

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

SOCIAL SECURITY ADMINISTRATION WALNUT CREEK DISTRICT OFFICE
WALNUT CREEK, CALIFORNIA

Respondent

and

Case No.
SF-CA-31205

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3171,
AFL-CIO

Charging Party

John R. Pannozzo, Jr. Esquire

For the General Counsel

Wilson G. Schuerholz

For the Respondent

Before: BURTON S. STERNBURG

Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. 7101, et seq. and the Rules and Regulations issued thereunder.

Pursuant to an amended charge first filed on June 10, 1993, by American Federation of Government Employees, Local 3172, (hereinafter called the Union), against the Social Security Administration, Walnut Creek District Office, Walnut Creek, California, (hereinafter called the Respondent), a Complaint and Notice

of Hearing was issued on December 6, 1993, by the Regional Director for the San Francisco, California Regional Office, Federal Labor Relations Authority. The Complaint alleges that Respondent violated Sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of the actions of its District Manager in bypassing the Union and dealing directly with an employee with respect to her participation in the Voluntary Leave Transfer Program. The Complaint also alleges that Respondent further violated Section 7116(a)(1) of the Statute by virtue of the actions of its District Director in expressing disappointment with the employee's failure to contact Respondent's representatives rather than the Union in connection with her problems in using the Voluntary Leave Transfer Program.

A hearing was held in the captioned matter on April 13, 1994, in San Francisco, California. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. Counsel for the General Counsel and Counsel for the Respondent filed post-hearing briefs on May 12 and 13, 1994, respectively, which have been fully considered.

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The American Federation of Government Employees, AFL-CIO, (hereinafter called the AFGE), is the exclusive representative of a consolidated nationwide bargaining unit of certain employees of the Social Security Administration, including those working at the Walnut Creek District Office. The Union is an agent of the AFGE for purposes of representing the Walnut Creek District Office employees of the Respondent.

In addition to a collective bargaining agreement, the AFGE and Social Security Administration are parties to a Memorandum of Understanding (MOU) which provides for a Leave Transfer Program (LTP) applicable nationwide. Under the terms of the LTP, in order to qualify for donations of sick leave from other employees, the affected employee desiring to obtain such sick leave for a personal medical emergency, such as surgery, must exhaust both annual and sick leave accounts before he or she can be eligible to participate in the LTP.

On April 28, 1993, Ms. June Nelson, a Service Representative at the Walnut Creek District Office met with Ms. Rebecca Austin, Assistant District Manager, concerning Ms. Nelson's possible participation in the LTP. Ms. Nelson was interested in the LTP since she was scheduled to undergo surgery the following day and anticipated an extended absence from work. As of April 28, 1993, according to Ms. Austin, Ms. Nelson had approximately 19 hours of annual leave and 20 hours of sick leave on the books.⁽¹⁾

According to Ms. Nelson, during the meeting Ms. Austin provided her with an application for the LTP but not the brochure which described how the LTP operated. Further, according to Ms. Nelson, Ms. Austin informed her that in order to participate in the LTP an employee had to exhaust all her annual leave and advanced sick leave as a prerequisite to participating in the LTP. Ms. Austin denied informing Ms. Nelson that exhaustion of advanced sick leave was a prerequisite to participating in the LTP. In any event, Ms. Nelson completed a Standard Form 71 (SF-71), Application For Leave, which was approved by Ms. Austin for 206 hours of advanced sick leave to be used in connection with Ms. Nelson's surgery scheduled for the

next day.

Later that day, while at home, Ms. Nelson filled out an application to participate in the LTP. The completed application was submitted the next day to the Respondent by a fellow worker.⁽²⁾ Ms. Austin, who would have normally processed the application for the LTP, went on leave to take care of her husband who had suffered a stroke. However, prior to leaving, she informed District Manager P.J. Rodriguez that she would have to handle Ms. Nelson's application for the LTP.

During the week of May 10, 1993, Ms. Rodriguez telephoned Ms. Nelson and inquired about her health. During the ensuing conversation she inquired about her participation in the LTP. According to Ms. Rodriguez, she told Ms. Nelson that she, Ms. Rodriguez, had her, Ms. Nelson's, request for the LTP and that if Ms. Nelson was still interested she would have to use up her annual leave before any request for participation in the LTP could be considered. Ms. Nelson replied that she was going to think about it. Although Ms. Nelson does not recall the aforementioned telephone conversation, she does not deny that it occurred.

On or about May 18, 1993 Ms. Nelson contacted the President of the Union, Mr. Michael Codon, and inquired about the requirements for participation in the LTP. Mr. Codon correctly informed Ms. Nelson that exhaustion of advance sick leave was not a requirement for participation in the program. He further informed her that he would write a letter to Ms. Rodriguez concerning her, Ms. Nelson's, use of the LTP.

