

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

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GENERAL SERVICES ADMINISTRATION .  
REGION IX, SAN FRANCISCO .  
CALIFORNIA .  
Respondent .  
and . Case No. 9-CA-00160  
AMERICAN FEDERATION OF .  
GOVERNMENT EMPLOYEES, AFL-CIO .  
Charging Party .  
.....

Deborah Finch  
Representative of the Respondent

Terry Fox  
Representative of the Charging Party

Lisa L. Katz  
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER  
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent (GSA) violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (2), by issuing to an employee, Theodore R. Helminski, a two day suspension from duty and pay because he filed grievances and used official time, activities protected by the Statute.

Respondent's answer admitted the jurisdictional allegations as to Respondent, the Union, and the charge, but denied any violation of the Statute.

For the reasons discussed below, I find that a preponderance of the evidence does not establish that Respondent violated the Statute as alleged.

A hearing was held in San Francisco, California. The Respondent, Charging Party, and the General Counsel were represented 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, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

### Findings of Fact

#### A. Helminski's Protected Activity

At all times material herein, Theodore R. Helminski has been employed by Respondent as a construction engineer in the bargaining unit represented by the American Federation of Government Employees, AFL-CIO (AFGE). Helminski became the Principal Representative of AFGE for Respondent's office at 525 Market Street in San Francisco in approximately March 1989.

In his capacity as Principal Union Representative, Helminski has advised employees about grievance procedures, filed grievances for employees, represented employees in oral hearings on disciplinary matters, represented one employee before the Merit Systems Protection Board (MSPB), filed group grievances, and filed grievances on his own behalf.

Between August and December of 1989, Helminski filed many grievances, about 15 on his own behalf under the parties' collective bargaining agreement. All of Helminski's own grievances involved complaints against his immediate supervisor, John G. Day, Acting Branch Chief, Construction Management Branch. He filed nine or ten of these grievances in October, including one grievance on October 6, 1989 specifically complaining about being given too many constructability reviews at a time when he was presenting a case before the MSPB "as well as serving on the CQM [Construction Quality Management] Selection Committee."

Day was the deciding official at the first step of the grievance procedure. Most of these grievances were raised

to the second step of the grievance procedure where the deciding official was the Assistant Regional Administrator, who was first Aki Nakao and later Richard Welsh.

Helminski also assisted at least three other bargaining unit employees in filing grievances in the Fall of 1989. Within this same time frame he also filed two group grievances, one of which was filed on October 12 and also involved John Day.

Helminski's Union activities, particularly his work on the MSPB appeal, took up a great deal of time. The MSPB appeal was filed on September 8, 1989 and the hearing was held on December 8, 1989. He was spending about four hours per day working on the MSPB appeal. This was the first time that Helminski had worked on an MSPB appeal, so it took him extra time.

Under the terms of the parties' National Agreement, Article 6, § 3.C., Union representatives are authorized official time to represent bargaining unit employees before certain agencies including the MSPB "as determined by these authorities." While he was working on the MSPB appeal, Helminski was told by Joyce Williams, the personnel specialist representing Respondent in the matter, that he was prohibited from using official time to work on the MSPB appeal. After he complained to the Administrative Law Judge handling the case, that issue was dropped and he was allowed to use official time.

From September 25 through November 2 approximately 208 working hours were available to Helminski. Of these, Helminski requested and was authorized at least 72 hours of official time for various Union activities. Helminski was never denied the amount of official time he requested. However, Helminski acknowledges that he was not always careful about accounting for his time and that he was not on official time when he filed nine or ten grievances on his own behalf. This activity consumed from 10-15 hours in October. There is no evidence that management was aware of this unreported use of duty time.

#### B. Helminski's Work on the Source Selection Board

A Source Selection Board is a group of three or four GSA employees who review proposals by Construction Quality Management firms (CQMs) competing to oversee the administration of GSA construction contracts. The Source Selection Board makes a recommendation about which CQM will

be awarded the contract based on the Board's review and evaluation of the CQM's proposals.

