

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

UNITED STATES SMALL BUSINESS ADMINISTRATION, WASHINGTON,
DC

Respondent

and

Case No. WA-CA-20820

ROBERT WILDBERGER

Charging Party

David R. Gray

Counsel for the Respondent

Ana de la Torre

Counsel for the General Counsel, FLRA

Robert W. Wildberger, Jr.

Pro se

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent interfered with the Charging Party's exercise of rights guaranteed by section 7102 of the Federal Service Labor Management Relations Statute (the Statute), 5 U.S.C. § 7102, in violation of section 7116(a)(1), by prohibiting him from acting as the representative of Marie Panzella in her appeal to the Merit Systems Protection Board (MSPB).

The Respondent answered the complaint, denying the allegations and stating that it had followed MSPB regulations which specifically provide parties to an MSPB appeal with an opportunity to challenge a designated representative when a party believes there is a reasonable likelihood of a conflict of interest or position. The Respondent averred that the American Federation of Government Employees (AFGE) is the incumbent exclusive labor representative in both the offices where Ms. Panzella and Mr. Wildberger were employed. The Respondent claimed it would have violated its statutory and contractual obligations to the AFGE and subjected it to an unfair labor practice charge if it has acquiesced in Mr. Wildberger's representation of Ms. Panzella on behalf of another union. The Respondent averred that a further conflict would have existed in Mr. Wildberger's representation due to his position with the Respondent, which position provided him with access to confidential and sensitive management information on the office where Ms. Panzella had been employed. The Respondent also claimed that a conflict would have been created by virtue of Mr. Wildberger's representation adversely impacting upon his workload and performance. Lastly, Respondent asserted that Mr. Wildberger's representation of Ms. Panzella was unauthorized pursuant to section 7120(e) of the Statute since there was a conflict or apparent conflict of interest.

A hearing was held in Washington, DC. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole. Based on the entire record,⁽¹⁾ 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 employees in Respondent's Central Office in Washington, DC, are part of a consolidated bargaining unit represented by the National Office of the American Federation of Government Employees (AFGE) with delegations of authority down to the local level. The consolidated unit includes the Melville, New York Branch Office, represented by AFGE, Local 3134. (Tr. 89-90).

The Charging Party, Robert Wildberger, was employed by Respondent (SBA) from June 1980 until September 1992. From about 1986 until September 1991 Mr. Wildberger was on 100% official time as President of AFGE, Local 2532. (Tr. 14).

During the fall of 1991, Wildberger, having been removed from Union office by AFGE, ceased being on 100% official time and resumed assigned duties at SBA as a Program Analyst, GS-13, in the Office of Program Analysis and Quality Assurance (OPAQA), Office of Compliance. (Tr. 14-15).

Mr. Wildberger's immediate office, the Office of Compliance, is responsible for managing the Respondent's onsite field office evaluation and review process. These reviews and the resulting reports address specific management weaknesses and internal control deficiencies in the Respondent's district and branch offices, including operational, performance, and personnel problems. The Respondent regards these reports as a critical part of its management system and they include highly sensitive management information. (Tr. 54-58, 130-131).

Specifically, Mr. Wildberger's job responsibilities in OPAQA were to review and edit draft reports prepared by the review teams and to summarize these reports. (Tr. 15-16; 59-60). In doing so he has access to highly sensitive and confidential management information. (Tr. 59-60; 130-131). The reports did not deal with positions the SBA planned to take before MSPB or the Equal Employment Opportunity Commission (EEOC). (Tr. 16).

Following his removal from Union office, Mr. Wildberger decided to form a rival labor organization, Solidarity, USA (Solidarity), which had as its initial focus the organizing of SBA employees. (Tr. 17-18, 37-39). Solidarity filed a "Labor Organization Information Report" with the U.S. Department of Labor and has been assigned a file number for public disclosure purposes. (Tr. 17). See 29 C.F.R. §§ 402.2, 402.7. Solidarity did not represent any employee of Respondent as of the date of the hearing. (Tr. 94).

