

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: November 9, 2001

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: UNITED STATES ATTORNEY'S OFFICE
SOUTHERN DISTRICT OF TEXAS
HOUSTON, TEXAS

Respondent

and

Case No. DA-CA-00871

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3966

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

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WASHINGTON, D.C. 20424-0001

UNITED STATES ATTORNEY'S OFFICE SOUTHERN DISTRICT OF TEXAS HOUSTON, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3966 Charging Party	Case No. DA-CA-00871

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before DECEMBER 10, 2001, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

DEVANEY
Judge

WILLIAM B.
Administrative Law

Dated: November 9, 2001
Washington, DC

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

UNITED STATES ATTORNEY'S OFFICE SOUTHERN DISTRICT OF TEXAS HOUSTON, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3966 Charging Party	Case No. DA-CA-00871

Joseph Gontram, Esquire
For the Respondent

Ms. Jeanell Nero-Walker
For the Charging Party

Melissa J. McIntosh, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. 1, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated §§ 16(a)(5)

1

For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71" of the statutory reference, i.e., Section 7116 (a)(5) will be referred to, simply, as, "\$ 16(a)(5)".

and (1) of the Statute when it declared the Union's proposals, on Respondent's proposed Sick Leave Policy, non-negotiable. Further, Respondent asserts that the Sick Leave Policy was not its policy but, rather, was a government-wide Regulation promulgated by OPM which Respondent merely called to the attention of the Union and its employees.

This case was initiated by a charge filed on September 11, 2000 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued November 30, 2000, and set the hearing for April 12, 2001 (G.C. Exh. 1(b)), pursuant to which a hearing was duly held on April 12, 2001, in Houston, Texas, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard and to introduce testimony and evidence bearing on the issues involved and were afforded the opportunity to present oral argument which Respondent and General Counsel each exercised. At the conclusion of the hearing, May 14, 2001, was fixed as the date for mailing post-hearing briefs and General Counsel and Respondent each timely mailed a helpful brief, received on, or before, May 17, 2001, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

FINDINGS

1. The American Federation of Government Employees, AFL-CIO, Local 3966 (hereinafter, "Union"), is the exclusive representative of all non-supervisory employees in the United States Attorney's Office, Southern District of Texas, with certain exclusions (G.C. Exh. 2).

2. On July 18, 2000, Respondent, by Mr. Michael Mason, since November, 2000, Executive Director Houston Federal Executive Board, and prior thereto, Personnel Officer for the United States Attorney's Office for the Southern District of Texas (Tr. 28), submitted a draft of a new sick leave policy to Ms. Jeanell Nero-Walker, President of Local 3966 (G.C. Exh. 3; Tr. 12)².

3. On July 19, 2000, Ms. Nero-Walker requested source material for the sick leave policy statement and on the same day, Mr. Mason told Ms. Nero-Walker that she should respond to the draft by July 25, 2000 (G.C. Exh. 4; Tr. 13). On July 21, 2000, Ms. Nero-Walker requested, ". . . to negotiate the Policy Issuance" (G.C. Exh. 5) and stated that she was available to meet July 25, 2000 (id.).

²

The markings and writing on G.C. Exh. 3 are Ms. Nero-Walker's (Tr. 12) and were not submitted to Respondent.

4. Mr. Mason and Ms. Nero-Walker met on July 26, 2000, but did not negotiate (Tr. 15); however, Ms. Nero-Walker submitted proposals on July 26th which Mr. Mason on July 27, 2000, stated,

"I have reviewed your recommended changes and find that they are substantive in nature and do not deal with the impact and or implementation of the issuance" (G.C. Exh. 6).

5. On August 4, 2000, Ms. Nero-Walker re-submitted the same two proposals she had originally submitted on July 26, 2000 (Tr. 15). The Union's two proposals were:

"Proposal 1

"This is an Entitlement and should be label [sic] as Entitlement instead of Elibibility [sic]. The language should be stated as stated in the new policy (5 USC 6301).

"Proposal 2 Under certain conditions, an employee may use the 12 weeks of FMLA leave intermittently. An employee may elect to substitute annual leave and/or sick leave consistent with current laws and OPM's regulations for using annual and sick leave, for any unpaid leave under the FMLA." (G.C. Exh. 7).

6. On August 16, Mr. Mason responded as follows:

"Regarding your proposals for the Suggestion Policy Issuance and the Sick Leave Policy Issuance: I must remind you that our negotiated agreement gives you the right to negotiate only over the 'impact of the implementation' of the policy, not the substance of the policy. The changes you have proposed for both Issuances pertain to the substance of the policies and not I & I or appropriate arrangement.

"Therefore, the proposals you submitted are not negotiable." (G.C. Exh. 8).

7. On August 22, 2000, Mr. Mason sent the following to Ms. Nero-Walker,

"Attached is the Sick Leave Policy Issuance that is being forwarded to the U.S. Attorney today for his signature. If you have any questions or

comments, please feel free to contact me." (G.C. Exh. 9).

The attached, "Policy Issuance - Sick Leave to Care for a Family Member with a Serious Health Condition", dated August 17, 2000, the substance appears to be unchanged from the draft of July 13 (G.C. Exh. 3), except that the final Policy Issuance contained, as an attachment, several pages of questions and answers prepared by OPM (G.C. Exh. 9).

