Ch60849

Office of Administrative Law Judges

OFFICE OF THE ADJUTANT GENERAL
MISSOURI NATIONAL GUARD

Case No. CH-CA-60849

JEFFERSON CITY, MISSOURI

Respondent

and

ASSOCIATION OF CIVILIAN TECHNICIANS

MISSOURI COUNCIL OF CHAPTERS

Charging Party

Greg A. Weddle, Esquire For the General Counsel

Maj. John B. Keller, II, Esquire For the Respondent

Jerry L. Countryman, Esquire For the Charging Party

Before: JESSE ETELSON Administrative Law Judge

## DECISION

## Statement of the Case

The General Counsel of the Federal Labor Relations Authority (the Authority), by the Acting Regional Director of the Authority's Chicago Regional Office, alleges in an unfair labor practice complaint that the Respondent violated sections 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by repudiating certain provisions in the collective bargaining agreement (CBA) to which the Respondent and the Charging Party (the Union) were parties. The Respondent filed an answer and the parties complied with the Authority's prehearing disclosure and prehearing conference requirements. The parties then entered into a "Stipulation of Facts," waived their right to a hearing, and moved jointly for a decision based on the Stipulation of Facts and its attached exhibits. The parties agreed that the formal papers, introduced as Joint Exhibit 1(a) through 1(k), the stipulation, and its exhibits (Jt. Exh. 2, 3) constitute the entire record in this case.

I hereby grant the joint motion for a decision based on the stipulated record and make the following findings of fact, conclusions of law, and recommendations.

## Findings of Material Facts

The Union is a labor organization under section 7103(a)(4) of the Statute and is the certified exclusive representative of all Missouri Army and Air National Guard wage grade technicians employed by the Respondent. The Respondent is an agency under section 7103(a)(3) of the Statute. The Union and the Respondent were parties to a CBA that was effective February 23, 1995, that remained in effect in March 1996, and covered the bargaining unit employees represented by the Union. Article 23 of the CBA provided that Respondent was to issue sets of uniforms to bargaining unit employees who were required to wear

prescribed uniforms in the performance of their official civilian duties.

On March 12, 1996, the National Guard Bureau issued to Respondent a Labor Relations Alert (Jt. Exh. 3) advising Respondent that the provision of uniforms was totally controlled by Federal law and, as such, was no longer a condition of employment under the Statute. On March 14, 1996, after receiving the Labor Relations Alert, Respondent, by Labor Relations Specialist Emma McManus, informed the Union that Respondent would not honor the Article 23 uniform provisions described above.

At the time of the March 14 notification, Respondent had been preparing for the distribution of uniforms required by Article 23 and had begun to distribute the required uniforms. Respondent issued between five and ten percent of the required uniforms prior to discontinuing the distribution. Its sole reason for discontinuing the issuance of uniforms required under Article 23 was its receipt of the National Guard Bureau's March 12, 1996, Labor Relations Alert.

**Discussion and Conclusions**

Respondent does not dispute that the failure to honor Article 23 provisions regarding the issuance of uniforms was an unfair labor practice. Moreover, the facts found above establish a repudiation of the agreement. Respondent's sole defense is that the unfair labor practice was committed by the National Guard Bureau in directing Respondent to act as it did, and that, by complying with this directive, Respondent performed a ministerial act for which it is not responsible.

While it is true that the Authority has stated, repeatedly, that a respondent, when acting in a ministerial capacity and without discretion, does not commit an unfair labor practice, *see, for example, U.S. Department of the Interior, Bureau of Reclamation, Washington, DC*, 46 FLRA 9, 30 (1992), I find, with due respect to the Authority, that the Respondent has been misled. The statement that the action performed in a ministerial capacity is not an unfair labor practice overstates the Authority's actual treatment of such situations. I am forced to this conclusion because, in a concurrent line of cases, the Authority has held respondents at a subordinate level to have violated the Statute, even when they have merely followed orders from above, whenever the higher-level management entities that gave the orders were not named as respondents. *See Department of Transportation, Federal Aviation Administration, Fort Worth, Texas*, 55 FLRA 951, 960 (1999) and cases cited there.

