

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE AIR COMBAT COMMAND SEYMOUR JOHNSON AIR FORCE BASE GOLDSBORO, NORTH CAROLINA Respondent	
and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-188 Charging Party	Case No. WA-CA-02-0005

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been submitted to 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 **OCTOBER 20, 2003**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, Suite 300
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 17, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: September 17, 2003

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: WILLIAM B. DEVANEY
ADMINISTRATIVE LAW JUDGE

SUBJECT: DEPARTMENT OF THE AIR FORCE
AIR COMBAT COMMAND
SEYMOUR JOHNSON AIR FORCE BASE
GOLDSBORO, NORTH CAROLINA

Respondent

and Case No. WA-
CA-02-0005

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-188

Charging Party

Pursuant to section 2423.27(c) of the Final Rules and Regulations, 5 C.F.R. § 2423.27(c), 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 is a Motion for Summary Judgment and other supporting documents filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE AIR COMBAT COMMAND SEYMOUR JOHNSON AIR FORCE BASE GOLDSBORO, NORTH CAROLINA Respondent	
and	Case No. WA-CA-02-0005
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R5-188 Charging Party	

Major Ferdinando P. Cavese
For the Respondent

Philip T. Roberts, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. 1, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1 et seq., concerns whether Respondent violated the Statute when, after the Union had invoked arbitration of a grievance, it unilaterally initiated a telephone call to the grievant about the grievance. For reasons fully set forth hereinafter, I conclude that it did.

This case was initiated by a charge filed on October 3, 2001 and by an amended charge filed on July 5, 2002. The Complaint and Notice of Hearing issued July 18, 2002, and 1

For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7116(a)(1) will be referred to, simply, as, "\$ 16(a)(1)".

set the hearing for January 30, 2003, at a place to be determined in Raleigh, North Carolina. By Order also dated July 18, 2002, this case was transferred to the Chicago Regional Office. On January 15, 2003, the Chicago Region issued a Notice fixing the place of hearing in Goldsboro, North Carolina, on January 30, 2003.

On January 17, 2003, Respondent filed a Motion For Summary Judgment together with a Brief In Support of Motion For Summary Judgment. On January 23, 2003, General Counsel filed a Motion To Postpone Hearing and stated that he agreed that a hearing was not necessary. Accordingly, on January 23, 2003, the Chief Administrative Law Judge issued an Order postponing the hearing indefinitely; directing the parties to submit an agreed statement of facts; granting General Counsel until February 5, 2003, to respond to Respondent's Motion and Brief and, if he elects, to file a cross motion for summary judgment; and advising all parties that this case will be decided on Motion For Summary Judgment.

On February 5, 2003, General Counsel filed an agreed Statement of Facts and a Cross Motion For Summary Judgment. On February 6, 2003, Respondent moved to strike from General Counsel's Cross Motion his reference to an ALJ decision which had become final in the absence of exceptions. While it is true that the Authority's Order states,

" . . . the findings, conclusions and recommendations of the Administrative Law Judge constitute, without precedential significance, the findings, conclusions, and decision and order of the Authority." Fort Sam Houston, San Antonio, Texas and National Federation of Federal Employees, Local 28, 6-CA-10893, 6-CA-10894 (November 6, 1992), 105 ALJ Dec. Rep., Nov. 6, 1992),

there is no impropriety in General Counsel citing a final ALJ Decision. Such decision has no binding effect; nevertheless, it may be persuasive. It is especially appropriate in this case because the decision in question, to which General Counsel has drawn attention, was my own decision. Accordingly, Respondent's Motion To Strike is denied.

Agreed Statement of Facts

1. The National Association of Government Employees, Local R5-188 (Union) is the exclusive representative of an appropriate bargaining unit

of employees at the Seymour Johnson Air Force Base, Goldsboro, North Carolina (Respondent). The Respondent is an activity within the Department of the Air Force, which is an agency under 5 U.S.C. § 7103(a)(3), and Respondent is thus subject to the Authority's jurisdiction.

2. At all times material herein, the Union and Respondent have been parties to a collective bargaining agreement which includes a grievance and arbitration process. (Jt. Ex. No. 1).

3. On May 22, 2001, Ms. Kristie Sly, a bargaining unit employee at the Respondent, received a notice of a proposed 3-day suspension. (Jt. Ex. No. 2). Ms. Sly replied to the notice on May 30, 2001 (Jt. Ex. No. 3). On July 12, 2001, the Respondent issued its decision to suspend Ms. Sly for 3 days. (Jt. Ex. No. 4).

4. On July 23, 2001, Ms. Sly filed a grievance over the suspension action under the parties' negotiated grievance procedure. (Jt. Ex. No. 5).

5. On or about July 31, 2001, Respondent held the third-step grievance meeting on Ms. Sly's grievance.

6. On August 7, 2001, Respondent denied Ms. Sly's grievance. (Jt. Ex. No. 6).

7. On August 10, 2001, the Union invoked arbitration on Ms. Sly's grievance. (Jt. Ex. No. 7).

8. On August 16, 2001, Respondent's Civilian Personnel Officer, Jean Tucker, after having received the Union's arbitration request referred to in paragraph 7, telephoned Ms. Sly while she was working at Respondent's Fire Station. A transcript of the entire telephone conversation was obtained from the Fire Station tapes and is attached hereto as Jt. Ex. No. 8.

