UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: July 11, 2002

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE, WESTERN REGIONAL OFFICE
LABOR MANAGEMENT RELATIONS
LAGUNA NIGUEL, CALIFORNIA

and

U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE, U.S. BORDER PATROL
TUCSON SECTOR, TUCSON, ARIZONA

Respondents

and Case Nos. DE-CA-01-0497
DE-CA-01-0498

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, NATIONAL BORDER PATROL
COUNCIL, LOCAL 2544, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WESTERN REGIONAL OFFICE LABOR MANAGEMENT RELATIONS LAGUNA NIGUEL, CALIFORNIA and U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL TUCSON SECTOR, TUCSON, ARIZONA Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 2544, AFL-CIO Charging Party	Case Nos. DE-CA-01-0497 DE-CA-01-0498

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 12, 2002**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

RICHARD A. PEARSON
Administrative Law Judge

Dated: July 11, 2002
Washington, DC

OALJ 02-50

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, WESTERN REGIONAL OFFICE LABOR MANAGEMENT RELATIONS LAGUNA NIGUEL, CALIFORNIA and U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL TUCSON SECTOR, TUCSON, ARIZONA Respondents	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, NATIONAL BORDER PATROL COUNCIL, LOCAL 2544, AFL-CIO Charging Party	Case Nos. DE-CA-01-0497 DE-CA-01-0498

Matthew L. Jarvinen, Esquire
For the General Counsel

Gerald McMahon, Labor Relations Officer
Wanda Edwards, Labor Relations Specialist
For the Respondents

Edward Tuffly, Vice President
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

On May 31, 2001,[1] the General Counsel of the Federal Labor Relations Authority, by the Regional Director of its Denver Region, issued a consolidated unfair labor practice complaint in these two cases, alleging that the Respondents violated section 7116(a)(1), (5) and (8) of the Federal Service Labor-Management Relations Statute (the Statute) by

[1] Hereafter, all dates are in 2001, unless otherwise noted.

refusing to furnish necessary information to the Union. The Respondents jointly filed their Answer on June 27, denying that they had violated the Statute. The General Counsel filed a written motion to amend the Complaint on August 10 and orally moved during the hearing to further amend the Complaint. A hearing was held in Tucson, Arizona, on August 23, at which all parties were present and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. At the hearing, I granted the motions to amend the Complaint, over the Respondents' objection (Tr. at 12-13, 64-66). The General Counsel and the Respondents subsequently filed post-hearing briefs, which I have fully considered.

Based on the entire record,[2] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The U.S. Department of Justice, Immigration and Naturalization Service (INS) is an agency as defined by 5 U.S.C. § 7103(a)(3), and the U.S. Border Patrol (Border Patrol) is a component thereof. The American Federation of Government Employees, National Border Patrol Council (the Council) is a labor organization as defined by 5 U.S.C. § 7103(a)(4), and it is the exclusive representative of a nationwide unit of employees of the Border Patrol. The INS and the Council are parties to a collective bargaining agreement (CBA) covering Border Patrol employees. Local 2544 (the Charging Party or the Union) is an agent of the Council for purposes of representing unit employees in the Tucson Sector of the Border Patrol (Respondent Tucson Sector). The INS maintains a Western Regional Office, Labor Management Relations (Respondent Western Region) in Laguna Niguel, California, to provide labor relations advice and other administrative services for the various offices of the Border Patrol, as well as of the INS, in a geographic area covering from Alaska to Arizona.

The parties in this case have a history of litigation concerning Union requests for information under section 7114 (b)(4) of the Statute, a history that has affected their current actions. In *U.S. Border Patrol, Tucson Sector, Tucson, Arizona and Immigration and Naturalization Service,*

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2 The Transcript of the hearing contains two errors that need to be corrected. At page 13, line 3, the word "approved" should be corrected to read "proved". At page 65, line 8, the word "not" should be corrected to read "now".

Western Regional Office, Laguna Niguel, California, 52 FLRA 1231 (1997)("*Tucson Sector and Western Region I*"), the Authority held that the Union did not articulate a particularized need for disciplinary letters given to all employees in the Western Region for certain infractions. In that case, the Authority explained that the Union had never clarified or explained to the agency why it needed the information, other than in its initial, general request, and therefore the Union was not permitted to explain its request further at the hearing. 52 FLRA at 1241. Nevertheless, the Authority added the following footnote to its decision (52 FLRA at 1242 n.8):

> Our decision that the Respondent did not violate the Statute in these cases should not be taken as approval of its failure to engage the Union in any meaningful discussion of the Union's requests. We encourage all parties to follow the example set in *Twin Cities* by meeting to discuss their respective interests in the disclosure of information and attempting to accommodate those interests without resorting to litigation.

A few months after the above-cited decision, an FLRA Administrative Law Judge found that Respondent Tucson Sector unlawfully refused to furnish the Union with several types of documents necessary for the Union to respond to the proposed suspension of a Tucson Sector employee, and that the agency further failed even to respond to the Union's request for other documents. *U.S. Immigration and Naturalization Service, Border Patrol, Tucson, Arizona*, Case Nos. DE-CA-60715 and DE-CA-60791 (1997), ALJ Decision Reports, No. 129 (September 17, 1997)("*Tucson Sector I*"). In that case, the Judge ordered "a stronger than traditional remedy" (i.e., specifying a compulsory procedure for the Tucson Sector's handling of information requests) that he felt was necessary "to ensure that the Respondent makes timely and proper responses to information requests." *Id.*, slip op. at 10-12. Respondent Tucson Sector did not file exceptions to that decision and order, and accordingly the Judge's conclusions and order were adopted by the Authority, without precedential significance. 5 C.F.R. § 2423.41(a).

The specific events of the instant case were set in motion on February 16, 2001, when Respondent Tucson Sector notified Border Patrol Agent Jason Wood of his proposed removal (General Counsel Exhibit 3). The basis for the proposed disciplinary action was a series of incidents occurring between March and October of 1998. Two of these incidents occurred while Agent Wood was on duty and two while he was off duty, and two of the incidents involved

altercations between Agent Wood and county sheriff's officers and U.S. Customs officers. As a result, Respondent Tucson Sector accused Wood of three specifications of Conduct Unbecoming an Officer, one specification of Abuse of Aliens, one specification of Violation of Body Search Policy, and one specification of Failure to Remain in Designated Work Area.

Between the time of these incidents in 1998 and the date Respondent Tucson Sector proposed Wood's removal in February 2001, the case had already endured a tortuous history. According to the Written Reply to the proposed removal, submitted on March 19, 2001, by the Union on Wood's behalf (General Counsel Exhibit 10), the agency first proposed to suspend Wood for 60 days in April 1999 and then proposed to remove him in January 2000, based on some of the same 1998 incidents as described above. Shortly before the Union's grievance on these actions was to go to arbitration, the agency rescinded the suspension and removal in November 2000, reinstated him to his position, and simultaneously put him on administrative leave with pay. (He was not, however, given backpay for his earlier time lost.) The February 2001 proposed removal was actually a combination of the two previous disciplinary actions, with some of the previously-alleged offenses eliminated.

Agent Wood received notice of his proposed removal on March 1, 2001, and shortly thereafter he designated the Union to represent him in the matter. The CBA called for Wood to submit a reply by March 12. On March 5, Patricia Nighswander, Executive Director of the Council and one of the Union officials named as Wood's representatives, sent the Tucson Sector's Chief Patrol Agent, David Aguilar, a request for nine itemized categories of information relating to Wood's case (General Counsel Exhibit 5), as well as a request for an extension of time to reply to the proposed removal until 30 days after the agency furnished the information (General Counsel Exhibit 4). Ms. Nighswander asked for the following information:3

> 1. Please provide the statutory or regulatory basis which permits the agency to rescind two adverse actions (60 day suspension and removal)

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3 In addition to the text quoted here, Ms. Nighswander provided an explanation in each paragraph for the information requested. Throughout my decision, I will refer to the items of information requested by the Union by the correspondingly numbered paragraphs 1 through 9 of the Union's request.

and re-issue a new proposal of termination which combines the two cases. . . .

2. Please provide a copy of the Written Reply presented on behalf of Agent Wood on May 3, 1999 by his Union representative Jerry Miller. . . .

3. Please provide a copy of the memo written by Agent Wood on March 4, 1998 regarding the incident involving the three undocumented aliens who were allegedly abused by Agent Wood. . . .

4. Please provide a copy of the INS policy document entitled Body Searches, dated January 10, 1995. . . .

5. Please provide a copy of the letter of declination sent to AUSA Duncan to OIG Investigator Ricky D. Mauldin. Reference was made to this letter on page 11 of Mauldin's investigative file (5/14/98) in which he states:

> AUSA Duncan said that a letter of declination would be forthcoming. The letter will be included in the case file notes if received after closing. . . .

