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

LOWRY AIR FORCE BASE, DENVER, COLORADO Respondent	
and	Case No. 7-CA-90075
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1974 Charging Party	

Major Stephen J. Duggan
For the Respondent

Bruce Conant, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for Region VII, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by failing and refusing to process an administrative grievance filed by a unit employee on his own behalf and the behalf of other unit employees because said employees were covered by a collective bargaining agreement and advising the employee that only nonunit employees may use the administrative grievance procedure. Respondent filed an

Answer to the Complaint in which it admitted the factual obligations of the Complaint but denied the legal conclusions that by its conduct it violated section 7116(a)(1) and (2) of the statute.

Subsequently, Counsel for the General Counsel filed with the Regional Director for Region VII a Motion for Summary Judgment with a supporting brief and relevant documents including a copy of the parties' collective bargaining agreement. The Regional Director for Region VII thereupon transferred the matter to Office of Administrative Law Judges pursuant to section 2423.22(b) of the Rules and Regulations of the Authority. Thereafter Respondent filed a Motion to Dismiss and to Delay Hearing and a Response to Motion for Summary Judgment wherein Respondent gave argument in support of its position on the matter.

I have carefully reviewed and evaluated the entire record herein and make the following:

Findings of Fact

1. The charge in this case was filed by the Union on November 7, 1988, and was served upon Respondent on or about the same date.

2. At all times material the Union is, and has been, a labor organization within the meaning of 5 USC 7103(a)(4).

3. At all times material Respondent is, and has been, an agency within the meaning of 5 USC 7103(a)(3).

4. At all times material the American Federation of Government Employees, AFL-CIO, Local 1974, has been certified as the exclusive representative of all eligible non-professional civilian employees employed by Lowry Air Force Base, Denver, Colorado, excluding temporary full-time, temporary part-time and casual employees, managerial, executive and supervisory employees, managerial trainees, employees engaged in personnel work in other than a purely clerical capacity, professional employees, guards, and watchmen, USAF School of Applied Aerospace Science, the fire protection Branch of 3415 Civil Engineer Squadron, and employees in other units holding exclusive recognition.

5. At all times material Respondent and the Union have been parties to a collective bargaining agreement covering the employees in the unit described in paragraph 4, above.

6. At all times material the Union, by virtue of the recognition described in paragraph 4, above, and the collective bargaining agreement described in paragraph 5, above, has been, and is now, the exclusive representative of the employees described in paragraph 4, above.

7. At all times material Colonel Ray L. Rider, herein called Rider, has occupied the position of Respondent's Commander, and has been and is now a supervisor and/or management official within the meaning of 5 USC 7103(a)(10) and/or (11), and an agent of Respondent.

8. At all times material Captain Robert G. Sisterman, herein Sisterman, has occupied the position of Respondent's Chief of Base Administration, and has been and is now a supervisor and/or management official within the meaning of 5 USC 7103(a)(10) and/or (11), and an agent of Respondent.

9. At all times material Melvin N. O'Hara, herein O'Hara, has occupied the position of Offset Press Operator, WG-4417-7, at Respondent's Denver, Colorado, facilities, and has been and is now an employee in the bargaining unit described in paragraph 4, above.

10(a). On or about September 20, 1988, O'Hara, on behalf of himself and other unit employees, filed a grievance under the negotiated grievance procedure of the collective bargaining agreement, described in paragraph 5, above, alleging breaches of Article 22 of that collective bargaining agreement in the selection process for the position of "supervisor of Base Duplicating".

That grievance stated:

"In July of 1988 the supervisor of Base Duplicating retired, creating a promotion opportunity.
Capt. Sisterman, Chief of Base Administration contacted civilian personnel staffing section. He asked them to prepare a promotion evaluation pattern (PEP) copy enclosed, and to go Air Force wide to fill the position.

"Article 22 section E. of the union contract.
The Union will be given three (3) calendar days to review comment and/or request to negotiate on impact of newly developed PEPs. All supporting documentation relating to a PEP will be provided to the union as attachments to the PEP. The Union never received aforementioned documentation.

"Article 22 section F.1. of the contract.
The standard area for all positions is all activities serviced by the CPO. The expanded area is command and/or Air Force wide.

"Article 22 section F.3. of the contract.
If the area of consideration is expanded, the union will be notified. The union was never notified of Capt. Sisterman's intent to expand the area of consideration. It is evident by the experience, education and specialized experience sections of the PEP that all WG-4417-7 employees of Base Duplicating are eligible for consideration.

