

OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF COMMERCE, NATIONAL OCEANIC AND ATMOSPHERIC
ADMINISTRATION, NATIONAL OCEAN SERVICE, COAST AND GEODETIC SURVEY,
RIVERDALE, MARYLAND
Respondent

and

Case No. WA-CA-30566

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2640, AFL-CIO
Charging Party

Francis C. Silva Counsel For the Respondent
Stephen G. De Nigris Counsel For the General Counsel
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), during the period March 12, 1993 to May 19, 1993 by refusing to process six grievances filed under the parties' negotiated grievance procedure.

Respondent's answer admitted the commission of an unfair labor practice as alleged in the complaint, but averred that the complaint is moot because Respondent reinstated the negotiated grievance procedure on December 22, 1993 and is now willing to process the grievances upon request.

On December 27, 1993 Respondent moved to dismiss. The General Counsel opposed the motion and also moved for summary judgment. The Regional Director transferred the motion to the Chief Administrative Law Judge pursuant to section 2423.22(b) (1) of the Regulations. The Chief Administrative Law Judge gave the parties until January 4, 1994 to file any further pleadings. Both parties responded to the other's motion, and the pleadings were assigned to the undersigned for disposition pursuant to section 2423.19(k) and section 2423.22(b)(3) of the Regulations.

Respondent's motion to dismiss and reply to the General Counsel's motion, together with the supporting exhibits, will be treated as a cross-motion for summary judgment. Considering all the pleadings and exhibits, it appears that there are no genuine issues of material fact and that the General Counsel is entitled to summary judgment as a matter of law. Accordingly, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees, Local 2640, AFL - CIO (AFGE or Union) is a labor organization under 5 U.S.C. [°] 7103(a)(4).

The Department of Commerce is an agency under 5 U.S.C. § 7103(a)(3). The National Oceanic and Atmospheric Administration (NOAA) is a primary national subdivision under 5 C.F.R. § 2421.5, and the National Ocean Service (NOS) is an activity under 5 C.F.R. § 2421.4. The Coast and Geodetic Survey (CGS) is a line office of NOS.

The original charge was filed by the Union with the Washington Regional Director on April 21, 1993. The first amended charge was filed by the Union with the Washington Regional Director on June 11, 1993. A copy of the charge and first amended charge was served on the Respondent.

During the period covered by the complaint, these persons occupied the position opposite their names:

Kenneth H. Moyer - Chief, Distribution Branch, CGS, NOS, NOAA

Doris M. Gordon - Chief, Accounting and Order Processing Unit, CGS, NOS, NOAA

Carol W. Beaver - Chief, Aeronautical Charting Division, CGS, NOS, NOAA

Elaine S. Downs - Chief, Customer Service and Program Support Section, CGS, NOS, NOAA

During the time period covered by this complaint, Carol Beaver was a supervisor or management official under 5 U.S.C. §§ 7103(a)(10) and (11) and was acting on behalf of Respondent. Kenneth Moyer, Doris Gordon, and Elaine Downs were supervisors under 5 U.S.C. § 7103(a)(10) and were acting on behalf of Respondent.

The Union is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining.

On September 5, 1977 a collective bargaining agreement was signed by representatives of the Respondent and the Union. The chief representative signing for Respondent was the Director, National Ocean Survey, which organization is now known as the National Ocean Service.

In July 1987 the Chief, Aeronautical Charting Division, NOS, advised the Union, among other things, that Respondent wished to renegotiate a new agreement, that the agreement signed September 5, 1977 "is now terminated", and that management would "continue to honor its obligations under the Statute relative to conditions of employment with the bargaining unit."

On March 12 and March 15, 1993, respectively, Union Vice - President Brian Anthony - Jung filed grievances under the parties' negotiated grievance procedure.

On April 1, 1993, Respondent, by Moyer, refused to process the grievances under the parties' negotiated grievance procedure alleging that, "[B]ecause Local 2640 ... does not have a current agreement in place, I am considering your grievance under the informal stage in accordance with DAO 202-771, Employee Grievances dated March 18, 1986."

