FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF THE ARMY

90TH REGIONAL SUPPORT COMMAND

LITTLE ROCK, ARKANSAS

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 1017

Charging Party

Case Nos. DA-CA-80370

DA-CA-80824

Timothy D. Johnson Counsel for the Respondent
Cudge Hiatt Representative of the Charging Party
Charles M. de Chateauvieux Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The consolidated unfair labor practice complaint alleges that Respondent violated section 7116(a)(1), (5) and (8) of the of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1), (5) and (8), by failing to provide the Charging Party (AFGE/Union) information it requested for representational purposes. The complaint also alleges that the Respondent violated section 7116(a)(1) and (2) of the Statute by discriminating against Thomas Chapman, a bargaining unit employee, by failing to promote Chapman to a WG-10 inspector position because he engaged in activities protected by the Statute.

Respondent's answers admitted the jurisdictional allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute.

For the reasons explained below, I conclude that the Respondent violated the Statute by failing to furnish the requested information in a timely manner. However, Respondent did not violate the Statute by discriminating against Mr. Chapman in the selection of the WG-10 inspector position.

A hearing was held on May 6, 1999, in Alexandria, Louisiana. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and the General Counsel filed timely, helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Respondent and the Charging Party

The Respondent, is an agency under section 7103(a)(3) of the Statute. The Union is a labor organization under section 7103(a)(4) of the Statute and the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent. The Union was certified as the exclusive representative in July 1997, replacing the National Federation of Federal Employees (NFFE), Local 386 as the result of an election. The Respondent and the Union verbally agreed at about that time that the provisions of the Respondent - NFFE negotiated agreement as well as past practices would remain in effect until a new agreement is reached. This was confirmed in writing on December 20, 1997.

The Alleged Discrimination in Case No. DA-CA-80370

In July 1997, Thomas Chapman, a heavy mobile equipment repairman, WG-8, was serving as the shop steward for the NFFE bargaining unit and continued in that capacity for the AFGE. On July 9, 1997, Chapman filed a safety violation report against his then current supervisor.

In September 1997, Mr. Chapman applied for a repair inspector WG-10 position, but was not selected. Another position became available in October 1997, and as a result of an inquiry by the Union, Mr. Chapman and others who had been referred for the first position were added to the selection register for the second position.

In early November 1997, Chapman was the Union representative for two grievances filed by Union president Cudge Hiatt and, on November 20, 1997, Chapman filed a grievance against Daniel Simmons, his immediate supervisor and the selecting official for the WG-10 inspector position. The grievance concerned an outstanding personal debt Simmons allegedly owed Chapman for the purchase of a lawn mower in August 1996. Simmons understood the debt was to be paid by giving Chapman some Freon, and Chapman acknowledged that Freon was originally to be part of the payment. In the grievance Chapman requested to be paid a balance of $130.00 and also claimed that this debt had compromised Simmons' ability to fairly rate him

on a June 1997 performance evaluation with which he was dissatisfied.

After the grievance was filed, Chapman and Simmons discussed the grievance and Simmon's expressed concern that it could hurt his chances of a promotion. Chapman wrote a memorandum dated January 8, 1998, stating that he did not want the grievance to have any effect on Simmons' career, but wanted a response regarding the matter and would "ask for a relief in any ULP's resulting from this situation. . . ."

Shortly thereafter, Simmons' supervisors instructed Simmons to pay Chapman the outstanding money owed for the lawn mower, and Simmons' immediate supervisor, Robert Arnold, counseled Simmons regarding having outside monetary dealings with his subordinate employees. Simmons paid Chapman the following day.

On January 9, 1998, the Respondent denied Chapman's grievance, noting that Simmons had subsequently acknowledged and paid the debt and that any alleged improper performance rating should be timely addressed in the resolution process for contested performance evaluations.

On January 13, 1998, the Union proposed a settlement agreement regarding the issues remaining in the grievance. The Union asked that no form of reprisal be taken against Chapman because of his filing the grievance against Simmons, such as by lowering his performance appraisals, denying him promotions, or giving him "more than his share of duty assignments which are considered negative by the grievant and his peers."

