

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

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

MEMORANDUM

DATE: November 19, 2002

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
GRAND COULEE POWER (PROJECT)

OFFICE
GRAND COULEE, WASHINGTON

Respondent

and Case No. SF-CA-02-0301

PATRICK J. RUNNELS, AN INDIVIDUAL

Charging Party

and

COLUMBIA BASIN TRADES COUNCIL

Intervenor

Pursuant to section 2423.27(c) of the Rules and Regulations 5 C.F.R. § 2423.27(c), 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 Motions for Summary Judgment and other supporting documents filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

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| DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION GRAND COULEE POWER (PROJECT) OFFICE GRAND COULEE, WASHINGTON Respondent | |
| and PATRICK J. RUNNELS, AN INDIVIDUAL Charging Party and COLUMBIA BASIN TRADES COUNCIL Intervenor | Case No. SF-CA-02-0301 |

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 23, 2002**, and addressed to:

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

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: November 19, 2002
Washington, DC

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

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| DEPARTMENT OF THE INTERIOR BUREAU OF RECLAMATION GRAND COULEE POWER (PROJECT) OFFICE GRAND COULEE, WASHINGTON Respondent | |
| and PATRICK J. RUNNELS, AN INDIVIDUAL Charging Party and COLUMBIA BASIN TRADES COUNCIL Intervenor | Case No. SF-CA-02-0301 |

Robert Bodnar, Esquire
For the General Counsel

Mr. Max Gallegos
For the Respondent

Mr. Brook L. Beesley
For the Charging Party

Richard H. Robblee, Esquire
For the Intervenor

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This case involves a refusal by Respondent to permit an employee, Patrick J. Runnels, to designate an individual of his choice in a proposed seven day suspension proceeding. Respondent admitted all factual allegations of the

Complaint. On August 8, 2002, an Order was entered granting the Columbia Basin Trades Council's Motion to Intervene; and on August 9, 2002, an Order was entered denying General Counsel's Motion for Reconsideration of the Order Granting Intervention.

On September 27, 2002, General Counsel filed a Motion for Summary Judgment, and a Brief in Support, received on, or about, September 30, 2002; on October 2, 2002, a Notice was issued to Respondent and/or Intervenor to Show Cause on, or before October 9, 2002, why General Counsel's Motion should not be granted. On October 9, 2002, Respondent responded to General Counsel's Motion For Summary Judgment; on October 8, 2002, Intervenor filed a Motion for Summary Judgment and a Brief in Support of its Motion for Summary Judgment and In Opposition to General Counsel's Motion for Summary Judgment, received on October 9, 2002; on October 16, 2002, an Order was entered canceling the hearing set for October 31, 2002, Pre-hearing Disclosure and Pre-hearing Conference call and notifying all parties that this matter will be decided on Motion for Summary Judgment; and on October 25, 2002, the Charging Party filed a Response to Intervenor's Motion for Summary Judgment and Opposition thereto, received on October 31, 2002.

FINDINGS

1. Respondent is an agency within the meaning of 5 U.S.C. § 7103(a)(3)¹ (Complaint, Answer ¶ 2); the Columbia Basin Trades Council, hereinafter, "Columbia Basin" is a labor organization within the meaning of §3(a)(4) of the Statute and is the exclusive representative of an appropriate bargaining unit at Respondent; and Mr. Patrick J. Runnels, the individual Charging Party, is an employee of Respondent, within the meaning of §3(a)(2) of the Statute, and is in the bargaining unit represented by Columbia Basin (Complaint, Answer ¶¶ 3-5).

2. Mr. Runnels, as a member of the bargaining unit, is a prevailing rate employee defined as:

" . . . an individual employed in or under an agency in a recognized trade or craft, or other skilled mechanical craft, or in an unskilled, semiskilled, or skilled manual labor occupation, and any other individual,

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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 7103 (a) will be referred to, simply, as, "\$ 3(a)".

including a foreman and a supervisor, in a position having trade, craft, or laboring experience and knowledge as the paramount requirement”
(5 U.S.C. § 5342(a)(2)(A)).

The Columbia Basin negotiates for bargaining unit employees pursuant to the Prevailing Rate Systems Act, P.L. 92-392, 86 STAT. 564 (August 19, 1972)[5 U.S.C. § 5341, et seq.] (hereinafter, “PRSA”).

3. Section 9(b) of the PRSA provided as follows:

“Sec 9

. . . .

