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

PANAMA CANAL COMMISSION, BALBOA, REPUBLIC OF PANAMA Respondent	
and	Case No. 6-CA-80337
PANAMA AREA METAL TRADES COUNCIL; NATIONAL MARITIME UNION; AND INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS Charging Parties.	

Jay Sieleman, Esq.
For the Respondent

O'Donoghue & O'Donoghue
by Nicholas R. Femia, Esq.
For the Charging Party

Christopher J. Ivits, 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. section 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge and an amended charge having been filed by the Panama Area Metal Trades Council, the National Maritime Union, and the International Organization of Masters, Mates and Pilots, herein collectively called the Charging Party, against the

captioned Respondent, the General Counsel of the Federal Labor Relations Authority, herein the Authority, by the Regional Director for Region VI, issued a Complaint and Notice of Hearing, later amended, alleging Respondent violated and is violating section 7116(a)(1), (5) and (8) of the Statute when Respondent unilaterally terminated a contractual right of various employees to appeal adverse actions under Respondent's administrative appeals procedure. Respondent filed an Answer to the Complaint and Amended Complaint in which the factual allegations of the Complaint were admitted and the conclusionary allegations that Respondent violated the Statute were denied.

Subsequently, counsel for the General Counsel filed a Motion for Summary Judgment with supporting documents and a brief in support of the motion with the Regional Director for Region VI which was transferred to the Office of Administrative Law Judges for ruling on November 13, 1990 pursuant to section 2423.22(b)(1) of the Authority's Rules and Regulations. By Order dated November 26, 1990 the Chief Administrative Law Judge advised the parties that December 19, 1990 was set as the closing date for the filing of any pleadings or briefs by the parties and on December 6, 1990 that date was extended to January 14, 1991. Counsel for the Charging Party filed a brief in support of the General Counsel's Motion for Summary Judgment and Respondent filed a Response to the Motion for Summary Judgment and a supporting brief.1/ Based upon my review and evaluation of the entire record before me, I make the following:

Findings of Fact

1. The Charging Party filed an unfair labor practice charge and an amended unfair labor practice charge against Respondent on April 19, 1988 and April 24, 1990, respectively, and both were timely served upon Respondent.

2. The Regional Director for Region VI issued a Complaint and Notice of Hearing and an Amended Complaint and Notice of Hearing on behalf of the General Counsel of the Federal Labor Relations Authority on April 30, 1990 and

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1/ Respondent also filed a Motion for Oral Argument contending that the resolution of this case will be greatly facilitated by oral argument. I have carefully considered the motion and decided that oral argument is not required in this case and accordingly hereby deny Respondent's motion.

June 7, 1990, respectively, and Respondent filed a timely Answer to both Complaint and Amended Complaint.

3. At all times material the Charging Party has been a labor organization within the meaning of section 7103(a)(4) of the Statute.

4. At all times material Respondent has been an agency within the meaning of section 7103(a)(3) of the Statute and jurisdiction over Respondent is asserted pursuant to the Panama Canal Act of 1979, 22 U.S.C. section 3601, et seq.

5. At all times material the Charging Party has been the certified exclusive collective bargaining representative of a unit of professional employees and a unit of non-professional employees and each unit is appropriate for collective bargaining with the Respondent.

6. At all times material Respondent and the Charging Party have been parties to a collective bargaining agreement covering the professional employees' bargaining unit and have also been parties to a collective bargaining agreement covering the non-professional employees' bargaining unit.

7. At all times material M. N. Stephenson has occupied the position of Respondent's Director of Industrial Relations and has been a supervisor or management official within the meaning of section 7103(a)(10) and (11) of the Statute acting on behalf of Respondent.

8. On February 11, 1988 Respondent, by M. N. Stephenson, informed the Charging Party of the immediate termination of the right of non-veteran professional employees to elect to appeal adverse actions under the administrative appeals procedure contained in Article 10, Section 06.a and Article 11, Section 03.b of the professional employee unit's collective bargaining agreement described in paragraph 6 above, which sections provide:

> ARTICLE 10, SECTION 06. APPEAL RIGHTS.
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> a. An employee against whom adverse action has been taken shall have the right to appeal the decision within twenty (20) calendar days following the effective date of the decision utilizing either the existing statutory/Commission procedure or the negotiated grievance procedure, but not both. The option will

be considered to have been exercised at such time as the employee timely files a notice of appeal under the statutory/ Commission appeal procedure or timely files a grievance in writing to the Deputy Administrator in accordance with Article II of this Agreement, whichever event occurs first. Appeal rights and time limits shall be clearly defined in the decision of adverse action.

