MICHAEL ANTHONY MARR #2580
ATTORNEY, ARBITRATOR & MEDIATOR
111 NORTH KING STREET
SUITE #314
HONOLULU, HAWAII 96817
TELEPHONE: (808) 255-5017
E-MAIL: http://www.MmarrADR@aol.com

BEFORE ARBITRATOR MICHAEL ANTHONY MARR

SEATTLE, WASHINGTON

In the Matter of the Arbitration between THE ASSOCIATION OF ADMINSTRATIVE LAW JUDGES, Union, and THE SOCIAL SECURITY ADMINISTRATION, Agency.	FMCS NO. 16-51797-6 DECISION AND AWARD Hearing Dates: November 14 and 15, 2017 Grievants: Judge Larry Kennedy and Judge Irene Sloan

DECISION AND AWARD

The above-referenced matter was heard before your Arbitrator on November 14 and 15, 2017 in Seattle. The proceeding was transcribed by Buell Real Time Reporting. Sometime, the source for a statement of fact or alleged statement of fact shall be followed by the last name the attorney, witness, or exhibit, shall be in italics, and if applicable, include the page and line number(s) of the transcript. Under the circumstances of the grievance, your Arbitrator believes that citing the name of the source for the fact or the alleged statement of fact, rather than using

the traditional "Tr." will enable the reader to read this decision and award with better understanding and clarity without the necessity of referring to the transcript.

Both parties were represented by professional and competent counsel at the arbitration hearing. The Association of American Law Judges, IFPTE, AFL-CIO, hereinafter sometimes referred to as the "AALJ" or "Union" and Judge Irene Sloan and Judge Larry Kennedy, hereinafter sometimes referred to collectively as "Grievants" were represented by Judge Lillian Richter and Judge Caroline Siderius. The respective grievance of each judge shall sometime be collectively referred to as the "ALJ Grievance."

The Social Security Administration, hereinafter sometimes referred to as the "Agency" or "Employer was represented by Courtney Garcia and Meeka Drayton, both, Assistant Regional Counsel for the Social Security Administration. Several exhibits were received into evidence. Agency exhibit shall be preceded with the letter "*AE*" and Union exhibits the letters "*UE*." If appropriate, the exhibits shall be followed by the page number and be in italics. Joint exhibits shall be preceded with the letters "*JE*" and shall be followed by the page number and be in italics. *JE1*constituted the Collective Bargaining Agreement between the parties and shall sometimes hereinafter be referred to as the "CBA."

Your Arbitrator has reviewed the testimony and evidence presented during the arbitration hearing and has reviewed the well-written and convincing briefs submitted by the parties. Your Arbitrator does not feel compelled to address all of the numerous arguments and issues raised by these professional advocates. Please note that this is not to be interpreted that your Arbitrator has not read and reread the transcripts, the post hearing briefs and numerous pages of exhibits and carefully considered all arguments of counsel. Rather, your Arbitrator elects to address only those elements that have had a significant impact on his decision-making

process. Your Arbitrator, as a general rule, will not comment on matters that he believes are irrelevant, superfluous, redundant, or rendered moot by his opinion and award.

II. STIPLUATIONS.

1. The parties agreed that your Arbitrator had jurisdiction over the ALJ Grievance. *Garcia at 8:23, Richter at 8:24*

2. The parties agreed that the ALJ Grievance was procedurally arbitrable. *Garcia at 9:4, Richter at 9:2.*

3. The Union stated that the ALJ Grievance was substantively arbitrable. *Richter at 9:8.* The Agency stated that that the ALJ Grievance was not substantively arbitrable. *Garcia at 9:18-19.* The basis for the Agency's position is because it believes the ALJ Grievance is moot. *Garcia 10:7-8.*

4. The parties could not agree on a statement of the issue at the arbitration hearing but agreed that your Arbitrator would frame the issue after he reviewed their respective post hearing briefs. *Garcia at 11:10, Richter at 11:9.*[1]

III. ISSUES.

After a thorough review of the transcripts, exhibits, and post hearing briefs of the Agency and the AALJ, your Arbitrator frames the issues as follows:

1. Are the grievances of Judge Sloan and Judge Kennedy moot, making them substantively inarbitrable?

2. Did the Agency violate Article 1, Section 3 and Article 21, Section 1 of the CBA by refusing to provide redacted SSA documents of the claimants who filed bias complaints to the attorneys representing

[1] The Union, in its closing brief, argued two issues at page two: (1) Did the Agency violate Article 1, Section 3 and Article 21, Section 1 of the collective bargaining agreement when it failed and refused to provide Judges Kennedy and Sloan with the requested information? (2) What should the appropriate remedy be?

The Agency, in its closing brief, argued three issues: (1) Whether ALJ Sloan's grievance is moot because the bias complaint was closed out in her favor, requiring no further response. (2) Whether ALJ Kennedy's grievance is moot because the Agency sent redacted records pursuant to his Freedom of Information Act request. (3) Whether the Grievant's "basic due process" rights trumpet the Agency's obligation under the Privacy Act.

Judge Sloan and Judge Kennedy? If so, what is the appropriate remedy?

IV. BACKGROUND.

Judge Irene Sloan and Judge Larry Kennedy are administrative law judges for the Agency. They adjudicate social security disability claims under the Social Security Act. *Zahm at 24:5-7.* Approximately Ninety-Five Percent (95%) of the claims concern disability issues while the other five percent (5%) relate to resources, retirement, and associated matters. *Zahm at 24:7-11.*

The hearings that Judge Sloan and Judge Kennedy preside over are unusual under the Western system of justice because they are responsible for being a neutral decision-maker while protecting the rights of social security claimants and the government which is unrepresented at the hearings. *Zahm at 24:20-25.*

At the hearing the judge reviews the claimants file, which consists largely of medical records, ensures that all necessary documents are in the file, allows the claimant to testify, claimant witnesses, if any, to testify, and expert witnesses which the judge may call to testify. *Zahm at 24:12-19.* After the hearing the judge issues a decision in favor of the claimant (claimant is disabled), against the claimant (claimant is not disabled), or a decision that the claimant is disabled but only for a specific period of time. *Zahm at 25:13-24.*

If a judge denies a claim or the claimant is unhappy with the judge's decision the claimant can file an appeal with the Appeals Council and/or can also file a complaint with the Agency contending that the judge committed some type of misconduct in handling the claimant's claim, i.e., the judge was biased or unfair. *Zahm at 25:6-14.*

If a bias complaint is filed, it is investigated by the Agency pursuant to

Social Security Ruling 13-1F. *Zahm at 27:2-3*. Per Ruling 13-1F, the complaint is reviewed by either the Appeals Council, the Division of Quality Services (DQS), or the Office of the General Counsel, which handles civil rights complaints. *Zahm at 27:19-24.* Most bias complaints are filed with either the Appeals Council or the DQS. *Zahm at 28:4-5*. If an appeals judge does not like what a judge has done at the hearing level, he or she can refer the matter to DQS. *Zahm at 28:9-17*.

The DQS is the branch of the Agency that investigates and decides complaints against judges. *Zahm at 28:20-23*. A complaint can also be filed directly with DQS. *Zahm at 29:5-9*.

After a complaint is filed with DQS it sends a letter to the clamant or representative acknowledging receipt.[2] *Bryan at 249:12-18.* A DQS attorney or analyst reviews the complaint and audits the entire hearing recording and other relevant documentation. *Bryan at 250:1-8*. If there is nothing the region needs to investigate the complaint is closed. *Bryan at 250:14-20*. It is not unusual for the DQS to decide that no investigation needs to be done because the complaint is baseless. *Sochaczewsky at 205:1;*[3] *Bryan at 254:7-9*; *Zahm at 29;18-20; Sloan at 159:12-13*. During the fiscal 2016 and 2017 years combined, "only" sixteen percent (16%) were sustained. *Bryan at 254:11-15*. However, if DQS finds something that it does not like it will investigate. *Zahm at 29:23-24*.