“(b) The amendments made by this Act shall not be construed to-

“(1) abrogate, modify, or otherwise affect

in any way the provisions of any contract in effect on the date of enactment of this Act pertaining to the wages, the terms and conditions of employment, and other employment benefits, or any of the foregoing matters, for Government prevailing rate employees and resulting from negotiations between Government agencies and organizations of Government employees;

“(2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract; or

“(3) nullify, change, or otherwise affect in any way after such date of enactment any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date.”

(P.L. 92-392 (August 19, 1972)).

4. As part of the Statute, P.L. 95-454, 92 STAT. 1218 (October 13, 1978), Congress enacted the following miscellaneous Provision:

"Sec. 704. (a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.

"(b) The pay and pay practices relating to employees referred to in paragraph (1) of this subsection shall be negotiated in accordance with prevailing rates and pay practices without regard to any provision of-

"(A) chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph;

"(B) subchapter IV of chapter 53 and subchapter V of chapter 55 of title 5, United States Code; or

"(C) any rule, regulation, decision, or order relating to rates of pay or pay practices under subchapter IV of chapter 53 or subchapter V of chapter 55 of title 5, United States Code." (id.) (92 STAT. 1218)

5. Columbia Basin as early as 1950 negotiated with Respondent concerning presentation of disputes. Thus, Mr. Max Gallegos, who has been the Human Resources Officer for the Pacific Northwest Region of the Bureau of Reclamation for eleven years, has stated, in part, in a Declaration dated October 4, 2002, as follows:

"From 1950 to 1968, the labor agreement between the Agency and the Council contained a grievance and arbitration process that contained the following language:

"Any employee or group of employees, either directly or through union representatives, may present in writing to his or their immediate supervisor or supervisors any dispute with the Project growing out of the application or interpretation of the Agreement or Supplements thereto.

"In 1968, that language was modified to provide:

"Any employee or group of employees, either directly or through union representatives, may present in writing to his or their immediate supervisor or supervisors any dispute or interpretation of the General Agreement. An employee or group of employees may choose to personally present their grievance(s) or to designate a representative other than the Council. Nonetheless, employees covered by the Basic Agreement are limited to the grievance procedures contained herein and the Council shall be given an opportunity to state its position on any grievance

"In 1981, the parties again modified the language to read as it now provides in Article VII, Section 7.1(E):

"Any employee filing a grievance or serving as representative of another person on a grievance shall be protected from restraint, interference, coercion, discrimination, or reprisal in presenting the grievance. If an employee covered by this General Agreement should choose not to be represented by a representative approved by the Council, he must represent himself in presenting the grievance. The Council shall be given the opportunity to be represented at the adjustment of the grievance between the Office and the aggrieved. The adjustment of a grievance shall not be inconsistent with the terms of this General Agreement.

"Under the labor agreement in effect in December 2001 and to date, suspensions of 14 days or less are subject to the grievance and arbitration procedure and are not excluded

from arbitration. The Bureau does not view an employee's right to respond to proposed discipline of 14 days or less as a 'statutory appeals' procedure within the meaning of the contract exclusions from grievance and arbitration. . . ." (Intervenor's Brief In Support of Its Motion for Summary Judgment, et al., Declaration of Max Gallegos, pp. 3-4)

The Declaration of Mr. John Trumble, Business Representative of Local Union No. 77 of the International Brotherhood of Electrical Workers, an affiliate of Columbia Basin, for many years has served as an officer of Columbia Basin and has been chief negotiator and contract administrator representing Columbia Basin in its contacts with Respondent, has appended, from the historical records of Columbia Basin retained by his office, a full copy of the 1959 General Agreement (Exhibit A) and a full copy of the 1995 General Agreement (Exhibit B). Article IV, Section 4.4 of the 1959 Agreement (page 10 of Exhibit A) contains the precise language quoted by Mr. Gallegos, above, as having been in effect from 1950 to 1968; and Article VII, Article 7.1E of the 1995 Agreement (pages 10-11 of Exhibit B) contain the precise language quoted by Mr. Gallegos as having been inserted in 1981 and which continues to the present (id., Declaration of John Trumble and Exhibit A & B Attached thereto).

6. On December 12, 2001, Respondent proposed to suspend Mr. Patrick J. Runnels for seven days. Mr. Runnels was advised, in part, that,

"You may reply to this notice personally or in writing, or both personally and in writing . . .

"Since the Columbia Basin Trades Council represents your position, you may be represented or assisted at any stage of these proceedings by a representative of the Union. . . ." (General Counsel's Brief, Exhibit C) (Emphasis supplied).

