FEDERAL LABOR RELATIONS AUTHORITY OALJ 12-18
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF THE NAVY NAVAL FACILITIES AND ENGINEERING COMMAND MID-ATLANTIC RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 53, AFL-CIO CHARGING PARTY	Case No. WA-CA-12-0134

Jessica S. Bartlett
For the General Counsel

Douglas T. Frydenlund
For the Respondent

David L. Boyd
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The General Counsel filed a motion for summary judgment and the Respondent filed a cross-motion for summary judgment in this matter. As I find and the parties agree that there is no genuine issue as to any material fact, resolution of this case upon summary judgment is appropriate. Based upon the facts as alleged in the complaint and admitted in the Respondent's answer, I find that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute), by delivering a second step grievance decision directly to a bargaining unit employee represented by the Charging Party.

STANDARDS FOR SUMMARY JUDGMENT

In considering motions for summary judgment submitted pursuant to § 2423.27 of the Authority's regulations, the standards to be applied are those used by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure, *Nat'l Labor Relations Bd.*,

65 FLRA 312, 315 (2010). Upon review of the General Counsel's motion and the Respondent's cross-motion, I have determined that summary judgment is appropriate in this case because there is no genuine issue of material fact is in dispute.

On April 26, 2012, the acting Regional Director of the Washington Region issued a complaint and notice of hearing alleging that the Department of the Navy, Naval Facilities and Engineering Command Mid-Atlantic (Respondent) violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (Statute), by delivering a second step grievance decision directly to the grievant who was represented by the Charging Party.

The complaint, which was served on the Respondent by certified mail, specified that an answer was to be filed by May 21, 2012, and the Respondent filed an answer on May 17, 2012.* On June 4, 2012, the General Counsel filed a motion for summary judgment alleging that there was no genuine issue of material fact in dispute and that the Respondent's answer admitted all the essential allegations of the complaint. On June 13, 2012, the Respondent filed a cross-motion for summary judgment in which it asserted that there were no issues of material fact in dispute and that it was entitled to judgment as a matter of law because the action alleged to be a violation of the Statute was authorized by the parties' negotiated grievance procedure. As the record demonstrates and the parties agree that there is no genuine issue of material fact in dispute, it is appropriate to resolve this case by summary judgment and I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. The unfair labor practice complaint and notice of hearing was issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.

2. The Department of Navy, Naval Facilities and Engineering Command Mid-Atlantic (Respondent), is an agency within the meaning of 5 U.S.C. § 7103(a)(3).

3. The American Federation of Government Employees, Local 53 (Charging Party) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining.

4. The Charging Party filed the unfair labor practice charge with the Washington Regional Director on December 13, 2011.

5. A copy of the charge was served on the Respondent.

---

* Although the complaint failed to enumerate a paragraph number 5, that error is not fatal to the complaint as it was sufficient to apprise the Respondent of the conduct it would have to defend at the hearing. *Internal Revenue Serv., Chicago, Ill.*, 9 FLRA 648, 650 (1982).

6. At all times material herein, the following individual held the position set forth opposite his name and was an agent of the Respondent acting on its behalf:

Andrew Porter	Deputy Public Works Officer Public Works Department Oceana

7. At all times material herein, Andrew Porter was a supervisor and/or management official of the Respondent within the meaning of 5 U.S.C. § 7103(a)(10) and (11).

8. The Respondent and the Charging Party are parties to a collective bargaining agreement covering employees in the bargaining unit.

9. On or about December 13, 2011, Andrew Porter delivered a second step grievance decision directly to a grievant who the Respondent knew was represented by the Charging Party.

10. By its conduct the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (5).

DISCUSSION

The facts in this case are neither complex nor are they in dispute. On December 5, 2011, the Respondent, through its agent Andrew Porter met with bargaining unit employee Gilbert Mason and his representative from the Charging Party to discuss a second step grievance the Charging Party filed on behalf of Mason. On or about December 13, 2011, Andrew Porter delivered a written decision on the second step grievance directly to Mason outside the presence of the Charging Party representative who attended the grievance presentation on December 5, 2011. After the bargaining unit employee acknowledged receipt of the second step decision he was provided a copy and later that morning the decision was scanned and forwarded to the Charging Party representative via electronic mail.