As an organizing tactic for Solidarity, Mr. Wildberger let it be known that he was available to provide representational services for SBA employees. As a result, Frank Puleo, a local President for AFGE in SBA's Melville, New York office, contacted Mr. Wildberger, complained about AFGE, and asked him to represent a number of SBA employees, including Marie Panzella, before MSPB or EEOC, which Mr. Wildberger agreed to do. (Tr. 18-19).

Marie Panzella, at the time of her removal from employment by Respondent, was an employee of the Respondent's Melville, New York Branch Office. On May 27, 1992, Ms. Panzella appealed her removal to the MSPB and in her appeal form designated Mr. Wildberger as her representative. (Respondent's Exhibit (Res. Exh.) 58). The appeal form provided Mr. Wildberger's home address in Woodbridge, Virginia for service purposes, but did not indicate that he was acting in other than an individual capacity. (Res. Exh. 58).

Respondent, based upon its understanding that Mr. Wildberger's representation of Ms. Panzella would be in an individual capacity, filed a motion with the MSPB on June 15, 1992, seeking an extension of time for it to consider whether to object to Ms. Panzella's designation of Mr. Wildberger as her representative. (Res. Exh. 57).

MSPB regulation, 5 C.F.R. § 1201.31(b), provides:

(b) A party may choose any representative as long as that person is willing and available to serve. The other party or parties may challenge the designation, however, on the ground that it involves a conflict of interest or a conflict of position. Any party who challenges the designation must do so by filing a motion with the judge within 15 days after the date of service of the notice of designation. The judge will rule on the motion before considering the merits of the appeal. These procedures apply equally to each designation of representative, regardless of whether the representative was the first one designated by a party or a subsequently designated representative. If a representative is disqualified, the judge will give the party whose representative was disqualified a reasonable time to obtain another one.

The Respondent pointed out in its motion that Mr. Wildberger had not complied with Respondent's regulations, 13 C.F.R. Part 105, requiring prior approval from its Standards of Conduct ("SOC") Counselor before undertaking an outside activity. The Respondent noted that an employee's failure to comply with the Respondent's SOC regulations could result in disciplinary action against the employee. Respondent requested that Mr. Wildberger be given five days to submit his request under the SOC regulations and that it be given an additional five days for its SOC Committee to consider the request, including whether there was a conflict of interest or the appearance of a conflict of interest. (Res. Exh. 57).

On June 16, 1992, the Respondent, through Charles Thomas, Mr. Wildberger's immediate supervisor, notified Mr. Wildberger of the MSPB request and of the Agency's regulation, 13 C.F.R. § 105.510(a), providing that an employee may not, except with the written approval of the appropriate agency official, engage in any outside employment, occupation or similar activity. Mr. Wildberger was advised of the Agency's procedures for securing such approval and advised, "If you still propose to engage in this representational activity, you must immediately submit your request, in writing. . . . Your failure to obtain specific Agency approval for this activity could result in possible disciplinary action against you." Mr. Wildberger was also advised that, "in the event you request approval for this representational activity and it is approved, you would be required to use your accrued annual leave or leave without pay for any time spent on this representational activity." (General Counsel (G.C.) Exh. 2; Tr. 20).

On June 19, 1992, Mr. Wildberger responded to the SBA, objecting to the application of SOC regulations to his representation of Panzella before the MSPB as National President of Solidarity, and on behalf of Solidarity. Among other things, Mr. Wildberger asserted that this representational activity, as an organizing tactic of Solidarity, was protected under section 7102 of the Statute. He also asserted that in his representation of Panzella before the MSPB he would be enforcing the current labor contract. He claimed that this was concerted activity and was also protected activity under the Statute. He requested, under protest, that his response be considered a request for approval of this MSPB activity. (G.C. Exh. 3).

Respondent and AFGE are parties to a collective bargaining agreement (Master Agreement) applicable at all relevant times to the Central Office and Melville Branch Office. Article Ten specifically recognizes AFGE as the exclusive representative with rights and responsibilities. Article Eleven, Section 2, authorizes official time for AFGE representatives for various representational activities, including "preparing grievances and appeals of unit employees." (Joint (Jt.) Exh. 1; Tr. 90-91).