Respondent refused to enter into the settlement agreement. Respondent stated that Chapman could address any perceived disparate treatment or reprisal through existing laws and regulations and it would not "relinquish management's right to assign duties to any employee . . . by allowing an undisclosed committee to determine what duties are or are not allowable."

On February 6, 1998, Simmons selected Ronald Prince from the register for the WG-10 position instead of choosing Chapman or selecting from six other individuals on the list.

Simmons had rated both Chapman and Prince on their knowledge, skills, and abilities in their merit promotion applications. Both were given the highest rating of "highly acceptable" based on their job performance. Simmons had supervised Chapman as a WG-8 for three years and Prince as a WG-8 for 13 months.

The applications of Chapman and Prince reflect their previous experience. Both were called upon by Simmons to fill in occasionally as inspectors when WG-10 inspectors were not available. Prince had also performed the same or similar work required for a WG-10 when he had worked for six years, 1986 to 1993, as a WL-10 performing initial and final inspections for 11 mechanics. Prince had about 30 years of experience on miliary equipment while Chapman had 14 years. Prince stated on his application that he had used reference materials for 20 years while Chapman stated that he had used reference materials for three years as a WG-08 and for 14 years in the Army reserve.

According to the testimony of two coworkers of Chapman, Daniel Shuler and Dannie Zimmerman, and statements made by the shop foreman, Norman Anika, Chapman is a more knowledgeable mechanic than

Prince and is considered the "guy to go to" in the shop for technical guidance and advice.

Shuler also expressed the opinion that "if you was in the union and you associate with certain people in the shop . . . that it might be bad for you." Union president Hiatt testified that although he was on the selection list and had received information that Simmon's "had feelings against me as a Union representative," he did not pursue a discrimination complaint because he did not consider himself best qualified.

Daniel Simmons testified that he selected Prince because he felt Prince was the best qualified. Simmons stated he considered the applications, work habits, ability to inspect, and "real big" was experience, time in the system. He found Prince to be very knowledgeable, that he had done a good job inspecting for him when he was short of inspectors, and Prince's previous experience of six years as a WL-10 working with a lot of equipment demonstrated that he could perform the duties.

Simmons claimed that Chapman was a good mechanic and could do the job, but he would have selected Jesse Buck instead of Chapman if Prince had not been available because Buck had more experience than Chapman. Simmons stated that among equal mechanics, he would go with the one with the most experience.

Simmons claimed that he did not consider Chapman's grievance regarding the debt in the selection process as the debt had been paid, and he and his supervisors considered it a closed issue.

At the time Simmons made the selection of Prince for the inspector position, Simmons was in the same reserve unit as Prince and was subordinate to Prince in rank. Simmons was an E-6 and Prince was an E-7. However, a captain was in charge and there is no evidence that Prince and Simmons were in a supervisor - employee relationship. Since then Simmons has been promoted to E-7 and is not in the same chain of command as Prince.

Alleged Refusal to Furnish Information in Case No. DA-CA-80824

On March 4, 1998, the Union submitted to Respondent through, Sally Dana, Fort McCoy Civilian Personnel Office in Wisconsin, an information request. As pertinent here, the Union asked for: copies of all daily man-hour accounting work sheets for Thomas Chapman and Ronald Prince for the time period September 30, 1996 - February 13, 1998; all Equipment Inspection and Maintenance Work Sheets (Form 2404s) with local time accounting slips for each job order to include 01 and 06 time for the time period September 30, 1996 - February 13, 1998, for Thomas Chapman and Ronald Prince; and any and all training certificates for any and all schools attended by Thomas Chapman and Ronald Prince for the time period September 30, 1996 - February 13, 1998.

The Union explained that it needed the information to determine if the agency imposed disparate treatment, discrimination and pre-selection regarding the WG-10 inspector position; if work was fraudulently signed off as being performed; and if favoritism was taking place with regards to preferential job assignments, details, and training.

Shortly thereafter, Respondent offered to provide the Union the Form 2404s, access to a copy machine and supplies, and official time in order for the Union to make copies of the material. The Union insisted that Respondent make and furnish the copies as it had found that making its own copies was unsatisfactory in connection with an earlier information request in 1997.