7. By letter dated December 14, 2001, Mr. Brook Beesley, of BLB Consulting, Inc., advised Respondent that Mr. Runnels, ". . . has retained our firm to represent him in connection with the agency's Notice of Proposed Suspension . . . dated 12 December 2001. . . ." (id., Exhibit D)

Mr. Beesley relied on 5 C.F.R. § 752.203(d) which does, indeed, provide that, “. . . an employee covered by this part whose suspension is proposed in [sic] entitled to be represented during the action by an attorney or other representative. . . .”; and §752.203 was issued pursuant to 5 U.S.C. §7503(b) which was enacted as part of P.L. 95-454, i.e., as part of the Civil Service Reform Act of 1978 (see, 92 STAT. 1135, § 7503).

8. By letter dated December 19, 2001, Respondent acknowledged Mr. Beesley's letter of December 14, 2001, and stated, in part, as follows:

“. . . I must reiterate that Mr. Runnels occupies a position that is covered by a collective bargaining agreement negotiated between the Bureau of Reclamation . . . and the Columbia Basin Trades Council (CBTC). The CBTC is the exclusive representative for all craft employees of the Grand Coulee Power Office. As such, we cannot and will not officially recognize you as Mr. Runnels representative in regard to this disciplinary action until we receive written designation/ approval from the CBTC for you to act as Mr. Runnels' representative.

“Mr. Runnels does not have the right to independently select his representative concerning this disciplinary action . . . He may respond to the proposal independently, with a representative of the CBTC, or with a representative approved by the CBTC. . .

“Mr. Runnels does have the right to seek relief via the Equal Employment Opportunity (EEO) compliant procedure. If Mr. Runnels were to elect this avenue with which to seek relief he would be allowed (in accordance with 5 USC Chapter 71 §7114(a)(5)) to independently seek and appoint his own representative(s) without concurrence or approval of the CBTC. However, if Mr. Runnels were to file a complaint of discrimination and elect to have you as his representative, you would only be entitled to act as his representative in matters relating to the adjudication of Mr. Runnels EEO complaint. This right of representation does not include the right to act as Mr. Runnels' representative in this pending disciplinary action.

"If a decision is made concerning the proposed suspension that would be unacceptable to Mr. Runnels, he may choose to file a grievance . . . Given the fact that Mr. Runnels occupies a position, which is covered by a collective bargaining agreement with a negotiated grievance procedure in place, he would not be entitled to use the agency grievance procedure. Furthermore, the proposed action (7-day suspension) would not rise to the level of an 'adverse action' as defined by 5 CFR §752.401. Mr. Runnels would not be entitled to have his case adjudicated before MSPB
. . . . (id., Exhibit E)

9. Mr. Beesley responded by letter dated December 26, 2001, and reiterated his prior position. (id., Exhibit F)

10. Respondent replied to Mr. Beesley's letter of December 26, 2001, by its letter dated January 10, 2002, in which Respondent stated,

". . . It is my final position that management will not recognized you as Mr. Runnels' representative in responding to this proposed disciplinary action, unless you have been approved to do so by the Columbia Basin Trades Council (CBTC).

"I do not disagree with your position that Mr. Runnels is entitled to representation during his response (oral and/or written) to the disciplinary action proposed . . . However, Mr. Runnels' representative must be either a representative of the union, a representative approved by the union, or Mr. Runnels can represent himself. Again, we will not recognize you as Mr. Runnels' representative regarding this proposed disciplinary action. If you have received approval from the CBTC . . . we will afford you the rights associated with such designation. If approval has been granted please notify me of this in writing.
. . . ." (id., Exhibit G)

11. By letter dated January 18, 2002, Mr. Runnels was notified that the proposed seven day suspension had been found warranted and appropriate and, ". . . that his

suspension without pay would begin January 20, 2001 [sic], and end January 26, 2001 [sic]." Mr. Runnels was advised, "You do not have the right to appeal this action to the Merit Systems Protection Board. You can however, grieve this action under the provisions of Article VII of the Basic Labor Management Agreement" (id., Exhibit H).

Mr. Runnels served the suspension, January 20-26, 2002, and filed the charge on February 11, 2002 (id., Exhibits A and B, Pars 6 and 17).

CONCLUSIONS

General Counsel relies on §14(a)(5)(A) of the Statute which provides,

"(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from-

"(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

. . . ." (5 U.S.C. §7114(A)(5)(a)).

