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

OALJ 14-18

SOCIAL SECURITY ADMINISTRATION SAVANNAH, GEORGIA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 4056 CHARGING PARTY	Case No. AT-CA-12-0323

Mark D. Halverson
For the General Counsel

De Famuyiwa
For the Respondent

Reginald Maxwell
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

On August 31, 2012, the Regional Director of the Atlanta Region of the Authority issued a complaint and notice of hearing in the above case alleging that the Social Security Administration, Savannah, Georgia (Respondent) violated § 7116(a)(1) and (2) of the Statute by committing an unfair labor practice when it suspended Verna Bowden, a union steward for

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the American Federation of Government Employees, AFL-CIO, Local 4056 (Union/ Local 4056), based upon behavior she exhibited while engaged in protected activities. The Respondent filed its Answer to the complaint on September 25, 2012, denying that it suspended Bowden for protected activities.

A hearing in the matter was conducted on February 26, 2013, in Savannah, Georgia. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent committed an unfair labor practice when it suspended Verna Bowden for behavior she exhibited while she was engaged in protected activity. I also find that the assignment of data entry to claims representatives was not a change in working conditions that required notice and bargaining. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(4) of the Statute. The Social Security Administration, Savannah, Georgia, field office is responsible for handling claims related to disability, retirement, survivor's claims, and medical cessation. Tr. 23. These claims are handled by claim representative (CRs), and consists of two types: Title II and Title XVI. *Id.* Title II CRs focus on retirement, disability, survivor, and medical cessation claims for applicants eligible for benefits under Title II by virtue of posted earnings and contributions. *Id.* Whereas Title XVI claim representatives focus on disability claims for children, adults, and aged claims for people over sixty-five, who are eligible for benefits under Title XVI based upon lack of income and assets. *Id.* All claim and service representatives are represented by Local 4056, the Union, which is a labor organization within the meaning of § 7103(a)(4) of the Statute.

At the Savannah office, service representatives and some claim representatives were assigned receptionist duties so members of the public could walk in and file a benefits claim. Tr. 26, 88. Members of the public could also schedule an appointment to file a claim. Tr. 15.

The job description for a claim representative includes the following:

> Examines evidence to evaluate its validity and acceptability in establishing entitlement to benefits, and when necessary, takes the required developmental actions to ensure that all available relevant evidence has been obtained. Assists the applicant in securing evidence, electronically records the evidence required, and when applicable, prepares and records special determinations of facts.

Tr. 96, 97. Consequently, CRs input data such as earnings. Tr. 87. However, when inputting data, Title XVI and Title II claim representatives do not use the same procedures. Tr. 98. Depending on the type of claim, the information is input into either the Title II or Title XVI system. Tr. 112.

Claim representatives input data related to determining if an individual qualifies for benefits based upon earnings and contributions or income and assets. Tr. 113, 114. They also input data when an individual who is already receiving benefits experiences changes in circumstances or needs to update personal information. *Id.* Claim representatives also input information related to earnings submitted by Title II and XVI beneficiaries. Tr. 101. Originally, claim representatives entered earnings information within the Savannah office, but sometime in 2009, service representatives assumed that duty. Tr. 104. Eventually, claim representatives reassumed this duty and they now input earnings information related to files they are assigned. Tr. 128, 132. This duty is part of the claim representatives position description which states that a claim representative: "Develops, investigates, and resolves discrepancies in earnings and determines amounts to be posted, adjusted or deleted from individual records; and determines whether income is wages or self-employment income and if covered income under the Social Security Act." Tr. 123.

By February 2012, a backlog of earning records provided by current Title XVI recipients had developed. Tr. 101-03. On February 8, 2012, Judy Phelps, an operations officer, called a mandatory meeting between Verna Bowden, Angela Kelly, and Noel Rodriguez. Tr. 28, 49, 82, 92. The purpose of the meeting was to inform Bowden, Kelly, and Rodriguez that they would assist walk-in claimants at the reception desk for the entire day while all remaining CRs would spend the day entering earnings information in order to reduce the backlog. Tr. 105. For the CRs working on the backlog, any appointments that they had scheduled for the day were cancelled. Tr. 93. Title II claim representatives were to be paired with a claim representative from the Title XVI unit for refresher training on posting earnings in that information system. Tr. 93, 117, 119.

