

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

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INTERNAL REVENUE SERVICE,  
WASHINGTON, D.C.  
  
and  
  
INTERNAL REVENUE SERVICE,  
SERVICE CENTER,  
OGDEN, UTAH  
  
Respondents  
  
and  
  
NATIONAL TREASURY EMPLOYEES UNION  
  
Charging Party  
  
. . . . .

Case No. 7-CA-90703

Bruce E. Conant, Esquire  
Joseph Swerdzewski, Esquire  
For the General Counsel

Gary Anderson, Esquire  
For the Respondents

Kathleen Mac Kenzie  
For the Charging Party

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 September 27, 1989, by the National Treasury Employees Union, (hereinafter called the Charging Party or NTEU), a Complaint and Notice of Hearing

was issued on December 29, 1989, by the Regional Director for Region VII, Federal Labor Relations Authority, Denver, Colorado. The Complaint alleges that the Internal Revenue Service, Washington, D.C. and the Internal Revenue Service, Service Center, Ogden, Utah, (hereinafter called Respondents), violated Sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute, (hereinafter called the Statute), by virtue of their action in issuing a reprimand to Mr. Timothy Chavez "in reprisal for Chavez' participation in activities protected under the Statute".

A hearing was held in the captioned matter on March 7, 1990, in Ogden, Utah. 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 General Counsel and the Respondent submitted post-hearing briefs on May 7, 1990 which have been duly considered.<sup>1/</sup>

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

The NTEU, at all times material herein, has been the exclusive representative of a nationwide bargaining unit of Respondents' employees, including employees located at the Service Center in Ogden, Utah. The NTEU and the Respondents are parties to a collective bargaining agreement executed on May 2, 1989.

Article 9, Section 2, which pertains to Stewards and Official Time, provides for "Bank Time"<sup>2/</sup> to be determined by a set formula and not to exceed 7000 hours per year. For purposes of this Article of the Collective Bargaining Agreement the term "steward" includes assistant chief stewards, chief stewards, chapter presidents, joint council chairpersons, and any other individuals authorized by the Union in advance to act on its behalf.

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<sup>1/</sup> In the absence of any objection, the General Counsel's "Motion to Correct The Transcript of the Proceedings", should be, and hereby is granted.

<sup>2/</sup> "Bank Time" is the official time allotted to Union representatives for purposes of performing their labor relations functions.

Article 9, Section 2(I)(3) provides as follows:

the Employer recognizes that chapters or joint councils are likely to use their allotments of official time, bank time and other time in such a way that one or two representatives pursue labor-management duties on a full-time or virtually full-time bases.

Article 9, Section 2(O) provides as follows:

Stewards and employees wishing to use time under this article will check with their supervisors and will be released provided their work requirements or work schedules do not prohibit release. Stewards or affected employees will inform their supervisors as to where they will be and the approximate time that they will be away from their work areas.

Article 9, Section 2(Q) provides as follows:

When stewards or employees have completed the use of time under this article, they will check back in with their supervisors upon returning to their work areas and will inform the supervisors of the amount of time they used.

In Article 9, Section 2(G)(16) the parties recognize that NTEU chapters with 1000 or more unit employees will generally maintain full-time union office hours. In accordance with this latter provision, the record indicates that the NTEU does maintain a full time office at the Ogden Service Center where two union officers spend their entire working time.

Mr. Timothy Chavez, the alleged discriminatee herein, has worked at the Center for approximately six years as a clerk in the Collection Branch. Mr. Chavez has been a NTEU steward for the past four years and, in January 1989, was elected to the position of Secretary of the NTEU Chapter that represents the employees at the Service Center.

As Chapter Secretary, Mr. Chavez is one of five elected officers which compose the governing board. One of the officers, the Chapter's Treasurer, is not eligible to the

official time awarded the NTEU under the collective bargaining agreement since he is not a unit employee. As a steward, Mr. Chavez is responsible for representing some 700 unit employees. As Chapter Secretary, he, among other things, maintains the Chapter's records. He is the fourth officer in the line of succession to the Presidency of the Chapter after the President, First Vice President and the Second Vice President.