If the DSQ finds that further investigation is needed, a memo along with the complaint is sent to the regional office where the judge is located and the regional office investigates further. *Bryan at 251:6-12; Zahm at 29:24-30:2; AE9*. A thorough investigation is

---

[2] Ms. Joy Bryan has been employed in various positions with the Agency for approximately 27 years. *Bryan at 246:3.* Since September, 2008, she has been a branch chief for the DQS and her branch includes the Seattle region. *Bryan at 247:15*. One of her duties consists of overseeing misconduct and bias complaints. *Bryan at 248:1-2.*

[3] Judge Mark Sochanzewsky has been the Regional Chief Administrative Law Judge (RCALJ) for the Seattle Region since May of 2008. *Sochanzewsky at 196:4-10*. He also authored *JE5* to Judge Kennedy and *JE6 t*o Judge Sloan advising them that their respective Step 3 grievances based upon the Agency's non-disclosure of SSA documents to their attorney was denied.

done again by reviewing the complaint, recording, and documentation. *Zahn at 30:2-5.* The judge is notified about the complaint, that there will be an investigation, and that the judge has the right to raise defenses. *Bryan at 251:12-14; Zahm at 30:1-8.* Complaints are fairly common as there have been about 2,000 social security rulings (SSR 13-1P). *Zahm at 30:15-16.* The social security rulings have binding effect on the Agency, indicate how the Agency operates, and are published in the Federal Register. *Zahm at 31:2-6.*

The current complaint process was set up in 1993 to protect the integrity of the social security system, the rights of claimants, and procedures for complaints. *Zahm at 31:20-24.* The AALJ believes the system became unfair for judges because the Agency hasn't been adhering to its own procedures and the CBA. *Zahm at 32:7-10.* Over time, the AALJ amassed 50 to 60 grievances, negotiated with the Agency, and out of this evolved SSR 13-1P. *Zahm at 32:9-14.* While the AALJ believes the system is still unfair, it is much better than it once was. *Zahm at 32:15-17.*

The regional chief administrative law judge (RCALJ) for the region reviews the records and the audio recording of the hearing. *Bryan at 251:12-25.* He also gives the judge to opportunity to respond. *SSR 13-1p. JE2.* Thereafter the RCALJ recommends if further action is warranted. *Bryan at 251:15-25.*

Discipline regarding bias complaints is "very rare." *Bryan at 273:15-22.* In those rare instances where discipline is administered, it is usually a reprimand. *Bryan at 274:1-3.* If a bias complaint is sustained, it could result in an oral counseling which is not memorialized. *Sochaczewsky at 207:7.* A majority, at worst, result in oral reminders, oral counseling, and sometimes, written counseling. *Sochaczewsky at 205:14-19.* Upwards to ninety-five percent, perhaps higher, result in no discipline. *Sochaczewsky at 200:14.*

However, bias complaints can result in counseling up to suspension. *Zahn at 40:1-14*. Counseling and reprimands can lead to more serious discipline for subsequent infractions such as a suspension. *Zahn at 40:7-13*. Reprimands can also lead to consequences in terms of being removed from telework or a transfer list, both important benefits to judges under the CBA. *Zahm at 40:13-25*. She recalls two cases where complaints lead to the suspension of judges, which of course results in a loss of wages. *Zahm at 41:1-4*. *SSR 13-1P* provides that judges may be counseled, trained, mentored, and disciplined. *JE2 at 4*.

Telework is covered by Article 15 of the CBA. *Zahm at 42:19-20*. This is a benefit that allows a judge to work at home at least eight (8) to ten (10) days per month and avoid a commute. *Zahm at 42:19-24*. This a cost savings to a judge in terms of money and time and the judge can work in "pajamas." *Zahm at 43:1-6*.

The transfer list is covered by Article 20 of the CBA. *Zahm at 43:10*. It is important because most applicants, before they become judges, are not assigned to areas where they reside and it is not unusual for an applicant to state, if selected, they would go anywhere in the United States. *Zahm at 143:17-21*. Several judges leave their families hoping to return home within a reasonable period of time. *Zahm at 43:21-24*.

Judges are encouraged to obtain liability insurance to protect themselves and obtain the assistance of a legal representative if they have problems with the Agency. *Zahm at 48:10-13*. In addition, the AAJJ does not represent judges at MSPB hearing. *Zahm at 48:14-15*. Hence, if the Agency moves to suspend or remove a judge, the AAJJ will not represent them. *Zahm at 48:14-19*. Insurance gives the judges representation during the grievance process and arbitration hearings. *Zahm at 48:18-25*.

The MSPB is the acronym for "Merit Systems Protection Board." *Zahm at*

49:11-13. Zahm at 48:11-12. Under the law, administrative law judges cannot be terminated by the Agency. *Zahm at 49:11-13*. Rather, the Agency must file charges before the MSPB and it determines if there is good cause to suspend or terminate a judge. *Zahn at 49:11-17*. [4]

On October 30, 2014 Judge Kennedy received a letter from RCALJ Olson, which forwarded a misconduct complaint filed by a claimant. *JE3.* The letter informed him that an investigation had been initiated and that he had the right to respond. *JE3*. That same day Judge Kennedy emailed RCALJ Olson and requested that RCALJ Olson's office provide his attorney with a copy of the complaint, a copy of the audio recording of the hearing,[5] the DQS letter, and Judge Olson's cover letter. [6] *JE3.* Judge Kennedy, by letter dated November 24, 2014, filed a Step 3 grievance asserting that the Agency had wrongfully denied his request for information because his attorney informed him that he never received the requested SSA documents. *JE3*.

On December 3, 2015, ACALJ Mark Sochaczewsky denied Judge Kennedy's Step 3 grievance although Judge Kennedy stated that he would accept the requested documents in redacted form and his attorney would sign a non-disclosure agreement. *JE5.* The denial was also based upon the assertion that disclosure of the SSA documents would violate the Privacy Act. *JE5*.

On March 26, 2015, Judge Sloan received a letter from RCALJ Olson,

---

[4] Most cases heard by the Merit Appeals Board regard adverse actions taken by the Agency, i.e., terminations, suspensions for more than 14 days, reductions in pay, and furloughs of 30 days or less. The Board also considers retirement matters, performance based removals, deductions in grade, denials of within-grade salary increases, reduction-in-force actions and several other matters not before your Arbitrator.

[5] The Agency maintained at the arbitration hearing that it did not have the technology to redact audio recordings. However, Judge Zahm testified that the Agency made this same claim during an arbitration hearing concerning Judge James F. Gillet, *UE2*. Judge Zahm, who represented the Grievant testified that the Agency eventually redacted the recording. *Zahm at 72:1-3*. It is significant to note that the Gillet hearing was held over 5 years ago on August 2, 2012. *UE2*. With rapid advances in electronic technology, surely it would be much easier today to redact audio recordings.

[6] These documents and other personally identifiable information of claimants requested by Judge Sloan and Judge Kennedy shall hereinafter sometimes be referred to collectively as the "SSA documents."

which made reference to a misconduct complaint filed by a claimant against her. The letter informed her that she was under investigation and that she had the right to respond. *JE4*. Like Judge Kennedy, she emailed Judge Olson and requested that a copy of the audio recording for the hearing, a copy of the complaint, the letter from DSQ, and Judge Olson's cover letter be forwarded to her attorney. *JE4.* Judge Sloan, by letter dated May 22, 2015, filed a Step 3 grievance asserting that the Agency had wrongfully denied her request for the SSA documents and that same be sent to her attorney. *JE4*.

On April 18, 2016, ACALJ Mark Sochaczewsky denied Judge Sloan's Step 3 grievance although Judge Sloan stated that she would accept the SSA documents in redacted form and her attorney would sign a non-disclosure agreement. *JE6*. The denial was also based upon the assertion that disclosure of the SSA documents would violate the Privacy Act. *JE6*.

The parties were unable to resolve their differences and the grievance of Judge Sloan and Judge Kennedy. Ultimately, the ALJ Grievance was set for an arbitration hearing before your Arbitrator.