ARTICLE 11, SECTION 03. OPTIONS.

b. With regard to matters which, under the provisions of 5 U.S.C. § 7121(e), an aggrieved employee may, at the employee's discretion, raise either under an appropriate statutory/Commission procedure or under the negotiated grievance procedure, but not under both, the option will be considered to have been exercised at such time as the employee timely files a notice of appeal under the applicable statutory/Commission procedure or timely files a formal grievance with the Deputy Administrator in accordance with the provisions of Section 12.b. of this Article.

9. On February 11, 1988 Respondent, by M. N. Stephenson, informed the Charging Party of the immediate termination of the right of non-veteran non-professional employees to elect to appeal adverse actions under the administrative appeal procedures contained in Article 7, Section 7.07 of the non-professional employee unit's collective bargaining agreement described in paragraph 6 above, which provides, in relevant part:

SECTION 7.07. APPEAL RIGHTS.

a. An employee against whom an adverse action has been taken shall have the right to appeal the decision within 20 calendar days after the effective date of the decision utilizing either the existing statutory/agency procedure or the negotiated grievance procedure, but not both. The option will be considered to have been exercised at such time as

the employee timely files a notice of appeal under the statutory/agency appeal procedure or timely files a grievance in writing in accordance with Article 8 of this Agreement, whichever event occurs first. Appeal rights and time limits shall be clearly defined in the decision of adverse action.

10. Respondent took the action described in paragraph 8 above without obtaining the Charging Party's agreement on the change.

11. Respondent took the action described in paragraph 9 above without obtaining the Charging Party's agreement on the change.

12. At all times since February 11, 1988 Respondent has denied non-veteran professional employees the election to appeal adverse actions under applicable collective bargaining provisions as described in paragraph 8 above.

13. At all times since February 11, 1988 Respondent has denied non-veteran non-professional employees the election to appeal adverse actions under applicable collective bargaining provisions as described in paragraph 9 above.

14. In its February 11, 1988 letters to the Union terminating non-veteran employees' availability to the administrative appeals procedures, Respondent indicated it was continuing to permit employee appeals of adverse actions under the negotiated grievance procedures.

Additional Findings, Discussion and Conclusions

In terminating the rights of non-veteran professional and non-professional employees to elect to appeal adverse actions under the administrative appeal procedures found in the parties' collective bargaining agreements, Respondent relied upon the Authority's decision in American Federation of Government Employees, Local 1799 and Department of the Army, Aberdeen Proving Ground, Maryland, 22 FLRA 574 (1986). In Aberdeen the Authority was called upon to determine the negotiability of a union proposal that gave employees the option of using either the agency appeals procedure or the contractual grievance procedure to contest a non-disciplinary adverse action of separation for cause. The agency declared the proposal was nonnegotiable claiming it was inconsistent with section 7121(a)(1) of the Statute

and the union relied on section 7121(e)(1) of the Statute to support its contention that the provision was negotiable. Those sections of the Statute provide, in relevant part, as follows:

> § 7121. Grievance procedures
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> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
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> . . . . .
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> (e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. . . .

The Authority concluded that the union's proposal in Aberdeen was nonnegotiable reasoning: section 7121(a) establishes that, except for limited matters set forth in sections 7121(d) and (e), the negotiated grievance procedure is the exclusive procedure for resolving all matters which fall within its coverage[2/]; the exceptions to the exclusivity requirement set forth in 7121(e) permit employees covered by title 5 the option of challenging various actions, including performance based non-disciplinary actions (section 4303

2/ Section 7121(d) refers to discrimination matters not relevant in Aberdeen or the case herein.

actions and inferentially various disciplinary actions under section 7512), through their negotiated grievance procedure or to the Merit Systems Protection Board (MSPB) through the appellate procedures of section 7701; section 7121(e) also permits employees not covered by 5 U.S.C. 4303 and 7512 to challenge similar actions through their negotiated grievance procedure or through applicable "appellate procedures" which may exist under non-title 5 personnel systems; "appellate systems" as interpreted by the Authority includes any applicable appeals procedure established by law; the employees referred to in the union's proposal were non-appropriated fund (NAF) employees not covered by section 4303 and therefore could not appeal non-disciplinary separations for cause to the MSPB under section 7701; the parties acknowledged NAF employees did not have access to any other statutory appeals procedure to contest such non-disciplinary separations but rather, the agency created, by regulation, an internal administrative appeals system to contest such matters; the record did not indicate that the agency's internal administrative appeals system was "established by or pursuant to law" and therefore the internal administrative appeals system was not an "appellate procedure" within the meaning of section 7121(e)(1); and since the internal appellate procedure was not available to NAF employees to challenge performance based separations for cause, the only procedure open to challenge such actions was the negotiated procedure. Accordingly the union's proposal was found to be nonnegotiable.