On June 24, 1992, Respondent moved to disqualify Mr. Wildberger as Ms. Panzella's representative before the MSPB pursuant to MSPB regulation 5 C.F.R. § 1201.31(b) on the basis that his representation would involve a conflict of interest. Respondent asserted that Mr. Wildberger's letter of June 19, 1992 demonstrated that he intended to represent Panzella solely as a representative of Solidarity. Respondent stated that AFGE was the exclusive representative of Agency employees and "the Agency cannot allow any union other than AFGE to represent the Appellant without violating both its contractual obligations to AFGE, and possibly subjecting itself to the filing of an Unfair Labor Practice charge and the issuance of a complaint. . . ." The Agency also pointed out that even if Mr. Wildberger were to resubmit his request as an individual, there were potential reasons for disqualifying him based on the nature of his official duties and the amount of time the representation might take. (Res. Exh. 51).

On June 22, 1992, the MSPB Judge issued a Notice directing Mr. Wildberger and Respondent's officials to meet and discuss Respondent's SOC procedures and the representational issue. Apparently, this Notice and

the Respondent's Supplemental Motion crossed in the mails. (Res. Exh. 53).

The parties met on June 29, 1992 and reviewed the SOC procedures; however, the parties were unable to resolve the representational issue. Moreover, while Mr. Wildberger refused during the meeting to clarify whether he was proceeding in an individual representative capacity or on behalf of Solidarity, he asserted to the Respondent that he was entitled to official time in representing Ms. Panzella. Counsel for Respondent responded, "Of course, the Agency maintains that you absolutely are not entitled to official time to do this." (Tr. 45-47; 80-82; Res. Exh. 48).

By letter to Mr. Wildberger dated July 1, 1992, Respondent, by David R. Gray, reiterated Respondent's position, in part, as follows:

As you are well aware, both the Washington, DC, Office Center, where you are employed, and the Melville, NY Branch Office, where Ms. Panzella was formerly employed, are exclusively represented by the national consolidated unit of the American Federation of Government Employees ("AFGE"). The Agency has, in the past, repeatedly and consistently advised you that the Agency cannot allow any union other than the AFGE to represent employees in such covered offices. For the Agency to do so would violate its statutory and contractual obligations to the AFGE and, in all likelihood, result in unfair labor practice charges by the AFGE against the Agency. Accordingly, for you to represent Ms. Panzella in the name of Solidarity, U.S.A., would be a further violation by the Agency of its statutory and contractual obligations to the AFGE and prejudicial to the Agency's interests.

...

If you immediately submit to me a clear and unequivocal statement to me [sic] that your intention to represent Ms. Panzella is in an individual capacity, the Agency stands ready to process a request for Standards of Conduct approval as soon as possible. If we proceed in this manner, I will recommend to Mr. Thomas, as your supervisor, that he immediately approve up to one hour of official time for you to be used for purposes of providing the information needed by the Standards of Conduct Counselor for his consideration or that of the Standards of Conduct Committee. (G.C. Exh. 4).

Following the parties' inability to resolve the representational issue, the MSPB Judge held a telephone conference with Mr. Wildberger and Respondent's Representative on July 6, 1992 and asked for a written statement from Ms. Panzella confirming whether she still wanted Mr. Wildberger to represent her and in what capacity--as an individual or as an official of Solidarity. The Judge indicated Mr. Wildberger could also submit a response. (Res. Exh. 45-47).

Notwithstanding Respondent's objection to Mr. Wildberger's representation of Ms. Panzella, if he were to act as an official of Solidarity, Mr. Wildberger, on July 7, 1992, requested unqualified approval from the Respondent "to respond and to undertake [Ms. Panzella's] representation on behalf of Solidarity, U.S.A." Mr. Wildberger further sought a statement from the Respondent that he would not be in violation of the Respondent's SOC regulations through his proposed representation of Ms. Panzella. (Res. Exh. 44).