V. APPLICABLE LAW, COLLECTIVE BARGAINING AGREEMENT PROVISIONS, POLICIES AND DIRECTIVES.

1. The Collective Bargaining Agreement between the Association of Administrative Law Judges and the Social Security Administration, *JE1*, provides in relevant part as follows:

Article 1, Section 3 A

> (1) In the administration of all matters covered by this Agreement, the Parties are governed by existing or future laws, existing government-wide rules and regulations as defined in 5 U.S.C. Chapter 71, and by government-wide rules or regulations issued after the effective date of this Agreement and regulations implementing 5 U.S.C. §2302.

Article 10, Section 2

A grievance is defined as any complaint:

A. By any Judge concerning any matter relating to the employment of the Judge;

B. By the AALJ concerning any matter relating to the employment of any Judge; or

C. By any Judge, the AALJ, or the Employer concerning:

1. The effect or interpretation, or a claim of a breach, of this Agreement; or

2. Any claimed violation, misinterpretation or misapplication of any law, rule, or regulation affecting conditions of employment.

Article 21

RECORDS

Section 1 – General Provisions

A. The collection, maintenance, retention, and retrieval of Employer's records on Judges shall be in accordance with law, government-wide rules, regulations, and this Agreement.

B. The following records are maintained in a system of records by the Employer pursuant to the Privacy Act of 1974, as amended:

1. The Electronic Official Personnel File (e-OPF) or subsequent electronic equivalent;

2. SSA -7B Employee Record and electronic equivalent;

3. SSA-7B Employee Record Extension File or electronic equivalent;

4. Mainframe Time and Attendance System (MTAS) or subsequent electronic equivalent;

5. Complaints filed pursuant to 57 Fed. Reg. 49186-187 (1992) "Procedures concerning Allegations of Bias or Misconduct of ALJs" alleging bias or misconduct by Judges in the decisional process.

This list of records is not all-inclusive. Further, this provision does not constitute a waiver of any right either Party may have, pursuant to 5 U.S.C. Chapter 71, with regard to the maintenance or access of the records.

RELEVANT FEDERAL LABOR RELATIONS ACT STATUTES

2. Section 7116(a)(5) of the Federal Labor Relations Statute, provides in relevant part, as follows:

> (a) For the purposes of this chapter, it shall be an unfair labor practice for any agency –
>
> (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter; and
>
> (5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter.

Section 7114(b)(4) of the Federal Labor Relations Statute, provides in relevant part:

> (a) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation –
>
> (4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—
>
> (A) which is normally maintained by the agency in the regular course of business;
>
> (B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and
>
> (C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining.

3. **THE PRIVACY ACT**

The Privacy Act, 5 U.S.C. Section 552a(b) provides in relevant part, as follows:

> Conditions of Disclosure – No Agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be-

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (3) (4)(D) of this section.

VI. PRIMARY POSITIONS OF THE AGENCY

1. When the Agency processes claims for disability benefits, it collects sensitive information, including social security numbers, birthdates, phone numbers, home addresses, and medical information. The public trusts the Agency to protect their private information.

2. The Agency and its employees are required by the Privacy Act, 5 U.S.C. § 552a(b) to safeguard personally identifiable information from unauthorized disclosure.

3. The Privacy Act requires the Agency and employees to first obtain the consent of the person to whom the information pertains prior to disclosing SSA records contained in a system of records.

4. The Privacy Act contains limited exceptions that allow the disclosure of records but there is no exception to allow the Agency to provide SSA records to the Grievants' attorney to assist them in responding to a bias complaint.

5. Even court filings may be considered improper disclosures under the Privacy Act. Any public filing must be made with written consent, the routine use exception, or the court order exception.

6. Even during the course of litigation, if an agency is asked to produce information protected by the Privacy Act, an agency must object on the basis that the Privacy Act prohibits disclosure under established case law.

7. Written consent must be clear and unequivocal. A claimant does not waive his or her rights under the Privacy Act by filing a bias complaint.

8. The System of Records Notices published in the Federal Register further enumerates routine use exceptions for disclosure. The notices inform the public under what circumstances their personal and private information shall be released and there is no exception within this system for SSA documents to be released to the Grievants' attorney.

9. Disclosure of SSA documents to assist an administrative law judge in responding to a bias complaint would be a violation of the Privacy Act which provides for civil and criminal penalties. An Agency employee who violates the Privacy Act could be subjected to a misdemeanor charge.

10. The ALJ Grievance requests that the Agency provide their attorney with personally identifiable information of claimants who have alleged that the

judges were biased so that they may respond to the complaint. However, the ALJ's have access to this sensitive information, may provide a response, and this is all that is required by Social Security Ruling (SSR) 13-1p.

11. The Grievants have experienced neither discipline nor litigation related to the bias complaints. In fact, the Division of Quality Services (DQS) closed the complaint against Judge Sloan in her favor, requiring no further action. There is nothing for her to respond to and her grievance is moot.

12. The Grievants can potentially obtain some information by making a request under the Freedom of Information Act (FOIA). The Agency sent some of the materials requested by judge Kennedy's attorney in redacted form pursuant to a FOIA, albeit to the wrong address. The experts in the Agency's Office of Privacy and Disclosure (OPD) processed the request and redacted private information.

13. Since the Privacy Act prohibits disclosure of claimants' records to a third party attorney with the claimant's consent, the ALJ Grievance should be denied.

VII. PRIMARY POSITIONS OF THE UNION

1. The Agency violated Section 7114(b) of the Federal Labor Relations Act when it failed to provide information that they requested to defend against a bias complaint.

2. The Union elected to pursue the grievances of Judge Sloan and Judge because the requested information is of immense importance not just to Judge Sloan and Judge Kennedy, but also to approximately 1600 judges that constitute the bargaining unit.

3. Judge Sloan and Judge Kennedy retained an attorney to represent them in bias complaints made against them because such complaints can lead to serious consequences, including discipline.

4. Judge Sloan and Judge Kennedy requested that copies of the complaint, audio recording, letter from DQS, and letter from Acting RCALJ Olson, regarding their respective grievance, be forwarded to their attorney so their attorney could respond as their legal representative to the bias complaint.

5. Judge Sloan and Judge Kennedy advised the Agency that they would accept documents with personally identifiable information redacted from the documents to protect the privacy of the claimants. The Agency failed and refused to provide the requested information on the basis that it was precluded from doing so under the Privacy Act.

6. As a result of the Agency's actions, Judge Sloan and Judge Kennedy have been denied the right to effective assistance of counsel and have been unable to respond to the bias complaints.

7. In addition to requesting a traditional remedy, the AALJ is requesting a cease and desist order and that a notice be posted in all hearing offices in order to ensure that all administrative law judges are aware of their due process right to effective representation by counsel in responding to complaints and/or issues that affect their terms and conditions of employment.

VIII. IS THE ALJ GRIEVANCE MOOT?

Mootness is a threshold jurisdictional issue that may be raised at any stage of the Authority's proceedings. *Assn of Civilian Technicians, Show-me Army Chapter v. United States, Department of the Army*, 59 FLRA 378 (2003), citing *United States Dep't of the Interior, Nat'l Park Service, Golden Gate Nat'l Recreation Area, S.F., Cal.,* 55 FLRA 193, 195 (1999) and *Int'l Fed'n of Profl & Technical Eng'rs,* Local 35 54 FLRA 1384, 1387 n.3 (1998). A dispute becomes moot when the parties no longer have a legally cognizable interest in outcome. *Id.* citing *Soc. Sec. Admin., Boston Region 1), Lowell Dist. Office, Lowell, Mass.,* 57 FLRA 264 (2001). In this respect, the mootness doctrine provides that, although there may have been a justiciable controversy when a case was filed, once that controversy ceases to exist, the case will be dismissed for want of jurisdiction. *Nat'l Treasury Employees Union,* 63 FLRA 26 (2008).

