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

INTERNAL REVENUE SERVICE, WASHINGTON, D.C. Respondent and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. 8-CA-80151

Kenneth Russell, Esquire
Gerald M. Cole, Esquire (on the Brief)
For the General Counsel

James D. Bailey, Esquire
Andrew R. Krakoff, Esquire (on the Brief)
For the Charging Party

Richard M. Slizeski, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding 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., (the Statute).

Upon an unfair labor practice charge filed by the National Treasury Employees Union, (NTEU) against the Internal Revenue Service, Washington, D.C., the General Counsel of the Federal Labor Relations Authority (the Authority), by the Acting Regional Director for Region 8, issued a Complaint and Notice of Hearing on March 4, 1988. The Complaint alleges that the Respondent violated Section 7116(a)(1) and (5) of the Statute by refusing to recognize Cleveland Harris as a steward-at-large of Chapter 198 of NTEU.

A hearing was held on May 26, 1988, in Los Angeles, California. All parties were permitted to present their positions, to call, examine, and cross-examine witnesses, and to introduce evidence bearing on the issues presented. The General Counsel, NTEU, and IRS submitted post-hearing briefs.1/

On the basis of the entire record, the briefs, and my evaluation of the evidence, I make the following findings of fact, conclusions, and recommendation:

Findings of Fact

IRS and NTEU have been parties to a series of nationwide collective-bargaining agreements affecting employees of IRS represented by NTEU. The current agreement is called "NORD II", an acronym for the parties' second "National Office Regions and Districts" agreement. NORD II contains a negotiated grievance procedure and a separate article, Article 9, dealing, in part, with the designation of stewards and other individuals who may act for NTEU in grievance meetings and in other matters.

In 1986, employee Cleveland Harris, as president of Chapter 198 of NTEU, advised the chief of IRS' labor relations section for its Los Angeles District that Harris was designating himself as steward under Article 9 for all "organizational segments within Chapter 198." Subsequently, Harris left the employment of IRS, but remained Chapter 198 president. On October 19, 1987, he wrote a letter to the IRS district director for Los Angeles, stating that he remained "steward-at-large" (a position described separately in NORD II Article 9) and, as such, needed provisions to be made for his access to unit employees who needed representation. The response to this letter came from Al Julg, the IRS labor relations chief to whom Harris had addressed his

---

1/ A few days before the hearing, IRS filed a motion to dismiss the Complaint. Essentially, the basis of the motion was that the alleged unfair labor practice represented nothing more than a dispute over the interpretation of a collective-bargaining agreement which should be resolved through the grievance-arbitration process. The motion was referred to the Chief Administrative Law Judge and was presented to the undersigned at the hearing, where the IRS supplemented it with an oral motion for summary judgment. I reserved decision on these motions, and IRS renewed them with an addendum submitted after the hearing.

1986 designation of himself as steward. Julg advised NTEU that IRS would no longer recognize Harris either as a "steward-at-large" or as a "steward" because such officials must, under a subsection of Article 9, be bargaining unit employees. However, Julg acknowledged Harris' status as chapter president, and set forth the conditions under which Harris would be given access to employees in that capacity.

Since the date of that response, Harris has been permitted to engage in all the representative functions of a chapter president except those which IRS contends are reserved for stewards who are bargaining unit employees. Essentially, that limitation applies only to the stage of the negotiated grievance procedure at which a chapter president is, according to IRS' interpretation of the contract, permitted to participate. The extent of this limitation reflects the fact that while Article 41, the article of the contract setting forth the grievance procedure, differentiates the functions of stewards and chapter presidents, Article 9, described in brief above, does not. The General Counsel and NTEU would characterize Julg's refusal to recognize Harris more broadly, in light of his memorandum which refuses to recognize him "in any capacity as a steward-at-large" or "in any capacity as a steward for any organizational segment." However, the memorandum as a whole (G.C. Exh. 4), considered together with the contract language to which it refers and the uncontradicted testimony of IRS Labor Relations Specialist Kamins, presents a much less sweeping limitation of Harris' representative capacity. To the extent that it is contended that the refusal to recognize encompassed Harris' representative activities other than in grievance proceedings, the General Counsel has not sustained the burden of so proving. That is, there is no evidence that IRS has restricted Harris or intends to restrict him in any other way.

Discussion and Conclusions

The General Counsel and NTEU contend that IRS may not reject NTEU's designation of its steward or steward-at-large absent a clean and unmistakable waiver of the Union's right to designate such representatives. They argue against the existence of such a waiver, asserting that the contractual provision that requires stewards to be unit employees is inapplicable to a chapter president who designates himself as steward. Refusing to accord Harris his designated status of steward or steward-at-large, they, argue, constitutes a refusal to bargain and an interference with the rights of the employees whom Chapter 198 represents.

