

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

.
DEPARTMENT OF THE TREASURY .
OFFICE OF THE CHIEF COUNSEL .
INTERNAL REVENUE SERVICE .
NATIONAL OFFICE .
Respondent .
and .
NATIONAL TREASURY EMPLOYEES .
UNION .
Charging Party .
.

Case No. 3-CA-80281

Carolyn J. Dixon, Esquire
For the General Counsel

Jefferson Friday, Esquire
For the Charging Party

Barbara Mintz, Esquire
For the Respondent

Before: BURTON S. STERNBURG
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. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to a charge filed on March 3, 1988, by the National Treasury Employees Union, (hereinafter called the Union or NTEU), a Complaint and Notice of Hearing was issued on May 31, 1988, by the Regional Director for Region III,

Federal Labor Relations Authority, Washington, D.C. The Complaint alleges that the Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office, (hereinafter called the Respondent), violated Section 7116(a)(1) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of its actions in prohibiting unit employee/union steward Warren Joseph from representing unit employee Benjamin Foster in an EEO proceeding held pursuant to the Department of the Treasury's EEO Complaint Procedure.

A hearing was held in the captioned matter on December 9, 1987, in Washington, D.C. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The Charging Party submitted a post-hearing brief on September 2, 1988 and the General Counsel and Respondent submitted their post-hearing briefs on September 12, 1988, all of which have been fully considered.^{1/}

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

Since March 3, 1987, the Union has been certified as the exclusive representative of some 600 employees working in the Office of the Chief Counsel, which is a component part of the Office of the General Counsel, Internal Revenue Service. Approximately 300 of the 600 employees are attorneys.

The Union and the Respondent are parties to a collective bargaining agreement which provides for official time for Union Stewards in connection with their representation of unit employees. In this connection Article 4, Section 2 provides in pertinent part as follows:

Section 2: Official Time

- A. The Employer fully recognizes that whatever reasonable time is spent in the conduct of

^{1/} In the absence of any objection, the respective motions of the General Counsel and the Respondent to correct transcript, should be, and hereby are, granted.

Union/Employer business is spent as much in the interest of the Employer as that of the employees.

- B. Stewards shall be provided official time, as determined by the Federal Labor Relations Authority (Authority), for participation for or on behalf of, the Union in any phase of proceedings before the Authority during the time the steward would otherwise be in a duty status.
- C. Stewards shall be granted official time for participation for, or on behalf of, the Union in the meetings with the Employer (including time to travel to and from such meetings) described in subsection D. below. Except where otherwise specifically provided, for each of these meetings one (1) steward only is entitled to time.
- D. The meetings referred to in subsection C. above are:
 - 1. meetings with the Employer concerning personnel policies, practices or other general conditions of employment, or any other matter covered by 5 USC 7114(a)(2)(A);
 - 2. meetings to discuss or present unfair labor practice charges or unit clarification petitions;
 - 3. oral replies to notices of proposed disciplinary, adverse or unacceptable performance actions;
 - 4. meetings to present appeals in connection with statutory or regulatory appeal procedures in which the Union is designated as the representative;
 - 5. meetings for the purpose of presenting reconsideration replies in connection with the denial of within-grade increases;
 - 6. examinations of employees in the unit by a representative of the Employer in connection with an investigation if:

- a. the employee reasonably believes that the examination may result in disciplinary action against the employee; and, . . .
 - b. the employee requests representation;
7. tax audits of unit employees that are conditions of employment when the employees request representation; and, . . .

The Treasury Department's EEO "Directive" dated January 12, 1987, which governs "Processing Discrimination Complaints," provides in Part XIV "Representation and Official Time," Section (b)(2), that "A complainant may be represented by an employee organization with exclusive bargaining rights unless such representation would constitute a conflict of interest or position".

Article 5, "Employee Grievance Procedure" of the collective bargaining agreement provides in Section D(1) as follows:

Employees who believe they have been illegally discriminated against on the basis of race, color, religion, sex, national origin, age or handicapping condition have the right to raise the matter under the statutory procedure or the negotiated grievance procedure of this Agreement, but not both . . .

Mr. Warren Joseph is the Executive Vice President and Chief Steward of NTEU Chapter 251. In his capacity as Chief Steward, Mr. Joseph attends grievance meetings, supervises other stewards in the performance of their duties, assists in the representation of employees in grievances, arbitrations, EEO and MSPB appeals. He also participates in labor negotiations.