Questions of mootness typically focus on whether relief can any longer be granted as the result of changes in circumstances. *Id.* Specifically, courts dismiss cases as moot when the issue involved has been resolved by interim events leaving nothing that can be affected by a court decision. *Id.*

The burden of demonstrating mootness is a heavy one. *Assn of Civilian Technicians, Show-Me Army Chapter v. United States, Department of the Army,* 59

FLRA 378 (2003) The party urging mootness meets its burden by demonstrating that: (1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief of events have completely or irrevocably eradicated the effects of the alleged violation. *Id.*

For example, the Authority reversed an arbitrator's decision that determined that a grievance was moot because he believed he could not craft a remedy. Here, the Agency had initially found that the grievant had not performed adequately under its Performance Improvement Plan. After a grievance had been filed, the Agency changed its position and claimed that the grievant had performed successfully under its Performance Improvement Plan (PIP), that all references to the PIP had been removed from her personnel file, and that she was no longer subject to any adverse effects resulting from the unacceptable performance appraisal. As stated in *American Federation of Government Employees, Local 3230 v. United States Equal Employment, Opportunity Commission,* 59 FLRA 111 (2004):

> Where, as here, a dispute involves an alleged ULP, the matter does not become moot simply because the grievant's file has been expunged of the disputed disciplinary action. *See, e.g., United States Air Force Academy, Colo. Springs, Colo.*, 52 FLRA 874, 878 (1997). This is because "other remedies, including a cease and desist order and the posting of a notice, remain viable if it is determined that an unfair labor practice occurred." *Id*. (*citing Dep't of Justice v. FLRA*, 991 F.2d 285, 289 (5th Cir. 1993) and cases cited therein); *see also AFGE, Local 1941 v. FLRA*, 837 F.2d 495, 497 n.2 (D.C. Cir. 1988) (even after employee's death, suitable remedies, such as cease and desist order or posting of notice to employees by respondent agency, were still available).
>
> Consistent with the foregoing, remedies of a cease and desist order and posting of notice to employees remain available in this case, notwithstanding the undisputed fact that the PIP has been removed from the grievant's file. *See, e.g., NTEU*, 48 FLRA 566, 570 (1993). Indeed, the Union specifically requested these remedies. *See id*. at 8-9. Therefore, we conclude that the Arbitrator's determination that the grievance was moot is contrary to law, and we find that the Arbitrator should have addressed the merits of the grievance.
>
> Also see *Social Security Administration, Boston Region (Region 1), Lowell*

District Office, Lowell, Massachusetts and American Federation of Government Employees, Local 1164 57 FLRA 55, (2001) where the Authority discussed disciplinary action and reassignment of an employee in the context of a finding of no mootness and *United States, Department of Justice, Federal Bureau of Prisons, Metropolitan Detention Center, Guaynabo, Puerto Rico and American Federation of Government Employees, Council of Prison Locals, Local 4052 59 FLRA 41,* (2004) where the Agency found no mootness regarding an Arbitrator's award relating to harassment, promotion, and remedies.

> Your Arbitrator believes that the grievances of Judge Sloan and Judge Kennedy are not moot and the Agency has not met its heavy burden because the judges have a cognizable interest in obtaining the SSA documents. Neither has received the SSA documents requested. There is no reasonable expectation that the Agency will provide the SSA documents to these judges if they are again the subject of a bias complaint.

In addition, Judge Sloan's grievance is not moot based upon the following totality of circumstances regarding her grievance:

(1) It is unclear if the lawsuit filed against Judge Sloan, albeit decided in her favor at the District Court level, may be on appeal. *Sloan at 168:14-16.*

(2) Judge Sloan testified that one bias complaint is "at issue" and is before the 9th Circuit Court. *Sloan at 160:20-21*.

(3) Judge Olson informed her that the Agency may have to revisit an issue regarding a complaint made against her. *Sloan at 160:12-1.* She has received nothing from the Agency stating that case will not be revisited. *Sloan at 172:4-22.*

(4) There are other bias complaints filed against Judge Sloan and she intends to seek counsel in the same manner as she has in the ALJ grievance. *Sloan 170:1, 17. 22*. In other words, the same issue facing Judge Sloan in the ALJ Grievance could recur again and she will be facing the Agency arguing the same Privacy Act defense.

(5) Judge Sloan has been advised by Hearing Office Chief Administrative Law Judge (HOCALJ), Keith Allred, that the bias complaint filed against her by "MP" had been resolved by the Agency in her favor Allred at *178:4-15, 180:6-4; AE8*. <u>However, at the time he advised Judge Sloan that the</u>

complaint had been resolved in her favor, he was unaware of the Phelps complaint in District Court or any other venue. *Allred at 181:11*. Nor was he aware of *UE 26*, a letter from Acting Regional Chief Administrative Judge, Lyle Olson, advising Judge Sloan that one complaint against her was found to have no merit but in regard to another she was given the opportunity to respond. *UE23*. Judge Sloan also testified that that she had the exact same allegations made against her by two claimants with the initial "P." *Sloan at 168:18-19*. Still, *JE6*, indicates that the SSA records that she seeks are those that belong to a claimant referred to as "MP." *JE6*.

(6) The Agency has denied Judge Sloan's request for the SSA records and the records have not been produced to her attorney.

(7) Judge Sloan has more than one complaint against her and your Arbitrator. Given items (1) through (6), your Arbitrator is uncertain if the complaint regarding Judge Sloan's concerns are on appeal before the 9th Circuit Court or some other venue.

(8) Judge Sloan testified that she intends to continue to ask for SAA documents to be disclosed to her attorney if other bias complaints are filed against her. It cannot be said that there is no reasonable expectation that the alleged violation will recur.

In addition, Judge Kennedy's grievance is not moot based upon the following totality of circumstances specific to his grievance:

(1) Judge Kennedy testified that the very first time he saw a letter tendering the SSA documents to his attorney in redacted form was during the morning of day one (1) of arbitration hearing, *Kennedy at 100:23-25*. The letter, dated July 2016 evidently was sent to Judge Kennedy's attorney, but to the wrong address. Your Arbitrator believes this is insufficient service of process and insufficient delivery to Judge Kennedy and/or his attorney for purposes of his grievance.

(2) There is nothing in the record to indicate that these records comply with the FOIA request made by Judge Kennedy's attorney. There may be additional information, not released to Judge Kennedy's attorney, which should be released under the FOIA.

(3) There is nothing in the record to indicate that the Agency attempted to deliver the SSA documents to Judge Kennedy's attorney or to give the SSA documents to Judge Kennedy to give to his attorney on day two (2) of the arbitration hearing. Nor is there any evidence to indicate that the Agency resent the SSA documents to Judge Kennedy's attorney.

(4) Since Judge Kennedy and/or his attorney did not have the SSA documents as of day two (2) of the arbitration hearing, he still had a cognizable interest in his grievance and it is not arguably moot until he in in actual receipt of the SSA documents or some type of stipulation or agreement regarding the SSA documents which were not produced at the arbitration hearing.

(5) Judge Kennedy testified that the complaint against him, to his knowledge, was still pending. *Kennedy at 91:25-92:1*. There is nothing in the record to indicate that the complaint is not pending.

(6) If future bias complaints are filed against Judge Kennedy, he could very well find himself attempting to obtain information from the Agency with the Agency once again asserting a Privacy Act defense.

Your Arbitrator is concerned with what appears to be an inconsistent policy of releasing SSA records to its administrative law judges. Other than relying upon the Office of Privacy and Disclosure, hereinafter referred to as "OPD" there is nothing in the record to explain how the OPD in some situations decides to release SSA records to judges but in other instances decides not to release SSA records.[7]

For example, in one bias complaint against Judge Kennedy, the Agency released the SAA records to his attorney. However, in Judge Kennedy's current grievance, the Agency has elected not to release them to his attorney. Judge Sochaczewsky was advised that it occurred as the result of a mistake because the first time Judge Kennedy had personally identifiable information of claimants the OPD was not consulted. Mistake or no mistake, sometimes the Agency apparently does not always consult the OPD prior to disclosure. This is a substantial mistake and it is unclear from the record how often the "mistake" is made. Judge Sochaczewsky testified that prior to deciding not to release the SSA documents he sought the advice of the OPD

[7] The OPD is one of the major components within the Office of General Counsel. The OPD develops and interprets Social Security Administration (SSA) policy governing the collection, use, maintenance, and disclosure of personally identifiable information under the Privacy Act, section 1106 of the Social Security Act. The OPD also directs all FOIA activities within SSA, including developing FOIA policies and procedures, establishing national guidelines for handling FOIA requests, publishing the Annual Report on FOIA activities, and reviewing FOIA and Privacy Act requests and appeals to determine the proper disclosure of records.

because he was not certain if the SSA records could be released under the Privacy Act. *Sochaczewsky at 199:15-200:7*.