The Union filed the unfair labor practice charge regarding the failure to furnish information on July 31, 1998. The information request remained outstanding through January 1999 despite several conversations between management and Union officials over who should make the copies.

On February 9, 1999, Respondent and the Union entered into a memorandum of agreement in which the Respondent agreed to furnish all of the outstanding data in its entirety to the Union within fifteen days. In early March 1999, Respondent provided the Union with what it claimed was all the information that was still in existence. The information provided included some but not all of the information that the Union had requested. The Form 2404s had been replaced by a computerized system during at least part of the period covered by the request.

In response to the requests for training certificates, Respondent provided in March 1999 some training certificates of Mr. Prince which he had evidently attached to his WG-10 application. Despite a seemingly contrary provision in the collective bargaining agreement, Respondent does not normally maintain training certificates in the regular course of business and is not required by OPM to do so. Thus, no other training certificates were available.

On March 10, 1999, the Union found a box under a copying machine which contained some of the requested and missing 2404's. The box may have been placed there in connection with a previous Union request for much of the same or similar material. After reviewing the contents of the box, the Respondent gave the box to the Union.

The Union, based on the contents of the box, prepared and provided Respondent a list describing documents which it had requested and considered still missing. Respondent again asserted that such documents no longer existed. However, the Union received information that the missing documents were maintained in a vault in the ECS arms room and the Union was subsequently provided by an office clerk one of the missing 2404's. The Union advised Scott Sanders, Respondent's administrative officer, of this possible location of the missing documents, but had received no official response prior to the hearing. Mr. Simmons contended that the administrative technician had already gone through the material in the vault to provide the information that had been made available to the Union in early March 1999.

Discussion and Conclusions of Law

A. *The Information Request*

Section 7114(b)(4) of the Statute provides that the duty to bargain in good faith includes, among other things, the obligation --

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data --

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining . . . .

Section 7116(a)(1), (5) and (8) of the Statute provides:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency --

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

* * * *

(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

* * * *

(8) to otherwise fail or refuse to comply with any provision of this chapter.

* * * *

The General Counsel contends that the Respondent's refusal to provide the requested information was inconsistent with its obligations under Section 7114(b)(4) of the Statute and therefore violated Section 7116(a)(1), (5) and (8) of the Statute.

The Respondent does not dispute the fact that the Union established a particularized need for the information as required by *Internal Revenue Service, Washington, D.C. and Internal Revenue Service, Kansas*

City Service Center, Kansas City, Missouri, 50 FLRA 661 (1995)(*IRS*), thus demonstrating that the information is necessary. The record also establishes that this requirement and the other statutory requirements for disclosure of the information have been met.

The Respondent claims that there was never a refusal to furnish the available information to the Union; that it initially offered to provide the Union with official time and access to a copy machine and materials so that the Union could make the copies, and it later copied and supplied the available information to the Union. The record reflects that of the three categories of information requested in March 1998, the daily man-hour accounting work sheets, Form 2404s, and training certificates for Thomas Chapman and Ronald Prince, the available training certificates were not supplied until March 1999, some twelve months later. Respondent did not begin to furnish the other items until January 1999, some ten months later.

The obligation to furnish information in a timely manner attaches at the time of the request not the filing of an unfair labor practice charge. *U.S. Department of Justice, Office of Justice Programs*, 45 FLRA 1022 (1992)(Justice). Respondent failed to furnish the information in a timely manner, and the failure to supply information in response to a union's request for information in a timely manner violates section 7116(a)(1), (5) and (8) of the Statute. *U.S. Department of the Treasury, U.S. Customs Service, Southwest Region, Houston, Texas*, 43 FLRA 1362 (1992); *Justice*, 45 FLRA at 1026-27.