On September 14, 1989 Helminski was assigned to work on a Source Selection Board to evaluate the proposals of six CQMs. John Day gave him the assignment with the statement that "time was of the essence and please get with it. . . ." <sup>1/</sup> No specific deadline for completion of the work was given. Immediately thereafter, Helminski left the office on travel status followed by approved annual leave and did not return until September 25, 1989.

When Helminski returned to the office on September 25, 1989 he signed several forms. Included was a "Statement of Conflict of Interest" certifying that neither he nor any member of his family had "any direct financial or employment interest" in any of the firms to be reviewed by the Board. There is no evidence that Helminski ever had any such interest.

Andrew Kilk, another construction engineer in the Design and Construction Division, was named Chairman of the Board. On more than one occasion in early October 1989 Kilk asked Helminski how he was doing on the project and when he would finish. Helminski replied, "I'm going to get to it." Helminski mentioned that he was having a problem because of derogatory things he knew about one of the firm's previous dealings with GSA. Kilk ignored the comment.

Helminski acknowledged in a grievance filed with John Day on October 6, 1989, in which he complained about having too many constructability reviews, that he was "serving on the CQM Selection Committee."

Kilk and Board member Reiretes completed their CQM evaluations by October 17, 1989. Each member of the Board was responsible for the evaluation of the six competing firms. It would normally take an engineer from four to six hours to evaluate each firm. The Chairman, Kilk, spent 40 hours on his evaluations over a two to three week period. During the period September 25, 1989 to November 2, 1989 Mr. Helminski had sufficient working time apart from his

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<sup>1/</sup> Helminski testified that he did not have any discussion with Day on September 14 about the Source Selection Board and first learned of it when he returned to the office on September 25. I credit Day's testimony on this point.

reported official time within which to complete his Board responsibilities.

Mr. Helminski testified that he wanted to be removed from the Board because of the amount of time he was spending on his own grievances and in representing an employee before the MSPB. He also had an "emotional problem" with the assignment because of derogatory things he knew about one of the firms to be evaluated which he was told could not be considered in his evaluation. Accordingly, he was "very suspicious" of Mr. Day's and Mr. Wilby's motives in putting him in that position. He also believed that the work was "not very important" because of information he had received from other sources. He testified that the Board assignment was not part of the critical elements in his performance evaluation, and, accordingly, he felt he should give "very special attention" to his critical elements items since he was being monitored very closely at the time under a performance improvement plan. Mr. Helminski acknowledged that he was suffering from stress during the time he was assigned to the Board and found it difficult to concentrate, organize his work, and work efficiently.

On October 23, 1989 Helminski gave Kilk a note asking if it was at all possible to be removed from the Board.<sup>2/</sup> He stated, "I've got too much Union stuff and I didn't realize [the firm I have a problem with] was in this pile."

On October 25, 1989, Kilk forwarded the note to Day commenting that Helminski was the only one who had not completed his evaluation and recommending that an alternate complete the evaluation. Kilk wrote to Day again on

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<sup>2/</sup> Helminski testified that he requested to be removed from the Board because of his time conflicts at an earlier date. He claims he discussed it with Day when he received the assignment in September and in a routing slip to Day on October 10, 1989. Day denies receiving the October 10 routing slip and claims that Helminski did not complain to him of any problem completing the assignment prior to late October. I credit Day's testimony. Helminski admits that he assured Kilk in early October that he was getting the work done. In a grievance filed with Day on another matter on October 6, 1989 Helminski stated that he was "serving on the CQM Selection Committee." He also did not refer to an earlier request to be removed in his October 23 note to Kilk or November 2 memorandum to Day, to be discussed later.

November 1, 1989 Kilk reiterating this information and stating, "[Helminski] states his union actions prevent him from [completing the assignment]."

On November 2, 1989 Day sent Helminski a memorandum directing him to proceed "at once" to complete the evaluation. Helminski was told to complete the work on a "first priority" basis by November 6, 1989.

Helminski replied to Day by memorandum dated the same day requesting that he be relieved from the assignment. He stated that as Principal Representative for AFGE "a great deal of my time must be spent on union matters." He also cited the "additional representational time which must be used" in connection with the MSPB appeal. In addition, Helminski cited the time it took him to respond to Day's "harassing memoranda . . . seeking[ing] vengeance on me for my revelations regarding management improprieties. . . ." Helminski stated he also had "a strong emotional bias" against one of the firms. Helminski gave a copy of his memorandum to the contracting officer.