In regard to the ALJ grievance currently before your Arbitrator, the Agency, without explanation, was willing to send redacted SSA records to Judge Kennedy's attorney, albeit, to the wrong address but offered no explanation as to why Judge Sloan was denied the SSA documents. *UE 33.* Attorney Christopher J. Keevan represents both Judge Sloan and Judge Kennedy in the ALJ grievance. He sent almost identical FOIA requests for Judge Sloan and Judge Kennedy. *UE 33.* [8]

These inconsistencies indicate to your Arbitrator that the Agency and/or the OPD are relying upon inconsistent advice or improvidently determining whether to release SSA records and that a denial of SSA records to the attorney for Judge Sloan and Judge Kennedy, if another bias complaint is filed against them, will recur.

Lastly, while the ALJ Grievance is not a union initiated grievance the Union ratified and adopted the ALJ Grievance at Step 3. The AALJ represents approximately 1600 administrative law judges. *Sloan at 196:11*. The issue of SSA records being released to a judge's attorney will undoubtedly occur again absent an affirmative statement by the Agency that it is willing to provide redacted SSA records to a judge's attorney to defend against a bias complaint. It has not made such a statement. There is no reasonable expectation that the Agency will provide attorneys for judges with SSA documents to defend against bias complaints. This is also evident from the fact that Judge Sloan was never given SSA documents and Judge Kennedy, as of the date of day two (2) of the arbitration hearing, was not in receipt of SSA documents, either personally, or constructively through his attorney.

[8] A records request pursuant to the FOIA is an exception to the Privacy Act. However, the record in unclear if Judge Sloan's attorney filed a FOIA request as was done in the case of Judge Kennedy.

For all of the above reasons, the Agency has not met its heavy burden. The ALJ grievance is not moot and it is substantively arbitrable. Judge Sloan and Judge Kennedy still have a cognizable interest in their individual grievances. In addition, the issues regarding their individual grievances could very likely recur. Hence, your Arbitrator will decide the ALJ grievance on its merits since it is not moot.

IX. DID THE AGENCY VIOLATE THE CBA WHEN IT REFUSED TO RELEASE A REDACTED COPY OF THE AUDIO RECORDING, DQS LETTER, LETTER FROM RCALJ OLSON, AND THE COMPLAINT RELATING TO EACH CLAIMANT, TO THE ATTORNEY FOR JUDGE SLOAN AND JUDGE KENNEDY?

Your Arbitrator finds that Article 1, Section 3 A, which is an "incorporation of existing law clause" and Article 21, Section 1 mandate that the Agency disclose the SSA records to the attorney for the ALJ Grievance, pursuant to Section 7116 (a) (1) and (5) and Section 7114(b)(4) of the Federal Labor Relations Act, unless to do so would be unlawful under existing law. As a defense, the Agency has argued that the Privacy Act precludes the Agency from disclosure of the SSA records. The Agency is correct in taking the position that there are no statutory exceptions that mandate that the Agency disclose the SSA records to the attorneys for the ALJ Grievance. However, established case law supports the ALJ Grievance.

The Union, in its closing brief, argued five (5) positions for your Arbitrator to grant the ALJ Grievance. They include the argument that (1) redacted documents do not implicate the Privacy Act; (2) arguendo the Privacy Act was implicated by the requests for information, the Agency's internal procedures require disclosure (3); the Agency could have provided the records under the routine use exception; (4) the claimants waived their Privacy Act concerns when they filed bias complaints; and (5) equity dictates the disclosure of the documents.

IX.A. REDACTED DOCUMENTS DO NOT IMPLICATE THE PRIVACY ACT.

In *Social Security Administration v. American Federation of Government Employees, Council 25, AFL-CIO*, Case No. WA-CA-12-0407, 2014 West Law 7496607, (2014), *UE11*, the Grievant disputed her performance appraisal and asserted that she had been discriminated against because of her union activity. The union sought the appraisal ratings of other employees during the relevant appraisal period. The Social Security Administration refused to release the appraisal ratings arguing that release would violate the Privacy Act. The request specifically stated that the agency "may redact the names of the Case Intake Technician and any other personal identifiers." The union specifically stated that it needed the information as evidence to show an arbitrator that the grievant was being rated unfairly and inequitably. The union also asserted that the agency violated Section 7114(b(4) of the Statute. Administrative Judge Susan E. Jelen, on the issue of Section 7114(b)(4), stated as follows:

> Section 7114(b)(4) of the Statute requires an agency to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data (1) which is normally maintained by the agency in the regular course of business; (2) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of the subjects within the scope of the collective bargaining agreement; and (3) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to the collective bargaining agreement.

The data requested in the ALJ Grievance consist of SSA documents which are normally maintained by the Agency in its regular course of business. The SSA records are also reasonably available and necessary for a full and proper discussion, understanding, and negotiation of a subject within the scope of the CBA, i.e., Article 1 (existing laws and the Privacy Act), and Article 21 (retention of records) and the disclosure of the SSA records pursuant to existing law; specifically, Section 7116 (a) (1) and (5) and Section 7114(b)(4) of the

Federal Labor Relations Act. Lastly, the SSA Documents most certainly did not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to the collective bargaining agreement. Since the Union established these three requirements, the Agency violated Section 7114(b)(4) and Section 7116 (a) (1) and (5) of the Federal Labor Relations Act unless it has a defense.

In regard to the Agency's Privacy Act defense for failing to release the SSA documents, it is established law that documents which are sanitized of personally identifiable information does not violate the Privacy Act. As stated by Judge Jelen:

> Finally, as for the Respondent's assertion that disclosure by office location would violate the Privacy Act, 5 U.S.C. § 552a, I note that it is well settled that the disclosure of information in sanitized form, to remove names and personal identifiers, does not violate the Privacy Act. See. E.g., Health Care Fin. Admin, 56 FLRA503 (2000). In the case at hand, the Union requested the Respondent to "redact the names of the Case Intake Technicians and any other personal identifiers." (Jt. Ex. 1 at 1). Because the Union requested sanitized information, the Respondent's Privacy defense does not present a real issue for review. See U.S. DOJ, INS, Border Patrol, El Paso, Tex, 37 FLRA 1310, 1324 (1990) (when a Union requests information in sanitized form, it is unnecessary to determine whether disclosure would violate the Privacy Act). If the Respondent genuinely believed that marking the information by office location would act as a personal identifier, it should have redacted it, as requested, and disclosed the information pursuant to the Statute.
>
> The Respondent correctly cites FAA, for the proposition that "Employees have significant privacy interest in shielding their individual performance appraisals from public view." 51 FLRA at 1061. However, in FAA, the Union requested "unsanitized copies of performance appraisals" identified by "name and position."" *Id.* at 1056 (emphasis added). As stated above, the Union here requested the Respondent to sanitize the information by "redact[ing] the names… and any other personal identifiers. (Jt. Ex. 1 at 1). In the very case relied upon by the Respondent, the Authority confirmed that the "[d]isclosure of sanitized… performance appraisal information… would protect against a clearly unwarranted invasion of the employees' privacy[.]" FAA, 51 FLRA at 1062n6. Because the Union requested the information is a sanitized form, I reject the Respondents defense that the Privacy Act prohibits disclosure.