Giving the Union an opportunity to review and make copies of part of the requested information, the Form 2404s, did not satisfy the obligation to timely furnish the rest of the requested information. *Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas*, 43 FLRA 697, 708 (1991) *rev'd and enforcement denied on other grounds sub nom. DOJ, INS, USBP, El Paso, TX,* 991 F.2d 285 (5th Cir. 1993). Inasmuch as Respondent did eventually copy the information for the Union, it is unnecessary to decide whether its initial offer to have the Union copy a portion of the requested information, the Form 2404s, on official time would have satisfied its statutory obligations.(1)

With regard to the Respondent's position that additional information beyond that furnished in January and March 1999 does not exist, the Union has received information that additional form 2404s are located in the vault of the arms room and it has been provided one of the missing forms it was requesting from that source. The Respondent has not officially responded to this information other than to assert that this location was previously searched for the information it provided the Union in March 1999.

In *Department of Health and Human Services, Social Security Administration*, 36 FLRA 943, 950 (1990), the Authority defined what is meant by the phrase "reasonably available" in section 7114(b)(4) of the Statute. It found that "available" referred to information which is accessible or obtainable, while "reasonable" referred to means that are not extreme or excessive. It appears that information in the vault of the arms room is accessible or obtainable and the Respondent has not shown that a further search for the requested information in this location would require extreme or excessive means. Therefore, it will be recommended that the Respondent conduct a further search and furnish any additional portions of the requested information which may be located.

B. *The Alleged Discrimination*

Section 7116(a)(1) of the Statute provides that it shall be an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of any right provided by the Statute. Consistent with the findings and purpose of Congress as set forth in section 7101, section 7102 of the Statute sets forth certain employee rights including the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal and that each employee shall be protected in the exercise of such right. Such right includes the right to act for a labor organization in the capacity of a representative. Section 7116(a)(2) of the Statute provides that it shall be an unfair labor practice for an agency to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

C. *The Authority's Analytical Framework*

Under the Authority's analytical framework for resolving complaints of alleged discrimination under section 7116(a)(2) of the Statute, the General Counsel has, at all times, the overall burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. As a threshold matter, the General Counsel must offer sufficient evidence on these two elements to withstand a motion to dismiss. However, satisfying this threshold burden also establishes a violation of the Statute only if the respondent offers no evidence that it took the disputed action for legitimate reasons. Where the respondent offers evidence that it took the disputed action for legitimate reasons, it has the burden to establish, by a preponderance of the evidence, as an affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. *United States Air Force Academy, Colorado Springs, Colorado*, 52 FLRA 874, 878-89 (1997); *Federal Emergency Management Agency*, 52 FLRA 486, 490 n.2 (1996); *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*).

D. *Protected Activity - Motivation*

The Respondent contends that Chapman's grievance was not protected activity. Respondent claims that Chapman was not a Union representative and his grievance was not valid as there was no contract in force on November 20, 1997, under which a grievance could have been filed. The Respondent also asserts that the grievance would have been excluded from the contract anyway as he skipped the first step and it related to a personal debt.

The record indicates that Chapman was a Union representative during the pertinent period, that there was a grievance procedure, and there is no indication in the record that his grievance was ever considered by the Respondent to be invalid in any respect insofar as its processing was concerned.

The record reflects that there was an oral agreement that the provisions of the Respondent - NFFE, Local 386 agreement would remain in effect until a new agreement was reached. It is also well settled that,

following the expiration of an agreement and the election of a new collective bargaining representative, mandatory subjects of bargaining, such as a grievance procedure, continue by operation of law, to the maximum extent possible, following the expiration an agreement, in the absence of either an express agreement to the contrary or the modifications of those conditions of employment in a manner consistent with the Statute. Permissive subjects of bargaining, such as the designation of union representatives, do not survive where one party exercises its right to terminate the designation. *See Federal Aviation Administration, Northwest Mountain Region, Seattle, Washington and Federal Aviation Administration, Washington, D.C.*, 14 FLRA 644 (1984); *Department of Transportation, Federal Aviation Administration, San Diego, California*, 15 FLRA 407 (1984). Accordingly, the grievance procedures and the designation of union representatives continued in full force and effect at all times relevant herein by operation of law, because the parties did not expressly provide to the contrary.