On August 3, 1989, Mr. Timothy Towns, Chief, Compliance Division, Ogden Service Center and Mr. Chavez' fourth line supervisor, held a meeting with Mr. Chavez.<sup>3/</sup> The meeting was attended by Del Ahlstrom, Mr. Towns' assistant, Mr. John Woods, Ms. Joy Purser and Ms. Marie Winegar, Mr. Chavez' 3rd, 2nd and 1st line supervisors, respectively. The NTEU representatives at the meeting were Ms. Stratton, the NTEU Chapter President, Ms. Arlene Brown, the NTEU Chapter First Vice President and Ms. Jan Grant, the NTEU Chapter Chief Steward.

At the meeting Mr. Towns gave Mr. Chavez a letter entitled "Work Requirements". The letter which was later revised and reissued on August 8, 1989, after setting forth an explanation of the reasons for the letter i.e., meetings with Ms. Grant and Ms. Stratton wherein Mr. Towns was informed that as a general rule Mr. Chavez could perform his required steward duties in approximately 5 hours per week, the fact that there had been a hiring freeze in the Collection Branch and the fact that he had only spent approximately 40 hours on agency work since January 1989, went on to state as follows:

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<sup>3/</sup> According to Mr. Towns he had been concerned about the fact that during the period January 1st through approximately the middle of July 1989, Mr. Chavez had only spent approximately 40 hours on actual work within the collection division. Moreover, since March, Mr. Chavez had spent no hours at all on work related items. Mr. Towns discussed the matter with Ms. Laura Stratton and Ms. Jan Grant, NTEU Chapter President and Chief Steward, respectively. After they informed him that they did not need Mr. Chavez at the NTEU office on a full time basis he then discussed the matter with Ms. Marie Winegar, Mr. Chavez' first line supervisor, and the NTEU representatives and came up, according to Mr. Towns, with a basic agreement "in principle" as to the amount of time that could be devoted to NTEU representational work by Mr. Chavez and how it would be handled.

While being aware of your multiple responsibilities, I also have to take into account the above information and the workload needs in Collection. Based upon these considerations and the requirements in Article 9, Section 2(O) which states in part "stewards and employees wishing to use time under this article will check with their supervisors and will be released provided their work requirements or work schedules do not prohibit release", and Article 9, Section (I)(3) which states that "the Employer recognizes that chapters or joint councils are likely to use their allotments of official time, bank time, and other time in such a way that one or two representatives pursue labor - management duties on a full time or virtually full time basis" (emphasis added).

1. Your presence as a clerk in BMF Unit 5 is required by the workload for the first 4 to 5 hours each morning.
2. Normally your duties as an NTEU steward or secretary can be handled in the remaining time.
2. Absence from your Unit in the morning, stemming from Union business is acceptable only under the following circumstances:
  - A. To handle a Union matter as requested by either Laura Stratton or Jan Grant. When this situation arises, one of these individuals will contact Ms. Winegar.
  - B. To attend any unit meeting required as a steward for Receipt and Control or Examination Branches.

At any time you are absent from the work area pursuing your official duties as an NTEU official or steward the requirements of Article 9, Section 2(O), (P), and (Q) are to be followed.

There may be other times that workload may require your presence in the area; however, we will attempt to keep these situations to a minimum in order to allow you to plan your time to fulfill your NTEU responsibilities. We will also attempt to keep you informed of these pressing workload situations in advance in order to cause as little disruption as possible.

It is intended that the above requirements will allow you to meet all your responsibilities. However, you need to be aware that failure on your part to report to work in your Unit each morning, except under the conditions in 3(a) or 3(b) above, will be considered insubordination and dealt with accordingly.