6. Please provide sanitized copies of all proposal and decision notices for disciplinary and/or adverse action cases (including settlement agreements) within the Western Region from three years prior to the dates of the instant alleged offenses to the present for the following types of charges:

a. Conduct unbecoming by an off duty Border Patrol Agent towards a law enforcement person from another agency or entity.

b. Conduct unbecoming by an on duty Border Patrol Agent agent [sic] towards a law enforcement person from another agency or entity.

c. Abuse of aliens.

d. Violation of Body Search Policy.

e. Failure to remain in designated work area. . . .

> 7. Please provide copies of written policies and/ or instructions in existence prior to October of 1998 pertaining to the requirement that Border Patrol Agents request permission from supervision before leaving their designated work area. . . .
>
> 8. Please provide a copy of the letter written by SBPA William Furnia to Joe Lapata, Deputy Port Director, of Customs in Nogales, Arizona in which Mr. Furnia requested "information related to an incident at the Nogales Port of Entry, with a member of the U.S. Border Patrol". In addition, please provide a copy of the "incident report" referenced in Mr. Lapata's letter. . . .
>
> 9. Please provide copies of all letters sent within the past three years by supervisory personnel in Western Region to other law enforcement agencies requesting information on allegations of off duty conduct by Border Patrol Agents. . . .

On March 8, Deputy Chief Patrol Agent Edwin B. Pyeatt, the Tucson Sector official responsible for Union information requests, responded to Ms. Nighswander's letters: he furnished the Union with two of the nine categories of information (Items 3 and 4), denied five (Items 1, 2, 5, 7 and 8) and forwarded the other two categories of requested information (Items 6 and 9) to Respondent Western Region (General Counsel Exhibit 6). Pyeatt also partially denied the Union's requested extension for replying to the proposed removal, allowing the Union until March 19 to submit its reply (*Id.*).

On March 12, Nighswander replied to Pyeatt's March 8 letter by further explaining the Union's need for the five categories of information he had denied. She also protested his refusal to extend the Union's reply deadline beyond March 19, explaining that she could not adequately respond to the allegations in the proposed removal without first reviewing the information she had requested (General Counsel Exhibit 7). In a second letter also dated March 12, Nighswander referred Pyeatt to Judge Oliver's 1997 decision involving the same parties (*Tucson Sector I, supra*) and asked Pyeatt to specify (among other things), for each item requested, any countervailing non-disclosure interests, whether the requested data exists, whether further clarification of the Union's request is necessary, and whether Pyeatt would be willing to try to resolve any ongoing disputes in a telephone conference (General Counsel Exhibit 8). Mr. Pyeatt responded on March 15, further

explaining his reasons for denying the information, and denying the request for a telephone conference (General Counsel Exhibit 9). The Union submitted its written reply to the proposed removal of Agent Wood on March 19 (General Counsel Exhibit 10). Also on March 19, a representative of Respondent Western Region sent a letter to Nighswander, acknowledging that Items 6 and 9 of the Union's information request had been forwarded to the Region, and stating that the Region had "not identified whether the requested information exists and/or can be provided subject to Government regulations, countervailing INS interests in non-disclosure, or other privacy concerns." (General Counsel Exhibit 11). Neither Respondent Western Region nor Respondent Tucson Sector replied further to the Union's request for Items 6 and 9.

On March 23, the Union filed two unfair labor practice charges; both charges cited the "U.S. Dept. of Justice, INS, U.S. Border Patrol" as the Charged Agency or Activity and listed the Tucson Sector's address. The charge in Case No. DE-CA-01-0497 alleged that "the agency has failed to respond appropriately to items 6 and 9" of the Union's data request by forwarding the request to "another layer of INS management." (General Counsel Exhibit 1(a), page 3.) The charge in Case No. DE-CA-01-0498 alleged that "the Agency has refused to provide the information requested in items 1, 2, 5, 7 and 8 of the data request." (General Counsel Exhibit 1(a), page 4.) Respondent Western Region was not named as a charged party or served with a copy of either charge at that time. On May 31, however, the Union amended the charge in DE-CA-01-0497 (the charge relating to Items 6 and 9 of the data request) by naming Respondent Western Region as the charged party, and a copy of the amended charge was served on Respondent Western Region. Also on May 31, the Regional Director of the Denver Region of the FLRA issued a Consolidated Complaint in both cases and named Western Region and Tucson Sector as separate respondents. In the body of the Complaint, the only agent of the Respondents identified was Chief Patrol Agent Aguilar, and both Respondents were alleged to have committed unfair labor practices by refusing to furnish the Union with Items 1, 6, 7, 8 and 9 of the data request. (General Counsel Exhibit 1 (c)). The refusal to furnish Items 2 and 5 was not alleged to be unlawful in the Complaint.

The Respondents jointly filed their Answer on June 27 denying any unlawful actions. The General Counsel filed a Motion to Amend the Consolidated Complaint on August 10. As amended, the Complaint alleged that Respondent Tucson Sector refused to furnish the Union with Items 1, 7, and 8 of the data request and that Respondent Western Region refused to

furnish Items 6 and 9, and it named Deputy Chief Patrol Agent Pyeatt rather than Chief Patrol Agent Aguilar as the responsible Tucson Sector official. At the start of the hearing, I granted the General Counsel's motion to amend, over the objection of the Respondents (Tr. at 12-13). Later during the hearing, I granted another motion by the General Counsel to amend paragraph 8 of the Complaint to allege that the amended charge, but not the original charge, in Case No. DE-CA-01-0497 was served on Respondent Western Sector (Tr. at 64-66).

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel alleges that the Respondents failed to comply with section 7114(b)(4) of the Statute by refusing to furnish the Union with Items 1, 6, 7, 8 and 9, thereby violating section 7116(a)(1), (5) and (8). It argues that the information request of March 5, supplemented by the Union's two letters dated March 12, satisfied the Authority's requirement that the Union "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." *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas City Service Center, Kansas City, Missouri*, 50 FLRA 661, 669 (1995)("*IRS Kansas City*").

The GC further contends that Respondent Tucson Sector violated both the spirit and the letter of the *IRS Kansas City* line of cases by denying the Union's requests in the barest and most conclusory manner. That is, by "simply saying 'no'," and then by refusing even to discuss the issues with the Union, Tucson Sector shut down "the exchange of information . . . [that] permits the parties to consider and, as appropriate, accommodate their respective interests and attempt to reach agreement on the extent to which requested information is disclosed." 50 FLRA at 670-71. As for Respondent Western Region, the GC argues that after promising on March 19 to assess and respond to the Union's request for Items 6 and 9, it simply failed to respond further, leaving the Union and Agent Wood totally in the dark as to whether the request had been denied, or why. Such a failure is as much an unfair labor practice as an outright denial of information, the GC urges.

The Respondents assert several procedural objections in addition to challenging the merits of the Complaint. They first object to the manner in which the charge in DE-CA-01-0497 was amended: the amendment was not made prior to the issuance of the Complaint, they assert, and Respondent Western Region was not served with a copy of the amended charge before receiving the Complaint; as a result, Western Region was not able to present its side of the story to the General Counsel in order to avert litigation. They also object to the two amendments to the Complaint. The General Counsel first moved to amend the Complaint on August 10, nine business days before the hearing, and in the Respondents' view, "[t]he nature of the ULP was altered entirely as against Respondent WR." Respondent's Closing Brief at 2. Specifically, the original complaint based its allegations against both Tucson Sector and Western Region on the purported actions of CPA Aguilar, a Tucson Sector official who has no authority to act on behalf of Western Region. This was, in the Respondents' view, a fatal defect in the Complaint, and Respondent Western Region's trial strategy sought to exploit that defect. Shortly before trial, however, the General Counsel sought to cure the defect by alleging Western Region's failure to furnish Items 6 and 9 of the data request as an unfair labor practice. This last-minute "ambush" of Western Region deprived them of due process, the Respondents argue. While the Respondents concede that the second amendment of the Complaint, relating to service of the charge, was minor, they argue that it prejudiced them nonetheless. They also assert that granting the two amendments demonstrated greater leniency to the General Counsel than the Respondents were afforded.