"Article 22 section L. of the contract.
Selection of employees of the installation is encouraged unless candidates outside the commuting area or non-Air Force candidates are clearly better qualified for the position vacancy.
Capt. Sisterman has made a selection of a WG-8 from Williams A.F.B. Arizona. I believe, and it is the belief of my fellow employees that this selection is not legal, logical or economically prudent.
We have within Lowry Base Duplicating many fully competent career individuals, who have devoted a life long career to quality and excellence. We ask that we be given the opportunity to compete in a fair and equitable promotional opportunity."

(b). On or about October 13, 1988, Respondent, through Rider, wrote O'Hara advising him as follows:

"1. This is in response to your referenced letter, dated and received 20 September 1988. This letter is being returned without action based on the fact that the position in question is not a bargaining unit position.

"2. I refer you to the Union-Management Agreement, Article 22, Section A, which states: Section A. The Provisions of this article apply to the filling of positions within the bargaining unit through the promotion process. When a position is filled by promotion, competitive procedures will be used except as otherwise noted. The position in question, Offset Duplicating Press Operation Foreman, WS-4417-07, is a supervisory position and is not within the bargaining unit as defined in Article 22.

"3. Based on the above, your letter is returned without action."

11(a). On or about October 25, 1988, O'Hara, on behalf of himself and other unit employees, filed an administrative grievance pursuant to Air Force Regulation (AFR) 40-771, alleging breaches of AFR 40-335 in the selection process for the position described in paragraph 10(b), above. That grievances stated:

"In compliance with A.F.R. 40-771, this grievance is filed on behalf of the employees of Base Duplicating. Melvin N. O'Hara Et EL.

"The employees of Base Duplicating feel the following sections of the Merit Promotion Program have been violated. Therefore the promotion of Mr. Pete Martinez was in violation of A.F.R. 40-335.

"A.F.R. 40-335 Section A. Item 2.a.
All employees within a designated area of consideration who meet the minimum qualification standards, and any legal or regulatory requirements imposed by the Office of Personnel Management (OPM) are considered eligible for promotion.

"A.F.R. 40-335 Section B. Item 5.e.
Qualified Candidates. Those who meet established qualification requirements for the position.

"A.F.R. 40-335 section B. Item 9.a.
Equal Opportunity For Advancement. The authority for personnel management functions is normally delegated to the lowest practicable level of supervision. However, when training, employment, or promotion patterns in an organization indicate that the principle of equal opportunity may not have been fully observed, the authority to select employees for promotion may be withdrawn by the Commander and assigned to higher level supervisors pending the outcome of an appropriate inquiry.

"A.F.R. 40-335 Section C. Item 23.a.
Candidate Evaluation;
All employees within the area of consideration receive consideration for each position being filled. Data on each employee's Master Personnel File (MPF) is matched against criteria specified in the PEP. Computerized processing procedures determine initial and basic eligibility. Employees who meet basic eligibility requirements are ranked through the application of ranking criteria, placing each eligible in his or her rank order. The computer output

listing, Product Index, identifies the rank order of each basically eligible employee.

"A.F.R. 40-335 Section C. Item 26.
Certification For Promotion.
A promotion certificate is the listing of the names of the best qualified candidates who are within reach on the register for referral to the selecting supervisor. The listing order of certification is determined by CCPO's; commonly used methods are alphabetical or other random order or rank order. No matter what order is used, selecting officials should be made aware that all certified eligibles are to be considered and any may be selected. Subject to the requirements to select a repromotion eligible. Local MPP plans must state this.

"A.F.R. 40-335 Section C. Item 29.
Selecting From The Certificate.
Except as otherwise provided in this regulation or by specific requirement of higher authority, any of the candidates listed on the certificate may be selected. Any entitlements to PCS costs must be according to Joint Travel Regulations (JTR), volume 2. The cost involved in moving an employee from a different geographic area is weighed in relation to his or her qualifications and the relative qualifications of available candidates from within the commuting area.

"It is our resolution that the promotion of Mr. Pete Martinez be recinded, and the Merit Promotion Program be applied to filling this position."

(b). On or about October 31, 1988, Respondent, through Sisterman, at Respondent's Lowry Air Force Base facility advised O'Hara as follows:

"1. This is in response to your letter dated and received 25 October 1988.