Bowden was a Title II claim representative. Tr. 23. She was also the union steward for AFGE Local 4056. Tr. 22. Before the meeting started, Bowden spoke with Phelps. Tr. 29, 95. Phelps began to explain what was going to happen that day with claim representatives, including using them for inputting Title XVI earnings information. Tr. 29-30. In response, Bowden stated, "[T]hat's not Title II's job; how much more are you going to put on us?" Tr. 57, 92, 119. Bowden believed that she was going to be assigned to work both on inputting earnings information and working with walk in claimants. Tr. 29. According to Bowden, she had not worked on earnings data entry. Tr. 48, 49, 74. Bowden informed Phelps that she would take the issue to the Union. Tr. 30, 99. Bowden then returned to her cubicle without being dismissed from the meeting. Tr. 94, 137, 157. After Bowden left the meeting, Phelps followed her to her cubicle. Tr. 31, 95. Shortly afterward, the two moved to the IVT room to continue their discussion. Tr. 32, 95.

Following the meeting in the IVT room, Bowden called Union vice president Louis Santiago, who worked in Port Orange, Florida, to discuss the situation. Tr. 33-34, 61. Santiago eventually sent District Manager Michelle Wright a demand for bargaining which was denied. Tr. 166-68. After conducting an investigation, Bowden was given notice of a proposed two day suspension for leaving the February 8 meeting prior to being dismissed. Tr. 36, 37, 137, 139-141. *See also* Jt. Ex. 1. Bowden submitted a rebuttal to the proposed suspension on March 1, 2012. Tr. 38. However, by a decision dated March 13, 2012, Bowden was suspended for two days without pay. Tr. 40, 165. *See also* Jt. Ex. 2. On March 16, 2012, Bowden submitted a formal request for official time for the events of February 8, 2012. Tr. 69, 165. In response to Bowden's suspension, Santiago filed an unfair labor practice charge on March 21, 2012.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel contends that the Respondent violated § 7116(a)(1) and (2) of the Statute by suspending Verna Bowden for engaging in protected activity when she left the meeting without permission. The General Counsel argues that Verna Bowden was acting within her official position as a Union steward when she left the meeting in protest over the change in duty assignments given to Title II claims representatives on February 8, 2012. According to the General Counsel, Bowden honestly and reasonably believed that the change in work assignments for the day required notification to and bargaining with Local 4056.

The General Counsel maintains that Bowden did not engage in any flagrant misconduct that would justify discipline. To demonstrate that Bowden did not engage in flagrant misconduct, the General Counsel argues that neither the Agency's mission nor operations were adversely affected by Bowden's behavior. At no time did Bowden use profanity or threaten to harm others. Additionally, the audience to Bowden's unpremeditated behavior was limited to two other employees and an operations officer. As additional evidence, General Counsel points to Bowden's statement during the meeting that she was going to contact the Union vice president to discuss the new assignments.

As a remedy, the General Counsel seeks an order directing the Respondent to expunge all references of Bowden's suspension from Bowden's personnel files. In addition to the order, the General Counsel seeks an award of backpay, with interest, for the two days Bowden was improperly suspended. General Counsel also requests a cease and desist order, to be accompanied by a signed notice from the Atlanta Regional Director of the Social Security Administration and asks that the notice be physically posted and sent electronically to all bargaining unit employees at the Respondent's Savannah, Georgia, field office.

Respondent

Respondent claims that Bowden violated agency rules when she left the meeting called by management before she was dismissed. Respondent alleges that Bowden's misconduct was not protected activity because she did not invoke a right under a collective

bargaining agreement during the meeting, thus demonstrating that her walking away before the conclusion of the meeting was not related to Union representation. Because it was unrelated to any protected activity, Bowden's conduct, which was disrespectful, was properly the subject of disciplinary action. Further, the Respondent contends that even if Bowden was acting as a Union official at the meeting, her conduct "exceeded the bounds of protected activity." Resp. Br. at 6.

The Respondent submits that assigning claim representatives the duty of posting earnings in its computer system did not required notice and bargaining. According to the Respondent, posting earnings was not a change in working conditions that required bargaining because claim representatives have always entered such data as part of their duties. Respondent asserts that Title II CRs are trained to enter earnings data and regularly input such data for their assigned files and that entering earnings data for Title XVI claim files is also part of the job when such duties are needed.

Respondent warns that finding a violation in this case will affect a manager's ability to instruct or direct employees. Respondent is concerned that employees would be able avoid work or ignore management instructions by claiming a protected right. Respondent also opposes the General Counsel's request that the area director sign any required posting. Respondent asserts that because the area director was not involved, he should not be required to sign a posting related thereto. Instead, Respondent submits that if a signed posting is ordered, the signatory should be the person that disciplined Bowden. Respondent also opposes an electronic posting to bargaining unit employees at the Savannah field office as non-traditional and unnecessary.

DISCUSSION

This case presents two questions: 1) whether posting earnings information changed the conditions of employment for claim representatives; and 2) whether Bowden engaged in protected activity as a union steward when she left the meeting without being excused after learning of the duties being assigned to Title II claim representatives on February 8, 2012.

