

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

DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, MUSKOGEE, OKLAHOMA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2250 Charging Party	Case No. DA-CA-50700

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before 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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before JUNE 19, 1996, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: May 20, 1996
Washington, DC

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

MEMORANDUM

DATE: May 20, 1996

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
MUSKOGEE, OKLAHOMA

Respondent

and

Case No. DA-CA-50700

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2250

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), 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 are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, MUSKOGEE, OKLAHOMA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2250 Charging Party	Case No. DA-CA-50700

William D. Scales
Counsel for the Respondent

Sandra Fletcher
Representative of the Charging Party

Charlotte A. Dye
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (5), by refusing to comply with a past practice of allowing representatives of the Charging Party (Union) to use official time to attend Equal Employment Opportunity (EEO) hearings to represent the bargaining unit employees and charging an employee absent without official leave (AWOL) for such representation.

Respondent's answer admitted that it had charged an employee with AWOL for attendance at an EEO hearing, but denied the existence of such a past practice, or failure to comply with a past practice.

A hearing was held in Tulsa, Oklahoma. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.

The General Counsel presented the testimony of the current President and former President of the Union who testified that they attended EEOC hearings on official time as representatives of the bargaining unit and not as representatives of the individual complainants, and that management had knowledge of this practice.

Respondent presented the testimony of Ronald W. Meyerricks, Chief, Human Resources Management Service, who testified that the Union representatives appeared to be acting as technical advisors to the representatives of the individual complainants, rather than representing the bargaining unit as a whole, and management had not knowingly allowed the Union representatives to attend EEO hearings on official time. Respondent also presented the testimony of three former supervisors of Union President Chappell who testified that Chappell was on 100% official time, never made them aware of his Union activities on the station, and never requested or made them aware that he was attending EEO hearings on official time. Michael Capps, the current supervisor of President Fletcher, testified that before she became Union President on 100% official time, Fletcher advised him of her attendance at an EEO hearing (he did not remember in what status), but that since she became Union President she was not required to advise him of her activities on the station.

The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record, including my observation of the witnesses and their demeanor, I have credited major portions of the testimony of the General Counsel's witnesses and make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees (AFGE) is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at Respondent. The Union is an agent of AFGE for purposes of representing unit employees at Respondent's Muskogee, Oklahoma facility. The President of the Union receives one-

hundred percent official time and is afforded considerable discretion in the use of that time while on the facility.

On a yearly basis, approximately two or three Equal Employment Opportunity (EEO) hearings are held at Respondent of which the Union is aware. In 1987 or 1988, James Chappell, then President of the Union, attended an EEO hearing for Gary Truman, bargaining unit employee. Chappell attended the EEO hearing in his capacity as President of the Union to represent the interests of the bargaining unit. Truman's personal representative was Steve Angel, a private attorney from Oklahoma City, Oklahoma. Chappell attended Truman's EEO hearing on official time.

On January 25, 1988, Chappell attended an EEO hearing for Rosanne Nunley, bargaining unit employee. Chappell attended the EEO hearing in his capacity as President of the Union to represent the interests of the bargaining unit.¹ Chappell attended Nunley's EEO hearing on official time. On May 12, 1988, Chappell, as Union President, signed a settlement agreement involving Nunley's EEO complaint. By signing, Chappell signified that the settlement agreement did not infringe upon the rights of the bargaining unit, consistent with his role as technical advisor.

On or around February 24, 1988, Chappell attended an EEO hearing for Judith I. Snow, bargaining unit employee. Chappell attended the EEO hearing in his capacity as President of the Union to represent the interests of the bargaining unit. Chappell attended Snow's EEO hearing on official time. On February 24, 1988, Chappell, as Union President, signed a settlement agreement involving Snow's EEO complaint. By signing, Chappell signified that the settlement agreement did not infringe upon the rights of the bargaining unit, consistent with his role as technical advisor.