Respondents further object to my rulings that precluded them from raising certain defenses to the alleged unfair labor practices. At the outset of the hearing, and reaffirming a ruling I made during the prehearing conference, I ruled that by refusing to comply with subpoenas to bring to the hearing the documents that were the subject of the Union's data request, the Respondents had waived the right to assert any legal defenses that would require examination of the documents themselves (Tr. at 5-7). Later in the hearing, I ruled that because the Respondents had not asserted (at or near the time they responded to the Union's data requests) that the information was not "normally maintained by" or "reasonably available to" the agency, its witnesses at the hearing could not raise such issues (Tr. at 117-27). The Respondents object that these rulings also violated their due process rights, especially in conjunction with the alleged irregularities in the amendment of the charges and the Complaint. They argue that Western Region was not originally charged with an

unfair labor practice and only was served with the amended charge after the Complaint had been issued against it on May 31. Therefore, Western Region had no opportunity to present its case to the FLRA Regional Director prior to formal litigation. In its view, Western Region then asserted all possible defenses to the alleged ULP in a timely manner by its June 27 Answer to the Complaint, preserving its right to litigate those defenses at the hearing. Western Region defends its failure to follow up on its March 19 letter to the Union regarding the data request, arguing that the Union's filing of unfair labor practice charges on March 23 took the information dispute "out of the hand of the Union" (Tr. at 121-23).

On the merits of the actual information requests, the Respondents assert that the Union was not entitled to Items 1, 6, 7, 8 and 9. Under the standards of *IRS Kansas City*, they insist that the Union did not show, with specificity, how the information was necessary, rather than merely useful, to adequately represent Agent Wood. They object to Items 1 and 7 as attempts by the Union to convert section 7114(b)(4) into a discovery process and a fishing expedition. In asking for the agency's legal basis for rescinding the two prior actions against Wood and reissuing a new action against him (Item 1), the Union was asking Tucson Sector to justify its action and to argue its legal case, and Respondents insist that this exceeds the scope of a proper information request under section 7114(b)(4). They argue similarly concerning the policies requiring agents to request permission before leaving their designated work area (Item 7), and they also note that Agent Wood was not charged with violating a specific policy to that effect. Therefore, furnishing a copy of such a policy, even if it existed, was not "necessary" for the Union to represent Wood.

The Respondents oppose production of Item 6 (disciplinary proposals, decisions and settlements involving any of the five charges against Wood) on several grounds. They note first that the Union had not made an <u>actual</u> claim that Wood had been disparately treated; the Union simply asserted that he <u>might</u> have been treated disparately and needed the information to explore that possibility. In the Respondents' view, that is an insufficient justification under *IRS Kansas City*. They also argue that the request in Item 6 was too broad, as it sought information about employees who were not similarly situated to Wood: e.g., employees working under different deciding officials, employees who were not Border Patrol Agents, and employees charged with only one offense, not five. Because of these

defects, the Union did not demonstrate "particularized need" for the information.

With respect to Item 8, the Respondents note that DCPA Pyeatt's letter of March 15 advised the Union that the agency did not have the requested letter from SBPA Furnia to Deputy Port Director Lapata, and that he didn't know if such a letter existed. Therefore, the letter was not normally maintained by the Respondents. Item 9 was closely related to Item 8, as the Union requested other letters sent by supervisors in the Western Region to other law enforcement agencies concerning other Border Patrol Agents. The Respondents argue that because the Furnia letter had apparently never been written, and because the Union had no idea whether other Border Patrol supervisors had ever written such letters, the Union had not demonstrated a particularized need for the information or how it would use such information in Wood's case, if the letters did exist.

Analysis

Procedural Issues

Looking at the Respondents' objections to the amendments of the charge and Complaint, I reject the claim that the amended charge in DE-CA-01-0497 violated section 2423.9 of the Rules and Regulations, 5 C.F.R. § 2423.9. It is incorrect on its face to assert, as the Respondents do at pages 7-8 of their Closing Brief, that the charge "was not amended prior to the issuance of the complaint . . ." The amended charge was filed on the same day that the Complaint issued, but paragraphs 9 and 10 of the Complaint expressly refer to the charge having already been amended. It is evident, therefore, that the amended charge and Complaint complied with section 2423.9.

However, as a result of the same-day filing of the amended charge and the Complaint, Respondent Western Region is correct in stating that it did not have any formal opportunity to present evidence to the FLRA before a complaint was issued. But the Authority has held that it will not review the adequacy of a precomplaint investigation in an unfair labor practice proceeding; rather, it will decide a case based on the merits of the complaint once it reaches the Authority. *Department of the Navy, Mare Island Naval Shipyard, Vallejo, California*, 26 FLRA 474, 475 (1987). Both in that case and in *Delaware Army and Air National Guard*, 16 FLRA 398, 410-12 (1984), it was noted that sections 7104(f)(2)(A) and (B) and 7118(a)(1) of the Statute authorize the General Counsel of the FLRA to

investigate charges and issue complaints without imposing any specific standards or limitations. While section 2423.8 of the Rules and Regulations provides that "all parties involved are afforded an opportunity to present their evidence and views to the Regional Director," the extent to which the Regional Director (RD) chooses to allow a charged party to present its evidence is within the discretion of the RD, and the Authority will not second-guess that discretion.[4]

With regard to the General Counsel's motions to amend the Complaint, the Respondents cite no case law or specific provision of the Statute or regulations prohibiting the amendments under the circumstances of this case. Rather, they argue that the amendments (particularly the pretrial amendment which was the subject of the General Counsel's written motion) drastically altered the case theory against Western Region and similarly forced Western Region to alter its trial strategy at the last minute. Section 2423.20(c) of the Rules and Regulations permits the General Counsel to amend a complaint *sua sponte* until an answer is filed; thereafter, it may be amended only with the permission of the Administrative Law Judge. The Rules do not expressly limit the judge's discretion in ruling on such motions. The Authority has consistently ruled, however, that the guiding principle is "fairness": specifically, under the circumstances of each case, "whether the respondent knew what conduct was at issue and had 'a fair opportunity' to present a defense." *Department of Veterans Affairs, Veterans Affairs Medical Center, Washington, D.C.*, 51 FLRA 896, 900 (1996)("*VAMC*"), quoting *U.S. Department of Labor, Washington, D.C.*, 51 FLRA 462, 467 (1995)("*DOL*") and *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981). Indeed, when these requirements are met, the judge himself is permitted to find a violation that was not

[4] Respondent Western Region's claim of prejudice on this point seems more than a little disingenuous. On the one hand, it pleads that it didn't have time to present its case to the RD prior to the issuance of complaint, and on the other hand it argues that it couldn't respond to Items 6 and 9 of the data request after March 23, because the Union's filing of a charge with the FLRA took the matter out of their hands and the Union's hands. Moreover, Respondent's counsel was careful not to insist that Western Region was unaware of the ULP charge before May 31, and to clarify that he was only contending that Western Region officials "weren't served the charge." (Tr. at 126). It would appear that Western Region had the opportunity to present evidence to the FLRA before May 31 if it had wanted to, but it stayed out of the case as long as it wasn't charged with an unfair labor practice.

specifically alleged in the complaint. *Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 54 FLRA 1529, 1531 (1998); *VAMC*, *supra*, 51 FLRA at 900.

The circumstances of this case demonstrate that the Respondents had fair notice of the issues prior to the hearing and that they had a full opportunity to litigate those issues at the hearing. The General Counsel filed its initial motion to amend the Complaint nine working days before the hearing; the matter was discussed at the prehearing conference; Western Region answered the amended Complaint at the outset of the hearing, and it then proceeded to fully litigate the issue at the hearing. It cannot be argued, therefore, that the Respondents were in any way caught by surprise here.

What the Respondents actually seem to be arguing is that the first amendment to the Complaint made it more difficult for them to prevail at the hearing. The original Complaint named CPA Aguilar, an agent of Tucson Sector, as the person whose actions constituted an unfair labor practice by both Tucson Sector and Western Region. Western Region was understandably eager to exploit this weakness in the Complaint. The amended Complaint sought to correct the problem by separately identifying the failures of Tucson Sector and Western Region to furnish different items of the Union's data request. Although the amendment may have indeed corrected a problem in the original Complaint, it did not alter the nature of the alleged ULPs or allege new facts that the Respondents were not aware of. Since the original charges had been filed on March 23, the Union had been consistently complaining about the denial of its data request. Although Western Region was not named as a respondent until May 31, the Union had from the start objected to Tucson Sector's denial of certain parts of the data request as well as to Tucson Sector's forwarding of other parts of the request to "another layer of INS management." And from the issuance of the original Complaint on May 31, Western Region was named as a respondent and understood that it was accused of participating with Tucson Sector in the unlawful denial of the data request. Thus, the amendment of the Complaint on August 10 did not catch Western Region by surprise or force it to defend an entirely different type of misconduct than it had previously anticipated. Due process does not guarantee the Respondents that a defective complaint can never be corrected. The Respondents were fully prepared to defend the conduct that was the subject of the amended Complaint, and therefore I reaffirm my rulings permitting the amendments to the Complaint.

