

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

.....
NATIONAL LABOR RELATIONS .
BOARD .
Respondent .
and . Case No. 2-CA-50471
NATIONAL LABOR RELATIONS .
BOARD UNION, LOCAL 6 .
Charging Party .
.....

Raymond M. Forster, Esq.
For the Respondent

Edgar Allan Jones, III, Esq.
For the General Counsel

Joseph V. Kaplan, Esq.
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on December 23, 1985 by the Regional Director of the Federal Labor Relations Authority, Region II, a hearing was held before the undersigned on November 9, 1988 at Pittsburgh, Pennsylvania.

This case arose under the Federal Service Labor-Management Relations Statute (herein called the Statute). It is based on a first amended charge filed on October 9, 1985 by the National Labor Relations Board Union, Local 6 (herein called the Union) against the National Labor Relations Board (herein called the Respondent).

The Complaint alleged, in substance, that on or about March 15, 1985 the Union requested Respondent to provide certain information, including a copy of the recommendation of Respondent's Pittsburgh Regional Director, concerning an employee's request for part-time employment so that the Union could adequately represent the employee in the Pittsburgh Regional Office in connection with a grievance. Further, that on or about August 8, 1985 and thereafter Respondent failed and refused to provide such requested information as required by section 7114(b)(4) of the Statute - all in violation of 7116(a)(1), (5) and (8) of the Statute.

Respondent's Answer, dated January 14, 1986, admitted the request for the aforesaid information and its refusal to furnish same. It denied that the data fell within the framework and provisions of section 7114(b)(4) of the Statute or that the refusal to provide the data was violative of section 7116(a)(1), (5) and (8).

On February 12, 1986 all of the parties herein executed a "Stipulation of Facts" which would constitute, along with the exhibits therein, the stipulated record. An Order Transferring Case To The Federal Labor Relations Authority was issued by the Regional Director, Region II, on February 13, 1986 pursuant to section 2429.1 of the Authority's Rules and Regulations since there were no material issues of fact for resolution.

Thereafter, on March 10, 1987, the Authority issued its decision in 26 FLRA 108 based on the stipulated record. It held that the information requested^{1/} would improperly interject the Union and give it access to management's internal decision-making process involving decisions under section 7106 of the Statute. The Authority declared that the decision to deny a scheduled work change was included within management's right to assign work under section 7106(a)(2)(B) of the Statute; that the Regional Director's recommendation, as part of the memorandum sought by the Union, was part of management's deliberative process. Thus, disclosure of the

^{1/} In respect to the data sought by the Union, the Respondent had furnished workload data which had been requested. It refused to provide a copy of a memorandum written by the Pittsburgh Regional Director to the Associate General Counsel and the Assistant General Counsel of Respondent wherein the Regional Director made a recommendation concerning an employee's request for part-time work.

details of the recommendation was held to be "prohibited by law" under section 7114(b)(4), and the Authority concluded Respondent did not fail to comply therewith nor violate section 7116(a)(1), (5) and (8) of the Statute.

In NLRB Union, Local 6 v. FLRA, 842 F.2d 483 (D.C. Cir. 1988), the Second Circuit vacated the Authority's decision and remanded the case to it. The Court concluded that section 7106 of the Statute does not prohibit the disclosure of anything. It merely reserves to management the authority to act in certain areas. It held that the disclosure of the data is not prohibited by law. The Court stated that the documents may not be disclosable under 7114(b)(4)(B) or (C), but the Authority did not base its decision thereon. Thus the case was remanded for the Authority to reconsider its decision.

In accordance with the remand the Authority reconsidered the case to determine whether the memorandum sought by the Union herein is "necessary" within the meaning of 7114(b)(4)(B) and/or constitutes "guidance, advice, counsel, or training . . . relating to collective bargaining" under 7114(b)(4)(C). It concluded that the stipulated record did not provide sufficient facts to rule on those issues. Such facts based on testimony as well as an examination in camera by the Administrative Law Judge, if necessary, would be appropriate. The case was remanded to the Regional Director for further proceeding in the Authority's Decision issued on June 6, 1988.