A similar result occurred in *Health Care Financing Administration*, 56 FLRA, 503 (2000), *UE12,* where an agency asserted a Privacy Act defense. The Authority stated as follows:

> There is no dispute that the requested information in this case would be sanitized to protect the privacy interests of the affected individuals. Although the Respondent argues that the Privacy Act does not contain any provision for the release of sanitized records. See Exception at 10, *citing IRS, Austin*, 51 FLRA 1166, the redaction of documents to permit disclosure of nonexempt portions is appropriate under Exemption 6. See Department of the Air Force v. Rose, 425 U.S. 352, 374 (1976) (Rose); see also United States v. Ray, 112 S.Ct.541, 547 (1991) (Court held that redaction procedure is "expressly authorized by the FOIA"). Further, the court in *Rose* found that the request for sanitized information "respected the confidentiality interests embodied in Exemption 6." Rose, 425 U.S. at 380. Here, because identifying information would be redacted, there would be no unwarranted invasion of the privacy under Exemption 6. Thus, the information would be required to be disclosed under the FOIA, and the privacy Act would not prohibit its release.

Id. at 506.

Likewise, in *U.S. BOJ INC, Border Patrol, El Paso, Tex.* 37 FLRA 1310, 1324 (1990), *UE13,* although the Union failed to ask for sanitized information, the Authority determined that the Respondent violated its duty to provide information. The Authority noted that the materials were necessary to compare the appraisals of other agents to those of the Petitioner. The Authority concluded that "As such, it is unnecessary to decide in this case, whether disclosure of unsanitized information would be prohibited by law, within the meaning of Section 7114(b)(4)." *Id.* at 1324.

The Agency countered in its closing brief that the cases cited above by the Union are inapplicable to the ALJ Grievance. It notes as follows:

> Federal Labor Relations Authority case number WA-CA-12-0407 involved a union's section 7114(b) request in the context of an arbitration. Union Ex. 11. In that case the Union submitted a 7114(b) request for employee performance records. Id. Here, there is no 7114(b) request at issue for employee performance

> records. Joint Exs. 3 & 4. Rather, the Grievants, contrary to the Privacy Act, sought to provide their attorneys with copies of records containing private information of claimants during the investigation of a bias complaint. Grievant's request did not arise in the context of arbitration or other litigation, it was not part of a formal 7114(b) request from the Union, and the records belonged to the public (e.g., claimants), not agency employees. Union Ex. 11. The Union here contends that the broad language in case number WA-CA-12-0407 means any records that are redacted may be provided. Union Ex. 11. However, the Union's position is contrary to the Privacy Act and existing federal law. As noted above, to provide claimant records, an exception must apply. Even if FOIA required the Agency provide these records, which it does not, the Agency must have an actual FOIA request in hand to do so. Bartel, 725. F.2d at 1411-13; Agency Ex. 4. In addition, employee's records fall within a different System of Records, 60-0239, which contains different routine use exceptions. See 60-0239 71 Fed. Reg. 1859, available at 2006 WL 4652.

The Agency argues the ALJ grievance is not a formal 7114(b) request. While your arbitrator agrees that the request does not appear to be "formal," such requests do not need to be formal. The Authority has held that since the purpose of a charge is to initiate an investigation, a charge is sufficient if it informs the Respondent of the "general nature of the violation and does not prejudice the Respondent. E.g. *U.S DOJ, BOP, Allenwood Fed. Prison Camp, Montgomery Pa*, 40 FLRA 449, 445 (1991). Likewise, the purpose of a complaint is to notify the Respondent of the "specific claims" against it. *Dep't of Transp., FFA, Fort Worth, Tex*, 55 FLRA 951, 956 (1999). A complaint is valid if it bears a relationship to the charge, and is closely related to the events complained of in the charge. *BOP*, 40 FLRA at 455. The FLRA has consistently stated that the legal validity of a document depends upon the clarity of what is being stated or requested, not the form of what is being requested.

The Step 3 response by ACALJ Mark Sochaczewsky indicates that the Agency clearly and unequivocally understood that Judge Sloan (*UE6*) and Judge Kennedy (*UE5*) were requesting; specifically, that a copy of the complaint, DQS letter, the audio recording of the hearing, and Judge Olson's cover letter be sent to their attorney to help them defend against a

bias complaint. The request, while not formal, placed the Agency on notice what the judges were requesting. [9] The requests of Judge Sloan and Judge Kennedy were valid 7114(b) requests, assuming such requests were necessary. In addition, the AALJ intervened at Step 3. The AALJ, by doing so, ratified and adopted the ALJ Grievance request for disclosure as its own request.

The Agency also argues the aforementioned three cited by the AALJ are for employee records, not claimant records. Hence, employee records fall within a different System of Records, 60-0239, which contains different routine use exceptions. The fact remains that in these three cases, the Grievant's requested redacted records of employees and the agency in each case argued a Privacy Act defense on the basis that the Privacy Act did not provide for a specific exception for the release of employee records. Your Arbitrator sees no reason why the redaction exception should not be extended from employees who request employees records for their designated representative, the Union, to employee (Judges) who request for claimant information to be sent to their designated representative, a private attorney, when a privacy act defense is raised. It is significant to note that the United States Supreme Court has approved of the redaction method in a case in a lawsuit brought under the FOIA for case summaries of honor and ethics hearings at the United States Air Force Academy. *Department of Air Force v. Rose,* 425 U.S. 352 (1976). In regard to the use of redaction as a common method used to protect privacy interests, the Justice Brennan stated:

> To be sure, redaction cannot eliminate all risks of identifiability, as any human approximation risks some degree of imperfection, and the consequences of exposure of identity can admittedly be severe. But redaction is a familiar technique in other contexts. Moreover, we repeat, Exemption 6 does not protect against disclosure of every incidental invasion of privacy only such disclosures as constitute "clearly unwarranted" invasions of personal privacy."

[9] It is significant to note that the Union witnesses testified that they strongly suggest that Judges purchase liability insurance because the Union will not represent Judges unless the grievance affects the entire bargaining unit. This is an additional reason why the Agency should view requests for information by judges as 7114b requests.

Id. at 382.

The Agency argues that the request for information was raised during an investigation of a bias complaint and not in the context of arbitration or other litigation under. *SSR 13-1p. JE2*A. Assuming this position was applied to the grievance process under the CBA, your Arbitrator respectfully disagrees and believes that the ALJ Grievance was raised in the context of litigation pursuant to the CBA.

Collective bargaining agreements must be interpreted according to ordinary contract principles. *Textile Workers v. Lincoln Mills of Alabama*, 353 U.S. (1957). Again, in *M & G Polymers USA, LLC v. Tackett,* 135 S.Ct. 926 (2015), the Supreme Court held that courts interpret collective bargaining agreements should be interpreted according to ordinary principles of contract interpretation at least when those principles are not inconsistent with federal labor law policy. This rule of law was recently affirmed by the United States Supreme Court in *CHN Industrial v. Reese*, February 20, 2018. Basic contract rules of interpretation and construction have always been the deciding factor in your Arbitrator's decisions and awards. The United States Supreme court had increasingly relied on the use of dictionary definitions to determine statutory interpretation and construction of contracts, statutes, and legislative intent. See Samuel A. Thurmma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 244-62 (1999).

Black's Law Dictionary, (Centennial Edition) Sixth Edition, (1990), defines the word litigation as:

> Legal action, including all proceedings therein. Contest in the court of law for the purpose of enforcing a right or seeking a remedy. A judicial controversy, a suit at law.

The investigative process pursuant to SSR 13-P, *JE2*, is initiated by the Agency

through the DQS. Your Arbitrator agrees that while the DQS gathers information regarding a claimant's accusations of bias or wrongdoing against an administration law judge, the investigation is not litigation. However, it is significant to note that SSR 13-P, *JE2*, does not address what occurs once a judge files a grievance pursuant to Article 10 of the CBA.