"2. Review of AFR 40-771, Chapter 3, states that only non-bargaining unit employees may use the grievance procedures contained in this regulation. Because all the employees of the Base Duplicating Center, with the exception of the supervisor, are part of the bargaining unit represented by Local 1974, American Federation of Government Employees (AFGE), you are ineligible to file under AFR 40-771. Therefore, your employee grievance is rejected."

12. Respondent, through Sisterman, failed and/or refused to process the grievance described in paragraph 11(a), above, because the grievants were at all material times herein employees in the unit described in paragraph 4, above, and covered by a collective bargaining agreement described in paragraph 5, above.

Discussion and Conclusions

Respondent contends no violation of the Statute has been established since the General Counsel has failed to allege and prove that the matter raised by the Agency grievance did not come within the coverage of the collective bargaining agreement and indeed the arbitrability of whether the negotiated grievance procedure covered the matter was a matter for an arbitrator to decide under the negotiated agreement. Respondent also contends that the violation alleged by the grievant when pursuing the Agency grievance was different from the grievance presented under the collective bargaining agreement grievance and that allegation presented a matter which was cognizable under the negotiated agreement since it concerned a question of the proper application of a regulation. In this regard Respondent relies on Article 26, Section B.1. c. of the negotiated agreement which defines grievance as "any complaint. . . by any bargaining unit employee . . . concerning . . . (1) The effect or interpretation or a claim of breach, of the Agreement; or (2) Any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment."

In Portsmouth Naval Shipyard and Department of the Navy (Washington, D.C.), 23 FLRA 475 (1986), a unit employee was told he was ineligible for a job he sought outside the represented unit. He filed a grievance on the matter through the negotiated grievance procedure which was rejected since the negotiated procedure permitted such a grievance only for a position within the employee's own bargaining unit. The employee then filed a grievance under the agency grievance procedure which was denied solely on the ground that Navy regulations deny access to the agency's grievance procedure to a bargaining unit employee covered by a negotiated agreement. The Authority found Respondent's conduct violative of the Statute holding:

> "The Authority concludes that it is a violation of section 7116(a)(1) and (2) of the Statute to deny employees access to an administrative grievance procedure because they

are represented by a union in an appropriate unit and covered by a collective bargaining agreement. The agency's administrative grievance procedure is a condition of employment as it is a personnel matter or practice established by rule or regulation for resolving disputes affecting employee working conditions. Section 7116(a)(1) and (2) of the Statute clearly prohibits discrimination between unit and nonunit employees with respect to conditions of employment based solely on bargaining unit status. There is no indication in the Statute or its legislative history that Congress intended for there to be any exceptions to this prohibition other than those which derive from the Statute itself. While section 7121(a)(1) of the Statute provides, with certain exceptions, that the grievance procedures of a collective bargaining agreement are to be the exclusive procedures for resolving grievances which fall within its coverage, it does not prohibit employees from using the agency grievance procedure to raise issues outside the scope of the negotiated grievance procedure. Thus, while the Statute does not mandate the scope of an administrative grievance procedure, once such a grievance procedure is established, unit employees may not be denied access to it solely on the basis of their status as members of a unit covered by a collective bargaining agreement. We thus find that Respondent's policy of discriminating between represented and unrepresented employees regarding access to the Agency grievance procedure is prohibited by the Statute." (Footnote omitted.)

The record herein discloses Melvin O'Hara filed a group grievance under the negotiated grievance procedure concerning the selection of an individual for a supervising job and the grievance was rejected by Respondent since the position which was the subject of the grievance was "not within the bargaining unit . . ." Thereafter a grievance was filed by O'Hara on behalf of himself and others under the Agency grievance procedure covering the selection of the particular individual for the supervisory job which was the subject of the grievance under the negotiated procedure. Respondent rejected this grievance stating "only non-bargaining unit employees may use the (administrative) grievance procedures" and because the grievant and the other

employees were in the bargaining unit, they were ineligible to file a grievance under the administrative procedure.

With regard to Respondent's contention concerning the General Counsel alleging and proving the matter at issue was not within the coverage of the collective bargaining agreement, the record discloses management took the position that the grievance was not cognizable under the negotiated agreement since the underlying issue concerned a position outside the bargaining unit. The grievant obviously conceded this issue and proceeded to the Agency grievances procedure. The terms of the negotiated agreement clearly state that the contractual promotion procedures apply only to filling positions within the bargaining unit and there is no contention or argument by the General Counsel that a grievance regarding the promotion at issue herein is cognizable under the negotiated agreement. Management and the grievant agree to that and I so find. In these circumstances I conclude the General Counsel need not specifically allege and prove, as Respondent contends, that the matter raised by the grievance does not come within the coverage of the collective bargaining agreement.