At the request of the General Counsel a subpoena duces tecum was issued on July 25, 1988 for the production of the memorandum which is at issue in this case. On September 30, 1988 Respondent filed a Motion To Quash the Subpoena Duces Tecum or in the Alternative for Protective Order. Under date of October 20, 1988 the motion was referred to the Chief Administrative Law Judge.

At the hearing the undersigned concluded that the memorandum in question should be produced for use at the hearing, and that a protective order would issue that it not be disclosed to the Union. Accordingly, I denied Respondent's Motion to Quash the Subpoena, in accordance with section 2429.7 of the Rules and Regulations, and directed Respondent to produce it for the limited purpose of its use at the hearing. Although Respondent refused to do so, it did furnish it to the undersigned for an in camera

inspection.^{2/} General Counsel indicated it would not seek enforcement of the subpoena.

All parties at the hearing were afforded full opportunity to be heard, to adduce evidence and to examine and cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact^{3/}

1. At all times material herein the National Labor Relations Board Union has been, and is now, the exclusive representative of a consolidated nationwide unit of certain employees of Respondent, including all full time and regular part-time professional employees employed in the Regional Offices of the National Labor Relations Board.

2. At all times material herein the National Labor Relations Board Union has delegated authority to the Union (Local 6) to act as its representative for the purposes of collective bargaining of Respondent's unit employees in the Pittsburgh, Pennsylvania office, and such delegation has been recognized by Respondent.

^{2/} The undersigned recited for the record the general nature and tenor of the memorandum to enable the parties to litigate and brief the issues herein: (a) whether its production is necessary; (b) whether it constitutes guidance, counsel or training under section 7114(b). The document has been marked as Respondent's Exhibit 1 and is being forwarded to the Authority under seal but not furnished to the General Counsel or the Union. Although requested by the latter parties, the undersigned refused to take sanctions against Respondent and draw adverse references due to its refusal to comply with the directive order. See Department of Commerce, National Oceanic and Atmospheric Administration, National Weather Service, Silver Spring, Maryland, 30 FLRA 127.

^{3/} Findings herein are based on a Stipulation of Facts executed on February 12, 1986, together with the evidence adduced at this hearing and the exhibits made part of the stipulated record.

3. At all times material herein the Respondent and the National Labor Relations Board Union have been, and still are, parties to a nationwide collective bargaining agreement covering unit employees including professional employees in the Pittsburgh Regional Office. The said agreement provides for the filing and processing of grievances in Article XV thereof. Further, Article XXII of the agreement entitled "PART-TIME EMPLOYMENT" sets forth various provisions re the request for, consideration of, and granting or denying of part-time employment to employees.

4. On January 14, 1985 a field attorney in Respondent's Pittsburgh Regional Office, Mary T. Enyart, requested to work a part-time schedule. Specifically, she requested to work from 8:30 a.m. to 5:00 p.m. on Monday, Tuesday and Wednesday of each week. The request was made pursuant to Article 22 of the collective bargaining agreement.

5. Under date of January 25, 1985 Respondent's Pittsburgh Regional Director, Gerald Kobell, sent a memorandum^{4/} to Respondent's Associate General Counsel Joseph E. DeSio and Assistant General Counsel John P. Falcone, relative to the request by Enyart for part-time employment. In this memorandum Kobell stated the reasons why the employee sought part-time employment, his discussion with the employee, certain specified alternative schedules, the problems involved where part-time schedules have been implemented, the complement of the staff, and the staffing problems in the regional office. Kobell concluded the memorandum with his recommendation.

6. Falcone replied to Director Kobell in a memorandum dated March 8, 1985 concerning employee Enyart's request for part-time employment which, he recited, Kobell recommended be denied. He referred therein to the number of field examiners in the regional office; that while one examiners and one attorney work part-time thereat, the staffing will not be reduced and the region has fewer attorneys than previously; that the work is increasing and recent requests by two field attorneys were denied; and that staffing considerations plus operating needs of the region preclude approval of the part-time schedule requested. Thus, Falcone wrote, the request by Enyart was denied.^{5/}

^{4/} This was the subject of the dispute concerning whether it should be produced at the hearing pursuant to the subpoena duces tecum served on Respondent. Its contents were alluded to generally by the undersigned at the hearing after in camera inspection.