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The EEO hearing officer identified Mr. Chappell in the transcript as "the Complainant's technical advisor." (GC Exhibit 5). Mr. Chappell testified that only two parties are recognized at EEO hearings - the complainant and the Agency - and although a transcript may list him as present as technical advisor for the complainant, in fact, he is there to represent the bargaining unit. Mr. Chappell acknowledged that he sat on the same side of the table as the complainant's representative "because . . . I am not an Agency representative," but denied that he was there to give advice strictly to the complainant or the complainant's representative." (Tr. 55).

Ronald W. Meyerricks, who became Chief of Human Resources in 1992, raised the question, in a management review of official time in 1992, of under what authority the Union was attending EEO and other statutory hearings. However, he never told Union officials (until 1995 in the instant case) that the use of official time was inappropriate, or examined their time cards to determine their leave status.²

On May 13, 1993, Respondent advised Union President Chappell, in connection with his request for official time to represent an employee at a deposition in Oklahoma City before the Merit Systems Protection Board (MSPB), that "when an employee opts for a statutory appeals process such as MSPB, OWCP, or EEOC, the union as an institution has no status before those boards, and thus no right to official time to represent the employee before them." The letter did not specifically address the right of Union officials to use official time to represent the bargaining unit during such proceedings.

On April 8, 1994, Sandra Fletcher, then Vice-President of the Union, attended an EEO hearing for Alfred F. Childers, bargaining unit employee. Fletcher attended the EEO hearing in her capacity as Vice-President of the Union to represent the interests of the bargaining unit.³ Fletcher attended Childers's EEO hearing on official time and informed her supervisor, Michael Capps, of her use of official time. Ron Meyerricks, Chief of Human Resources, attended the hearing representing Respondent.

On June 21, 1994, Chappell attended an EEO hearing for Vernice Frazier, bargaining unit employee. Chappell attended the EEO hearing in his capacity as President of the Union to represent the interests of the bargaining unit.⁴ Frazier's personal representative was Ralph Simon, a private

²
Meyerricks testified that he had informed Fletcher, in a meeting with the interim Director in early March 1995, that the use of official time to represent the bargaining unit was inappropriate. Fletcher denied that any such statement was made to her at these meetings. I credit her testimony.

³
The cover of the transcript for the Childers' hearing under "Appearances" states "Also Present: Ms. Sandra Fletcher, for the Complainant, Mr. Fred Blocklinger, for the Agency."

⁴
The cover of the transcript for the Frazier hearing under "Appearances" reflects both "Ralph Snow, Attorney at Law" and "Jim Chappell, AFGE" as "For the Complainant." Chappell testified that this designation is not correct; he was there to represent the bargaining unit.

attorney from Tulsa, Oklahoma. Chappell attended Frazier's EEO hearing on official time.

In March 1995, Fletcher assumed office as President of the Union. On July 12, 1995, Fletcher attended an Equal Employment Opportunity (EEO) hearing for William Coombs, bargaining unit employee. Fletcher attended the EEO hearing in her capacity as President of the Union to represent the interests of the bargaining unit. Fletcher attended the hearing on official time.

During Ms. Fletcher's absence from the Union office, the secretary of Medical Center Director Billie Valentine telephoned to request Fletcher's attendance at a meeting. After the Director's secretary was informed that Fletcher was at an EEO hearing, the Director then asked Mr. Meyerricks to determine Ms. Fletcher's status at this hearing.

Upon her return to the Union office after Coomb's EEO hearing had concluded, Fletcher received a telephone call from Meyerricks. Meyerricks inquired about the duty status that Fletcher used to attend the EEO hearing. Fletcher informed Meyerricks that she attended the hearing on official time. Meyerricks told Fletcher that she was not entitled to use official time to attend EEO hearings. This was the first instance that any Union official had been informed that the Activity considered the use of official time to attend EEO hearings to represent the bargaining unit inappropriate. Fletcher told Meyerricks that she would take whatever leave was appropriate and that she would call him later.

After consulting another person for advice, Fletcher telephoned Meyerricks and informed him that she believed the use of official time was appropriate.

