees, and illegally offered comp time in lieu of overtime. The position descriptions are needed to show the critical, essential and grade-controlling duties of the positions, to show that the job duties have not changed and to show that the Grievants are and were improperly exempted. The Union needs a list of the individuals who denied the overtime to call them as witnesses and a list of employees effected to call them as witnesses.

The SF-50's will show that the Grievants are improperly exempted and the Agency's exemption pattern was arbitrary, capricious and/or violative of the Agreement. Finally, the Union needs the rosters, overtime rosters and printouts of overtime worked to show damages to the Grievants. The requested information will further enable the Union to fulfill its representational duties to represent employees under the statute. If the Agency is unable to fulfill any request in full, please fulfill it in any non-objectionable part, and explain any denial in detail.

The record establishes that HUD did not provide the requested information. Although, HUD provided AFGE with a bargaining unit employee list dated February 11, 2004 prior to the first med-arb session and then provided AFGE with an updated the list dated September 5, 2005 on or about October 10, 2005. HUD's response appears to satisfy AFGE's FLSA grievance information **Request 1.**, particularly as the Union has converted that list to an electronic format.

For its part the record establishes that HUD has not asserted that the Union has failed to assert a particularized need for the requested information and HUD has not asserted any countervailing interest against disclosure of the requested information.

Based on the record developed by the parties, the Arbitration finds that the Union has stated: exactly why it needs the requested information; what the Union will use the requested information for when it has been furnished; and how the use of information relates to the Union's role as the exclusive representative. The Arbitrator also finds that HUD has not informed the Union that it was asserting a countervailing anti-disclosure interest; and HUD has not established such an anti-disclosure interest.

V. DECISION AND ORDER

Based on the record developed by the parties and for the reasons discussed above, the Union Motion to Compel Discovery of the information requested in the Travel and FLSA grievances is granted, except as regards AFGE's FLSA grievance **Request 1**, which HUD's has satisfied.

The record establishes that HUD responded to AFGE's FLSA grievance information **Request 5**, and **6**, (concerning FLSA worksheet and the names of the individuals who made the determinations on the worksheet) stating that "[a]vailable worksheets were provided to the Union prior to the September 28, 2005 mediation session" and identifying three individuals who prepared those work sheets. HUD's response to AFGE information request is incomplete and refers only to recently prepared FLSA worksheet and the individuals who made the determinations. Arguably, these FLSA worksheets were prepared in expectation of litigation and lack material and probative value.


HUD's responses to these two information requests, as well as many other Agency responses, are incomplete and vague, and arguably, dissembling and evasive. The Arbitrator finds that if HUD does not have the information requested by AFGE; if it does not exist; HUD cannot find it; or, for any reason, the Agency cannot provide the requested information, then the Agency must expressly so state in response to AFGE's information requests. The Arbitrator also finds that HUD's responses to AFGE's instant information requests must be accurate, complete, clearly stated and up-to-date. For these reasons, the Order below requires HUD to respond to some AFGE information requests again even though the Agency may have already responded, albeit only partially and without clarity.

Alternatively, AFGE's Motion to Compel Discovery requests that the Arbitrator draw an adverse inference from HUD's failure to produce the requested information. Since HUD is now being ordered to respond to AFGE's information requests, this evidentiary remedy is premature and denied without prejudice. AFGE may renew its request for an adverse inference, at hearing or in writing, if HUD fails to comply with the Arbitrator's Order.

ORDER:

Within 10-calendar days of receipt of this Decision and Order, HUD must provide AFGE with the information requested in the Travel and FLSA grievances, except as regards AFGE's FLSA grievance information **Request 1**.

If the information is not in HUD's possession; does not exist; cannot be found; or, for any reason, HUD cannot provide the information, then HUD must expressly so state in its response to the Union's information requests.


Sean J. Rogers, Esq.
Alexandria, Virginia
October 19, 2005