On May 18, 1993, Mr. Codon wrote a letter to Ms. Rodriguez which reads in pertinent part as follows:

On April 29, 1993, June Nelson submitted a request to be certified for the Leave Transfer Program. She was informed by the supervisor, Diane Schultz, that she would not be eligible for this program until she exhausted her Advanced Sick Leave.

I have reviewed the regulations and cannot find any such requirement. Nor is her illness/injury excluded from qualifying her. However, your actions have delayed Ms. Nelson's participation in the program. I am requesting that you do a Regionwide solicitation for leave donations, and such donations be used to offset the Advanced Sick Leave, which may not have all been necessary if you had properly processed the April 29, 1993, request.

Please send me copies of the paperwork to verify your action on this matter.

On May 20, 1993, Ms. Rodriguez responded to Mr. Codon's letter as follows:

I want to clarify some points you made in your letter. Diana Schultz is not June Nelson's Supervisor. Diane Schultz is a service representative.

We do have a request from June Nelson to participate in the leave transfer program. Based on the information in PMS, chapter 630 Ms. Nelson must exhaust all her leave before she can participate in the program. The PMS also states I have 30 days to respond to the request. However, she does not have to exhaust all her leave to be approved for the program. When I

spoke to June Nelson a week ago, she indicated she did not want to use her annual leave.

I sent June a letter since I have not been able to reach her by phone, asking her for clarification. I also need medical certification as well. Once I receive an answer from June, I will proceed with the leave participation program.

On the same day, Ms. Rodriguez sent a letter to Ms. Nelson which reads in pertinent part as follows:

I hope you are recuperating well after your surgery. When we spoke last week, we discussed briefly your leave and you wanted to know when your advanced sick leave would run out. I have tried calling you over a period of several days and the phone just rings. You indicated to me that you did not want to use your annual leave. Since you have requested to participate in the leave transfer program, one of the requirements is that all leave will soon be exhausted. We can start the process now, once [you] let me know what you want to.

You will exhaust your advanced sick leave on 6/7/93. Your current annual leave balance is 33.50 hours and we will begin using A/L beginning 6/8/93 until 6/12/93.

Again, please let me know if you want to participate in the program so that I can approve your request. . . .

On May 27, 1993 Ms. Rodriguez telephoned Ms. Nelson at her home and discussed the LTP. According to Ms. Nelson, Ms. Rodriguez informed her that her advanced sick leave was nearly exhausted and that she was now eligible to participate in the program. She further informed Ms. Nelson that she had now accumulated about 32 hours of annual leave. Ms. Nelson informed Ms. Rodriguez that she did not want to use her annual leave since she was about to return to work. Ms. Rodriguez admits the telephone call and that she spoke about the LTP, the criteria for participation therein and asked whether Ms. Nelson wanted to use her annual leave. She denies, however, informing Ms. Nelson that she had nearly exhausted her advanced sick leave.

On May 28, 1993 Mr. Codon mailed another letter to Ms. Rodriguez concerning Ms. Nelson's participation in the LTP. The letter reads in pertinent part as follows:

With respect to the Leave Sharing Program, June Nelson was informed by her OS that she was not eligible for the program because she had not exhausted all her Advanced Sick Leave. June was thus left with the impression that you were not processing her request.

Now you state that you have 30 calendar days to respond. Why didn't you write to June earlier, if you intended to act on this request? However, at least you do admit now that she does not have to exhaust all her leave.

Additionally, as we both know, leave donations can be used to liquidate Advanced Sick Leave, as in this case. June knows of friends and fellow workers who are willing and ready to donate leave as soon as you make your decision.

I will monitor this situation to its conclusion. I do not believe it has been handled properly.

On June 3, 1993, Ms. Rodriguez again wrote to Ms. Nelson and requested a doctor's statement covering the period she was absent from work. She also told Ms. Nelson that if she had changed her mind about using up her annual leave she would be happy to process her request to participate in the LTP. A copy of the letter was not forwarded to the Union.

On June 8, 1993 Ms. Nelson returned to work. The next day June 9, 1993, Ms. Rodriguez called Ms. Nelson into her office. During the course of a discussion concerning the LTP, according to Ms. Nelson, Ms. Rodriguez stated to her that she, Ms. Rodriguez, "had been receiving various correspondence from the Union, and she was extremely disappointed in me that I hadn't contacted her instead of the Union". Ms. Rodriguez denies making the aforementioned statement. Following the meeting Ms. Nelson called Mr. Codon and informed him of Ms. Rodriguez' statement. Mr. Codon corroborated Ms. Nelson's testimony that following the meeting Ms. Nelson called him and informed him of the aforementioned statement made by Ms. Rodriguez.