According to the record, particularly the testimony of Mr. Chavez and Ms. Arlene Brown, who acknowledge some discussion with management about Mr. Chavez' use of official time prior to the issuance of the above quoted letter, the NTEU was not in agreement with all the restrictions set forth in the August 8, 1989, and on August 29, 1989, filed a grievance over the "work requirements" letter. At the time of the hearing in this case the grievance had been scheduled for arbitration.<sup>4/</sup>

On September 15, 1989, Mr. Chavez was given "a letter of official reprimand" for failure to adhere to the requirements set forth in the August 8, 1989 letter issued by Mr. Tim Towns. The letter reads in pertinent part as follows:

According to the expectations in the letter, you were to spend approximately 4 to 5 hours a day in your work area. If this was not possible, either Laura Stratton or Jan Grant would advise your

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<sup>4/</sup> Due to the fact that the validity of the "work requirements" letter had already been challenged by the Union through the grievance and arbitration procedure, section 7116(d) bars further action in this proceeding concerning the letter's validity. Accordingly, for purposes of the instant proceedings the "work requirements" letter was accepted as valid.

manager. Of the 21 work days between August 7, 1989, and September 8, 1989, your presence was required in the Union office on a full time basis on nine occasions. Of the other 12 days, you were only in the work area on 4 days. Of these 4 occasions, you charged a total of 20.9 hours to work or work related training. On the other 8 days, you did not do any work in the area. Furthermore, you are not consistently reporting to your work area the first thing each morning as required in the letter.

In issuing this reprimand, I have taken into consideration that typically you should not be required to spend more than 5 hours a week on steward duties. You and Laura Stratton have also stated that you could be available for Collection work 4 to 5 hours a day without interfering with your NTEU responsibilities, unless your manager has been notified by either Jan or Laura.

You are cautioned that any future violations of this nature or other misconduct may result in more severe disciplinary action up to and including removal.

It is the foregoing letter of reprimand which is the subject of the instant complaint. Although Ms. Brown and Mr. Chavez deny that he, Mr. Chavez, violated the August 8th work requirements letter, based upon my observation of the witnesses and their demeanor while on the witness, I credit the testimony of Ms. Winegar, Mr. Chavez' first line supervisor to the contrary.

Ms. Winegar, whose credited testimony is supported by both her contemporaneous notes and Mr. Chavez' Form 3081 Employee Time Reports, testified that Mr. Chavez failed to work the required 4 to 5 hours on agency work some 10 times during the period August 9 through September 8, 1989. To the extent that Ms. Brown or Mr. Chavez testified that many of such absences were based upon prior requests to Ms. Winegar from Ms. Stratton or Ms. Jan Grant, or their respective acting representatives, to have Mr. Chavez at the NTEU office, I credit Ms. Winegar's testimony to the contrary. Ms. Winegar further testified that on many occasions when Mr. Chavez left his place of employment to perform NTEU representational activities he failed to inform

Ms. Winegar as to where he was going and how long he would be away from his work station as required by Article 9, Section 2(0). Ms. Winegar further testified that on many occasions when Mr. Chavez returned to work he failed to inform her of the amount of time he had used for NTEU representational work.

While Ms. Winegar never ordered Mr. Chavez not to leave the work area, she did tell him on many occasions during the period that she had a lot of work in her area and that he was needed. According to Ms. Winegar the Respondent was trying to be flexible and the work requirements letter was issued in hopes that Mr. Chavez would, apparently on his own, see the light and spend at least four to five hours a day on agency business.<sup>5/</sup>

Respondent's Form 3081, entitled Employee Time Report, is filled out daily by each employee and reflects how and where the employee spent his daily hours. The employee then submits his time card to his first line supervisor, who, according to Ms. Winegar initials the Form 3081. The initials of the supervisor does not indicate approval of the time spent on any particular function, i.e. annual leave, break, work or union activity, but merely signifies that the supervisor has checked the calculations on the Form and that they add up to eight or nine hours, as the case may be, work day. In this latter connection the record indicates that Mr. Chavez worked a schedule which allowed him to take a three day weekend every other weekend.