IRS argues that the matter of the identity of the Union's representative in grievance proceedings is governed by the collective-bargaining agreement, not by a statutory right, and that the parties' dispute over the correct interpretation of the contract provisions governing stewards and stewards-at-large must be resolved, if at all, under the grievance procedure to which the parties have agreed. I conclude, for the reasons that follow, that this argument prevails.2/

The traditional view, held by the Authority since it first addressed the issue, is that each party to the bargaining relationship contemplated under the Statute has the sole right (over which it need not bargain) to designate its own representatives for dealing with the other party for collective-bargaining purposes. American Federation of Government Employees, AFL-CIO, 4 FLRA 272, 274 (1980). Despite relevant developments that will be discussed below, the Authority adheres in general to that principle. See American Federation of Government Employees, Local 1738, AFL-CIO, 29 FLRA 178, 188 (1987). In fact, in Internal Revenue Service, Washington, D.C. and Fresno Service Center, Fresno, California, 16 FLRA 98, at 98-99, 121-123 (1984), (hereinafter referred to as "IRS Fresno"), the Authority found a violation of Sections 7116(a)(1) and (5) in the refusal of IRS to permit the union's chief steward to participate in a grievance meeting, despite the assertion by IRS that the contract contained a waiver of the union's right to designate the chief steward as its representative. Thus, were the state of the law today what it was when IRS Fresno was decided, it would appear that the General Counsel's theory of the instant case would govern.

However, a different approach, or, more precisely, a combination of different approaches, began to emerge some time later. In Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 22 FLRA 91, 113-114, (1986) (hereafter "SSA"), the Authority adopted the administrative law judge's finding that a refusal to honor the union's designation of its representative to bargain over certain proposed changes affecting unit employees was a matter for contract interpretation through the contractual grievance and arbitration procedures rather than through unfair labor practice procedures. The rationale for this result was that, since the parties had agreed to a formalized bargaining relationship, and the contract was susceptible to either the agency's interpretation (which

---

2/ Since I deem this procedural bar to be dispositive, I do not reach any of the other issues raised by the parties.

restricted the Union's designation of a bargaining representative) or the General Counsel's interpretation (under which the union had not waived the right to designate whomever it wished), the parties' mutually agreed grievance and arbitration procedure was the appropriate avenue for resolution of the dispute. This theory, while acknowledging the union's right to designate its representative as a statutory right, contemplates that the nature of that right changes once the parties have, by agreement, formalized the procedures of the bargaining relationship. Once those procedures have become matters of contract, legitimate disputes regarding their application are deemed to be similar to any other contract dispute.

Under SSA, the statutory right to designate a representative becomes a matter for contract interpretation under the negotiated grievance-arbitration procedures by virtue of the parties' voluntarily incorporating the subject of designated representatives in their agreement. As the facts in SSA demonstrate, this result does not depend upon the designations in question being for representatives in the grievance procedures themselves, but would apply to designations of representatives for all aspects of the bargaining relationship. Thus, SSA would have potential applicability here even if IRS' refusal to recognize Harris encompassed more than the contractual grievance functions of stewards and stewards-at-large. However, I do not regard SSA as the strongest precedential basis for disposition of this case, in part because it is not clear whether the Authority passed on the judge's relevant finding. For, in adopting his findings, the Authority noted "particularly the limited nature of the General Counsel's exceptions," which were "limited to the Judge's dismissal of one allegation in the consolidated complaint." Since the judge dismissed several allegations, the Authority's published affirmance does not reveal whether the Authority considered the allegation of refusal to honor the Union's designation on the merits or adopted the dismissal in the absence of an exception.3/

3/ On the state of the Authority's position on the availability of unfair labor practice and grievance avenues, generally, see Federal Aviation Administration, Spokane Tower/Approach Control, 15 FLRA 668 (1984); Department of the Treasury, United States Customs Service, Region IV, Miami, Florida, 19 FLRA 421, 422-423 n.5 (1985) (refusing to adopt NLRB's Collyer Insulated Wire doctrine of deferral to arbitration procedures); 22nd Combat Support Group (SAC), March Air Force Base, California, 30 FLRA 331, 334 (1987);

(footnote continued)

A recent development in Authority precedent provides more compelling guidance for this case. In National Federation of Federal Employees, Local 29 and Department of Defense, HQ U.S. Military Entrance Processing Command, 29 FLRA 726, 728-30 (1987) (hereinafter "NFFE"), the Authority held a union proposal concerning the identity of management representatives at various steps of the grievance procedure to be negotiable. The Authority reasoned that the requirement of section 7121 of the Statute that the parties negotiate a grievance procedure takes precedence over the management right to assign a particular individual the responsibility for hearing a grievance at a particular step of the procedure. The Authority specifically held that the designation of the individual was a matter concerning the structure of the grievance procedure and thus fell within an exception that, the Authority declared, section 7121 carved out of the management right to assign work.