The Respondents next object to my trial rulings that limited the defenses they could assert, arguing that this prevented them from fully defending their actions. I agree that my rulings inhibited the presentation of their case, but the limitations were of their own making, and they were appropriate responses to earlier decisions by the Respondents to narrow the focus of the case.

First, the Respondents chose to deny portions of the Union's data request on very narrow grounds, articulating only some of the possible reasons for denying the information. I ruled, consistent with Authority case law, that the Respondents could not raise at the hearing, as defenses to their actions, grounds for denial that they had failed to articulate to the Union at or near the time of the Union's request. The Authority has applied this principle equally to both agencies and unions in data request cases, in furtherance of its *IRS Kansas City* standard, "which requires parties to articulate and exchange their respective interests in disclosing information . . . ." 50 FLRA at 670. It applied this rule to preclude consideration at the hearing of an agency's countervailing interests against disclosure that were not expressed previously in *Federal Aviation Administration*, 55 FLRA 254, 260 (1999). And in several cases, the Authority has refused to permit a union to articulate at the hearing reasons for disclosure that it had not offered "at a time when it [the agency] reasonably could have assessed the necessity [of] the information." *Tucson Sector and Western Region I*, 52 FLRA at 1239; *U.S. Equal Employment Opportunity Commission*, 51 FLRA 248, 258 (1995)("*EEOC*"). In the instant case, after Respondent Tucson Sector denied most of the Union's initial data request, the Union sent a second letter further explaining its need for the information (General Counsel Exhibit 7), and a third letter asking DCPA Pyeatt to articulate all grounds for his denial and asking for a telephone conference to discuss the issues further (General Counsel Exhibit 8). Pyeatt responded to these letters with some additional explanations for his denial of the requested information, and he refused to meet further with the Union about the matter (General Counsel Exhibit 9). Given these facts, after the Union's repeated requests to elicit explanations from Respondent Tucson Sector, it would have been totally inappropriate to permit either respondent to provide explanations at the hearing that it had refused to provide earlier. This applies equally to Respondent Western Region, as it had ample time between March 8 (when Tucson Sector forwarded the Union's request for Items 6 and 9 to Western

Region) and May 31 to explain its actions (or inaction) to the Union.[5]

Second, the Respondents opposed, and refused to comply with, two subpoenas which sought the information that was the subject of the disputed data requests. As a result, I ruled, first at the prehearing conference and then at the hearing, that the Respondents could not assert any defenses which required examination of the documents themselves. For instance, if the Respondents were to assert that disclosure of the requested disciplinary records would violate other employees' privacy rights, I would need to examine the documents themselves in order to evaluate that claim. Since the Respondents refused to make the documents available even for my review, it would have been unfair to allow them to raise defenses that would not be subject to judicial scrutiny. The Respondents were advised prior to the hearing of the consequences of their refusal to comply with the subpoenas, and cannot validly object now. The Authority has held that judges have broad discretion to rule on contested subpoenas and to impose sanctions against parties refusing to comply. *Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland*, 30 FLRA 127, 138-40 (1987). In that case, the Authority also stated that the agency could not defend its refusal to supply the documents named in the subpoena on the grounds that those same documents were central to the merits of its allegedly unlawful refusal to furnish the information under section 7114(b)(4). It reasoned:

> A party should not be permitted to foreclose review and argument concerning relevant and material evidence in a case by simply asserting

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[5] As I stated at the hearing (Tr. at 119-27), the filing of ULP charges against Tucson Sector on March 23 did not suspend or terminate the obligation of either respondent to reply to the Union's information request. The duty to furnish necessary information continues along with the parties' collective bargaining relationship. Furthermore, the Union's asserted need for the information (i.e., the pending removal action against Agent Wood) continued after March 23, regardless of whether the FLRA was investigating the ULP charges. The obligation to respond was especially true for Western Region, as it had previously told the Union that it was evaluating whether the requested information existed and whether any grounds existed to refuse disclosure, and that it would respond further to the Union's request after it had completed its evaluation of these issues (General Counsel Exhibit 11).

> that the evidence is exempt or privileged, and thereby also foreclose litigation of its position.

30 FLRA at 139. Similarly, in restricting the Respondents' ability to raise defenses at the hearing, my ruling narrowly applied only to those defenses which required examination of the contents of the withheld documents, and it served only to prevent the Respondents from benefiting from their refusal to comply with the subpoenas (Tr. at 5-7).

The Merits of the Union's Request for Information

Before discussing individually each disputed item in the Union's information request, some general comments are necessary. As all parties recognized, the Authority's decision in *IRS Kansas City* set forth a framework for unions and agencies to process information requests under section 7114(b)(4), as well as for litigating such disputes. Under this framework, the union has the underlying responsibility to articulate its particularized need for the information and to explain how its intended use of the information relates to its representational duties. The union cannot meet this obligation by making simple declarations of need or conclusory assertions. Moreover, if the dispute reaches litigation, the union's need for the information will be judged by how well it articulated its need at or near the time it made the request, not at the hearing. (See discussion *supra*.) Agencies have a parallel set of responsibilities. Once the union has made its request for information and articulated why it needs it and how it will use it, the agency must respond by either furnishing the information or asserting and establishing its countervailing anti-disclosure interests. And like the unions, agencies cannot meet this obligation with bare conclusions or by simply saying "no." In other words, the framework calls for the parties to undertake an ongoing exchange concerning their respective interests. It requires the exchange to occur in a timely manner when the request is made, not months or years later during litigation, and it encourages the parties to accommodate the other's interests by considering alternative forms or means of disclosure. 50 FLRA at 670-71. If the parties do not reach agreement, *IRS Kansas City* provides (50 FLRA at 671):

> an unfair labor practice will be found if a union has established a particularized need, as defined herein, 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 particularized need.

In cases since *IRS Kansas City*, the Authority has emphasized the dynamic and mutual nature of the process. One party's satisfaction of its obligation often depends on the degree to which it has responded to the countervailing interests articulated by the other party. Therefore, unions have not established particularized need when they have failed to respond adequately to agency requests for clarification or to agency expressions of countervailing interests. *U.S. Department of the Treasury, Internal Revenue Service, Washington, D.C. and U.S. Department of the Treasury, Internal Revenue Service, Oklahoma City District, Oklahoma City, Oklahoma*, 51 FLRA 1391, 1395-96 (1996); *EEOC*, 51 FLRA at 257-58. On the other hand, when a union met with the agency and discussed its need for information in detail, and the agency failed to raise a particular concern about the information, the Authority has allowed the union to explain its need for the information as late as the ULP hearing. *U.S. Department of Justice, Immigration and Naturalization Service, Northern Region, Twin Cities, Minnesota*, 51 FLRA 1467, 1475-76 (1996)("*INS Twin Cities II*").[6] These holdings further the Authority's stated purposes of facilitating a timely and mutual exchange between union and agency concerning their respective interests in disclosure, and of encouraging the parties to reach accommodations of their interests short of litigation. They encourage parties to express their interests at or near the time of the information request, and they penalize parties that make bare or conclusory assertions or simply say "no."

Based on the record in this case (including my impressions of the demeanor of the witnesses), it appears to

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6 It was evident at the hearing that the parties in the instant case were familiar with the *INS Twin Cities* line of cases, as the parties and the issues were similar. The Authority issued three separate decisions in that case, first at 46 FLRA 1526 (1993)("*INS Twin Cities I*"), next at 51 FLRA 1467 (1996), cited above, and finally at 52 FLRA 1323 (1997)("*INS Twin Cities III*"); and the U.S. Court of Appeals issued two opinions, 39 F.3d 361 (D.C. Cir. 1994) (remanding to the Authority), and finally affirming the Authority at 144 F.3d 90 (D.C. Cir. 1998). Interestingly, the *INS Twin Cities* cases involved union information requests relating to the proposed removal of a Border Patrol Agent named Jason Wood. It is not clear from our record whether this is the same Jason Wood whose proposed removal is the focus of the instant case.

me that the Union has generally tried to apply the principles of *IRS Kansas City* and its progeny, whereas the Respondents (particularly Tucson Sector) seem to have tried to ignore those same principles. After DCPA Pyeatt denied seven of the Union's nine requests on March 8, the Union sent two additional letters to him, offering some additional explanation for its requests and proposing a meeting to discuss the issues directly. In its second letter dated March 12 (General Counsel Exhibit 8), the Union sought to elicit from Pyeatt specific explanations as to exactly why he felt that disclosure of the information was improper, quoting portions of the ALJ's 1997 order in *Tucson Sector I*. Mr. Pyeatt then provided a slightly more detailed response (General Counsel Exhibit 9), but at no time did either Respondent articulate any countervailing interests of the agency in non-disclosure or any reasons why disclosure was precluded by law. In general, Tucson Sector's prime directive seems to have been, "Say as little as possible." Besides ignoring the specific order from Judge Oliver that was binding on Tucson Sector, the Respondents were also flaunting the Authority's oft-stated behest that parties engage in "meaningful discussion" of information requests. *Tucson Sector and Western Region I*, 52 FLRA at 1242 n.8.