Mr. Joseph is employed in the office of Chief Counsel as an Attorney Advisor, GS-14. His primary duty is to draft responses to inquiries from taxpayers concerning the consequences of proposed transactions. He also gives technical, advice on request, to various IRS field offices concerning the proper method for handling certain tax matters. He drafts revenue rulings, announcements, notices and news releases that appear in the "Internal Revenue Bulletin". Mr. Joseph's job has nothing whatsoever to do

with anything related to EEO matters. Thus, according to the uncontradicted testimony of Mr. Joseph, neither he nor his fellow attorneys participate in anyway on the Department of Treasury's behalf in EEO matters, including having access to the Department's files dealing with EEO matters.

During 1987, unit employee Benjamin Foster filed an EEO age discrimination complaint under Respondent's EEO appeals procedure. The Union was designated by Mr. Foster as his representative in the matter. The Union, in turn, designated Chief Steward Warren Joseph to handle Mr. Foster's case for the Union.

On December 10, 1987, while Mr. Foster's EEO complaint was pending formal hearing, Respondent's representative, Mr. Neil Worden, filed with hearing officer Judge Mona Reed an "Objection to Representation" seeking the disqualification of Mr. Joseph as Mr. Foster's representative. Mr. Worden cited as the basis for his motion to disqualify Mr. Joseph, Part XIV of Respondent's EEO procedures concerning representation of complainants. Mr. Worden specifically referred to Part XIV(b)(1) which provides for personal representation of a complainant by another Department of Treasury employee.^{2/} Thus, Mr. Worden argued that since

^{2/} Part XIV(b)(1) provides as follows: "A complainant's representative may be an employee of the Department so long as representation is consistent with the faithful performance of his or her duties."

General Counsel Directive No. 6 provides, in relevant part, as follows:

(D) Other Outside Employment

Permission to engage in other outside employment may be granted when there is a showing by the attorney that such employment is wholly consistent with the general policies set forth in this Directive. Representation of individual Treasury Department employees in disciplinary or grievance proceedings in any hearing of any nature is determined to be prohibited employment regardless of whether any form of compensation is received.

Mr. Joseph is an attorney in the office of the Chief Counsel, he is subject to General Counsel Directive No. 6 which has been narrowly interpreted by the General Counsel as prohibiting Chief Counsel attorneys from providing representation, even for Chief Counsel employees, in administrative and court hearings, including those involving EEO matters." Mr. Worden concluded, therefore, that Mr. Joseph should be disqualified because to do otherwise ". . . would be tantamount to permitting him to do an act inconsistent with the faithful performance of his duties." Mr. Worden did not argue or otherwise mention Part XIV(b)(2) of Respondent's EEO procedures which authorizes Union representation for complainants in established bargaining units.

On December 14, 1987, Mr. Joseph corresponded with EEO hearing officer Judge Reed on Mr. Foster's upcoming formal hearing. He discussed procedural matters such as formal designations of representative, possible hearing dates, witness lists and documents needed for the hearing. Mr. Joseph also stated he would respond to Mr. Worden's Objection to his Representation of Mr. Foster with a motion in opposition. On December 17, 1987, Mr. Joseph filed with Judge Reed his opposition to the motion to disqualify him as Mr. Foster's representative. In support of his opposition, Mr. Joseph argued that the Union had been properly designated by Mr. Foster as his representative and that he (Mr. Joseph) was acting in his capacity as Union steward in this case. Mr. Joseph pointed out the relevant provisions of the collective bargaining agreement authorizing Union representation in the Respondent's EEO statutory appeals procedure. He also noted that General Counsel Directive No. 6, relied on by Mr. Worden, did not by its terms specifically prohibit Chief Counsel attorneys from representing fellow employees in EEO matters. Mr. Joseph concluded his submission with a paragraph explaining his role as a Union representative and the rights of employees to act on behalf of a labor organization guaranteed in section 7102 of the Statute. Meanwhile, on December 15, 1987, Judge Reed referred Mr. Worden's Objection to Representation to the Respondent Agency for a decision on the matter.