^{5/} A copy was sent to Enyart.

7. Under date of March 15, 1985 Mark E. Wirick, President of the Union, sent a memorandum to Kobell requesting information. In addition to asking for data re the Regional case intake and the trial calendar of the office, the Union requested "a copy of the Regional Director's recommendation concerning the part-time schedule request of Field Attorney Mary Theresa Enyart." The memo also stated the information was sought in order to evaluate the merits of a prospective grievance.

8. In response to the foregoing request for information, on April 11, 1985 Kobell sent the Union the case intake data and a copy of the travel calendar for unfair labor practice cases. He refused to furnish his memorandum of January 25, 1985 with his recommendation re the request by Enyart for part-time work. Kobell stated in his memorandum to the Union that he had advised Enyart of his recommendation to deny her request and the reasons therefor.

9. A written grievance was submitted by the Union on or about April 26, 1985 on behalf of Enyart re the refusal to grant her part-time employment - all pursuant to Article 15, Sections 5 and 7 of the collective bargaining agreement. The Union supplemented its grievance in a memorandum dated May 2, 1985 to Kobell wherein it was stated that, based on the information supplied by the Region and otherwise known, the denial of Enyart's request was violative of the contract.^{6/} Under date of May 20, 1985 Kobell sent the Union an answer to the grievance. The Regional Director summarized all the facts involved in the dispute re Enyart's request for part-time work, the basis for the refusal to grant the request, and denied any violation by management of the agreement or applicable law. The grievance was accordingly denied.

10. In a memorandum dated June 4, 1985 the Union repeated its request for Kobell's written recommendation re Enyart's request for part-time work.

11. The Union submitted Enyart's grievance at Step 3 in a memorandum dated July 1, 1985 and sent to Associate General Counsel Joseph E. DeSio. A reply thereto dated August 7

^{6/} The grievance also recited that the Union believed there were other considerations prompting the denial of part-time employment; that the Regional Director was hostile to such employment by the legal staff.

notified the Union that Falcone made the decision to deny part-time employment for Enyart based on staffing considerations and operating needs of the Regional Office.

12. Falcone wrote the Union on August 8, 1985 denying the request for Kobell's memorandum to the Division of Operations re the latter's recommendation of Enyart's request. He stated therein that the memorandum constituted internal communications essential to management deliberations; that it was not relevant to the decision and thus not necessary for the Union to carry out its representational duties.

13. The parties subsequently agreed to extend the time for referring the grievance to arbitration until the instant case is decided by the Authority.

14. The record reflects that before decisions are made in Washington by Respondent which affect a regional office, it is customary to require a written recommendation from the region. Since the various management officials in Washington must confer re the needs of a regional office, such a recommendation provides the facts and details necessary to make such decisions. The Washington officials of Respondent rely heavily on those facts, as related by the Regional Director, and his recommendation. Final decisions, as to working part-time in the regional offices, are made by Washington, although the regional directors will confer with supervisors before making a recommendation.

15. Assistant General Counsel Falcone testified he utilizes the memorandums from the regional office in respect to recommendations, as one concerning part-time employees, in preparing his discussions with the Associate General Counsel and/or the General Counsel. Further, the memorandum and recommendation from the regional director provides guidance and advice with respect to a submitted problem which requires a determination by the Washington office.

Conclusions

In the instant case Respondent supplied the requested data concerning the case intake and trial calendar. However, it refused to furnish the memorandum by Regional Director Kobell which, with his recommendation, he submitted to Respondent's Associate General Counsel and its Assistant General Counsel re the request by regional staff attorney Enyart to work part-time. Respondent contends that the memorandum was not "necessary" under section 7114(b)(4)(B)

of the Statute, and that in any event it constituted guidance, advice and counsel under section 7114(b)(4)(C) thereof.