Notwithstanding the Respondents' general recalcitrance in obeying the dictates of section 7114(b)(4), it is the Union which must first articulate its particularized need for information. If the Union failed to do so, Mr. Pyeatt's "just say no" policy was not an unfair labor practice. But if the Union met its threshold burden of demonstrating the need for any item in its request, then *IRS Kansas City* calls for a finding that the agency has committed an unfair labor practice, because in almost every instance here, Mr. Pyeatt did not express any specific grounds for, or countervailing interests in, non-disclosure. I will evaluate whether the parties met their respective burdens based on the information articulated to the other party at or near the time of the request, not based on reasons articulated at the hearing or in post-hearing briefs.

Of the nine items of information requested by the Union on March 5, Tucson Sector provided the Union with Items 3 and 4, forwarded the request for Items 6 and 9 to Western Region (which never responded substantively to the Union), and denied Items 1, 2, 5, 7 and 8. Sometime between March 8 and 12, Western Region gave the Union the information requested in Item 2, notwithstanding Tucson Sector's refusal

(see General Counsel Exhibit 7, page 2).[7] The General Counsel did not allege that the denial of Item 5 was improper. This leaves five of the items still in dispute, Items 1, 6, 7, 8 and 9. I will discuss these in order.

Item 1: "Please provide the statutory or regulatory basis which permits the agency to rescind two adverse actions (60 day suspension and removal) and re-issue a new proposal of termination which combines the two cases."

The Union stated that it needed this information "in order to determine whether the agency's actions are supported by appropriate legal foundation or are simply motivated by the notion that MORE IS BETTER. The Union anticipates that such information will be used in the written and oral replies presented on behalf of Agent Wood." General Counsel Exhibit 5. Tucson Sector denied the request because it "does not demonstrate the required particularized need which is necessary for entitlement to such information under the statute." General Counsel Exhibit 6. It later admitted that "the information exists and the release is not precluded by law", but insisted nonetheless that the Union had not demonstrated particularized need. General Counsel Exhibit 9.

The Union's request was made in the context of an especially unusual, protracted and convoluted disciplinary and grievance process in Wood's case. Agent Wood had been under investigation by the Respondents since at least 1997,

[7] The denial of Item 2 is an example of Tucson Sector's obstinate refusal to grant even simple requests for information. The Union was seeking a copy of a document written in 1999, at an earlier stage of the disciplinary process against Agent Wood, by a Union steward who had subsequently become a supervisor. The Union explained to Pyeatt that it didn't have a copy of the document and couldn't obtain one from the supervisor. Although Pyeatt admitted that the document existed and disclosure wasn't prohibited by law, he refused to furnish it to the Union, apparently because it had been "generated by the local union." General Counsel Exhibit 6. The Authority has long held that the right to information under 7114(b)(4) is not dependent on whether the information is available from an alternative source. *U.S. Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington*, 38 FLRA 3, 7 (1990)("*Puget Sound*"). While Western Region's subsequent compliance with the Union's request saved Tucson Sector from having this action included in the Complaint, and I do not consider it in my unfair labor practice findings, I do find it unfortunately typical of Tucson Sector's approach to Union information requests.

and two adverse actions against him had been proposed and approved by Tucson Sector; just before the cases were to go to arbitration, the agency withdrew the actions and almost immediately proposed a new removal action against him in early 2001. The Union asked the agency to provide a copy of any statute or regulation that permitted such a procedural action. The relevance of this information to the Union's representation of Wood in the proposed removal action seems quite direct and obvious. If there were no specific legal provisions permitting the agency's action, the Union could cite that fact in support of its grievance; if there were specific legal provisions supporting the agency's action, it would be equally helpful for the Union to know those provisions and to evaluate them. I conclude, therefore, that the Union demonstrated a need for the information and that its intended use of the information was properly related to its representation of Wood at the oral and written reply stage of the disciplinary process.

The only real question here is not whether the Union showed a particularized need for the information, but whether this is the type of "data" or information that is encompassed in section 7114(b)(4). Or, as the Respondents argue in their brief, "the Statute was not created to force the Agency to persuade the union of its ability to take an action." I agree with the Respondents that the Statute does not require an agency to create information or documents if they do not already exist or if the information is not maintained by the agency. Section 7114(b)(4) does not require an agency to perform legal research or write a legal brief at a union's whim. But if a statute or regulation exists that supports the agency's action, and the agency has that statute or regulation in its possession, then the Statute does require the agency to furnish it to the union. The *Puget Sound* decision is directly applicable here. In that case, the union sought copies of portions of the Federal Personnel Manual and a statute that had been cited by the agency in drafting a proposed policy. The Authority held that the documents were necessary to the union for bargaining purposes and ordered the agency to furnish them. The only real difference in our case is that the agency did not cite any specific regulation or statute justifying its procedural actions regarding Wood, and the Union was trying to learn whether such documents actually existed; but if the agency <u>had</u> based its actions on a specific regulation or statute, then the Union was equally entitled to that document here as in *Puget Sound*. Pyeatt explicitly admitted in his March 15 letter that the information exists. He never asserted that the information was not maintained by the agency. I therefore conclude that Tucson Sector should

have furnished Item 1 to the Union, and its failure to do so violated sections 7114(b)(4) and 7116(a)(1), (5) and (8).

Item 6: "Please provide sanitized copies of all proposal and decision notices for disciplinary and/or adverse action cases (including settlement agreements) within the Western Region from three years prior to the dates of the instant alleged offenses to the present for the following types of charges: [lists charges against Wood]".

The Union explained that it needed this information "in order to compare the discipline the agency has proposed against Agent Wood with that given to other employees who had committed similar offenses." It expressly cited the Authority's decision in *INS Twin Cities I*, 46 FLRA 1526, which upheld the union's need for five years of disciplinary records throughout the INS's Northern Region involving four different offenses.[8] Tucson Sector forwarded this request to Western Region, which acknowledged receipt of the request on March 19 but never responded further to the Union.

Although Respondent Western Region argued at the hearing and in its brief that the Union did not demonstrate a particularized need for this information, it never satisfactorily explained why it failed to respond to the Union after it stated on March 19 that it would do so. As I have already explained in footnote 5 *supra*, and at the hearing, the Union's filing of unfair labor practice charges on March 23 did not "take the matter out of the hands" of either the Union or the Respondents: Agent Wood still faced removal proceedings, and indeed DCPA Pyeatt expressly refused to delay the Union's deadline for filing its written reply to the proposed removal beyond March 19. Moreover, the March 23 ULP charges were filed only against Tucson Sector, leaving Western Region free to process the Union's information request and to respond accordingly. It never did so.

Based on this alone, the failure of Respondent Western Region to respond to the Union's request was an unfair labor practice. The Authority has often held that an agency is required to reply to an information request even if the information requested does not exist, and that the failure

[8] Although not cited by the Union in its information request in our case, the Authority held in *INS Twin Cities II* that some of the information it had ordered the agency to furnish in *INS Twin Cities I* was not necessary under the new *IRS Kansas City* standards, but it reaffirmed its decision that the region-wide disciplinary records were necessary and must be given to the union. 51 FLRA at 1473-79.

to do so is an unfair labor practice. *Department of Health and Human Services, Social Security Administration, New York Region, New York, New York*, 52 FLRA 1133, 1149-50 (1997); *U.S. Naval Supply Center, San Diego, California*, 26 FLRA 324, 327 (1987). In the *Social Security* case, *supra*, the Authority held that the failure to respond to a request for unsanitized personnel records was unlawful even though the union was not entitled to the requested records.