By letter dated July 20, 1995, Meyerricks informed Fletcher that she would be charged with Absent Without Official Leave (AWOL) for attending the EEO hearing, if she did not elect to charge the time she spent at the hearing to annual leave or leave without pay by July 24, 1995. Absent an election, Fletcher would be charged with AWOL. Fletcher did not choose to take leave for the time she spent at the hearing and, on July 26, 1995, she was charged with three and one-half hours of AWOL.

On August 1, 1995, Fletcher attended an EEO hearing for Janice Converse, bargaining unit employee. Fletcher attended the EEO hearing in her capacity as President of the Union to represent the interests of the bargaining unit.

Fletcher attended the hearing on official time. Prior to attending the EEO hearing, Fletcher was told that she would receive AWOL if she attended. By letter dated September 25, 1995, Roy M. Cowins, Chief of Medical Administration Services, informed Fletcher that any decision with respect to her use of official time to attend Converse's EEO hearing was being held in abeyance until the matter was addressed by the Federal Labor Relations Authority pursuant to her unfair labor practice charge.

As noted above, the Union and Respondent disagree over the representational role of a Union officer as a technical advisor in the EEO hearings. Chappell and Fletcher testified that where they each attended the above EEO hearings as a Union officer and technical advisor, the role of a technical advisor was to give technical advice to the complainant's representative and the Agency's representative in the event a settlement discussion arose, to ensure that nothing was agreed to in the settlement which was contrary to the collective bargaining agreement or to the interests of bargaining unit employees. The parties acknowledge that a settlement can be reached at any stage of the EEO proceedings. Respondent was represented at each of the EEO proceedings.

Ronald W. Meyerricks, Chief of Human Resources, testified that a settlement seldom arises during the course of an EEO hearing, because settlement is supposed to be pursued before the hearing, although settlement can occur at the hearing. He testified that, based on his personal observations at the EEO hearings, he viewed Chappell and Fletcher as technical advisors representing the complainant and for the purpose of providing technical assistance and advice to the complainant's representative. He observed that the Union technical advisors whispered to or passed notes to the complainant's representative, just as the technical advisor to the Respondent's representative did, although the content of such communications was not known. Mr. Chappell testified that his communications of this nature concerned the bargaining unit as a whole.

Discussion and Conclusions

The General Counsel contends that Respondent violated section 7116(a)(1) and (5) of the Statute by refusing to comply with the established practice of allowing representatives of the Union to use official time to attend EEO hearings to represent the bargaining unit.

Respondent points out that it is well settled that if a matter does not concern a "condition of employment," it

cannot become such through either past practice or agreement between the parties. Respondent notes that "matters specifically provided for by Federal statute" are excepted from the definition of a "condition of employment" under section 7103(a)(14). As the EEO process is a creature of Federal statute under Title VII, as codified at 42 U.S.C. § 2000e, et seq., Respondent contends that a "condition of employment" is not involved in the issue presented, and a past practice cannot be established in this case. Assuming that a "condition of employment" is involved, Respondent contends that the General Counsel failed to present sufficient evidence to substantiate that the practice of attending EEO hearings on official time, on behalf of AFGE, was a practice that was consistently exercised by the Union or that Respondent knew or acquiesced in the practice.

Condition of Employment

The parties recognize that in determining whether an Agency has refused to comply with an established practice, it must first be decided whether the matter alleged to be a practice involves a condition of employment of bargaining unit employees. Antilles Consolidated Education Association and Antilles Consolidated School System, 22 FLRA 235 (1986); U.S. Department of Labor, Washington D.C. and U.S. Department of Labor, Employment Standards Administration Boston, Massachusetts, 37 FLRA 25 (1990).

The matter alleged to be a practice here is not the EEO process, but the use of official time by Union representatives to attend EEO hearings on behalf of the bargaining unit and not on behalf of individual complainants. The Authority has held that the use of official time by Union officials is a condition of employment. U.S. Patent and Trademark Office, 39 FLRA 1477 (1991).