An agency must notify the designated representative when a change in the conditions of employment is more than de minimis in nature. *See DHHS, Soc. Sec. Admin.*, 24 FLRA 403, 407-08 (1986) (establishing a de minimis standard when examining management's bargaining duties). In determining whether a change by management was de minimis, the Authority examines the facts and circumstances of the case with an emphasis on the "nature and extent of the effect or reasonably foreseeable effect of the change on conditions of employment of bargaining unit employees." *Id.* at 408. Both parties' interests are balanced and the number of employees involved is not controlling. *Id.*

If a change in work assignments is similar to an employee's job description, the Authority will find that the change is de minimis. *Id.* at 408 (noting that the agency did not have a duty to bargain over an employee's reassignment because it was substantially similar to her previous job, despite some changes in the duties and tasks).

In this case, I find that the General Counsel has failed to show by a preponderance of evidence that the Agency's decision to assign Title II CRs the duty of entering earnings information for Title XVI claim files for a single day was more than a de minimis change to their conditions of employment.

Data entry is a component of a claim representative's duties. Tr. 48, 86, 87. *See also* Jt. Ex. 10. As Phelps and Goodwin testified, claim representatives had previously been responsible for posting earnings information. Tr. 104, 128. It was only because of staffing considerations that this duty became the responsibility of service representatives for a period of time around 2009. Tr. 127, 148, 149. Further, claim representatives were always responsible for entering earnings information related to the Title II files assigned to them. Tr. 132. Although this was the first time the Title II claim representatives were assigned to enter earnings information related to Title XVI claim files, it was not unusual for claim representatives to have their scheduled appointments shutdown so they could catch up with other work backlogs. Tr. 150.

By making earnings posting the primary duty for most of the claim representatives for a single day, the Respondent was able to substantially reduce the earnings data entry backlog. Tr. 131. In addition to limiting this assigned duty to a single day, no claim representative experienced a demotion, pay deduction, or other change to their position as a result of that day's assignment and Title II claim representatives not familiar with the Title XVI system had a Title XVI claim representative they could use as a source to re-familiarize them with that system. Tr. 117, 119, 130. For the reasons stated above, I find that the posting of earnings information is part of every claim representative's duties and that assigning Title II claim representatives the duty of posting earnings for Title XVI claim files for a single day was a de minimis change. Thus, the duty assignment did not change bargaining unit employee's conditions of employment.

Bowden Was Engaged in Protected Activity and Did Not Exhibit Flagrant Misconduct

Union representatives are given substantial latitude with their behavior when dealing with management. *See Air Force Flight Test Ctr., Edwards AFB, Cal.*, 53 FLRA 1455, 1463 (1998) (finding that respondent had not exceeded the "broad scope of intemperate behavior that remains within the ambit of protected activity"). "[E]ven insubordinate behavior must be examined according to the broader 'flagrant misconduct' standard". *Id.* at 1464. Behavior which rises to the level of "flagrant misconduct" is not protected activity, even if done in the course of representing the union. *Id.* at 1455. Union behavior which does not meet the flagrant misconduct standard is protected.

In determining if behavior exhibited by an union official amounts to flagrant misconduct, the behavior is judged against four criteria: 1) the place and subject matter of the discussion; 2) whether the outburst was impulsive or designed; 3) whether the outburst was provoked by the employer's conduct; and 4) the nature of the intemperate language and conduct. *Dep't of the Air Force, Grissom AFB, Ind.*, 51 FLRA 7, 12 (1995) (*Grissom AFB*). "However, the foregoing factors need not be cited or applied in any particular way in determining whether an action constitutes flagrant misconduct." *Id.*

Unions and their representatives are expressly permitted to "use intemperate, abusive, or insulting language without fear of restraint or penalty if [they] believe[ ] such rhetoric to be an effective means to make a point." *Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974). Both actions and words are held to the same standard. *See Grissom AFB*, 51 FLRA at 11.

The Authority has previously examined the nature of a union representative leaving a meeting without being excused. In *Fed. Bureau of Prisons, Office of Internal Affairs, Wash., D.C.*, 53 FLRA 1500, 1516-20 (1998) (*BOP, OIA*), a union president left a mandatory counseling meeting without permission and was suspended by the agency after his actions were found disrespectful. Applying the flagrant misconduct standard from *Grissom*, the Authority determined that the union president had acted disrespectfully, but was engaged in protected activity at the time, so it was improper for the agency to suspended him. *Id.* at 1516.