In your Arbitrator's view, once a judge (or AALJ) files a grievance under Article 10, Section 1 of the CBA, the Agency must consider it's right to investigate under SSR 13-P, *JE2*, and consider the rights and obligations of the judge, AALJ, and the Agency under the CBA. A grievance, which is a complaint, begins the litigation process and "all proceeding therein," which of course includes the step procedures within the grievance process. In effect, there are two proceedings occurring at the same time, an investigation under SSR 13-P and a grievance under the CBA. Each step of the grievance process brings the parties closer to arbitration, not the conclusion of an investigation. The parties know, as they have negotiated, pursuant to Article 10, Section 4, that the administrative law judge is entitled to ask for binding arbitration if the grievance (complaint) is not settled at lower step levels. The fact that the grievance process is a litigation process and not an investigative process is supported by the fact that bias complaints against judges can lead to adverse action, from counseling up to termination. [10]

The grievance process, being a litigation process under the CBA, includes entitlement to discovery. [11] As noted in Fairweather's *Practice and Procedure in Labor Arbitration*, 4th Ed., (1999), page 191:

> IV. DISCOVERY UNDER SECTION 8 (a) (5) of the NLRA. Although informal discovery as a case proceeds through the grievance is

[10] Article 10, Section 4.A,3 gives a judge the right to file a prohibited personnel practice.

[11] It is significant to note that the Union witnesses testified that they strongly suggest that Judges purchase liability insurance because the Union will not represent Judges unless the grievance affects the entire bargaining unit. This is an additional reason why the Agency should view requests for information by judges as 7114b requests.

> widespread, cases arise where the company or the union refuses to disclose requested information. However, in NLRB v. Acme Industrial Company, the Supreme Court held that parties have a limited duty under Section 8 (a) (5) or 8 (b) (3) of the NLRA to disclose information needed by a requesting party in relation to a grievance proceeding. The Court reasoned that this obligation to provide such information to the union stems from the union's need to make an informed judgment about the strength of its claims and to enable the union to eliminate nonmeritorious claims at an early stage in the proceeding. Further, if the Union determines that a claim is meritorious, it needs such information to prepare for arbitration. Thus, the refusal to supply the Union with information requested for the proper enforcement of the contract is a violation of Section 8 (a) (5) of the NLRA…

(Footnotes omitted.)

Similarly, as noted in Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. (2003), at page 202:

> The attitude of the parties becomes clear as the grievance moves through the grievance machinery. The terms of the CBA may provide for full, partial, or no disclosure. However, unless there are contractual prohibitions, both parties should make a complete disclosure of all the facts, positions taken, and provision of the agreement relied upon at the earliest possible step in the grievance procedure. For nowhere in the relationship between Employer and Union is mutually good faith more important than in handling grievances… Accordingly, settlements at the first steps of the grievance procedure will be facilitated by honest and open disclosure of each party's position and its basis. The absence of such disclosure, with its inherent lack of good faith, is not only unfair but unwise.

(Footnotes and citations omitted.)

Both Judge Sloan and Judge Kennedy requested SSA Documents that were sanitized so the documents would not include personally identifiable information. The Union, by intervening at Step 3, affirmed and ratified their grievances to also be Union grievances. Hence, the Agency's Privacy defense is inapplicable to the ALJ Grievance. Redacted documents do not implicate the Privacy Act. There is absolutely no reason why the SSA documents should not be turned over to the attorney for Judge Sloan and Judge Kennedy, in the redacted form that was

requested. The Grievant's are entitled to redacted SSA records under the three cases cited by the AALJ. *UEs 11, 12, 13,* the CBA, and established law as noted above. This of course includes video hearing records in redacted form.[12]

IX.B. DOES THE AGENCY'S INTERNAL PROCEDURES REQUIRE DISCLOSURE OF THE SSA DOCUMENTS?

The Union maintained there is an Agency manual policy which regulates the manner in which the Agency releases information to Judge Sloan and Judge Kennedy. *Zahm at 60:24.* It was entered into evidence as *UE10.* It evidently has several subchapters within a table of contents. *Id.* GN (General Notice) 03305.000 discusses disclosure with consent. *Id.* The Union maintains that General Notice "GN" 03305.002, titled "Limitations on Disclosure With Consent" authorizes the release of the information belonging to claimants if the information is redacted. *Zahm at 61:18-23.* As stated:

> Personal information about other individuals for whom we do not have a written consent document authorizing the release of information about them may be contained in the Number Holders (NH) records. The NH may not provide consent authorizing the release of their information about his or her record. Therefore, we must redact any such information about other individuals before releasing the requested information about the NH.

The POMS by virtue of being connected with the HALLEX indicates the Agency's policy regarding matters at the hearing's office level. *Zahm at 61;1-13*. Judge Sloan and Judge Kennedy are entitled to their own records under the HALLEX because it is their behavior that is being scrutinized. *Zahm at 59:19-25*. The HALLEX is the "hearing office's litigation manual." *Zahm at 59:12-13*. Since the HALLEX references POMS, POMS are part of the HALLEX in regard to matters at the hearing's level. *Zahm at 61:2-8*.

[12] The Agency mistakenly stated in its closing brief that hearing records are not part of any system of records. However, the Federal Register, Volume 47, No. 198, October 13, 1982, notifies the public that such SSA records shall be maintained as SOR 60-0009.

Given the record your Arbitrator has concluded that the HALLEX is used by administrative law judges for direction by administrative law judges for adjudicating claims. However, it does not appear to be a law, rule, or regulation that affects their conditions of employment. In addition, your Arbitrator was unable to find ANY case law supporting this Union contention. Hence, the ALJ Grievance cannot be granted based upon the HALLEX or the POMS.

IX.C. AS A GENERAL PROPOSITION, JUDGES ARE NOT ENTITLED TO A CLAIMANT'S RECORDS UNDER THE ROUTINE USE EXCEPTION.

The AALJ argued that the SSA records were available to the attorney for the ALJ Grievance under the "routine use exception" to the Privacy Act. It cited as authority *LeMaster v. Thompson*, 189846, (1993), decided in the United States District Court of the Northern District of Illinois. In this case, Evelyn Irene Thomas, a Specialist with the Social Security Administration, released 74 pages of social security records of LeMaster and his deceased brother to an Assistant United States Attorney who was representing the defendants in a legal action brought by *LeMaster* in Ohio. *Slip Op. at 1*. LeMaster argued, among many matters, that the Social Security Administration, violated his rights under the Privacy Act. United States District Court Judge Aspen stated as follows regarding the routine use exception of the Privacy Act:

> LeMaster, however, runs afoul of the routine use exception of the Privacy Act, which permits a record contained in a system of records to be disclosed without the consent of the individual if the disclosure is for a routine use. This means that the disclosure of a record outside the Department of Human Services must be for a purpose which is "compatible" with the purpose for which the record was collected. 20 CFR § 401.310(b). Although LeMaster does not state why he initiated suit in Ohio, it is fairly safe to assume it was to challenge denial of benefits or some other action that the SSA took which did not please LeMaster. One purpose for which records are collected is to determine the amount of

> benefits to which one is entitled, if any. If a court is to determine whether denial of benefits, in whole or in part, was correct, it must be able to review the records, thus making disclosure of LeMaster's records compatible with the purpose for which they were collected. A court is also obligated to give careful scrutiny to the whole record to determine that there is a sound foundation for the findings of the SSA. *See Vitek v. Finch*, 438 F.2d 1157 (4th Cir. 1971). If the SSA could not release LeMaster's records to the attorney representing it who in turn could not submit these records to the district court in Ohio, then that court would be hamstringed into making any kind of credible determination in this case. (Footnote omitted).

Id.

In regard to the discovery process, Judge Aspen stated as follows:

> The Court also notes that by initiating the action against the SSA, LeMaster himself placed his records at issue. Several courts have considered plaintiffs' various objections under the Privacy Act to the release of their records in the course of discovery. In Tootle v. Seaboard Coast Line Railroad Company, 468 So.2d 237, 239 (Fla.App. 5 Dist. 1984), a plaintiff in a personal injury case petitioned for a writ of certiorari to quash an order compelling deposition of a psychologist who examined him for the SSA. Among other reasons for denying plaintiff's petition, the District Court of Appeals of Florida determined that because the SSA's record and the psychologist had information relevant to plaintiff's tort claim, the privacy interest gave way to the discovery process.

Id. at 2.