9. Ms. Tucker did not notify the Union and obtain its consent to Ms. Tucker's telephone conversation with Ms. Sly referred to in paragraph 8.

Conclusions

As I stated in Fort Sam Houston, San Antonio, Texas and National Federation of Federal Employees, Local 28, supra,

"Upon receipt of the grievance, any discussion, questions, or argument, management had relating to the grievance, or the procedure in filing the grievance, should have been addressed to the Union and not directly to . . . [the employee]. Dealing directly with the employee on a grievance in which the Union has been designated as the representative for the employee has consistently been held to be a bypass and a violation of the Statute. Social Security Administration, 16 FLRA 434, 435 (1984); 438th Air Base Group (MAC), McGuire Air Force Base, New Jersey, 28 FLRA 1112, 1121-1123 (1987)" (hereinafter, "McGuire AFB").

The level of the grievance is immaterial - it may be before an actual grievance is filed, when the Union sought informally to resolve a dispute, U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, 51 FLRA 1339, 1345 (1996) (hereinafter, "Bastrop, Texas"); at the point, after the grievance has been filed, with Union representation, when the grievance was rejected because the job sought was outside the bargaining unit and grievance must be filed under the Agency Grievance Procedure, and the agency contacted the grievant for information, Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Region X, Seattle, Washington, 39 FLRA 298, 299-302 (1991) (hereinafter, "HEW Region X"), at the point of delivery of a final decision to the grievant only, Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 35 FLRA 345 (1990), or here, at the point following invocation of arbitration by the Union, when Respondent called the grievant for information,

" Agencies unlawfully bypass an exclusive representative when they communicate directly with bargaining unit employees concerning grievances, disciplinary actions and other matters relating to the collective bargaining relationship. . . . Such conduct constitutes direct dealing with an employee and is violative of section 7116 (sic) [a] (1) and (5) of the Statute because it interferes with the union's rights under section 7114(a) (1) of the Statute to act for and represent all employees in the bargaining unit. Such conduct also constitutes an independent violation of section 7116(a) (1) of the Statute because it

demeans the union and inherently interferes with the rights of employees to designate and rely on the union for representation. . . ." HEW, Region X, 29 FLRA at 311.

I fully agree with General Counsel that Respondent attempts to distinguish these cases by offering a thoughtful, if novel, interpretation of the Authority's bypass decisions. According to this theory, the Judge must look to see whether the employee's position or status has changed as a result of the communication by the agency. If it has, then an unlawful bypass has occurred. While this interpretation is interesting it has no grounding in the actual basis for the Authority's decisions. Instead, the theoretical underpinning of the Authority's bypass decisions is far simpler: when the union is acting *qua* exclusive representative, the agency must deal with it alone and not the bargaining unit employees. See, McGuire AFB, supra, 28 FLRA at 1122.

In its cross-motion for Summary Judgment, General Counsel makes no reference to § 14(a)(2)(A), nor of a possible violation of § 16(a)(8) and I do not address this matter.

Having found that Respondent violated §§ 16(a)(5) and (1) and also, independently, violated § 16(a)(1), it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41(c), and § 18 of the Federal Service Labor- Management Statute, 5 U.S.C. § 7118, the U.S. Department of the Air Force, Air Combat Command, Seymour Johnson Air Force Base, Goldsboro, North Carolina, shall:

1. Cease and desist from:

(a) Failing and refusing to bargain in good faith with the Union by bypassing the Union and communicating directly with a bargaining unit employee concerning a grievance/arbitration matter.

(b) Interfering with the right of its employees to rely on the Union to handle and process the arbitration of their grievances through the negotiated grievance procedure.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise

of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Statute:

(a) Post at its facilities, copies of the attached Notice on forms to be finished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander of the U.S. Department of the Air Force, Air Combat Command, Seymour Johnson Air Force Base, Goldsboro, North Carolina, 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 insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e) notify the Regional Director of the Chicago Region, Federal Labor Relations Authority, 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

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WILLIAM B. DEVANEY
Administrative Law Judge

Dated: September 17, 2003
Washington, DC

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 the Air Force, Air Combat Command, Seymour Johnson Air Force Base, Goldsboro, North Carolina, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to bargain in good faith with the Union by bypassing the Union and communicating directly with a bargaining unit employee concerning a grievance/ arbitration matter.

WE WILL NOT interfere with the right of employees to rely on the Union to handle and process the arbitration of their grievances through the negotiated grievance procedure.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

—

(Activity)

DATE: _____ BY: _____
(Signature) (Title)

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 question concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, Illinois 60603-9729, and whose telephone number is: 312-886-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. WA-CA-02-0005, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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7000 1670 0000 1175

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REGULAR MAIL:

Mae Howell, President

NAGE, Local R5-188

P.O. Box 11082

Goldsboro, NC 27532

DATED: September 17, 2003
Washington, DC