Under Authority precedent, it is well settled that an agency unlawfully bypasses an exclusive representative when it communicates directly with a bargaining unit employee concerning a grievance the exclusive representative filed on behalf of the employee. *U.S. Dep't of the Air Force, 355th SPTG/CG Davis-Monthan AFB, Ariz.*, 63 FLRA 635 (2009). This is not a recent development in federal labor law. *Soc. Sec. Admin.*, 16 FLRA 434 (1984). Similarly, direct delivery of a final disciplinary action to an employee, without inviting the union which had represented the employee in the matter constitutes a bypass of the exclusive representative in violation of the Statute. *U.S. Dep't of Justice, FBOP, FCI, Elkton, Ohio*, 63 FLRA 280, 282 (2009); *Dep't of the Air Force, Sacramento Air Logistics Ctr., McClellan AFB, Cal.*, 35 FLRA 345 (1990); *438th Air Base Group (MAC), McGuire AFB, N.J.*, 28 FLRA 1112 (1987).

The crux of such a violation is that the exclusive representative cannot exercise its statutory right and obligation to act on behalf of a bargaining unit employee in the presentation and processing of the employee's grievance through the negotiated grievance procedure when the representative is ignored or bypassed by the agency. When an exclusive representative is not furnished with the written decision before or at the same time it is delivered to the employee, the failure to acknowledge and recognize the role of the exclusive representative not only impairs the ability to adequately represent the bargaining unit employee to whom it owes a duty, it also sends a clear and unmistakable message to the bargaining unit employee that their being represented does not matter. In short, it is the equivalent of telling them "You can bring him, but I'm going to ignore him and he can't help you, his involvement will only hurt you." Such a message improperly chills bargaining unit employees from the exercise of their legal rights and cannot be countenanced simply because it is easier, quicker and more convenient to deal directly with the employee when his representative is not present.

While the Respondent cites brevity and convenience as support for why its conduct in this case should not be found in violation of the Statute, its primary justification allegedly flows from Article 24 of the parties negotiated agreement. The Respondent cites the following language from Section 8A, Step 2 (Formal), of that article:

> The division director will render a written decision to the employee and/or the UNION within five (5) calendar days thereafter[.]

The Respondent contends that this language demonstrates that the parties have agreed that the Respondent may provide a written decision on second step grievance directly to a bargaining unit employee. However, that is not the plain meaning of the language, nor is it consistent with the full Step 2 (Formal) process outlined in Section 8A. A close reading of the complete section makes it clear that the Union is the primary conduit through which the grievance process should be conducted. The entire paragraph reads as follows:

> Step 2. (Formal) If no satisfactory settlement is reached, the grievance shall be submitted by the UNION in writing on a form mutually agreed to by the UNION and the ACTIVITY within five (5) calendar days from the date of receipt of the decision of Step 1 to the division director of the department involved. The division director shall, along with appropriate staff, meet within five (5) calendar days after receiving the written grievance and discuss the grievance with representatives of the UNION, the aggrieved employee and such other personnel (witnesses) who have personal knowledge of the matter out of which the grievance arose. Witnesses will normally be present at the meeting for only the period of time they are presenting pertinent information. The

> division director will render a written decision to the employee and/or the UNION within five (5) calendar days thereafter. If a mutually acceptable agreement is reached the matter will be closed.

Not only does this section identify the Union as the party entitled to submit a second step grievance on behalf of bargaining unit employees; in terms of discussing the matter, the first party identified as the person with whom a division director should discuss it is not the employee, it is the Union representative. More importantly, under the terms of the parties' Negotiated Agreement, the Division Director can deliver a written decision in one of two ways: 1) To the employee **and** the Union at the same time; **or** 2) To the Union. Contrary to the assertion of the Respondent, the plain meaning of the contract language does not provide the option of delivering a decision to only the employee or of giving it to the employee now and providing it to the Union later. That interpretation of the language cannot be drawn from its plain meaning and the Respondent presents no evidence that anything other than a plain meaning interpretation should be applied.