On July 9, 1992, the Respondent answered, reiterating its previous objection to his proposed representation of Ms. Panzella on behalf of Solidarity. The Respondent reiterated previous advice that if Ms. Panzella requested Mr. Wildberger to represent her in an individual capacity and he, in turn, wanted to, he must still request SOC approval, and the Respondent would give him one hour of official time to so request. (Res. Exh. 42).

Mr. Wildberger responded on July 13, 1992, stating Ms. Panzella continued to want his representation on behalf of Solidarity. However, he advised he considered himself under order to withdraw from the proposed representation and asked that the Respondent so advise the MSPB Judge. (Res. Exh. 39). The Respondent received a letter from Ms. Panzella dated July 10, 1992, confirming that she wanted Mr. Wildberger to represent her on behalf of Solidarity. (Res. Exh. 40).

In an effort to obtain a final resolution, the Respondent, on July 13, 1992, filed with the MSPB Judge a renewal of its objection to Ms. Panzella's designation of representative and requested a ruling on the issue. (Res. Exh. 37).

By Notice dated July 20, 1992, the MSPB Judge ruled that Ms. Panzella could respond to the Respondent's renewal of objection, and directed the Respondent to allow Mr. Wildberger to prepare the response, if desired by Ms. Panzella. (Res. Exh. 33).

On July 23 and 24, 1992, Mr. Wildberger requested unqualified written approval to respond in his capacity as President of Solidarity to the renewal of objection; to participate in the telephone conference rescheduled for August 3, 1992; to provide prehearing submissions; and to otherwise fully participate in the case addressing all matters of substance and procedure. (Res. Exh. 30, 32).

On July 24, 1992, the Respondent advised Mr. Wildberger that, while he was not entitled to any official time for such activity under the Master Agreement or MSPB regulations, the Respondent would not consider his preparation of a response on the limited issue of disqualification of Ms. Panzella's choice of representative to be in conflict with the Respondent's SOC regulations. However, he was advised that any submissions or participation that went beyond this and discussed the merits or the procedures of the case would be considered in conflict with the SOC regulations. Similarly, the Respondent advised that it would regard his participation in the August 3, 1992 telephone conference for the limited purpose of discussing the disqualification issue not to be in conflict with the SOC regulations. (G.C. 11, Res. Exh. 29).

On July 30, 1992, Mr. Wildberger stated he would not participate in the conference call under the circumstances. He reiterated that he was entitled to representational time under Agency SOP 36-302. (Res. Exh. 23, 59). Mr. Wildberger refused to either respond to the renewal of objection or participate in the telephone conference.

On August 3, 1992, the MSPB Judge issued a Notice in which she denied the Respondent's motions objecting to Mr. Wildberger's representation and concluded that no conflict of interest or position existed. The MSPB Judge noted that the issue of whether Mr. Wildberger's representation would interfere with his workload would have to be resolved by Mr. Wildberger and his superiors. (Res. Exh. 22).

On August 6, 1992, Mr. Wildberger sought representational time directly from the MSPB Judge. The MSPB Judge ruled on the same day that she had no authority to grant such time. (Res. Exh. 20 and 21).

On August 12, 1992, the Respondent filed motions with the MSPB Judge asking that she reconsider her refusal to dis-qualify Mr. Wildberger. Respondent alleged legal error as well as newly-available evidence. The Respondent also asked that, if reconsideration were denied, the MSPB Judge then certify the issue to the full Board of the MSPB as an interlocutory appeal. (Res. Exh. 18).

Respondent alleged that the newly-available evidence consisted of two new developments. The first had to do with Mr. Wildberger's position with the Respondent and the conflict of position which would result from his representation of Ms. Panzella. In October of 1991, an evaluation report was issued on the Melville Branch Office by the Office of Compliance. (Tr. 60-61) While Mr. Wildberger and Mr. Thomas disputed whether Mr. Wildberger had any specific work assignments involving the Melville report, he had potential access to it and a copy was found in his work area on August 3, 1992 together with a number of documents referring to Solidarity, the FLRA, and Ms. Panzella's appeal. Matters related to these three subject areas were unrelated to Mr. Wildberger's official duties. (Tr. 40-41, 61, 67, 73-76; Res. Exh. 18).