The filing of a grievance by Chapman was clearly protected activity regardless of the merits of the grievance. 5 U.S.C. § 7121; *Headquarters Forces Command, Fort McPherson, Georgia*, 53 FLRA 1715 (1998). The grievance clearly related to the employment of the employee as it involved the supervisor's alleged inability to rate the employee fairly because of the conflict of interest allegedly caused by the personal debt owed to the employee by the supervisor. *See U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas*, 51 FLRA 1339, 1344 (1996)("Grievance" to be interpreted in light of its broad definition under section 7103(a)(9) of the Statute.) Therefore, the General Counsel satisfied the threshold burden by showing that Chapman was engaged in protected activity as a Union steward during the pertinent period and filed grievances. Specifically, on November 20, 1997, Chapman filed a grievance against Simmons, his supervisor and the selecting official for the WG-10 inspector position. It is undisputed that Respondent through Simmons and his supervisors were aware of Chapman's protected activity.

The General Counsel also satisfied the threshold burden of showing that consideration of such activity was a motivating factor in the selection process. This was shown by: (1) the closeness in time between the protected activity and management's selection decision, which may support an inference of illegal anti-union motivation, although it is not conclusive proof of a violation, *General Services Administration, Region IX, San Francisco, California*, 40 FLRA 973, 982 (1991); (2) the fact that Simmons expressed concern that the grievance could affect his own promotional opportunities; and (3) some suggestion, although vague, of union animus in the workplace.

E. *Affirmative Defense Established*

Although the General Counsel satisfied the threshold burden, the Respondent established an affirmative defense for its actions. The Respondent established, through the testimony of Simmons, whom I credit, that it had a legitimate, nondiscriminatory justification for its action in selecting Prince and that it would have taken the action even in the absence of the protected activity. Even though Prince did not have as much experience with the Respondent as Chapman and Chapman is regarded as a superior mechanic, Prince had much more over-all experience than Chapman and previously performed the same or similar inspection work for six years, experience which Chapman did not have. The General Counsel argues, but did not establish, that this reason was a pretext for Respondent's not selecting Chapman. There is no evidence that the Respondent improperly used its judgment regarding what aspects of the job and the applicants' backgrounds were most important in distinguishing among the applicants.

I conclude that a preponderance of the evidence does not establish that the Respondent violated section 7116(a)(1) and (2) by failing to promote Chapman to the WG-10 inspector position.

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

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the Department of the Army, 90th Regional Support Command, Little Rock, Arkansas, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, Local 1017, information in a timely manner, as required by law, including the information in its March 4, 1998, information request, as amended.

(b) Otherwise failing and refusing to furnish the American Federation of Government Employees, Local 1017, the exclusive representative of certain of its employees, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

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

(a) Conduct a further search and furnish the American Federation of Government Employees, Local 1017, any outstanding information requested in its March 4, 1998, information request, as amended.

(b) Post at its facilities where bargaining unit employees 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 Commanding Officer, 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, Dallas 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 herewith.

3. The Complaint in Case No. DA-CA-80370 is dismissed.

Issued, Washington, DC, July 9, 1999.

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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 the Army, 90th Regional Support Command, Little Rock, Arkansas, has 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 and refuse to furnish the American Federation of Government Employees, Local 1017, information in a timely manner as required by law, including the information in its March 4, 1998, information request, as amended.

WE WILL NOT otherwise fail and refuse to furnish the American Federation of Government Employees, Local 1017, the exclusive representative of certain of our employees, upon request, data which is normally

maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

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 conduct a further search and furnish the American Federation of Government Employees, Local 1017, any outstanding information requested in its March 4, 1998, information request, as amended.

_____

(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, Dallas, TX 75202, and whose telephone number is: (214) 767-4996.

1. The Authority held in *Veterans Administration Regional Office, Denver, Colorado*, 10 FLRA 453 (1982) that the requirement under section 7114(b)(4)(B) that an agency "furnish" information means to "give" a single copy of the data without charge. However, the Authority also noted recently in *IRS*, 50 FLRA at 671, that it expected the parties to consider "alternative forms or means of disclosure that may satisfy both a union's information needs and an agency's interests in information."