Nor is the question of the arbitrability of the matter relevant to a determination herein. When the grievance was filed under contractual procedures, no one objected to Respondent's determination that no grievance on the subject matter herein could be filed under the negotiated procedure. There was simply no dispute between parties that the matter was not a grievance under the contract. Where, as here, it is clear from conduct that there is no issue raised by a declaration of non-grievability under the agreement, the parties are not required to go to an arbitrator to pass on the matter.

I also find no merit in Respondent's contention that the rejection of the Agency grievance presented a matter which was cognizable under the collective bargaining agreement and the grievant should have processed that rejection through the negotiated grievance procedure. Management never conveyed this position to the grievant when it rejected the grievance. When it returned the grievance to the grievant management took the position the matter was not grievable under the Agency procedure because the grievant was a member of the bargaining unit and therefore ineligible to file an Agency grievance. Thus it was for this reason and not because the subject matter of the grievance was not cognizable under the Agency procedure that the grievance was not honored as a grievance. Management's response gave no

explanation or provided for any exceptions. The reason for the rejection was expressly stated: "only non-bargaining unit employees may use the (Agency) grievance procedures." The rejection went to the availability to the persons using the grievances procedure, not the subject matter of the grievance. The rejection of the grievance under these circumstances is a violation of the Statute. Portsmouth Naval Shipyard and Department of the Navy (Washington, D.C.), supra.

In view of the entire foregoing I conclude Respondent violated section 7116(a)(2) and (1) of the Statute by its maintenance of a rule or regulation which excludes employees who are members of a bargaining unit and covered by a collective bargaining agreement from utilizing Respondent's administrative grievance procedure regarding a matter not covered by the contractual grievance/arbitration agreement. I further conclude Respondent separately violated section 7116(a)(1) of the Statute by interfering with, restraining, or coercing employees in the exercise of rights guaranteed in section 7102 of the Statute to form and join a labor organization "freely and without fear of penalty on reprisal" when it informed unit employees that, because they were covered by a collective bargaining agreement, they could not utilize the Agency grievance procedure. Accordingly I hereby grant the General Counsel's motion for summary judgment deny Respondent's motion to dismiss and recommend 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 Lowry Air Force Base, Denver, Colorado shall:

1. Cease and desist from:

(a) Discouraging membership in and activity on behalf of the American Federation of Government Employees, AFL-CIO, Local 1974, the exclusive representative of a unit of its employees, or any other labor organization, by maintaining a rule which prohibits bargaining unit employees from utilizing the agency grievance procedure to grieve matters not covered by their negotiated grievance procedure solely on the basis of the employee's inclusion within a bargaining unit covered by a collective bargaining agreement.

(b) Interfering with, restraining, or coercing employees in the exercise of their right to engage in collective bargaining assured by the Federal Service Labor-Management Relations Statute by enforcing a rule or regulation which prohibits bargaining unit employees from utilizing the agency grievance procedure to grieve matters not covered by their negotiated grievance procedure solely on the basis of their status as employees within a bargaining unit covered by a collective bargaining agreement.

(c) Interfering with, restraining, or coercing employees in the exercise of their right to engage in collective bargaining assured by the Federal Service Labor-Management Relations Statute by making statements to unit employees to the effect that solely because they are covered by a collective bargaining agreement, they cannot utilize the Agency's administrative grievance procedure to grieve a matter not covered by their negotiated grievance procedure.

(d) 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) Reinstate and process on the merits under the Agency's grievance procedure the grievance filed Melvin N. O'Hara, a unit employee on his own behalf and on the behalf of other unit employees, which alleged breaches of AFR 40-335 in the selection process for filling the position of supervisor of Base Duplicating.

(b) Post at its facility 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 Commander of Lowry Air Force Base, Denver, Colorado, or a designee, 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 VII, Federal Labor Relations Authority, in writing, within

30 days from the date of this Order, as to what steps have been taken to comply herewith.

SALVATORE J. ARRIGO
Administrative Law Judge

Dated: September 19, 1989
Washington, D.C.