The other newly-available evidence proffered by Respondent to the MSPB dealt with complaints Respondent had received on a number of occasions, including April 2, April 21, and May 13, 1992, from officials of the AFGE that it was improperly allowing Mr. Wildberger to engage in organizing activities on behalf of Solidarity. (Tr. 100-102; Res. Exh. 37). On August 6, 1992, the President of AFGE, Local 2532 stated to Raymond Barnes, the Respondent's Chief of Labor Relations, that if Mr. Wildberger did not cease his attempts to organize AFGE bargaining unit employees using official time, the AFGE would take appropriate action. (Tr. 102-104; Res. Exh. 18).

By Notice dated August 13, 1992, the MSPB Judge advised the parties that she had decided to reconsider her August 3, 1992 ruling on the matter of whether Mr. Wildberger should be disqualified as Ms. Panzella's representative. The Notice further advised that she was providing Ms. Panzella and Mr. Wildberger with an opportunity to respond. (Res. Exh. 17). Mr. Wildberger responded on August 22, 1992. (Res. Exh. 11).

During a conference call on September 1, 1992, the MSPB Judge announced to the Respondent's representative and Mr. Wildberger that she intended to dismiss the case due to her MSPB time constraints without prejudice to Ms. Panzella's right to refile an appeal within a certain time frame. On September 21, the MSPB Judge did dismiss the case without prejudice. The Decision did not address the disqualification of representative issue, leaving it unresolved. (Res. Exh. 7).

On September 16, 1992, Mr. Wildberger was removed by the Respondent from Federal service. (Res. Exh. 5; Tr. 143).

On October 19, 1992, Ms. Panzella refiled her appeal before the MSPB and again named Mr. Wildberger to represent her on behalf of Solidarity. (Res. Exh. 6).

On November 3, 1992, the Respondent again filed an objection to Mr. Wildberger's representation with the MSPB. Respondent stated there was a continuing conflict by virtue of Mr. Wildberger's past position in OPAQA and his past access to confidential and sensitive information concerning management and the operations of the Melville Branch Office. The Respondent stated that its previous concerns over Mr. Wildberger's attempt to represent Ms. Panzella on behalf of Solidarity and his ability to accomplish the duties and responsibilities of his official position were alleviated since he was no longer an employee of the Respondent and subject to its control. (Res. Exh. 5).

The MSPB Judge did not rule on this objection as Mr. Wildberger voluntarily withdrew as Ms. Panzella's representative, and Ms. Panzella designated a representative of AFGE as her new representative. (Tr. 36, 37, 145).

On January 14, 1993, the MSPB Judge in Ms. Panzella's appeal issued a decision incorporating a last chance agreement between the Respondent, Ms. Panzella, and their respective representatives and dismissed Ms. Panzella's appeal. The last chance agreement resolved Ms. Panzella's appeal to the MSPB.

Discussion and Conclusions

Standing

Respondent contends that the complaint should be dismissed because, although the complaint names Mr. Wildberger as an "individual charging party," the actual charging party is Solidarity, which is allegedly not a labor organization and lacks standing to bring the charge.

The charge and amended charge against the Agency was signed by Robert Wildberger. In answer to Item 2 of the FLRA charge form, which asks for the name of the "charging labor organization or individual," Wildberger identified himself as "Robert Wildberger, President, Solidarity, U.S.A." The complaint alleged in paragraph 3 that "Robert Wildberger (Charging Party) is a person under 5 U.S.C. § 7103(a)(1)." and Respondent's answer admitted the allegation.

Section 7118(a)(1) of the Statute, and section 2423.3 of the Authority regulations, provide that an unfair labor practice may be charged "by any person." Section 7103(a)(1) of the Statute, and section 2421.2(a) of Authority regulations, define the word "person" as "an individual, labor organization, or agency."