Thereafter, on December 18, 1987, Ms. Gwendolyn M. Wells, Respondent's Director, Office of Equal Opportunity Program, (OEOP), notified Mr. Joseph of his right to respond to Mr. Worden's motion pursuant to section 1613.214(b)(13)

of Title 29 of the Code of Federal Regulations.^{3/} Mr. Joseph was advised that Respondent's OEOB would issue the decision on the disqualification matter. On December 24, 1987, Mr. Joseph filed a detailed response with Respondent's OEOB. He began by explaining that Mr. Foster had designated the Union as his representative in the EEO process. He pointed out that the Union, in turn, designated him to handle this case. Mr. Joseph then explained the rights guaranteed employees in section 7102 of the Statute to act on behalf of a labor organization. Mr. Joseph asserted that no conflict existed based on his job duties and position. He argued that the directive relied on by Mr. Worden did not explicitly prohibit his representation of Mr. Foster in the EEO proceeding. He further argued that if General Counsel Directive No. 6 did apply to EEO proceedings, then it had been superseded by the Statute.

While the Objection to Representation was pending decision by Respondent's OEOB, on January 28, 1988, Respondent's agent, supervisor Robert Berkovsky, issued a terse seven line order to Mr. Joseph to cease his representation of Mr. Foster in the EEO case. According to Mr. Berkovsky, Mr. Joseph's representation constituted a violation of General Counsel Directive No. 6. As a pre-hearing conference on the case was set to take place the following day, Mr. Joseph immediately prepared a written statement of position on the issue for Mr. Berkovsky. Mr. Joseph again explained the role of the Union in this case and the requirements of section 7102 of the Statute. Mr. Joseph detailed how strict adherence to General Counsel Directive No. 6 interfered with the statutory right of employees to act on behalf of a labor organization. He set forth for Mr. Berkovsky the relevant provisions of the collective bargaining agreement authorizing official time for Union stewards in Respondent's EEO statutory appeals procedure. Mr. Joseph also went through the exercise of formally requesting official time for the pre-hearing

^{3/} Section 1613.214(b)(13) provides as follows:

In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission (or the agency prior to a hearing on the complaint) may, after giving the representative an opportunity to respond, disqualify the representative.

conference. He stated that if work duties required his presence in the office, he would reschedule the conference with the Judge. In response to this detailed statement outlining the issues, the arguments, the relevant statutory provisions and the contractual requirements, Mr. Joseph received the following response from Mr. Berkovsky:

As you have been instructed, General Counsel Directive No. 6 prohibits the representation of employees in EEO proceedings by an attorney of the Office of Chief Counsel, Internal Revenue Service. Accordingly, your representation in any EEO pre-hearing matter or at a EEO hearing is prohibited and you are hereby again instructed not to undertake such representative.

Based on his supervisor's strict orders, Mr. Joseph notified Judge Reed on January 29th, that he could not participate in the pre-hearing conference. Judge Reed decided to postpone the pre-hearing conference until February 19, 1988, noting that Respondent's OEOP was still considering the issue of representation.

On February 17, 1988, Mr. Joseph was provided the long awaited decision from Respondent's OEOP on the representation issue. It was decided by Respondent's OEOP that Worden's motion to disqualify Joseph was without merit. In pertinent part, OEOP's decision reads as follows:

With regard to the issue of whether Mr. Joseph specifically can be shown to have a conflict which would warrant his disqualification, the challenge made by bureau counsel does not detail the actual duties assigned Mr. Joseph and demonstrate how this creates a conflict of position. Instead, Counsel relies on the broad prohibition in General Counsel Directive No. 6 of outside employment to allege conflict. Counsel argues that Mr. Joseph's duties since such representation places him in conflict with a direct order not to engage in such activities.

The decision also noted that Mr. Worden's motion to disqualify Mr. Joseph did not question the propriety of the

complainant's designation of NTEU as a representative. Rather, it challenged only Mr. Joseph's participation on behalf of the Union. Respondent's OEO then decided that based on its review of the position held by Mr. Joseph and the duties assigned him, no conflict existed. Thus, it concluded that ". . . there is no conflict between the assigned duties of Joseph's position and his representation of complainant. The National Treasury Employees Union will be allowed to remain as complainant's designated representative and Mr. Joseph will be allowed to continue to participate in the complaint process on behalf of the Union."

Believing that the decision by Respondent's OEO would settle the issue of representation, on February 18, 1988, Mr. Joseph prepared a memorandum for Mr. Berkovsky and transmitted the OEO decision along with a request for clarification of the two prior memoranda. Mr. Berkovsky responded by memorandum dated February 18, 1988, wherein he completely ignored the decision of Respondent's own OEO and did not bother to make reference to the fact that the decision on representation ever issued. Mr. Berkovsky, however, did expand on his prior pronouncements of January 28th and 29th concerning Mr. Joseph's representation of employees in EEO hearings and pre-hearing proceedings. Mr. Joseph was again prohibited from representing any complainant in any ongoing EEO matter, at any step, now and in the future. He was also ordered to cease his representation of a Mr. James Green, a GS-4 mail clerk, in the scheduled investigation of his EEO complaint.