(1) Under section 7114(b)(4) of the Statute an agency is required to furnish to an exclusive representative data which is necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. A union has the right to such information to the extent necessary to carry out its representational functions and responsibilities. Internal Revenue Service, et al., 32 FLRA 920. Respondent insists that the Union herein was provided with all the factual data necessary to understand management's decision in refusing to permit Enyart to work part-time in the regional office. It maintains there is no need to know the Regional Director's recommendation or its basis; that the employee has been apprised of the facts underlying his decision, and any comments by the Regional Director are not needed for the Union to understand the agency's decision in this instance.

This view by the Respondent is too narrow an interpretation of section 7114(b)(4)(B). While certain factors considered by the Regional Director were made known to the employee, the Union has no way of knowing whether other considerations may have influenced his recommendation and were included in his memorandum to Washington. The record reflects that other staff employees had worked part-time, and a claim was made that Kobell evinced hostility toward part-time employment by the legal profession. A contention that a unit employee was not permitted to engage in such employment, while others were granted such option, would make necessary the divulgence the Director's recommendation to permit the Union to evaluate management's decision. See U.S. Department of Defense, et al., 31 FLRA 800. Apart from the facts re the staffing of the regional office and the case intake, the memorandum of Kobell could include details concerning Enyart's behavior, work record and history of employment.

The Authority has held that a union is entitled to data in order to determine whether, in processing a grievance, an agency has engaged in discriminatory conduct. U.S. Equal Employment Opportunity Commission, Washington, D.C., 20 FLRA 357. In conjunction with the grievance submitted by the Union on behalf of Enyart, a request was made for the memorandum with Kobell's recommendation. The Union should be entitled to inspect the memorandum, unless it is otherwise privileged from disclosure under section 7114(b)(4) so as to evaluate its significance and determine whether to

proceed with the grievance. Accordingly, I reject Respondent's defense that the Regional Director's memorandum to Washington management, dated January 25, 1985 was not necessary for the Union to fulfill its representational duties.

(2) The parties are in sharp disagreement as to whether Regional Director Kobell's memorandum to his General Counsel's office was privileged from disclosure under section 7114(b)(4)(C) of the Statute. While that section excludes from disclosure data which constitutes guidance, advice and counsel, General Counsel contends it is concerned only with such matters relating to the actual process of collective bargaining. This argument was rejected by the Authority in National Weather Service case, supra. In the cited case the General Counsel argued the exemptions under 7114(b)(4)(C) should not apply because the data sought does not directly relate to negotiations (collective bargaining). Chief Administrative Law Judge Fenton aptly concluded, and the Authority agreed, that the exemption for management guidance ought to have the same breadth as the duty to furnish. Thus, the similar argument by General Counsel herein is not acceptable.

A more difficult question is posed as to whether the particular data herein constitutes guidance, advice, counsel or training under 7114(b)(4)(C). If it be so determined, the agency would have no obligation to furnish such information to the bargaining representative. In the National Weather Service case, supra, the Authority found that a Labor Relations Officer's memorandum of an incident involving a union representative, sent to the Chief of the Personnel Branch, was an assessment of the incident with obvious labor relations implications. Since the memorandum embodying this assessment reflected the officer's deliberation or thought process and his recommendation concerning an appropriate management response, the Authority held it constituted guidance, advice or counsel for management officials or supervisors related to collective bargaining and was exempt from disclosure under section 7114(b)(4)(C) of the Statute.

In the cited case, however, a report from a branch manager to the employee's supervisor describing the incident was deemed factual in nature. Such statements of fact were determined by the Authority not to constitute guidance to management officials or supervisors under the Statute.

A careful review of the January 25, 1985 memorandum, which is the subject of dispute herein, convinces me that, except for a final sentence with a recommendation, it

constitutes a recitation of the facts which led to the action taken by Respondent in respect to Enyart's request for part-time employment. The Regional Director set forth therein details concerning: (a) the employee's request and the basis therefor; (b) the discussion he had with the employee, including options offered her for rescheduling her hours to official time for personal tasks; (c) the numbers of staff attorneys and the trials pending or assigned in the regional office, as well as anticipated hearings; (d) the fact that insufficient attorneys would be available to cover the legal work.