Taking into consideration the fact that a charge may be filed by "any person"; that the charge herein was admittedly filed by a "person" within the meaning of the Statute and pertinent regulations; and that a charge is not a formal pleading, but merely serves to provide a basis for the General Counsel's investigation into unfair labor practices, it is concluded the Respondent's contention that the Charging Party lacks standing is without merit. See National Aeronautics and Space Administration, Headquarters, Washington, DC, 12 FLRA 480, 502-04 (1983).

Mootness

Respondent claims that developments subsequent to the charge, complaint, and hearing have rendered the matters in controversy moot; any rulings would amount to advisory opinions; and the case should be dismissed. Respondent points out that Ms. Panzella's concerns have been settled, and Mr. Wildberger is no longer an employee of the Respondent or subject to its control. Therefore, Respondent states it has no continuing concern about Mr. Wildberger's representing employees on behalf of Solidarity. Respondent states that there conceivably could be a prospective conflict by virtue of Mr. Wildberger's past access to confidential and sensitive information in OPAQA, but this would be a fact-specific situation.

I conclude that the case is not moot. It alleges a violation of employee rights under the Statute. The current status of Mr. Wildberger and Ms. Panzella is not relevant to whether Respondent committed a violation of the Statute, as alleged, although it might be relevant to the affirmative relief ordered if a violation is found. Internal Revenue Service, Washington, D.C., 47 FLRA 1091 (1993).

The Merits

Mr. Wildberger, as President of Solidarity, was chosen by Marie Panzella to represent her before the MSPB. Marie Panzella, in pursuing a statutory appeal procedure to the Merit Systems Protection Board to contest her removal, was entitled to choose her own representative, and Respondent could not insist that only the AFGE, the exclusive representatives of the unit, could represent her before the MSPB. AFGE, the exclusive representative of the unit, was not the exclusive representative for the statutory appeal. 5 U.S.C. § 7114(a)(5); National Treasury Employees Union v. FLRA, 800 F.2d 1165, 1170 (D.C. Cir., 1986); AFGE, Local 916 v. FLRA, 812 F.2d 1326, 1328 (10th Cir., 1987); Reid v. Dept. of Commerce, 793 F.2d 277, 283 (Fed. Cir., 1986) American Federation of Government Employees, Local 1857, AFL-CIO, 46 FLRA 904, 918 (1992); Fort Bragg Association of Educators, National Education Association, Fort Bragg, North Carolina, 28 FLRA 908 (1987).

Mr. Wildberger, as President of Solidarity, intended to represent Ms. Panzella before the MSPB as an organizing tactic for Solidarity, a rival labor organization of the exclusive representative, AFGE. While employees acting on behalf of a union have a right under 7102 of the Statute to represent unit employees in a statutory appeal process, the right is not without limitation. Under section 7120(E) of the Statute, an employee is precluded from "acting as a representative of a labor organization" where that activity "would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee." U.S. Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office, 41 FLRA 402, 412-13 (1991). Moreover, Mr. Wildberger was not entitled to use official time for such representation under the collective bargaining agreement between AFGE and the Respondent. The agreement provides official time for duly appointed representatives of the exclusive representative.⁽²⁾ Further, Respondent could not lawfully grant such time or other assistance, such as Government services or facilities, to a labor organization, Solidarity, when that union did not have equivalent status with the exclusive representative of the agency's employees.⁽³⁾ There is no contention that Solidarity had attained equivalent status or that an exception applies. See U.S. Department of the Air Force, Barksdale Air Force Base, Bossier City, Louisiana, 45 FLRA 659 (1992).

Mr. Wildberger consistently stated that he sought to represent Ms. Panzella as an organizing tool for Solidarity. Section 7131(b) of the Statute makes it clear that activities related to the internal business of a labor organization, including solicitation of membership, must be performed while in a non-duty status.

The complaint alleges that Respondent interfered with Mr. Wildberger's exercise of rights guaranteed by section 7102 of the Statute, in violation of Section 7116(a)(1), in three specific respects:

1. By letter dated June 16, 1992, the Respondent, by Charles W. Thomas, informed the Charging Party that Respondent's regulations barring "outside employment" in section 105.510(a) require the Charging Party to seek written permission before he could represent one of Respondent's employees before the MSPB.