Between, June 9, 1993 and June 21, 1993, Ms. Nelson's application to participate in the LTP was approved and effectuated. Through the LTP, Ms. Nelson received donations of 163 hours of leave.⁽³⁾

Discussion and Conclusions

The General Counsel takes the position that the Respondent committed an independent violation of Section 7116(a)(1) of the Statute by virtue of the actions of Ms. Rodriguez in making remarks to Ms. Nelson at the June 9, 1993 meeting which tended to discourage Ms. Nelson from seeking representation by the Union. Additionally, it is the contention of the General Counsel that Respondent violated Sections 7116(a)(1) and (5) of the Statute by virtue of the actions of Ms. Rodriguez in dealing directly with Ms. Nelson, rather than with the Union, after having been informed that the Union was representing Ms. Nelson in connection with her participation in the LTP.

Respondent, on the other hand, based upon certain discrepancies in Ms. Nelson's testimony as a whole and Ms. Rodriguez denial, urges dismissal of the independent 7116(a)(1) allegation of the complaint. With respect to the 7116(a)(1) and (5) allegation based upon a bypass of the Union, it is Respondent's position that the Union had not been designated by Ms. Nelson to represent her with respect to her participation in the LTP and that the record evidence supports the conclusion that the Union was merely, according to its May 28, 1993 letter, monitoring the situation to insure that the MOU dealing with the LTP was properly applied.

Having analyzed the respective testimony of Ms. Nelson and Ms. Rodriguez, and observed them on the witness stand, I credit Ms. Rodriguez' denial that she ever stated to Ms. Nelson that she (Ms. Rodriguez) was disappointed that Ms. Nelson had not come to her rather than the Union with regard to her problems about participation in the LTP. Accordingly, it will be recommended that the independent 7116(a)(1) allegation of the complaint which is based upon such statement be dismissed.

Turning now to the remaining allegation of the complaint, i.e. the bypass of the Union, I find, based upon the record as a whole, that the Respondent did not bypass the Union with respect to its actions in applying the LTP to Ms. Nelson. In reaching this conclusion I rely upon the fact that neither Ms. Nelson nor the Union specifically informed the Respondent that the Union had been designated Ms. Nelson's representative for purposes of applying the LTP to Ms. Nelson's circumstances. While it is true that the Union had been contacted by Ms. Nelson about the LTP and went so far as to send a letter to Ms. Rodriguez wherein it took issue with her interpretation of the provisions of the program and informed her that the Union would be monitoring her handling of the situation, at no time did the Union ever make any personal and/or direct contact with Ms. Rodriguez about Ms. Nelson's application for participation in the LTP. Similarly, there is no evidence that Ms. Nelson ever told Ms. Rodriguez that the Union was representing her in the matter. While such may well have been Ms. Nelson's intention and also that of the Union, there is no evidence that such intention was conveyed to Ms. Rodriguez.

Moreover, the MOU dealing with the LTP clearly sets forth the requirements for participating in the LTP. To the extent that the requirements were not correctly applied by Respondent, the matter was clearly grievable. The aforementioned, appears to be exactly what the Union was attempting to convey to the Respondent by its correspondence dated May 18 and May 28, 1993.

In view of the foregoing considerations, I find that the record evidence is insufficient to establish that the Respondent bypassed the Union in violation of Section 7116(a)(1) and (5) of the Statute.

Accordingly, having concluded that the Respondent did not violate the Statute, as alleged in the Complaint, it is hereby recommended that the Federal Labor Relations Authority adopt the following Order dismissing the Complaint in its entirety.

ORDER

It is hereby Ordered that the Complaint in Case No. SF-CA-31205 should be, and hereby is, dismissed in its entirety.

Issued, Washington, DC, November 30, 1994

BURTON S. STERNBURG

Administrative Law Judge

1. Ms. Nelson claims that she had only 9 hours of annual leave. With respect to sick leave, according to Ms. Nelson, any sick leave balance was the result of having previously secured 34 hours of advanced sick leave. In this latter context, according to the uncontradicted testimony of Ms. Austin, Respondent is only allowed to advance 240 hours of sick leave to Ms. Nelson.

2. Ms. Nelson did not submit a form SF-71 prior to her surgery covering and/or exhausting the hours that were currently in her annual leave account.

3. The record indicates that Ms. Nelson became eligible and was accepted into the LTP when she agreed to use up the 32 hours of annual leave she had accrued as of June 9, 1993. She signed a SF 71, Application For Leave, for such hours on June 21, 1993. The aforementioned SF-71 notes that the leave application was executed "under protest". According to Ms. Nelson, if Respondent had allowed her into the program prior to her operation she never would have had to use the annual leave which accrued thereafter.