Day removed Helminski from the Board later in the day of November 2, 1989. Helminski had completed evaluations of two or three of the firms before being removed from the Board.

#### C. Disciplinary Action Taken Against Helminski

On December 26, 1989 Respondent sent Helminski notice of a proposed two day suspension. The proposal set forth two reasons. One was Helminski's failure to complete an assigned task, summarized as follows:

You knew of your assignment to the Source Selection Committee for approximately six (6) weeks before requesting to be removed from the committee and relieved of the assignment. The task assigned to you was reassigned and completed by Ashima Roy, an alternate Board member. Your failure to complete the evaluation or to timely request reconsideration as a Board member caused a significant delay in the contract administration process.

The second alleged act of misconduct was Helminski's use of the office telefax machine to send copies of another proposed suspension to the Office of the Special Counsel and AFGE headquarters.

Helminski responded to the proposed suspension on December 27, 1989. Helminski claimed that he did not receive the assignment until he returned from leave on September 25th and that he had complained to Day "at that time and on several later occasions that I had severe time problems and could not handle the additional assignment." He mentioned the priority he had given to his representational work before the MSPB and the fact that he had to give a great deal of attention to his normal work, additional constructability reviews, and to responding to 26 memoranda from Mr. Day. He stated he had attempted to give time to the Board but "had a great problem" with one of the contractors being considered.

Helminski also responded to the second allegation of improperly using the FAX machine. He asserted, in part, that both he and Mr. Day believed that the use of the machine was authorized; that it was not until December 12 that a contrary opinion was issued by the personnel department; and that "[o]bviously there is a difference of opinion on the use of these machines and we will have to resolve it by means of the grievance process[. However it is an unfair labor practice to attempt disciplinary proceedings based on a reasonable difference of opinion."

On March 30, 1990, Richard B. Welsh, Jr., Assistant Regional Administrator, Public Buildings Service, sent Helminski a letter announcing his decision to suspend Helminski for two days. Welsh acknowledged that there may have been some confusion about the Union's entitlement to the use of the FAX machine and dismissed the charge of unauthorized use of the machine. Welsh discussed the other reason for the action as follows:

In the matter of your failing to complete an assigned task, you were given the assignment to serve on the Source Selection Evaluation Board on September 14, 1989. By signing the Conflict of Interest Statement on September 25, 1989 you admitted to no conflicts that would substantially interfere with your duties as a member of the Source Selection Evaluation Board. By signing the statement you also made the commitment that should you later become aware of any conflicts of interest, you would disqualify yourself by informing the Chairperson of the [B]oard and abide by any instructions given you in the matter. If in fact you were aware of any conflict of interest, you

failed to request relief from the assignment until November 2, 1989, then only after being asked by your supervisor for your completed evaluation.

Accordingly, I find that the more serious charge of failing to complete your assignment to the Source Selection Evaluation Board is sustained. I find further that this infraction by itself merits the two (2) days suspension proposed. You will be suspended effective April 10 and 11, 1990.

From January 1987 through December 1989 there were eight Source Selection Boards used by the Construction Management Branch of GSA Region 9. During that time period Helminski was the only person to request to be excused from participation in a Board and the only person to receive a proposed disciplinary action for failure to complete the assigned work on a Source Selection Board. The record does not reflect any instance of an employee who was not engaged in protected activity not being held responsible for failure to complete an assigned task.

#### Discussion, Conclusions, and Recommendations

In cases involving allegations that an agency has violated section 7116(a)(2) of the Statute, the General Counsel bears the burden of proving the allegations of the complaint by a preponderance of the evidence. Letterkenny Army Depot, 35 FLRA 113 (1990); U.S. Department of Labor, Washington, D.C., 37 FLRA 25, 37 (1990) (Labor). In the instant case, the issue is whether the General Counsel has proved by a preponderance of the evidence that the Respondent's decision to issue Mr. Helminski a two day suspension for not completing an assignment was in retaliation for his filing grievances and using official time, activities which assist a labor organization and are protected by the Statute. See 5 U.S.C. §§ 7102, 7121(b)(3)(A), 7131(d).