2. By letter dated July 1, 1992, Respondent, by David R. Grey [sic], notified the Charging Party that he could not represent any of Respondent's employees if the Charging Party's representation was in his capacity as an official of Solidarity, U.S.A.

3. By letter dated July 24, 1992, Respondent, by David R. Kohler, informed the Charging Party that Respondent would consider any submissions or communications by the Charging Party to the MSPB on behalf of Marie Panzella to be representational activity violative of Respondent's standards of conduct.

1. The June 16, 1992 Letter

Respondent's June 16, 1992 letter to Mr. Wildberger did not interfere with his rights under section 7102 of the Statute. Respondent was unaware at the time that Mr. Wildberger was seeking to represent Ms. Panzella on behalf of Solidarity. Moreover, the letter merely sought Mr. Wildberger's compliance with the Agency's standard of conduct regulations to enable the Agency to determine whether Mr. Wildberger's representation of Ms. Panzella before the MSBP would pose a conflict of interest or conflict of position. Such a determination was not only consistent with Respondent's own regulation, but the MSPB regulation, 5 C.F.R. § 1201.31(b), specifically provides parties to an MSPB appeal with an opportunity to challenge a designation of a representative on the ground that the representation would involve a conflict of interest or position. As noted, section 7120(e) of the Statute also precludes an employee from "acting as a representative of a labor organization" if that activity "would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee."

2. The July 1, 1992 Letter

As set forth above, the July 1, 1992 letter notified Mr. Wildberger, in effect, that the Agency could not allow him to represent Ms. Panzella in the name of Solidarity inasmuch as both the Washington, D.C. Office Center, where he was employed, and the Melville, N.Y. Branch Office, where Ms. Panzella was formerly employed, are exclusively represented by the American Federation of Government Employees (AFGE). The

Respondent further advised Mr. Wildberger that for it to allow another union other than the AFGE to represent employees in AFGE-covered offices would, in its view, violate its statutory and contractual obligations to the AFGE and, in all likelihood, result in unfair labor practice charges by the AFGE against the Agency. Respondent stated, "Accordingly, for you to represent Ms. Panzella in the name of Solidarity, U.S.A., would be conduct directly prejudicial to the Agency's interests. Likewise, for you to be granted any official time for such representational activity would be a further violation by the Agency of its statutory and contractual obligations to the AFGE and prejudicial to the Agency's interests."

As discussed above, Respondent correctly informed Mr. Wildberger that he could not be granted official time for such representational activity; however, Respondent could not deny Mr. Wildberger the right under section 7102 to represent employees before the MSPB on behalf of Solidarity on the basis that only the exclusive representative had such a right. As noted, AFGE, the exclusive representative of the unit, was not the exclusive representative as to the statutory appeal. Such advice interfered with Mr. Wildberger's exercise of rights guaranteed by section 7102 of the Statute and violated section 7116(a)(1), as alleged.

The record does not support Respondent's assertion that its denial of Mr. Wildberger's request to represent Panzella on behalf of Solidarity was because of his unqualified requests for official time. Respondent's July 1, 1992 letter clearly separated the denial of organizational representation and the denial of official time. Respondent's defense, that allowing Mr. Wildberger to represent Panzella on behalf of Solidarity would have exposed it to a valid unfair labor practice charge, is also rejected. Allowing such representation would not have required Respondent to provide Wildberger official time or the use of Government property for such representation. Access to official time and Government property is governed by applicable law and regulation, the collective bargaining agreement, or as a matter of past practice. As noted, Section 7120(e) of the Statute, pro-hibiting acting as a representative of a labor organization in the event of a conflict of interest or position, is also a qualification.

3. The July 24, 1992 Letter

Respondent's July 24, 1992 letter specifically authorized Mr. Wildberger to appear before the MSPB and respond to the issue of his disqualification as Ms. Panzella's representative. The July 24, 1992 memorandum did state that any submissions, communications, or appearances, at that time, that went beyond the disqualification issue and dealt with the substantive aspects of Ms. Panzella's appeal would be considered by Respondent to be representational activity and violative of the Respondent's standards of conduct.