In this case, Verna Bowden claims that she engaged in protected activity because she was acting as a union steward when she protested the change in work assignments for Title II claim representatives. Tr. 14. Given that service representatives had been assigned the duty of entering earnings data for a considerable period of time, I find that it was not unreasonable for Bowden to believe that management's decision to return those duties to claim representatives constituted a change in conditions of employment that required notice to the Union prior to implementation. The reasonability of Bowden's belief is further supported by management's characterization that Title II CRs would be given training prior to commencing the assignment and would be paired with a Title XVI representative for guidance and assistance in the performance of the duty. Tr. 89, 119. Furthermore, it is important to note that entering earnings information was not a duty assigned to Bowden. Rather, she was going to be assigned to the reception counter for the entire day to assist anyone who walked in for assistance. Thus, her protest over the planned assignment of work was on behalf of those in the bargaining unit assigned the earnings posting duties and was consistent with her position as a Union steward engaged in protected activity when the disrespectful behavior occurred.

Because Bowden was engaged in protected activity, her actions must be judged against the *Grissom* standards. As indicated by *BOP, OIA*, leaving a meeting without permission is not inherently flagrant misconduct. In Bowden's case, the meeting was limited to three employees. Tr. 29. Other than Rodriquez and Kelly, no other employee was present during the incident. *Id.* The subject matter of the meeting was the work assignments for that day. Tr. 92. As a Union steward, Bowden represented all bargaining unit employees, including those now being tasked with data entry or mentorship duties. Tr. 22, 23, 176-77. No prior warning had been given to the Union regarding this change of assignment for the day and obviously Bowden had not planned to leave the meeting without permission. Tr. 30, 31. Bowden left the meeting after being informed by Phelps what was going to be assigned that day and her doing so was spontaneous and done with the intent of informing superior Union officials about management's actions. Tr. 31, 119. Bowden did not use profane language, she did not physically threaten anyone, and she did not shout. Tr. 31. Rather, she went to her cubicle and contacted the Union vice president. Tr. 33, 52, 99. At no point were the work assignments impeded or impacted by Bowden's actions. Tr. 106. Furthermore, as

management intended, all but the three designated claim representatives entered earnings data for the entire workday. Tr. 106. Based on these factors, I find that Bowden was engaged in protected activity as a Union steward and while disrespectful, her protest against the assignment of work did not rise to the level of flagrant misconduct that merited disciplinary action. Thus, the Agency violated the Statute when it suspended Bowden for two days without pay for the behavior she exhibited in protesting the assignment of work made without giving the Union notice or an opportunity to bargain.

CONCLUSION

I find that the Respondent violated § 7116 (a)(1) and (2) of the Statute when it suspended Verna Bowden for two days without pay based on behavior exhibited while engaged in protected activity. Therefore, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations and § 7118 of the Federal Service Labor–Management Relations Statute (Statute), the Social Security Administration, Savannah, Georgia, shall:

1. Cease and desist from:

(a) Suspending or otherwise disciplining the duly designated representatives of the American Federation of Government Employees, AFL-CIO, Local 4056 (AFGE Local 4056), for engaging in protected representational activity.

(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 actions in order to effectuate the purposes and policies of the Statute:

(a) Expunge, to the extent permitted by law, from all formal and informal personnel files for Verna Bowden any references to the suspension issued on March 13, 2012, including all manager's notes, memory joggers, and/or other documentation related to the suspension.

(b) Make Verna Bowden whole for all pay and benefits lost as a result of the two day suspension, with interest, in accordance with the Back Pay Act, 5 U.S.C. § 5596(b)(1) and (2)(A).

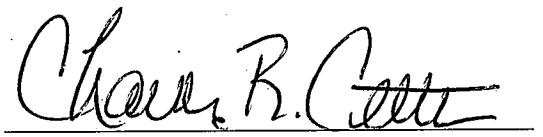
(c) Post at the Savannah Field Office where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the District Manager, Savannah Field Office, Social Security Administration, and shall be posted 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.

(d) Send, by electronic email, the Notice to all AFGE Local 4056 bargaining unit employees in the Respondent's Savannah Field Office. The Notice will be posted by email on the same day that the Notice is physically posted.

(e) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director of the Atlanta Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued Washington, D.C., July 23, 2014



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 Social Security Administration, Savannah, Georgia, 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 suspend or otherwise discipline bargaining unit employees, including stewards of the American Federation of Government Employees, AFL-CIO, Local 4056, for exercising their rights protected by the Statute.

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

WE WILL rescind the March 13, 2012, Decision to Suspend issued to Verna Bowden and expunge all references thereto from our records.

WE WILL make whole Verna Bowden for the unjustified personnel action taken against her in response to her exercising the right to represent bargaining unit employees.

_____
(Agency/Respondent)

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 its provisions, they may communicate directly with the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: 404-331-5300.