Looking at the substance of the Union's request, I find that the Union demonstrated a particularized need for the sanitized disciplinary records, including settlements. By explaining that it intended to use the records to compare Wood's discipline to that given to other employees, the Unions was articulating its intent to investigate both the narrow legal issue of disparate treatment and the broader question of whether the proposed punishment of Wood was fair and appropriate to the facts of his case. The Union is not required to specify (as Respondents argued in their brief) that Wood was in fact treated disparately or unfairly, because one of the purposes of furnishing information is to enable the Union to determine whether it has grounds for filing a grievance. The Union's request here made it clear that it wanted to investigate whether the proposed punishment of Wood was consistent with the agency's practice in other cases in the region, and it explicitly cited an Authority decision (involving essentially the same parties and the same collective bargaining agreement) that upheld the need for region-wide disciplinary records over a five-year period. Thus a fair reading of the Union's March 5 request incorporates the rationale expressed by the union and by the Authority in *INS Twin Cities I* for region-wide disciplinary information. In light of these stated reasons, it was incumbent on Western Region to explain with specificity any countervailing interests against disclosing the requested information.

At the hearing and in its brief, Western Region belatedly offered several reasons why the disciplinary records were not necessary to the Union to compare the agency's treatment of Wood and other employees. First, it argued that employees in other parts of the region, non-Border Patrol Agents, and employees accused of only one or two rather than five offenses, are not similarly situated to Agent Wood. In a similar vein, it argued that the Union didn't explain why it needed the records for as many as three years prior to Wood's proposed removal or why it needed settlement agreements. In arguing that the Union's request was too broad, Western Region's only witness, Ms. Rubio, testified that "the proposals and decisions of the employees that are in the Tucson Sector would certainly

be relevant . . . ." Tr. at 152. However, by admitting this, the Respondents conceded that the refusal to provide those documents relating to Tucson Sector employees was baseless. Moreover, the time for the Respondents to express specific objections to the breadth of the Union's request was at or near the time of the data request, not months later.

The instant case is distinguishable from cases such as *DOL*, *supra*, 51 FLRA at 476-77, where the Authority held that the union had established a general need for some information but not a specific need for the extensive records it sought. In *DOL*, however, the agency had specifically objected to the breadth of the information requested and had raised privacy objections to disclosing some of the information; *see* the initial decision in that case, 39 FLRA 531, 533. It was, therefore, incumbent on the union in *DOL* to explain its need more specifically, and the union failed to do so. *See also* the Authority's advice to the agency in *Health Care Financing Administration*, 56 FLRA 503, 507 n.3 (2000)(*"HCFA"*): if the agency was unclear as to any of the union's asserted reasons for the information, it should have sought clarification from the union, which then would have been obliged to explain its reasons further. Similarly here, if the agency felt that the Union needed records only for Tucson Sector employees and not others, or for Border Patrol Agents and not others, it should have raised these concerns with the Union in March and allowed the Union to justify or modify its position. A full reading of the Authority's *INS Twin Cities I* decision, to which the Union referred in its initial data request, would have afforded the Respondents an explanation of why the Union felt it needed region-wide records covering multiple years. The Respondents' failure to raise any specific objections to the request or to seek any balancing or accommodation of the parties' respective interests, at or near the time of the Union's request, makes it impossible to strike such a balance or accommodation after the fact.

I therefore conclude that the Union met its threshold burden of establishing a particularized need for all of the information requested in Item 6, and since Western Region has not established any countervailing interests in non-disclosure, Western Region violated sections 7114(b)(4) and 7116(a)(1), (5) and (8) by failing to respond to the Union's request and by refusing to furnish the Union with Item 6 of its request.

Item 7: "Please provide copies of written policies and/or instructions in existence prior to October of 1998 pertaining to the requirement that Border Patrol Agents

request permission from supervision before leaving their designated work area."

The Union explained that it needed this information "in order to determine whether Agent Wood's actions constitute a violation of policy or regulation. The Union anticipates that this information will be used in the written and oral replies." DCPA Pyeatt initially denied the request with the boilerplate answer that the Union had not "demonstrate[d] the required particularized need which is necessary for entitlement to such information under the statute." The Union then responded by noting that Wood had been charged with a specific offense, failing to remain in his designated work area. "When an agent is charged with a violation, it would seem that written policies or instructions pertaining to the violation would exist so that agents would be on notice as to what is required of them." To this argument, Pyeatt stated that "[t]he information exists and the release is not precluded by law", but he repeated his refusal to furnish the information, because the Union had not demonstrated a particularized need for it.

At the hearing, Mr. Pyeatt modified his position concerning the existence of the information requested in Item 7. He testified that he didn't believe there is a "particularized absolute policy that was written" specifically to address Agent Wood's alleged offense, but instead "we have a lot of general policy that goes to assigning of work and expectation of an employee to be in an area" (Tr. at 169-70). The Respondents seem to expend more effort in denying the Union's request than it would take to comply with it. In its apparent zeal to avoid conceding anything to the Union, Respondent Tucson Sector wavers between two positions and misses the point of both. On the one hand, it seems to be saying that since Wood wasn't charged with violating a specific rule, it has no obligation under 7114(b)(4) to furnish a document that doesn't exist. On the other hand, it insists that although no specific rule exists requiring agents to stay at their post, there are many general policies supporting the agency's prosecution of Agent Wood for leaving his post. Regarding the first position, Tucson Sector could have made its point by simply informing the Union, in its March 8 response, that no such "policies and/or instructions" exist. Apparently concerned that this would give the impression that the agency had no basis for charging Wood with misconduct, Pyeatt chose to stonewall the Union rather than to be responsive. He chose to say nothing, rather than to say that no specific policy exists or to explain that several general policies covered the alleged misconduct. He compounded his error in his March 15 response, when he admitted that the requested

information exists, an admission that he contradicted at the hearing. Concerning the second position, the Respondents miss the point that they were equally required to furnish any "written policies and/or instructions," regardless of whether they "specifically" or "generally" pertain to the issue identified in Item 7.

The purpose of the Union's request in Item 7 was to understand the source and nature of the agency's allegation against Wood, and I find that this was directly relevant to the Union's role in representing Wood and that it was "required in order for the union adequately to represent its members." *IRS Kansas City*, 50 FLRA at 670, citing *Department of Justice v. FLRA*, 991 F.2d 285, 290 (5th Cir. 1993). The Respondents do not seem to dispute that if Wood had been accused of violating a specific rule, they would have been required to furnish the Union with a copy of the rule. Indeed, Item 4 of the data request asked for "the INS policy document entitled Body Searches [another of the charges against Wood]," and Tucson Sector promptly complied with that request. The *Puget Sound* decision, *supra*, requires no less. The Union also explained in its March 12 request that it needed to see the written policy concerning the requirement that agents remain in their designated area, so that it could evaluate what, if any, notice Wood had that certain behavior was expected of him. The precise language of an agency's policy, if it exists, is essential for an employee to defend against his charges: he needs to know what, if any, exceptions or conditions exist to the required behavior, so that he can raise appropriate defenses. This rationale is no less true if the "policy" in question is a "general" one rather than a "specific" one. In either case, the employee, and the union defending him, needs to know what behavior is permitted and what behavior is prohibited. If no such policy exists, then of course the agency cannot be required to furnish it; but if so, it must inform the union of that fact. But to the degree that an agency accuses an employee of doing something that is prohibited, the employee is entitled to know precisely what is prohibited. If the prohibition is stated only in general terms, the agency is still required to tell the employee the general terms and the source of the prohibition.

I therefore conclude that Respondent Tucson Sector committed an unfair labor practice in refusing to furnish the Union with Item 7.

Item 8: "Please provide a copy of the letter written by SBPA William Furnia to Joe Lapata, Deputy Port Director, of Customs in Nogales, Arizona in which Mr. Furnia requested 'information related to an incident at the Nogales Port of

Entry, with a member of the U.S. Border Patrol.' In addition, please provide a copy of the 'incident report' referenced in Mr. Lapata's letter."

With regard to the information requested here, the transcript and the exhibits provide only sketchy details. The letter in question relates to an August 18, 1998 incident at the Mexico-U.S. border, in which Customs officials accused Agent Wood of "a very uncooperative and unprofessional attitude to his fellow law enforcement officers" while he was off duty. General Counsel Exhibit 3, pages 2-3. The complaint registered by Customs to Border Patrol officials about this incident formed the basis of one of the three specifications of Conduct Unbecoming an Officer against Wood. Testimony at the hearing indicated that the agency had previously given the Union copies of three letters (dated September 29, October 12 and October 20, 1998) relating to that incident. In the October 20 letter, a Customs official named Lapata (spelled Lafata in the transcript) wrote to a Border Patrol official named Furnia and referred to "your recent request" and to an "incident report" (Tr. at 94-95). Since Ms. Nighswander didn't have any letter written by Mr. Furnia, she assumed there was an additional letter and an incident report that were missing from the evidence file (*Id.*) Mr. Pyeatt's initial response to the Union's data request simply stated that it hadn't demonstrated a particularized need for these documents, but in his March 15 letter he also stated that "[t]he information requested is not in the custody of the Agency, and I am not aware if the information exists . . ." He testified at the hearing that he had searched and could not find any letter from Mr. Furnia to Customs; after reviewing the sequence of documents, he had come to conclude that Mr. Lapata had misconstrued a statement in a prior letter from Border Patrol to Customs (Tr. at 171-73).