Respondent's July 24, 1992 letter did not interfere with Mr. Wildberger's rights under section 7102 of the Statute. As noted, the MSPB regulation, 5 C.F.R. § 1201.31(b), specifically provides parties to an MSPB appeal with an opportunity to challenge a designation of representative on the ground that the representation would involve a conflict of interest or position. The regulation also provides that the MSPB Judge "will rule on the motion before considering the merits of the appeal."

Respondent had moved to disqualify Mr. Wildberger on the basis that his representation would involve a conflict of interest. Mr. Wildberger had not submitted the required information for Respondent to make a determination in this respect under its standards of conduct regulation. As noted, section 7120(e) of the Statute also precludes an employee from "acting as a representative of a labor organization" if that activity "would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the

official duties of the employee." Therefore, Respondent's advice to Mr. Wildberger, limiting his response to the MSPB to the issue of his designation as a representative, and precluding him from addressing the merits of Ms. Panzella's appeal until the issue of his disqualification was resolved, did not interfere with his rights under section 7102 of the Statute.

Conclusion

It is concluded that Respondent violated section 7116(a)(1) of the Statute, as alleged, on July 1, 1992 by advising Mr. Wildberger that he could not represent Ms. Panzella before the MSPB on behalf of a labor organization other than the exclusive representative. By doing so, Respondent interfered with Mr. Wildberger's right as an employee under section 7101 and 7102 of the Statute "to organize" and "to form, join, or assist any labor organization." However, Respondent did not violate the Statute by denying Mr. Wildberger official time or other Government facilities for such representation. Nor did Respondent violate the Statute by requiring Mr. Wildberger to comply with its standard of conduct regulations or by restricting his representation before the MSPB until challenges to his designation on the basis of a conflict of interest or conflict of position were resolved.

Although Mr. Wildberger is no longer employed by Respondent, and Ms. Panzella's appeal to the MSPB has been resolved, there has been no specific repudiation of the coercive conduct, or assurance that in the future Respondent will not interfere with the right of employees to form, join, or assist a labor organization other than the exclusive representative in this manner. Therefore, an order requiring the Respondent to cease and desist from such conduct and to post an appropriate notice is required.

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 United States Small Business Administration, Washington, D.C., shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by section 7102 of the Statute, by advising employees that they cannot act as representatives of a labor organization other than the exclusive representative in statutory appeal procedures before the MSPB where employees have designated such employee labor organization representatives as their representatives before the MSPB.

(b) 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) In accordance with law and regulation, permit employees to act as representatives of a labor organization other than the exclusive representative in statutory appeal procedures before the MSPB where employees have designated such employee labor organization representatives as their representatives before the MSPB.

(b) Post at its facilities nationwide 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 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 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. The remaining allegations of the complaint are dismissed.

Issued, Washington, DC, February 7, 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 interfere with, restrain, or coerce our employees in the exercise of rights guaranteed by section 7102 of the Statute, by advising employees that they cannot act as representatives of a labor organization other than the exclusive representative in statutory appeal procedures before the MSPB where employees have designated such employee labor organization representatives as their representatives before the MSPB.

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, in accordance with law and regulation, permit employees to act as representatives of a labor organization other than the exclusive representative in statutory appeal procedures before the MSPB where employees have designated such employee labor organization representatives as their representatives before the MSPB.

(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 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.

Dated: February 7, 1994

Washington, DC

1. Respondent's Motion for Leave to Reply to the General Counsel's brief is denied. The transcript, page 6, lines 7-10, is hereby corrected to read, "Relations Authority. The decision will be based strictly upon the record made here today, including the transcript of testimony, the formal pleadings, exhibits, and any other documents specifically authorized for filing herein."

2. The record does not establish that Mr. Wildberger was entitled to official time for MSPB representation under any other applicable statute, regulation, or past practice. (Res. Exhs. 23, 59; Tr. 139).

3. Under section 7116(a)(3) it is an unfair labor practice for an agency -

(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status[.]