As indicated in the National Weather Service case, supra, in order to conclude that a document is privileged from disclosure under section 7114(b)(4)(C) as guidance, advice or counsel, it must reflect the written deliberation or thought process and his recommendations. Regional Director Kobell's memorandum to managerial officials in Washington contains, for the most part, just certain facts with regard to the staffing of the regional office. While those facts form the basis for his ultimate recommendation, the memorandum does not set forth Kobell's deliberations or thought processes which might be described as, or form the basis of, guidance, advice or counsel by him to management. Neither is there present any in-depth assessment of the request with clear labor-management relations implications. Except for the last sentence, with its attendant footnote, which includes the recommendation of Director Kobell and his ultimate assessment, I conclude that the remainder of the memorandum is essentially a factual recitation of the staff attorneys, the number of complaints issued, cases tried or to be tried, and the considerations discussed with employee Enyart.

Accordingly, I find that, with such noted exception, the memorandum of January 25, 1985 from Regional Director Gerald Kobell to Joseph E. DeSio, Associate General Counsel and John P. Falcone, Assistant General Counsel was necessary for the Union to perform its representational duties on behalf of employee Mary T. Enyart; that it did not constitute guidance, advice, counsel or training for management officials or supervisors under section 7114(b)(4)(C) of the Statute. Respondent's failure and refusal to provide the said document with the exception of its last sentence with the recommendation and attendant footnote, was an infringement of section 7114(b)(4) of the Statute and hence violative of section 7116(a)(1), (5) and (8) thereof.

It is hereby recommended that the Authority issue the following:

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 National Labor Relations Board, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Labor Relations Board Union, Local 6, the exclusive representative of a consolidated nationwide unit of certain employees, including full-time and regular part-time professional employees, a copy of the January 25, 1985 memorandum from Regional Director Gerald Kobell to Joseph E. DeSio, Associate General Counsel and John P. Falcone, Assistant General Counsel, excluding the last sentence, with the recommendation and its attendant footnote, concerning the Director's assessment of employee Mary T. Enyart's request for part-time employment.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of 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:

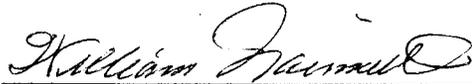
(a) Furnish the National Labor Relations Board Union, Local 6, the exclusive representative of a consolidated nationwide unit of certain employees, including full-time and regular part-time professional employees, a copy of the January 25, 1985 memorandum from Regional Director Gerald Kobell to Joseph E. DeSio, Associate General Counsel and John P. Falcone, Assistant General Counsel, excluding the last sentence, with the recommendation and its attendant footnote, concerning the Director's assessment of employee Mary T. Enyart's request for part-time employment.

(b) Post at its Pittsburgh, Pennsylvania Regional Office, 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 Pittsburgh, Pennsylvania Regional 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region II, Federal Labor Relations Authority, 26 Federal Plaza, Room 3700, New York, NY 10278, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued Washington, D.C., September 29, 1989



WILLIAM NAIMARK
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 fail and refuse to furnish the National Labor Relations Board Union, Local 6, the exclusive representative of a consolidated nationwide unit of certain employees, including full-time and regular part-time professional employees, a copy of the January 25, 1985 memorandum from Regional Director Gerald Kobell to Joseph E. DeSio, Associate General Counsel and John P. Falcone, Assistant General Counsel, excluding the last sentence, with the recommendation and its attendant footnote, concerning the Director's assessment of employee Mary T. Enyart's request for part-time employment.

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

WE WILL furnish, upon request, the National Labor Relations Board Union, Local 6, the exclusive representative of a consolidated nationwide unit of certain employees, including full-time and regular part-time professional employees, a copy of the January 25, 1985 memorandum from Regional Director Gerald Kobell to Joseph E. DeSio, Associate General Counsel and John P. Falcone, Assistant General Counsel, excluding the last sentence, with the recommendation and its attendant footnote, concerning the Director's assessment of employee Mary T. Enyart's request for part-time employment.

(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, Region II, whose address is: 26 Federal Plaza, Room 3700, New York, NY 10278, and whose telephone number is: (212) 264-4934.