Similarly, In *Mangino v. Department of the Army*, 1994 WL 477260 (1994), United States District Court of Kansas, the Plaintiff maintained that he was denied security clearance because his army records were used to deny his application for a security clearance was based upon false information. United States District Court Judge O'Connor, cited *LeMaster*. *Slip op. at 3*. He found that the routine use exception under the Privacy Act was applicable, hence, no privacy act defense. *Id. at 4*. In addition, he found that in order to determine if the denial was correct, he must be able to review the entire record. *Id. at 3*.

The burden of proof is on the Union to show that the ALJ Grievance should be

granted. There is nothing in the record to indicate that the claimants placed their records at issue or if they are merely claiming that the administrative judge acted improperly, was biased, or committed some other type of misconduct. Without more evidence on the issue of whether the claimants placed their records at issue, your Arbitrator finds that *LeMaster* and *Mangino* are inapplicable to the ALJ Grievance. In order for the routine use exception to apply, the social security records of the claimant must be in dispute, in addition to the conduct of the judge.

IX.D. AS A GENERAL PROPOSITION, CLAIMANTS DO NOT WAIVE THEIR RIGHTS UNDER THE PRIVACY ACT BY FILING A CLAIM.

As a general proposition, claimants for social security benefits do not waive their rights under the Privacy Act when they file a claim for benefits under social security laws and regulations. In *LeMaster*, Judge Aspen found that LeMaster waived his rights under the Privacy because he placed the content of his records in issue:

> In this case, LeMaster placed his SSA records at issue when he filed his suit in Ohio. To the extent the Privacy Act created privilege, if at all. For the SSA not to disclose his records to the attorney representing the SSA, who in turn used them in court proceedings, without LeMaster's permission, LeMaster waived any such privilege when he placed his records at issue.

Slip op. at 2.

Likewise, Judge O'Connor, quoting Judge Aspen, in *Mangino* found that Mangino had waived his rights under the Privacy Act by placing his records at issue. *Slip op. at 6.* The Union cited no case law consistent with *LeMaster* or *Mangino*. A claimant who alleges that an administrative law judge has denied him a fair and impartial hearing does not waive his rights under the Privacy Act. However, if the claimant, in alleging bias and prejudice places his own records in dispute while alleging bias or other misconduct by a judge, then and only then does the claimant waive his rights under the Privacy Act.

The record of evidence does not contain any evidence that the claimants placed

their social security records at issue, i.e., "the judge said that I falsified my medical records" or "the judge said I lied about my social security claim while raising his voice in an unprofessional manner." Claimants, by making statements such as these, would have brought their records into issue, not only those of the administrative law judge. There is nothing in the record to establish that *LeMaster* and *Mangino* apply to the ALJ Grievance. Hence, your Arbitrator finds that the claimants have not waived their rights under the Privacy Act by filing bias complaints against Judge Sloan and Judge Kennedy.

IX.E. EQUITY DICTATES DISCLOSURE OF THE SSA RECORDS.

Your Arbitrator has not, on the basis of equity alone, ruled that either an employee, union, or employer was entitled to relief. Parties to a collective bargaining agreement negotiate and ultimately negotiate their own collective bargaining agreement. Arbitrators should not rewrite the collective bargaining agreement of the parties absent a finding that is unconscionable or inconsistent with established law. Needless to say, under ordinary contract principles, this is very difficult to prove. As a general proposition, equity by itself does entitle an aggrieved party to a remedy. The aggrieved party must establish a violation of the collective bargaining agreement, policy, law, practice, or some claim that is arbitrable.

However, having found that the AJL Grievance should be granted on the basis that the attorney for Judge Sloan and Judge Kennedy was entitled to redacted copies of SSA documents once Article 10 of the CBA (Grievance Process) was invoked, as well as finding that documents sanitized of personally identifiable information does not violate the Privacy Act, your Arbitrator also finds that it was inequitable for the Agency to withhold the SSA documents given the following totality of circumstances:

1. the requested SSA documents will not be not be memorialized, published and will not be made public. They will be used for an

exceptionally limited group of people, the Agency, Judge Sloan and Judge Kennedy, who already know the identities of the complainants. The only person who has not seen the see the redacted SSA documents is the attorney for the judges. The attorney will not know the names of the claimants (complaining parties) since the documents will be redacted; and

2. the right to counsel has always included effective assistance of counsel;

3. the SSA documents are essential for effective legal representation and to defend against bias complaints;

4. Judge Sloan and Judge Kennedy should have been given redacted copies of the SSA documents within a reasonable period of time after their respective initial requests were made;

5. copies of redacted SSA documents will not compromise the privacy of claimants;

6. redacted SSA documents do not violate the Privacy Act;

7. a bias complaint, if sustained, can have negative consequences for judges, including counseling, reprimand, suspension, and termination;

8. failure to provide the redacted SSA documents can lead to onerous and unfair results other than counseling and discipline, i.e., removal from telework or a transfer list as well as pecuniary loss;

9. the SSA documents should be simple to produce and there is nothing in the record to indicate that providing same will result in extraordinary cost or hardship to the Agency;

10. there will be a serious injustice if an accused judge is wrongfully counseled or disciplined; and

11. Judge Sloan and Judge Kennedy both invoked the grievance procedure by filing grievances (complaints), under Section 10 of the CBA. The Agency, the grievants, and the AALJ must be mindful of their obligations, duties, responsibilities, and rights under the CBA.

12. Your Arbitrator considered the potential harm and privacy concerns to the social security claimants if redacted SSS documents are released to the attorneys for Judge Sloan and Judge Kennedy and can find no harm or privacy concerns. The claimants that filed bias complaints against Judge Sloan and Judge Kennedy will not have their privacy

right violated by the release of redacted SSA documents to the attorney for Judge Sloan and Judge Kennedy.

13. Given all of the foregoing in this Section IX.E, fundamental fairness and equity dictate under that redacted SSA documents should have been released to the attorney for Judge Sloan and Judge Kennedy.

X. CONCLUSION

The ALJ Grievance is not moot. The Agency has violated Article 1, Section 3 and Article 21, Section 1 of the CBA by refusing to provide redacted SSA documents of claimants, to the attorney for Judge Sloan and Judge Kennedy, pursuant to their grievances (initiated under Article 10 (Grievance Process) of the CBA, affirmed and ratified by the Union intervention at Step 3. Sections IX.A and IX.E above dictate that the ALJ Grievance should be granted.

XI. AWARD.

The ALJ Grievance (grievances of Judge Sloan and Judge Kennedy) are granted.

1. The Agency is ordered to cease and desist from:

   (a) Failing and refusing to permit disclosure of sanitized copies of the bias complaints, the letters from the Division of Quality Services, the letters from the Acting Regional Chief Administrative Law Judge, and the hearing recordings to the legal representative(s) of Administrative Law Judge Kennedy and Administrative Law Judge Sloan,

   (b) Failing and refusing to respond in a timely manner for requests for information made by Administrative Law Judge Kennedy, Administrative Law Judge Sloan and the Association of Administrative Law Judges, IFPTE.

   (c) In any like or related manner, interfering with, restraining or coercing bargaining unit employees from in the exercise of their contractual and statutory rights.

2. The Agency is ordered to take the following affirmative action:

   (a) Disclose or permit disclosure of sanitized copies of the bias complaints, the letters from the Division of Quality Services, the letters from the Acting Regional Chief Administrative Law Judge, and the hearing recordings to the

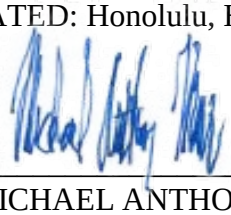
legal representative(s) of Administrative Law Judge Kennedy and Administrative Law Judge Sloan.

(b) Respond in a timely manner to requests for information made pursuant to the collective-bargaining agreement between the parties and Section 7116(a)(1) and (5) and Section 7114(b)(4) of the FLRA.

(c) Post a notice in every Hearing Office advising the bargaining unit of the determination made herein.

(d) Your Arbitrator shall retain jurisdiction for 60 days, subject to an extension(s) by the request of one or both parties, to ensure compliance with this decision and award issued by your Arbitrator.

DATED: Honolulu, Hawaii, March 12, 2018.



_____

MICHAEL ANTHONY MARR
Arbitrator