The record reflects that Helminski filed numerous grievances and used official time during the period in which he was accused of not completing an assigned task. Management was well aware of his grievances and that he had requested and been granted certain official time. Although closeness in time between an agency's employment decision and protected activity may support an inference of illegal anti-union motivation, it is not conclusive proof of a violation. Labor, 37 FLRA at 37.

As additional proof of management's illegal motivation, Counsel for the General Counsel points to the fact that Helminski was told by a personnel specialist that he could not use official time to work on the MSPB appeal. He was only allowed to do so after he complained to the MSPB Judge. The personnel specialist's advice was too restrictive and incomplete, but the parties' collective bargaining agreement does only authorize official time for MSPB representation "as determined by [the MSPB]." Helminski secured proper MSPB authorization after the personnel specialist's advice. Thus, this incident is not persuasive concerning illegal anti-union motivation.

Counsel for the General Counsel also points to the fact that part of the charge in the original proposed suspension was Helminski's "unauthorized use of the government FAX machine." Counsel claims that this shows illegal anti-union motivation as Helminski was seeking the assistance of AFGE headquarters by using the machine. It is noted that Helminski's own reply to this charge acknowledged "a reasonable difference of opinion" concerning whether this was an authorized use of this machine. In view of all the circumstances, including the fact that this charge was ultimately dismissed by management based on "confusion as to the union's entitlements," the initial charge also does not demonstrate management's illegal anti-union motivation.

The record demonstrates that Helminski should have been able to devote the amount of official time to Union activity which he requested and still complete his Board assignment in a timely manner. Helminski was never denied official time. Yet he acknowledged that he used more duty time for representational activity on his own grievances than he requested. The Respondent cannot be faulted for having expected Helminski to perform his assigned duties at times when he reported himself to be in a regular duty status, nor can it be held to have acted in reprisal for claimed protected activity of which it was unaware.

Record facts demonstrate that Helminski was informed of the importance of the assignment at the outset by his supervisor. When asked on more than one occasion by the anxious Board Chairman about the status of the project, he assured him that he would "get to it." Helminski requested to be excused only after four weeks had passed and the other two members of the Board had completed their evaluations within the normal time frame.

In addition to Helminski's having enough duty time to complete the assignment even with the reported official time

for protected activity, his testimony and correspondence reveal a number of reasons for his dilatory conduct and failure to complete the assignment. Despite being informed by his supervisor at the outset of the importance of the assignment and being asked by the anxious Board Chairman of the status of the project, Helminski (1) had an "emotional problem" with the assignment because of his bias against one of the firms to be evaluated; (2) was "very suspicious" of his supervisors' motives in giving him the assignment; (3) believed that the work was "not very important," (4) decided to give "very special attention" to his regular work, and (5) believed he was suffering from stress at the time and, therefore, found it difficult to concentrate, organize his work, and work efficiently.

The record demonstrates that (1) Helminski was issued a two day suspension from duty and work for failure to complete a work assignment; (2) Helminski failed to complete the work assignment; (3) there was a legitimate justification for Respondent's actions; and (4) the same action would have been taken in the absence of protected activity.

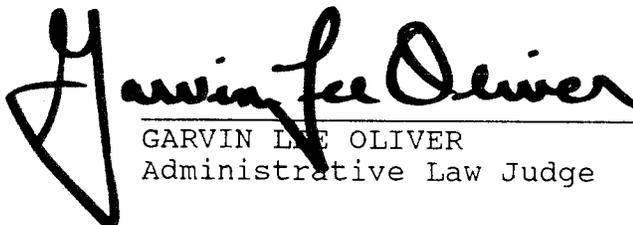
It is concluded that a preponderance of the evidence does not establish that Respondent's action of issuing Mr. Helminski a two day suspension from duty and pay for failure to complete an assignment was taken because Helminski engaged in protected activity. Accordingly, Respondent did not violate section 7116(a)(1) and (2) of the Statute as alleged.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

Order

The complaint is dismissed.

Issued, Washington, DC, February 14, 1991

  
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GARVIN LEE OLIVER  
Administrative Law Judge