My conclusion that the *dicta* absolving a lower-level respondent when it acts ministerially must yield to the principle that it is responsible for having violated the Statute when the superior entity is not named as a respondent is based on an earlier explanation the Authority gave for distinguishing two lines of cases. Thus, in *United States Department of the Treasury, Internal Revenue Service*, 23 FLRA 774, 779 (1986), the Authority explained why it would not find violations against a subordinate level of management where the higher level was named as a respondent but would find violations where the higher-level was not named:

> In finding that the Respondent IRS violated the Statute in these circumstances, the Authority notes
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> the relationship between this case and the Authority's decision in *Department of the Treasury and*
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> *Internal Revenue Service*, 22 FLRA No. 89 (1986). The allegations agaist the IRS in that case

> were dismissed because the IRS had merely engaged in the ministerial act of forwarding contractual language directed by the Panel to Treasury for agency head review and thereafter failing to incorporate the Panel directed language because of the determination by Treasury to disapprove such language. Under those circumstances, where the complaint alleged and the Authority found that Treasury had committed an unfair labor practice by disapproving the Panel-directed language and the Authority was able to issue an order against Treasury which effectively remedied the unfair labor practice found, the Authority -- consistent with precedent -- dismissed the complaint against IRS because it would not effectuate the purposes and policies of the Statute to find an additional cumulative violation against subordinate level management. *U.S. Department of Justice and Department of Justice, Bureau of Prisons, Washington, DC and Federal Correctional Institution, Danbury, Connecticut*, 20 FLRA No. 5 (1985), *enf'd*, 792 F.2d 25 (2d Cir. 1986). In this case, however, where the complaint did not charge Treasury with a violation but named only IRS and its subordinate activities as Respondents, the Authority concludes that it would effectuate the purposes and policies of the Statute to find a violation against IRS. That is, such a finding here would not be merely cumulative but is essential if the unfair labor practice committed is to be effectively remedied. A conclusion that the complaint against IRS must be dismissed because Treasury was not named as a Respondent would preclude a remedy for the violation of statutory rights which occurred here, a result which we conclude would be inconsistent with Congressional intent. Therefore, we find that Respondent IRS violated section 7116(a)(1) of the Statute and shall order it to remedy the violation found.

This explanation, which I take to be authoritative, is inconsistent with the notion that a subordinate level of management does not commit an unfair labor practice when it acts ministerially and without discretion. It is also, by its terms, inconsistent with any contention that subordinate level management should not be held responsible to remedy an unfair labor practice that it has been directed to commit by a higher-level of management that has not been named as a respondent.

Here, the General Counsel disputes both the Respondent's contention that it was directed to take the action it took and its contention that the National Guard Bureau is a "higher level activity" whose orders the Respondent was required to follow. However, as the National Guard Bureau has not been named as a

respondent in this case, the fact, if established, that the Respondent acted ministerially and without discretion would not be a defense. Therefore, it is inappropriate to enter into a determination of whether the facts that would establish such a defense in other circumstances have been established here.[(1)] Accordingly, I conclude that the Respondent committed the unfair labor practice of repudiating the contractual obligation to provide uniforms to certain bargaining unit employees, in violation of sections 7116(a)(1) and (5) of the Statute, and recommend that the Authority issue the following Order:

**ORDER**

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), the Office of the Adjutant General, Missouri National Guard, Jefferson, Missouri, shall:

1. Cease and desist from:

(a) Failing and refusing to honor its collection bargaining agreement with the Association of Civilian Technicians, Missouri Council of Chapters, the exclusive representative of certain of its employees, by declaring its intention not to honor, and by failing and refusing to complete its compliance with, the agreement's provision for issuing uniforms to bargaining unit employees who are required to wear prescribed uniforms in the performance of their official civilian duties.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured them by the Federal Service Labor-Management Relations Statute

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

(a) Upon request of the Association of Civilian Technicians, Missouri Council of Chapters, issue uniforms to bargaining unit employees as required by Article XXIII of the parties' collective bargaining agreement.

(b) Post at all its facilities where bargaining unit employees represented by the Association of Civilian Technicians, Missouri Council of Chapters 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 Adjutant General, Missouri National Guard, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the

date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, June 27, 2000.

JESSE ETELSON

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 Office of Adjutant General, Missouri National Guard, Jefferson, Missouri, 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 or refuse to honor our collective bargaining agreement with the Association of Civilian Technicians, Missouri Council of Chapters by declaring our intention not to honor, and by failing and refusing to complete our compliance with, the agreement's provision for issuing uniforms to bargaining unit employees who are required to wear prescribed uniforms in the performance of their official civilian duties.

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

**WE WILL,** upon request fo the Association of Civilian Technicians, Missouri Council of Chapters, issue uniforms to bargaining unit employees as required by Article XXIII of the collective bargaining agreement.

______________________________

(Respondent/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 questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, whose address is: 55 W. Monroe Street, Suite 1150, Chicago, Illinois 60603, and whose telephone number is: (312)353-6306.

1. Respondent notes that the unfair labor practice charge that initiated this case alleges, in part, that the National Guard Bureau interfered with the local bargaining relationship by directing the Respondent to disregard provisions of the collective bargaining agreement. However, notwithstanding that allegation, the National Guard Bureau was named as a respondent in neither the charge nor the unfair labor practice complaint, and the complaint contains no allegation against the National Guard Bureau. I find that these omissions, at least taken together, place this case within the category of cases in which the higher-level entity was not named as a respondent.