#### Discussion and Conclusions

The General Counsel takes the position that Mr. Chavez was disciplined because he engaged in activities protected

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<sup>5/</sup> Mr. Towns, who made the final decision to issue the letter of reprimand, testified that he had been away from the Service Center for approximately one month and upon his return discovered, through reports from various lower level supervisors, including Ms. Winegar, that Mr. Chavez had not been living up to the work requirements letter. He further testified that Ms. Winegar was under the impression that she could not refuse to allow Mr. Chavez to participate in NTEU representational activities. Mr. Towns also testified that he gave the letter of reprimand because Mr. Chavez had failed to conform to the work requirements letter and not because he used official time.

by the Statute. In support of this position the General Counsel contends that the preponderance of the evidence establishes that Mr. Chavez did not violate the work requirements letter. Moreover, according to the General Counsel, even if it is assumed that there was not 100% compliance with the work requirements letter, such non-compliance was condoned since Respondent signed Mr. Chavez' Form 3081 and by such action indicated approval of his activities. Finally, it is the General Counsel's position, that even if Mr. Chavez had been in total compliance with the work requirements letter, Respondent would have reprimanded him since the record establishes that the reprimand "was motivated by Chavez' protected activities."

Respondent, on the other hand, takes the position that Mr. Chavez was reprimanded solely because he violated the work requirements letter and not because of his participation in activities protected by the Statute.

Contrary to the contention of the General Counsel, I find that the record evidence establishes that Mr. Chavez did fail to comply with the work requirements letter. I further find that Ms. Winegar's initials on the Form 3081's submitted by Mr. Chavez did not, as contended by the General Counsel, signify approval and/or condonation of Mr. Chavez' use of official time in a manner contrary to the work requirements letter. In reaching these conclusion, I have credited the testimony of Ms. Winegar that Mr. Chavez had on a number of occasions, subsequent to the issuance of the work requirements letter, absented himself from the work place without having Ms. Stratton or Ms. Grant or their duly authorized representatives contact Ms. Winegar and/or on other occasions failed to inform Ms. Winegar where he was going and how long he would be gone on official business as required by the work requirements letter and/or Article 9 of the collective bargaining agreement.

With respect to the Ms. Winegar's initials on the Form 3081's submitted by Mr. Garcia, according to the credited testimony of Ms. Winegar, such initials did not signify approval of Mr. Chavez' use of official time but merely certified that Mr. Chavez' addition was correct.

Finally, I find no probative evidence in the record to support the General Counsel's contention, i.e. that Mr. Chavez would have been reprimanded even if he had complied with the work requirements letter, since the reprimand was in fact motivated by Mr. Chavez' protected activities. Mr. Towns denies that the letter or reprimand

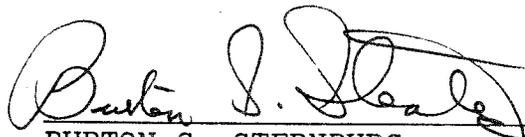
was based on any consideration other than Mr. Chavez' failure to comply with the work requirements letter and I credit such denial.

Having found, contrary to the allegations of the complaint, that Mr. Chavez did violate the provisions of the work requirements letter, that Ms. Winegar's initials on Mr. Chavez' Form 3081's did not constitute approval of Mr. Chavez' use of official time and that the record evidence fails to support a finding that Mr. Chavez would have been given the reprimand even if he had complied with the work requirements letter since such letter of reprimand was in fact motivated by Mr. Chavez' protected activities, I further find that the Respondents did not violate Sections 7116(a)(1) and (2) of the Statute, as alleged. Cf. Marine Corps, Logistics Base, Barstow, California, 23 FLRA 594.

In view of the foregoing findings and conclusions it is recommended that the Federal Labor Relations Authority adopt the following Order dismissing the complaint in its entirety.

ORDER

It is hereby Ordered that the complaint in Case No. 7-CA-90703 be, and hereby is, dismissed in its entirety.

  
BURTON S. STERNBURG  
Administrative Law Judge

Dated: July 27, 1990  
Washington, D.C.