General Counsel asserts that §14(a)(5)(A), ". . . includes adverse action procedures under 5 U.S.C. §§ 7501-04," citing American Federation of Government Employees, AFL-CIO, Local 1858 and U.S. Army Missile Command, the U.S. Army Test, Measurement, and Diagnostic Equipment Support Group, the U.S. Army Information Systems Command-Redstone Arsenal Commissary, 27 FLRA 69, 82 (1987) (Provision 7).²

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Ironically, the case cited and relied upon by General Counsel held, as to Union proposal 1,

"An employee or group of employees filing a grievance under this procedure shall be represented by a union official or by a representative approved in writing by the Union President. However, the employee or group employees may elect to represent himself/themselves"

that the provision was negotiable, i.e., lawful (id. at 70-71). Because the essentially like provision here applies only to the negotiated procedure, it too was lawful.

Charging Party relies on 5 C.F.R. §752.203(d), which was issued pursuant to 5 U.S.C. §7503(b)(3) and which, as noted above, was enacted as part of P.L. 95-454, the Statute, but not as part of chapter 71 of the Statute, from which it could be argued, although I do not believe Charging Party so argues, that because Sec. 704 exempts prevailing rate employees only, ". . . without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph." (Sec. 704 (a), 92 STAT. 1218, P.L. 95-454, October 13, 1978), the "exemption" of 704 does not extend to 5 U.S.C. § 7503(b)(3). In any event, Charging Party relies on §14(a)(5)(A) and (B) of the Statute (Charging Party's Response, p. 4).

Charging Party overlooks §9(b) of the PRSA, set forth hereinabove, enacted in 1972, provides in part, as follows:

"(b) The amendments made by this Act shall not be construed to--

. . .

"(2) nullify, curtail, or otherwise impair in any way the right of any party to such contract to enter into negotiations after the date of enactment of this Act for the renewal, extension, modification, or improvement of the provisions of such contract or for the replacement of such contract with a new contract; or

. . . ." (P.L. 92-392 (August 19, 1972)).

Section 704, enacted in 1978 as part of the Statute, plainly intended that,

"(a) Those terms and conditions of employment . . . with respect to Government prevailing rate employees to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation . . . prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392" (92 STAT. 1218, Sec. 704(a))

The following phrase, ". . . without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph", was not

intended, nor does it constitute a limitation on the stated unqualified language that, "Those terms and conditions of employment . . . to whom section 9(b) of Public Law 92-392 applies which were the subject of negotiation . . . prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with . . . section 9(b) of Public Law 92-392" The concluding phrase of Section 704(a) is an exemption from the provision of chapter 71 of title 5 of the United States Code, ". . . to the extent that any such provision [of chapter 71] is inconsistent with this paragraph"; but it does not limit or qualify the obligation to negotiate as to prevailing rate employees' conditions of employment which were negotiated before August 19, 1972.

Because Columbia Basin and Respondent negotiated on the issue of representation before August 19, 1972, and the modification or improvement of the provision in effect in 1959 was authorized by §9(b) of the PRSA, the contract provision was lawful and Respondent did not violate §16(a) (1) by refusing to recognize Mr. Brook Beesley as the representative of Charging Party Patrick J. Runnels. I shall, therefore recommend that the Authority adopt the following:

ORDER

General Counsel's Motion for Summary Judgment is denied and Intervenor's Cross Motion for Summary Judgment is granted and the Complaint in Case No. SF-CA-02-0301 is hereby dismissed.

DEVANEY
Judge

WILLIAM B.
Administrative Law

Dated: November 19, 2002
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. SF-CA-02-0301, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

| | |
|---|---------------------|
| Robert Bodnar 1648 Counsel for the General Counsel Federal Labor Relations Authority 901 Market Street, Suite 220 San Francisco, CA 94103-1791 | 7000 1670 0000 1175 |
| Max Gallegos, Human Resources Officer 1655 U.S. Department of the Interior Bureau of Reclamation, Pacific NW Region 1150 North Curtis Road, Suite 100 Boise, ID 83706-1234 | 7000 1670 0000 1175 |
| Brook Beesley, for Patrick Runnels 1662 P.O. Box 521 Alameda, CA 94501 | 7000 1670 0000 1175 |
| Richard H. Robblee, for Columbia 1648 Basin Trades Council Rinehart, Robblee & Hannah 1620 Metropolitan Park Building 1100 Olive Way Seattle, WA 98101 | 7000 1670 0000 1175 |

Dated: November 19, 2002
Washington, DC