Having exhausted all avenues and attempts at getting a reasoned, rational disposition of the issue, Mr. Joseph, on February 18th, notified Judge Reed and the other parties in the pre-hearing conference that he could no longer participate as Mr. Foster's representative in the EEO hearing. Judge Reed then adjourned the pre-hearing conference until March 1988, in order to give Mr. Foster an opportunity to find another representative. However, inasmuch as the prohibition on representation in EEO matters applied to all attorneys in the bargaining unit, including the Union's stewards, most of whom were attorneys, Mr. Foster was unable to secure representation for his EEO case and had to proceed alone in the pre-hearing conference in March 1988.

At trial, Respondent did not contest the facts set forth above. Rather, Respondent openly acknowledged its actions asserting its preeminent right, through General Counsel Directive No. 6, to prohibit Union stewards who are attorneys

from representing unit employees in the Respondent's EEO process. Respondent argued that its Directive, which per se states a conflict of interest in connection with representation of employees in grievances and disciplinary hearings, takes precedence over the Statute.^{4/} However, Respondent did admit that the prohibitions on representation contained in this Directive do not apply to all grievances and disciplinary matters. Thus, Respondent's witnesses acknowledged that Mr. Joseph may and does act as a representative of the Union in grievances and arbitrations (even those involving disciplinary matters) under the negotiated grievance procedure. According to Respondent, Mr. Joseph is not in violation of General Counsel Directive No. 6 in this scenario. In addition, Respondent's witnesses testified that Mr. Joseph may, without violating the Directive, represent the Union in formal discussions, contract negotiations, Weingarten meetings and FLRA proceedings. Respondent stated that if Mr. Joseph's representational activities on behalf of the Union are pursuant to the collective bargaining agreement, then he is not in violation of its Directive and will be allowed to participate.

Discussion and Conclusions

The General Counsel, noting the provisions of the collective bargaining agreement and the Respondent's EEO Regulation which allow for union representation upon request by a complainant in EEO proceedings, takes the position that Respondent's action in disallowing the attorneys in the Office of Chief Counsel to be the Union's designated representative in EEO proceedings is contrary to Section 7102 of the Statute which accords employees the right to represent a labor organization. While the General Counsel concedes that Section 7120(e) specifically denies the aforementioned right to any employee if his or her participation in such representational activity would result "in a conflict or apparent conflict of interest," she would find that the record evidence fails to establish any such conflict of interest. Accordingly, having denied the attorneys in the Office of Chief Counsel the opportunity to represent the Union in the EEO proceedings, it is the General Counsel's

^{4/} Respondent asserts a conflict exists even though Mr. Berkovsky admitted that Mr. Joseph's representation in the EEO complaint procedure did not interfere with the performance of his job duties.

position that such action by Respondent is contrary to Section 7102 and a violation of Section 7116(a)(1) of the Statute.

The Union concurs with the General Counsel's contention that the Respondent's action was contrary to Section 7102 and also contends that Respondent infringed on the Union's right to designate its own representatives. Further, the Union takes the position that Respondent's EEO directive is superseded by the Statute and that no conflict of interest exists.^{5/} As a remedy, the Union requests that it be reimbursed for all monies it had to expend to hire an attorney to represent the complainant in the EEO proceeding.

Respondent contends (1) that inasmuch as the instant dispute stems from differing interpretations of the collective bargaining agreement it should be submitted to an arbitrator, (2) that inasmuch as the Union has no statutory obligation to represent employees in EEO proceedings the FLRA has no jurisdiction over the instant matter, (3) that the Respondent's Directive is non-discriminatory in that it bars all attorneys irrespective of union affiliation from representing complainants in EEO proceedings, and (4) that there is a compelling need for the directive. In this latter connection Respondent notes that it is clear that a compelling need determination may not be made in an unfair labor practice proceeding.

Contrary to the Respondent and in agreement with the General Counsel and the Union, I find that the Respondent violated Section 7116(a)(1) of the Statute by virtue of its action in denying the attorneys in the Office of the Chief Counsel the opportunity to represent the Union in the EEO proceeding. In reaching this conclusion I rely on Section 7102 of the Statute which specifically gives employees the right to "act for a labor organization in the capacity of a representative" unless, as provided in Section 7120(e), such "participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee."