Based on these facts, the record does not support an allegation that Tucson Sector violated the Statute with regard to Item 8. In this respect, DCPA Pyeatt advised the Union at the time of his March 15 response that the requested information was not in the agency's custody and may not even exist. Both his testimony and Ms. Nighswander's generally corroborates Pyeatt's account regarding the existence of the documents. Ms. Nighswander had no definite knowledge that a letter from Furnia to Lapata existed, and only a vague reference in the October 20 letter supported her assumption that it existed. The same is true concerning the supposed "incident report," which more likely was actually the original September 29 complaint letter from Customs. Mr. Pyeatt consistently stated that the agency had no additional letters, and the General

Counsel has offered no probative evidence to refute that position. Therefore, I conclude that the information sought in Item 8 was not normally maintained by the Respondents, and the Respondents did not violate the Statute by refusing to furnish it.

Item 9: "Please provide copies of all letters sent within the past three years by supervisory personnel in Western Region to other law enforcement agencies requesting information on allegations of off duty conduct by Border Patrol Agents."

The Union justified this request by stating it "needs this information to determine whether letters such as that referenced in #8 above are routinely sent or whether the request for information regarding an incident involving Jason Wood constitutes disparate treatment." As with Item 6, Tucson Sector referred this request to Western Region, which acknowledged the request to the Union on March 19 and then failed to respond substantively. And as with Item 6, I find that Western Region's failure to follow up on the request constituted an independent violation of sections 7114(b)(4) and 7116(a)(1), (5) and (8).

Unlike Item 6, however, there are substantive defects in the Union's request for Item 9, and as a result I find that it has not demonstrated a particularized need for this information. The initial problem with the information requested here is that it is premised on the existence of the Furnia-Lapata letter cited in Item 8, and that letter apparently doesn't exist. The nonexistence of the Furnia-Lapata letter calls into question the underlying need for the wide range of letters requested in Item 9. Ms. Nighswander assumed from Lapata's October 20, 1998 letter that Furnia had asked Lapata about Wood's conduct, and she therefore wanted to find out whether other Border Patrol officials had written to other agencies about the conduct of other Border Patrol agents. Even if Furnia had written to Lapata about Agent Wood,[9] the Union was making an enormous leap of logic in seeking to extend its investigation in this manner. It is difficult to understand what Nighswander hoped to prove with the requested information. If the Respondents had complied with her request and had given her a large number of letters written by supervisors to other law enforcement agencies, she would have been in no better or worse position to represent Agent

[9] Indeed, regardless of the existence of a Furnia letter, a Border Patrol official did write to Customs on October 12 in response to the complaint from Customs about Wood's behavior on August 18.

Wood than if the Respondents had given her few, or no, such letters. The letters would simply indicate that the Respondents were responding to outside complaints concerning the off-duty conduct of its agents, but the letters wouldn't help the Union determine a pattern of disparate treatment. In order to determine whether Wood's conduct was treated differently than other such incidents, the Union would need to know about cases in which the Respondents failed to respond to an outside complaint; but Item 9 does not address those cases. Furthermore, the Union's request in Item 9 bears only a minimal relevance to the facts and issues of Wood's case. While it appears to have little or no idea what it is really looking for, the Union is asking the Respondents to undertake a potentially very broad search. In this context, the Union's request is insufficient to permit the Respondents "to make a reasoned judgment as to whether information must be disclosed under the Statute." *IRS Kansas City*, 50 FLRA at 670.

In summary, I conclude that Items 1, 6 and 7 of the Union's information request met the requirements of section 7114(b)(4) of the Statute, and that these items should have been furnished to the Union by the Respondents. Accordingly, Respondent Tucson Sector violated section 7116 (a)(1), (5) and (8) by refusing to furnish Items 1 and 7, and Respondent Western Region violated section 7116(a)(1), (5) and (8) by refusing to furnish Item 6. Additionally, Respondent Western Region violated the same provisions by failing to answer the Union's request for Items 6 and 9 after March 19, 2001.

Remedy

In cases where an agency has unlawfully refused to furnish necessary information to a union, the typical remedy is to order the agency to provide that information to the union[10] and to post a notice to employees explaining the action. Here, the General Counsel also seeks such a remedy, but it asks that I go further, that I order the Respondents to refrain from alleging untimeliness as a defense to any grievance or arbitration filed in connection with the proposed removal of Agent Wood, as long as the Union files such grievance timely from the date it finally receives the information in Items 1, 6 and 7 of its request.

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[10] The Respondents argue that because I prevented them from raising certain defenses at the hearing, they were unable to elicit testimony that they no longer maintain some of the information requested by the Union. Such questions may need to be addressed in the compliance stage of this case.

I agree that additional, or non-traditional, remedies are required here, but not the one suggested by the General Counsel. The *HCFA* case cited by the GC for its position illustrates how the GC misses the point. In *HCFA*, the agency was found to have improperly refused to furnish the union with documents relating to the posting and filling of a vacancy announcement. By withholding these documents, the union was unable to evaluate whether any employees' rights had been violated by the agency's procedures, and thus it could not determine which employees, if any, might have valid grievances. By prohibiting the agency from raising untimeliness as a defense to subsequently-filed grievances, the Authority's order corrected one of the underlying inequities created by the agency's unfair labor practice. 56 FLRA at 507. That is not the case with Agent Wood's proposed removal. The Union already has undertaken to represent him in that matter, and the Respondents' denial of parts of the data request did not prevent the Union from filing its written reply; moreover, if the removal or some other disciplinary action against Wood is ultimately approved by Tucson Sector, the Union does not need my assistance to file a timely grievance. What the Union and Agent Wood do need is assurance that they can submit an additional written reply to the agency's deciding official after they receive the information requested in Items 1, 6 and 7, and that such additional written reply will be considered by the deciding official before he issues a final decision.[11] As long as the Union submits its additional reply in a timely manner from the date that the Respondents furnish the required information, the Respondents should not be permitted to argue that the reply is untimely. In that respect, and for similar reasons as expressed in *HCFA* and in *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 160-62 (1996), such a remedy is necessary and would be effective in recreating the conditions with which the Respondents' conduct interfered.

In the circumstances of this case, however, I believe that an effective remedy must address more than simply the disciplinary action against Agent Wood. Early in this decision, I noted two prior FLRA decisions involving the same parties: *Tucson Sector and Western Region I*, a 1997 opinion issued by the Authority, and *Tucson Sector I*, a 1997 decision and order issued by an ALJ and subsequently adopted by the Authority without precedential significance. Although the Authority held in the former case that the

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[11] At the time of the hearing, the deciding official had not yet issued a decision in Wood's case, and it is unclear whether he has done so yet. If he has issued a decision, then that aspect of the remedy would be moot.

Union had not sufficiently articulated a need for the information requested, it chastised Tucson Sector and Western Region for their "failure to engage the Union in any meaningful discussion of the Union's requests." 52 FLRA at 1242 n.8. In the latter case, the ALJ found that Tucson Sector officials were violating both the spirit and the letter of their obligations under section 7114(b)(4), as expressed in the *IRS Kansas City* decision, and his remedy ordered the agency to implement specific procedures in handling 7114(b)(4) information requests. Those procedures were taken directly from the language of the Authority's decision in *IRS Kansas City*, 50 FLRA at 670-71. The Judge ordered Tucson Sector, among other things, to respond to such requests in writing within ten work days, to answer a series of questions about each item of information requested, to articulate all reasons why the information should not be released, and to offer to have a meeting or telephone conference "if it would assist in resolving any issue arising from the request." *Tucson Sector I*, slip op. at 12.

As I noted earlier in this decision, the facts of this case demonstrate that the Union has tried to apply the lessons of those two earlier cases, while the Respondents have continued to follow a practice of "stonewalling" information requests and stifling any "meaningful discussion" and attempts to accommodate the respective interests of union and management.[12] 52 FLRA at 1242. Apparently mindful that it had lost *Tucson Sector and Western Region I* because it had inadequately responded to agency objections, the Union here responded to Mr. Pyeatt's initial denial by offering additional justifications for its request, by asking Pyeatt to answer the specific questions posed earlier by the ALJ in *Tucson Sector I,* and by proposing a meeting or telephone conference to discuss the requests in detail. In contrast, Pyeatt ignored Judge Oliver's 1997 order and refused to engage in any meaningful discussion with the Union. For its part, Western Region totally failed to issue a substantive response to the request for Items 6 and 9 in this case, much as it had done in *Tucson Sector I*.