Soon afterward, the Authority had occasion to consider the negotiability of the issue of the identity of union officials who could process grievances. The Authority applied the rationale of NFFE, and held that the section 7121 requirement to negotiate over grievance procedures took precedence over the union's general right to designate its representatives. Commander, Carswell Air Force Base, Texas, 31 FLRA 620, 627-28 (1988).4/ This limited exception to the unilateral right to designate depends not on the parties' voluntary undertaking to reach an agreement formalizing the bargaining relationship, as in SSA, supra, but on the statutory requirement that they negotiate whether they are

---

3/ (footnote continued)

and Judge Oliver's attempt to harmonize Authority precedent, in Department of the Army, Fort Riley, Kansas, 26 FLRA 222, 238 (1987). See also Department of Health and Human Services, Social Security Administration, Baltimore, Maryland, 18 FLRA 855 n.1 and cases cited (1985); and compare it with Department of Defense, Department of the Army, Headquarters, XVIII Airborne Corps, and Fort Bragg, 15 FLRA 790, 793 n. 2 (1984) and Veterans Administration, Veterans Administration Medical Center, Muskogee, Oklahoma, 19 FLRA 1054, 1058-59 (1985).

4/ It should be noted that, in NFFE, the section 7121 requirement expressly overrode the management right to assign work, but by necessary implication also overrode management's counterpart to the union's right to designate its representatives.

willing to or not. On the other hand, Carswell has narrower applicability than SSA in one important respect. It affects only the right to designate grievance representatives.

I consider a logical implication of Carswell and NFFE to be that disputes over the designation of grievance representatives are matters of contractual rights and responsibilities rather than of statutory rights. Further, I conclude that this implication, while not necessarily inescapable, is more consistent with the rationale of Carswell and NFFE than the alternative theory that the right to designate grievance representatives is still a statutory right subject to surrender only by a clear and unmistakable waiver. I believe that this view of the Authority's thinking is supported by its recent willingness to characterize a dispute over the union's right to investigate grievances as a contract dispute, not suitable for disposition as an alleged unfair labor practice. Marine Corps Logistics Base, Barstow, California, 33 FLRA 627, 640-42 (1988).

It remains only to ensure that IRS' contract interpretation has sufficient basis to support the contention that this case should be treated as a contract dispute. The Authority has put its imprimatur on various characterizations of the minimum showing a party must make in this regard. Thus, it presumably is not sufficient for a party merely to assert that there is a real dispute as to contract interpretation. In the recent Marine Corps case, supra, the Authority found it sufficient that the respondent's interpretation was "arguable," noting that its argument concerning the wording of the provision in dispute was "plausible." Id. at 642. 5/ Here, the agreement contains provisions which (1) require all stewards except chapter presidents and chief stewards to be bargaining unit employees (2) subject stewards-at-large to all provisions respecting stewards (with exceptions that do not appear to affect the requirement that they be bargaining unit employees), and (3) differentiate the role of steward and the role of chapter president in the grievance procedure.

5/ Cf. Department of the Navy, United States Naval Supply Center, San Diego, California, 31 FLRA 1088, 1093-94 (1988) ("different and supportable interpretations"); Department of the Army, Fort Riley, Kansas, supra, 26 FLRA at 238 ("On the other hand, if Respondent's interpretation of the agreement is untenable, an unfair labor practice may be found.")

These provisions give at least colorable support to IRS' claim that a chapter president, when acting as a steward in a grievance proceeding, is subject to the unit employee requirement. It is not the only plausible interpretation, and extensive testimony by witnesses on both sides gave impressive support to versions of the bargaining history of these provisions that would support the parties' respective positions. Nevertheless, the considerations discussed above persuade me that the Authority would not have me sort it out. In these circumstances, my recommendation is that the Authority adopt the following Order:

ORDER

The Complaint in this proceeding is dismissed.

Issued, Washington, D.C., December 29, 1988

Jesse Etelson

JESSE ETELSON
Administrative Law Judge