On March 31, 1993, Anthony - Jung advanced the grievances of March 12 and March 15, 1993, to Step 2 of the parties' negotiated procedure.

To date, Respondent has not responded to the March 12 and March 15, 1993 grievances at Step 2.

On April 6, 1993, Union Vice President Anthony - Jung filed a grievance under the parties' negotiated grievance procedure on behalf of bargaining unit employee Robert Brown.

On May 12, 1993, Respondent, by Downs, refused to process the grievance under the parties' negotiated grievance procedure and wrote: "[B]ecause Local 2640 ... does not have a current agreement in place, I am considering your grievance under the informal stage in accordance with DAO 202-771, Employee Grievances dated March 18, 1986."

On April 19, 1993, Union Vice President Anthony - Jung filed a grievance under the parties' negotiated agreement.

On May 7, 1993, Respondent, by Beaver, refused to process the grievance pursuant to the parties' negotiated grievance procedure and wrote: "[B]ecause Local 2640 ... does not have a current agreement in place, I am considering your grievance under the informal stage in accordance with DAO 202-771, Employee Grievances dated March 18, 1986."

On April 19, 1993, Union Vice President Anthony - Jung filed another grievance under the parties' negotiated agreement.

On May 5, 1993, Respondent, by Gordon, refused to process the grievance under the parties' negotiated grievance procedure and wrote: "[B]ecause Local 2640 ... does not have a current agreement in place, I am considering your grievance under the informal stage in accordance with DAO 202-771, Employee Grievances dated March 18, 1986."

On May 13, 1993, Union Vice President Anthony - Jung filed a grievance under the parties' negotiated grievance procedure.

On May 19, 1993, Respondent, by Gordon, refused to process the grievance and wrote: "[B]ecause AFGE, Local 2640 does not have a current Agreement in place, I am addressing your grievance under the informal procedure in accordance with DAO 202-771, Employee Grievances."

On July 26, 1993, Respondent, by Carol W. Beaver, Chief, Aeronautical Charting Division, CGS, signed a proposed settlement agreement drafted by Counsel for the General Counsel, FLRA. Under the proposed agreement, Respondent agreed to reinstate the negotiated grievance procedure, process the above grievances upon request in a manner set forth in the agreement, and post a notice.

Since July 26, 1993, neither the Union nor the Regional Director of the Washington Regional Office, FLRA have signed or approved the proposed informal settlement agreement. Respondent was advised that, in view of other unfair labor practice charges pending against Respondent, the Regional Director would not approve an informal settlement involving just one case. Respondent took the position that other unadjudicated and disputed unfair labor practice charges should have no bearing on, or relevance to, settling this particular unfair labor practice charge.

The Regional Director issued the instant unfair labor practice complaint on November 30, 1993. By memorandum dated December 22, 1993, Respondent, by Division Director Beaver, CGS, advised the Union that it was honoring the negotiated grievance procedure effective that date, the procedure followed would be the one described in an addendum to the proposed settlement agreement, and Respondent would process the above grievances through this procedure if the Local so requested within 10 days of the memorandum.

Discussion and Conclusions

The parties agree that there is no material issue of fact in dispute and that summary judgment is appropriate. Moreover, Respondent admits, and I find, that it committed an unfair labor practice in violation of section

7116(a)(1) and (5) of the Statute by refusing to process the six grievances under the negotiated grievance procedure.

The only issue that remains is what remedy is appropriate. The General Counsel seeks a cease and desist order and a remedial notice to employees to be signed by the Secretary of Commerce. Respondent contends that the complaint is moot; that, in the alternative, the informal settlement agreement signed by the Respondent should be adopted; a cease and desist order is not necessary; and the Secretary of Commerce is not the appropriate official to sign a posting as the unfair labor practice occurred at the Division level, CGS, NOS. Respondent points out that there was no Department-level involvement in the unfair labor practice.