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In a separate decision issued today, involving Respondent Tucson Sector and the Union, a similar factual pattern was evident. DE-CA-01-0461, OALJ 02-49. Although I found in that case that the Union was not entitled to the information it requested, Tucson Sector denied the request without engaging in any meaningful discussion, and it took longer than the ten days afforded it by Judge Oliver to reply.

Accordingly, I find that it is necessary to order the Respondents to take specific actions concerning their handling of union information requests in order to deter future violative conduct and to recreate the conditions and relationships that the Respondents have interfered with. Specifically, the facts of this case demonstrate that the Respondents continue to refuse to fully articulate their reasons and their countervailing non-disclosure interests when they deny information requests, and they continue to refuse to meet with Union representatives to seek an accommodation of their interests with those of the Union. For the most part, the Judge's order in *Tucson Sector I*, if followed properly, adequately addresses these problems and effectuates the policies of the Statute, as articulated in *IRS Kansas City*, and I will adopt it with slight modification.

The Respondents' Closing Brief raises one additional issue that relates to the Judge's order in *Tucson Sector I*, and this warrants attention in my recommended order. In *Tucson Sector I*, the Judge ordered the Respondent, among other things, to:

> [r]espond in writing within ten (10) work days after the receipt of a data request by addressing the following issues:
>
> ****
>
> -- offer to and/or initiate a meeting and/or a telephone conference if it would assist in resolving any issue arising from the request.

The Respondents argue, based on this language, that they were not required to conduct a conference call for each information request. The language of the order is ambiguous enough to be susceptible to that interpretation. But the facts of this case demonstrate that, by asserting that they fully understand the Union's data request, Tucson Sector officials can refuse the Union's request for a meeting, on the theory that it would not "assist in resolving any issue arising from the request." Such an approach undermines the "meaningful discussion" and "attempts to accommodate interests" that are required by the Authority, and I therefore will modify the earlier order to make it clear that the Respondents must meet or participate in a telephone conference with the Union if either of the Respondents denies a request for information and the Union requests a conference or meeting. While such a requirement is not typically imposed for 7114(b)(4) violations, it is necessary here to effectuate the principles of *IRS Kansas City* and to deter future violations.

For the reasons stated above, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that:

A. The U.S. Department of Justice, Immigration and Naturalization Service, U.S. Border Patrol, Tucson Sector, Tucson, Arizona (the Respondent) shall:

1. Cease and desist from:

(a) Failing or refusing to furnish the American Federation of Government Employees, National Border Patrol Council (the Union), with Items 1 and 7 of the Union's data request of March 5, 2001, which information is necessary for the investigation and processing of the Union's response to the proposed discipline of employee Jason Wood and any subsequent grievance that may arise therefrom;

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

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

(a) Furnish the Union with Items 1 and 7 of the Union's data request of March 5, 2001;

(b) Reply in a timely and proper manner to requests for information made by the Union pursuant to the Statute by following this procedure:

(1) Respond in writing within ten (10) work days after the receipt of a data request by addressing the following issues:

-- whether the specific data requested exists;
-- whether or not it will be provided as requested;
-- whether clarification from the Union is required;

-- whether or not the release of the information is precluded by law, and if so, a statement of the reason(s);

-- and whether the Respondent has any countervailing interests in non-disclosure of the information requested;

(2) At the request of the Union, meet or conduct a telephone conference with the Union to discuss any issue arising out of a data request, if the Respondent refuses to furnish any requested information.

(c) If Respondent's deciding official has not issued a final decision on the proposed discipline of Agent Jason Wood before the date of this Decision and Order, it will consider any additional written reply to the proposed discipline of Agent Wood that the Union makes within ten (10) work days after the Union receives the information in Items 1, 6 and 7 of its data request, and it will refrain from asserting that such additional written reply is untimely.

(d) Post at its facilities in the Tucson Sector used by bargaining unit employees represented by the Union, copies of the attached Notice (Appendix A), on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Chief Patrol Agent of the Tucson Sector and shall be posted and maintained for 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 these Notices are not altered, defaced, or covered by other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

B. The U.S. Department of Justice, Immigration and Naturalization Service, Western Regional Office, Labor Management Relations, Laguna Niguel, California (the Respondent) shall:

· Cease and desist from:

(a) Failing or refusing to furnish the American Federation of Government Employees, National Border Patrol Council (the Union), with Item 6 of the Union's data request of March 5, 2001, which information is necessary for the

investigation and processing of the Union's response to the proposed discipline of employee Jason Wood and any subsequent grievance that may arise therefrom;

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

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

(a) Furnish the Union with Item 6 of the Union's data request of March 5, 2001;

(b) Reply in a timely and proper manner to requests for information made by the Union pursuant to the Statute by following this procedure:

(1) Respond in writing within ten (10) work days after the receipt of a data request by addressing the following issues:

-- whether the specific data requested exists;
-- whether or not it will be provided as requested;
-- whether clarification from the Union is required;
-- whether or not the release of the information is precluded by law, and if so, a statement of the reason(s);
-- and whether the Respondent has any countervailing interests in non-disclosure of the information requested;

(2) At the request of the Union, meet or conduct a telephone conference with the Union to discuss any issue arising out of a data request, if the Respondent refuses to furnish any requested information.

(c) Post at its facilities in the Western Region of the Immigration and Naturalization Service used by bargaining unit employees represented by the Union, copies of the attached Notice (Appendix B), on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by an appropriate official of the Respondent and shall be posted and maintained for 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 these Notices are not altered, defaced, or covered by other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 11, 2002

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RICHARD PEARSON
Administrative Law Judge

Appendix A

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, Immigration and Naturalization Service, U.S. Border Patrol, Tucson Sector, Tucson, Arizona, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish the American Federation of Government Employees, National Border Patrol Council (the Union), with Items 1 and 7 of the Union's data request of March 5, 2001, which information is necessary for the Union to represent employee Jason Wood.

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

WE WILL, upon request, furnish the Union with Items 1 and 7 of the Union's data request of March 5, 2001.

WE WILL reply in a timely and proper manner to requests for information made by the Union pursuant to the Statute by following this procedure:

1. We will respond in writing within ten (10) work days after the receipt of a data request by addressing the following issues:

-- whether the specific data requested exists;
-- whether or not it will be provided as requested;
-- whether clarification from the Union is required;
-- whether or not the release of the information is precluded by law, and if so, a statement of the reason(s); and
-- whether we have any countervailing interests in non-disclosure of the information requested.

2. At the request of the Union, we will meet or conduct a telephone conference with the Union to discuss any

issue arising out of a data request, if we refuse to furnish any requested information.

If we have not issued a final decision concerning Jason Wood's proposed discipline, we will consider any additional written reply that the Union makes on behalf of Agent Wood within ten work days after the Union receives the information in Items 1, 6 and 7 of its data request, and we will refrain from asserting that such additional written reply is untimely.

Date: _____ _____

Chief Patrol Agent
U.S. Border Patrol
Tucson Sector

This Notice must remain posted for 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 its provisions, they may communicate directly with the Regional Director, Denver Regional Office, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is (303) 844-5226.

Appendix B

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, Immigration and Naturalization Service, Western Regional Office, Labor Management Relations, Laguna Niguel, California, violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to furnish the American Federation of Government Employees, National Border Patrol Council (the Union), with Item 6 of the Union's data request of March 5, 2001, which information is necessary for the Union to represent employee Jason Wood.

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

WE WILL, upon request, furnish the Union with Item 6 of the Union's data request of March 5, 2001.

WE WILL reply in a timely and proper manner to requests for information made by the Union pursuant to the Statute by following this procedure:

1. We will respond in writing within ten (10) work days after the receipt of a data request by addressing the following issues:

-- whether the specific data requested exists;
-- whether or not it will be provided as requested;
-- whether clarification from the Union is required;
-- whether or not the release of the information is precluded by law, and if so, a statement of the reason(s); and
-- whether we have any countervailing interests in non-disclosure of the information requested.

2. At the request of the Union, we will meet or conduct a telephone conference with the Union to discuss any issue arising out of a data request, if we refuse to furnish any requested information.

Date: _____ _____

(Signature) (Title)

Immigration and Naturalization Service
Western Regional Office

This Notice must remain posted for 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 its provisions, they may communicate directly with the Regional Director, Denver Regional Office, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is (303) 844-5226.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by RICHARD A. PEARSON, Administrative Law Judge, in Case Nos. DE-CA-01-0497 and DE-CA-01-0498, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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Dated: July 11, 2002
Washington, DC