^{5/} The complaint does not allege a violation of the Statute predicated upon Respondent's refusal to allow the Union to select its own representative. Accordingly, no finding in this latter connection will be made by the undersigned.

The record is clear that Mr. Joseph was not a management official, supervisor or confidential employee. Additionally, the record indicates that Mr. Joseph's official duties, according to both his testimony and his official position description, have nothing whatsoever to do with EEO matters and are for the most part confined to tax interpretations.

In view of the foregoing, and since the Statute supersedes Respondent's restrictive Directive, I find that the Respondent violated Section 7116(a)(1) of the Statute when it forbid Mr. Joseph from acting as the Union representative in the EEO proceeding.

To the extent that Respondent argues or contends that the Complaint should be dismissed since there is a compelling need for the prohibition and, in any event, the prohibition was uniformly applied in a non-discriminatory manner to all the union and non-union attorneys in the Office of the General Counsel, I find such contentions or argument to be without merit.

As to the "compelling need" argument, neither my research nor Respondent have disclosed any cases involving similar circumstances as presented herein which support Respondent's position. While it is acknowledged that when "compelling need" is raised in answer to a Union's demand for bargaining on regulations affecting working conditions, Section 7117(b) mandates that a determination thereon be made by the Authority only through the medium of a negotiability appeal and not through an unfair labor practice proceeding. FLRA v. Aberdeen Proving Ground, Department of the Army, 108 S.Ct 1261 (1988). However, inasmuch as the "compelling need" defense appears in Section 7117 of the Statute wherein the "Duty to bargain in good faith" is set forth, it would appear that such defense would only apply in response to a union's request to bargain on a condition of employment which is covered by an existing agency rule to regulation. Inasmuch as there is no other reference in the Statute to "compelling need," I seriously question Respondent's position that it may utilize such a defense in the circumstances presented herein and deprive an employee of his statutory right to represent a union, particularly since Congress saw fit to spell out in Section 7120(e) the specific circumstances under which such right might be curtailed by an agency.

Finally, with respect to the argument that there can be no violation of the Statute since the prohibition had been applied non-discriminatorily, I note that Section 7116(a)(1) of the Statute states that it shall be an unfair labor

practice to interfere with the exercise by the employee of the rights accorded by the Statute and there is no requirement that such interference be of a discriminatory nature.

Having concluded that Respondent's remaining arguments are without merit and that the Respondent violated the Statute by virtue of its actions in prohibiting Mr. Warren Joseph from acting as the Union's representative in the EEO proceeding, it is hereby recommended that the Federal Labor Relations Authority adopt the following order designed to effectuate the purposes of the Statute.

ORDER

Pursuant to Section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and Section 7118 of the Federal Service Labor-Management Relations Statute, the Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing its employees in the exercise of rights guaranteed in Section 7102 of the Statute, by prohibiting employees from acting as representatives of the National Treasury Employees Union in EEO proceedings where employees have selected the National Treasury Employees Union as their representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their 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 Statute.

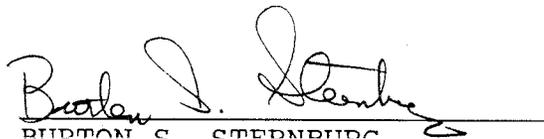
(a) Permit Warren Joseph and other employees to represent the National Treasury Employees Union in EEO proceedings where employees have selected the National Treasury Employees Union to act as their representative, and there is no actual conflict of interest.

(b) Post at its 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 a responsible official 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region III, Federal Labor Relations Authority, 1111-18th Street, N.W., P.O. Box 33758, Washington, D.C. 20033-0758, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, D.C., March 21, 1989


BURTON S. STERNBURG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights guaranteed in Section 7102 of the Statute, by prohibiting employees from acting as representatives of the National Treasury Employees Union in EEO proceedings where employees have selected the National Treasury Employees Union as their representative.

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

WE WILL permit Warren Joseph and other employees to represent the National Treasury Employees Union in EEO proceedings where employees have selected the National Treasury Employees Union to act as their representatives, and there is no actual conflict of interest.

(Agency)

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 of the Federal Labor Relations Authority, Region III, whose address is: 1111 - 18th Street, N.W., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.