The record establishes that the Union representatives attended the hearings for the purpose of monitoring any settlement discussions which may impact the bargaining unit and providing technical advice in the event of such a settlement. In U.S. Government Printing Office, 23 FLRA 35, 40 (1986) the Authority recognized that while the exclusive representative has no statutory rights or obligations to represent an employee who invokes the regulatory process of the EEOC, a union "may have a role if the settlement gives rise to an impact on the bargaining unit." And in American Federation of Government Employees, National Council of Field Labor Locals, 39 FLRA 546, 553 (1991), the Authority held that section 7131(d) does not preclude parties from agreeing to provide for official time in circumstances where

the official time is otherwise consistent with the Statute and other applicable laws and regulations. There is no contention here that official time in the instant circumstances was contrary to law, rule, or regulation. Therefore, I conclude that the matter alleged to be a practice in this case involved a condition of employment of bargaining unit employees.

Past practice

Once it is determined that the matter alleged to be a practice involves a condition of employment, it must be demonstrated that the practice has been consistently exercised over a significant period of time and followed by both parties or followed by one party and not challenged by the other. U.S. Department of Labor, Washington, D.C., 38 FLRA 899 (1990).

As reflected above, the record establishes that, for many years, Union officials used official time to attend EEO hearings to represent the bargaining unit. This is true for the President of the Union, who was entitled to one-hundred percent official time and therefore was not required to account to management for each specific use of official time while on the station, and also for the Vice-President, who was required to account to a member of management for the use of official time.

The record establishes that this practice was followed by both parties and never challenged until after the July 12, 1995 EEO hearing of William Coombs. The evidence clearly indicates that Respondent was always represented at the EEO hearings and was aware of the presence of a Union official as technical advisor. This is true whether a complainant was represented by a private attorney or by a Union official specifically designated as a personal representative (not representing the Union) and using the official time provisions available under the EEO regulations as the complainant's employee representative. 29 C.F.R. §1613.214(b). The evidence further establishes that on at least one occasion, the Vice-President of the Union specifically informed her supervisor that she was using official time to attend an EEO hearing to represent the bargaining unit.

Respondent contends that a May 13, 1993 letter to Chappell from Jerry W. Baxter, then Director, stating that the Union had no right to official time to represent a complainant before a statutory appeals board, such as the Equal Employment Opportunity Commission, put the Union on notice that it could not use official time to represent the

bargaining unit in EEO hearings. This letter cannot be read so broadly as it specifically addresses only the right of the union as an institution to official time "to represent the employee before [those boards]." (Respondent's Exhibit 5, emphasis added).

Human Resources Chief Meyerricks attended several EEO hearings and raised the question, in a management review of official time in 1992, of under what authority the Union was attending EEO and other statutory hearings (where there were two Union officials present and he perceived one as the complainant's representative on EEO administrative leave and one as the technical advisor). However, he never told Union officials (until 1995 in the instant case) that the use of official time was inappropriate, or examined their time cards to determine their leave status. If Respondent, in fact, truly questioned the type of leave the Union representative was on, it seems unlikely that a management representative would not have inquired into a Union official's status at the EEO hearings, including the use of official time. I conclude it is more likely that, since the Union had considerable discretion in the use of official time on the station, management knew that the technical representative was using official time under the established practice. Therefore, management did not question the leave being used until the matter was specifically raised in the instant case by the new Center Director.

I conclude that the General Counsel established the existence of a past practice of allowing Union representatives to use official time to attend EEO hearings to represent the bargaining unit.