8. Mr. Mason said they had shortened the OPM issuance, that he gave Ms. Nero-Walker the website references where she could obtain the statute and regulations; that Respondent used the word, "eligibility", rather than, "entitlement", because the paragraph entitled, "Eligibility" described what is necessary to take advantage of the law and to change the heading of the paragraph, ". . . would misconstrue the meaning of that paragraph." (Tr. 31). Mr. Mason further insisted that,

". . . By addressing changes in what management has proposed and wanting to rewrite these paragraphs, that was beyond the scope of what they were entitled to negotiate and that was what we told the Union." (Tr. 33).

CONCLUSIONS

I agree with Respondent that the law, 5 U.S.C. §§ 6307, 6381-6382, and Regulations of OPM, 5 C.F.R. §§ 630.401-630.404, 630.1203-1206, constitute the Policy concerning Sick Leave to Care for a Family Member with a Serious Health Condition under the Family and Medical Leave Act. Nor is there any basis to question Respondent's altruism in wanting to inform its employees of the benefits available to them. But I wholly disagree that Respondent was not obligated to bargaining concerning I & I of that policy. In Patent Office Professional Association and U.S. Department of Commerce Patent and Trademark Office, 48 FLRA 129 (1993) (hereinafter "Patent Office"), the Authority stated, by way of example, inter alia, "Proposals that merely require that an agency provide employees with documentation and information relating to the exercise of a management right and do not place any substantive limitations on the exercise of those rights generally are negotiable. . . ." (at 142) and, ". . . Thus, if Proposal . . . merely incorporated . . . a requirement imposed by the laws that govern . . . it would be negotiable. . . ." (at 143). Similarly, in National Treasury Employees Union and U.S. Department of Health and Human Services, Social Security Administration, Office of

Hearings and Appeals, Falls Church, Virginia, 47 FLRA 705 (1993), the Authority stated, ". . . We have previously held that the proper inquiry with respect to union proposals that require agencies to provide general information to employees is whether: (1) the information concerns conditions of employment; and (2) disclosure of the information violates any law or applicable regulation. . . ." (at 720).

Here, the Union sought to negotiate Respondent's proposed issuance to employees concerning sick leave benefits, a matter clearly concerning conditions of employment, and proposed two changes to Respondent's draft: First, to change the word, "Eligibility", the heading on the first page of Respondent's draft, to, "Entitlement". Nothing in the proposal in any manner affected Respondent's exercise of its rights. Indeed, the statute, 5 U.S.C. §§ 6307(a), 6382(a)(1), (2), and the regulation, 5 C.F.R., § 630.1203, use the word, "entitlement" and, because the Union's proposal, ". . . merely incorporated . . . a requirement imposed by the laws that govern . . . it would be negotiable. . . ." Patent Office, supra, 48 FLRA at 143. Second, the Union sought to insert a statement that, "Under certain conditions, an employee may use the 12 weeks of FMLA leave intermittently. An employee may elect to substitute annual leave and/or sick leave consistent with current laws and OPM's regulations for using annual and sick leave, for any unpaid leave under the FMLA". What was stated above with regard to the Union's first proposal applies equally to this proposal which the Union took from an OPM statement of Entitlement (G.C. Exh. 10, p.2).

Respondent's assertion that any proposal to change the wording of its proposed issuance constitutes a substantive change is utterly without basis and is rejected where, plainly, the Union's proposal does not affect the sick leave policy.

By its refusal to negotiate, Respondent violated §§ 16 (a)(5) and (1) of the Statute and it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.41(c) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(c), and § 18 of the Statute, 5 U.S.C. § 7118, it is hereby ordered that the United States Attorney's Office, Southern District of Texas, Houston, Texas, shall:

1. Cease and desist from:

(a) Refusing to bargain with the American Federation of Government Employees, AFL-CIO, Local 3966 (hereinafter, "Union"), the exclusive representative of its employees, before implementing changes to conditions of employment, including Policy Issuance concerning sick leave.

(b) Asserting that Union proposals, which are directed solely at proposed language of its issuances concerning conditions of employment and do not affect the exercise of any management right, are substantive in nature and non-negotiable.

(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) Upon request, bargain in good faith with the Union over all changes of conditions of employment, including Policy Issuances concerning sick leave.

(b) Refrain from asserting baseless claims that Union proposals, concerning conditions of employment, are non-negotiable when the proposals do not place any limitation on Respondent's exercise of its rights.

(c) Post at its Houston, Texas facilities, 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 United States Attorney for the Southern District of Texas, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to § 2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Dallas Region, Federal Labor Relations Authority, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

DEVANEY
Judge

WILLIAM B.
Administrative Law

Dated: November 9, 2001
Washington, DC

**NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY**

The Federal Labor Relations Authority has found that the U.S. Attorney's Office, Southern District of Texas, Houston, Texas, 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 refuse to bargain with the American Federation of Government Employees, AFL-CIO, Local 3966 (hereinafter, "Union"), the exclusive representative of our employees, before implementing changes to conditions of employment, including Policy Issuance concerning sick leave.

WE WILL NOT assert that Union proposals, which are directed solely at proposed language of our issuances concerning conditions of employment and do not affect the exercise of any management right, are substantive in nature and non-negotiable.

WE WILL NOT assert baseless claims that Union proposals, concerning conditions of employment are non-negotiable when the proposals do not place any limitation on Respondent's exercise of its rights.

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

WE WILL, upon request, bargain in good faith with the Union over all changes of conditions of employment, including Policy Issuances concerning sick leave.

_____ (Agency or 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, Dallas Region, Federal

Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202, and whose telephone number is: 214-767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. DA-CA-00871, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

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REGULAR MAIL

National President
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80 F Street, NW
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Dated: November 9, 2001

Washington, DC