The process set forth in the Negotiated Agreement between the Respondent and the Charging Party is consistent with the rights and duties of an exclusive representative under the Statute and it was the Respondent's failure to comply with the establish process that resulted in it violating the Statute. For the sake of brevity and convenience, the Respondent could have scanned and sent a copy of the decision to a single party using electronic mail, but the recipient had to be the Union and not the employee. After having an opportunity to discuss the decision with the employee it represented, the Union and the employee could have acknowledged receipt of the decision and discussed whether or not they wanted to file a third step grievance. While the record contains no indication of any nefarious intent in getting to the employee first without his representative present, the Respondent offers no legitimate justification for its bypass of the exclusive representative when Porter was fully aware of the fact that the employee was represented. After all, he conducted a discussion on the second step grievance only days earlier. Although there is no indication that the disregard the Respondent exhibited towards the bargaining unit employee's duly appointed representative influenced the employee's decision upon a third step grievance, the possibility that such behavior could have a chilling effect upon such a decision is reason enough to find a violation when there is no legitimate reason for delivering the grievance decision letter directly to a represented employee.

Delivering a grievance answer directly to a bargaining unit employee who is represented in the matter is an illegal bypass of the exclusive representative and by such conduct the Respondent violates § 7116(a)(1) and (5) of the Statute. Furthermore, when it is alleged in a complaint, such conduct independently violates § 7116 (a)(1) of the Statute because it interferes with a union's rights under § 7114(a)(1). However, such a violation was not alleged in the complaint thus, that independent violation was not established by the General Counsel in the case at bar.

As a remedy for the Respondent's violation of § 7116(a) (1) and (5) of the Statute, the General Counsel submitted a proposed order that would require the Respondent to post a Notice of violation and to distribute said notice by electronic mail to all bargaining unit employees represented by the Charging Party. For the reasons outlined below, the request for an electronic distribution of the notice of violation is denied, and does not appear in the order set forth in this recommended decision. The Authority has determined that the electronic posting of a notice is a nontraditional remedy. *U.S. Dep't of Justice, FBOP, FCI, Florence, Colo.*, 59 FLRA 165 (2003). If there are no legal or public policy objections to a proposed nontraditional remedy, it must be reasonably necessary and effective to recreating the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violations. *F.E. Warren AFB*, 52 FLRA 149, 161 (1996)(*Warren AFB*).

In this case, the complaint offered no allegations about the legality, necessity or efficacy of distributing a notice of violation using electronic mail, nor did the Respondent's answer make any admissions upon such matters. While the General Counsel's brief argued that an electronic distribution would be consistent with the method the Respondent used to provide a copy of the second step decision to the Charging Party, it presented no document, affidavit, applicable precedent, or other appropriate materials in support of the request for a nontraditional remedy. Thus, the findings mandated in the *Warren AFB* case cannot be made and ordering a nontraditional remedy is not appropriate. *Nat'l Ass'n of Air Traffic Specialists, Macon AFSS, Macon, Ga.*, 59 FLRA 261, 262 (2003).

CONCLUSION

For the reasons set forth in this decision, I recommend that the Authority Grant the General Counsel's motion for summary judgment, and Deny the Respondent's cross-motion for summary judgment and issue the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's rules and regulations and § 7118(a)(7) of the Federal Service Labor-Management Relations Statute (Statute), the Department of the Navy, Naval Facilities and Engineering Command Mid-Atlantic, shall:

1. Cease and desist from:

(a) Bypassing the American Federation of Government Employees, Local 53, AFL-CIO (Union), by delivering grievance decision letters directly to bargaining unit employees represented by the Union or communicating directly with employees about grievances that fall within the scope of the negotiated grievance procedure.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit 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) Post at its Naval Facilities and Engineering Command Mid-Atlantic, Public Works Department Oceana facility where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Deputy Public Works Director, Public Works Department Oceana, and shall be posted and maintained for sixty (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 such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to § 2423.41(e) of the Authority's rules and regulations and within thirty (30) days from the date of this Order, notify in writing the Regional Director, Washington Region, Federal Labor Relations Authority, of the steps taken to comply.

Issued, Washington, D.C., July 18, 2012

CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of the Navy, Naval Facilities and Engineering Command Mid-Atlantic, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT bypass the American Federation of Government Employees, Local 53, AFL-CIO (Union), by delivering grievance decision letters directly to bargaining unit employees represented by the Union or communicating directly with employees about grievances that fall within the scope of the negotiated grievance procedure.

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

_____
(Agency/Activity)

Dated: _____ 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 questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, and whose address is: 1400 K Street, NW., 2nd Floor, Washington, D.C. 20424, and whose telephone number is: (202) 357-6029 ext. 6018.