Conclusion

It is well established that an Activity cannot unilaterally change an established past practice regarding official time without affording the Union an opportunity to bargain over the change. U.S. Patent and Trademark Office, 39 FLRA 1477 (1991); Department of the Navy, Naval Avionics Center, Indianapolis, Indiana, 36 FLRA 567 (1990). By its action in this case, Respondent has violated section 7116(a) (1) and (5) of the Statute, as alleged in the complaint.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118

of the Statute, it is hereby ordered that the Department of Veterans Affairs Medical Center, Muskogee, Oklahoma, shall:

1. Cease and desist from:

(a) Refusing to comply with the established practice of allowing representatives of the American Federation of Government Employees, Local 2250 to use official time to attend Equal Employment Opportunity hearings to represent the bargaining unit.

(b) Charging representatives of the American Federation of Government Employees, Local 2250 with Absent Without Official Leave for using official time to attend Equal Employment Opportunity hearings to represent the bargaining unit.

(c) Unilaterally changing conditions of employment of bargaining unit employees by changing the past practice whereby Union representatives used official time to attend Equal Employment Opportunity hearings to represent the bargaining unit without first notifying the American Federation of Government Employees, Local 2250, the agent of the exclusive representative of certain of its employees, and affording it an opportunity to bargain about the decision to change such conditions of employment.

(d) 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 Relations Statute:

(a) Rescind the policy of not permitting Union representatives to attend Equal Employment Opportunity hearings on official time to represent the bargaining unit and reinstate the established practice of allowing representatives of the American Federation of Government Employees, Local 2250 to use official time to attend Equal Employment Opportunity hearings to represent the bargaining unit.

(b) Fully compensate Sandra Fletcher, President, American Federation of Government Employees, Local 2250, for three and one-half hours of Absent Without Official Leave charged to her, expunge all record of such charge from her personnel records, and advise Ms. Fletcher and the Union in

writing of such action and that the charge will not be used against her in any way.

(c) Post at its facilities 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 Medical Center Director 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.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Region, Federal Labor Relations Authority, Federal Office Building, 525 Griffin Street, Suite 926, Dallas, TX 75202-1906, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, May 20, 1996

GARVIN LEE OLIVER
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 Veterans Affairs, Medical Center, Muskogee, Oklahoma, 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 refuse to comply with the established practice of allowing representatives of the American Federation of Government Employees, Local 2250 to use official time to attend Equal Employment Opportunity hearings to represent the bargaining unit.

WE WILL NOT charge representatives of the American Federation of Government Employees, Local 2250 with Absent Without Official Leave for using official time to attend Equal Employment Opportunity hearings to represent the bargaining unit.

WE WILL NOT unilaterally change conditions of employment of bargaining unit employees by changing the past practice whereby Union representatives used official time to attend Equal Employment Opportunity hearings to represent the bargaining unit without first notifying the American Federation of Government Employees, Local 2250, the agent of the exclusive representative of certain of our employees, and affording it an opportunity to bargain about the decision to change such conditions of employment.

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 rescind the policy of not permitting Union representatives to attend Equal Employment Opportunity hearings on official time to represent the bargaining unit and reinstate the established practice of allowing representatives of the American Federation of Government Employees, Local 2250 to use official time to attend Equal Employment Opportunity hearings to represent the bargaining unit.

WE WILL fully compensate Sandra Fletcher, President,
American Federation of Government Employees, Local 2250, for
three and one-half hours of Absent Without Official Leave
charged to

her, expunge all record of such charge from her personnel

records, and advise Ms. Fletcher and the Union in writing of such action and that the charge will not be used against her in any way.

(Agency or 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 any of its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906 and whose telephone number is: 214-767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. DA-CA-50700, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. William D. Scales
Principal Senior Attorney
Department of Veterans Affairs
Office of District Counsel
125 South Main Street
Muskogee, OK 74401

Sandra Fletcher, President
American Federation of Government
Employees, Local 2250
Veterans Affairs Medical Center
Honor Heights Drive
Muskogee, OK 74401

Ms. Charlotte A. Dye
Federal Labor Relations Authority
Federal Office Building
525 Griffin Street, Suite 926
Dallas, TX 75202-1906

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Director
Department of Veterans Affairs
Honor Heights Drive
Muskogee, OK 74401

Dated: May 20, 1996
Washington, DC