Respondent's reinstatement of the negotiated grievance procedure on December 22, 1993 and its willingness to process the grievances on request did not render the case moot. Respondent's refusal to process the grievances under the negotiated grievance procedure some six to ten months earlier constituted a violation of the Statute and that violation requires a remedy. However, Respondent's subsequent remedial action is a factor to be considered in fashioning the appropriate remedy. Cf. Department of the Treasury, Internal Revenue Service, Washington, D.C., 43 FLRA 1378, 1388-89 (1992).

It is within the discretion of the Regional Director to approve or not approve an informal settlement agreement offered by the Respondent. 5 C.F.R. § 2423.11(b)(2). Accordingly, an Administrative Law Judge is without authority to direct that a Regional Director approve an informal settlement agreement drafted by Counsel for the General Counsel and signed by the Respondent. See 5 C.F.R. § 2423.19. Thus, the Regional Director was well within his authority and discretion to withhold his approval of the informal settlement agreement and proceed to have the matter litigated in accordance with the Statute and regulations.

The Regional Director having done so, and the General Counsel having established a violation of the Statute, the power to require a remedy which will be "appropriate to carry out the policies of [the Statute]" now vests in the Authority. 5 U.S.C. § 7105(g), 7118(a)(7); 5 C.F.R. §§ 2423.26(a), 2423.29(b).

I agree with Counsel for the General Counsel that a cease and desist order is appropriate in this case to vindicate AFGE's rights under the Statute and prevent similar illegal conduct in the future. I also agree that a posting is appropriate. With respect to who should be required to sign the notice, the Authority "has long held that the remedial purposes of a notice are best served by requiring the head of the activity responsible for the violation to sign the notice." Department of Health and Human Services, Regional Personnel Office, Seattle, Washington, 48 FLRA 410, 411 (1993). In this case, agents in Respondent's Aeronautical Charting Division, CGS, were responsible for the violations, including the Chief of that Division. Accordingly, the purposes of the Statute would best be served by requiring the head of the activity, the NOAA Assistant Administrator for the National Ocean Service, to sign the remedial notice. U.S. Department of Veterans Affairs, Washington, D.C., 48 FLRA 991, 992 (1993).

Based on the foregoing 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 U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Riverdale, Maryland shall:

1. Cease and desist from:

(a) Failing and refusing to process grievances filed under the grievance procedure negotiated with the American Federation of Government Employees, Local 2640, AFL - CIO, the exclusive representative of a unit of its employees.

(b) Failing and refusing to respond to grievances in a timely fashion which have been initiated under the negotiated grievance procedure.

(c) 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) Upon request, process those grievances filed by Brian Anthony - Jung on March 12, March 15, April 6, April 19, and May 13, 1993 under the negotiated grievance procedure.

(b) Upon request, respond to the grievances filed by Brian Anthony - Jung on March 12 and March 15, 1993, currently at Step 2 of the negotiated grievance procedure.

(c) Post at its facilities where bargaining unit employees represented by AFGE, Local 2650 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 NOAA Assistant Administrator for the National Ocean Service 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 Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, in writing, within 30 days from the date of this order, as to what steps have been taken to comply herewith.

3. Respondent's Motion to Dismiss or Cross - Motion for Summary Judgment is denied.

Issued, Washington, DC, February 18, 1994

GARVIN LEE OLIVER Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT refuse to process grievances filed under the grievance procedure negotiated with the

American Federation of Government Employees, Local 2640, AFL - CIO, the exclusive representative of a unit of our employees.

WE WILL NOT fail to respond to grievances in a timely fashion which have been initiated under the negotiated grievance procedure.

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, process those grievances filed by Brian Anthony - Jung on March 12, March 15, April 6, April 19 and May 13, 1993 under the negotiated grievance procedure.

WE WILL, upon request, respond to the grievances filed by Brian Anthony - Jung on March 12 and March 15, 1993, currently at Step 2 of the negotiated grievance procedure.

_____ (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 of the Federal Labor Relations Authority, Washington Region, 1255 22nd Street, NW, 4th Floor, Washington, DC 20037-1206, and whose telephone number is: (202) 653-8500.