Counsel for the General Counsel herein contends that the provisions in the parties' collective bargaining agreements providing for the election of administrative procedures or the filing of a grievance under the negotiated grievance procedure were "established by or pursuant to law." In addition Counsel for the General Counsel urges that Respondent's failure to provide rights assured under section 7121(e) of the Statute and its conduct of terminating portions of the collective bargaining agreements constituted a repudiation of the agreements in violation of section 7116(a)(1), (5) and (8) of the Statute. Counsel for the Charging Party supports the General Counsel's position and also contends that in any event, even assuming Respondent was privileged to terminate portions of the parties' agreements without negotiating with the Union, its failure to consult with the Union on the impact of its decision prior to taking the action herein violated the Statute. Counsel for the Charging Party also argues that most Panama Canal Commission employees would be "deprived of due process" if the Commission's actions are upheld since the decision of

the Authority in Panama Canal Commission and International Association of Firefighters, Local 13, 35 FLRA 1140 (1990), herein Firefighters, Local 13, held that non-preference eligible, excepted service employees at the Panama Canal Commission are precluded from challenging through a negotiated contractual grievance procedure adverse actions as set forth in 5 U.S.C. 7512 or actions based on unacceptable performance as set forth in 5 U.S.C. 4303.

In its brief Respondent takes various alternative positions in denying its conduct violated the Statute, primarily relying on Aberdeen and Firefighters, Local 13. Respondent further contends that its administrative appeals procedures were not established "pursuant to law" and denies that its failure to negotiate on the impact and implementation of its termination of employee use of the administrative appeals procedures to appeal adverse actions violated the Statute.

I find and conclude that under existing Authority decisions Respondent was privileged to terminate employees' contractual right to appeal adverse actions through the agency administrative appeals procedures. The parties' collective bargaining agreements both indicate that when an adverse action is taken against an employee, the employee may choose to challenge the action through the negotiated grievance machinery or the "statutory/Commission" or "statutory/agency" appeals procedures.3/ This language generally tracks the rights granted employees in section 7121(e) of the Statute. The first sentence in section 7121(e)(1) of the Statute encompasses adverse actions taken by an activity against an employee and gives the aggrieved employee the choice of pursuing the matter through the negotiated grievance procedure or the appellate procedures of 5 U.S.C. 7701, which section provides for appeal to the Merit Systems Protection Board (MSPB). However, an appeal to the MSPB is available only to competitive service employees and preference eligible employees (generally employees with veteran status).4/ See 5 U.S.C. 7511. Unit employees herein are not in the competitive service. See 35 C.F.R. Chapter 1,

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3/ "Commission" and "agency" are obviously both references to Respondent.

4/ Employees who do not have "competitive" status are called "excepted service" employees.

Part 253.3, (b)(4) and (e). See also Firefighters, Local 13, supra. Accordingly, adverse action appeals to the MSPB are not available to unit employees herein who are not veterans since they are in the excepted service. See Moore v. Panama Canal Commission, 7 MSPR 349 (1981) and Martinez v. Department of the Army, 4 MSPR 133 (1980).

An examination of the second sentence of section 7121(e) of the Statute reveals that non-preferential excepted service unit employees herein, who do not have resort to the MSPB, may challenge an adverse action by resort to the negotiated grievance procedure, or the agency appellate procedure if available, where the adverse action, identified as a "similar matter," arose "under other personnel systems applicable to employees covered by (the Statute)". However in Firefighters, Local 13, supra, the Authority held that adverse actions involving Panama Canal Commission employees in the excepted service "within the general Federal civil service" do not arise under another "personnel system" within the meaning of section 7121(e) of the Statute. Accordingly since the second sentence of section 7121(e) is not applicable to excepted service employees of the Panama Canal Commission, notwithstanding my substantial reservations regarding the Authority's holding in Firefighters, Local 13, based upon that case I am constrained to conclude that withdrawal of appellate procedures from such employees would not consist of withdrawing rights granted by section 7121(e) of the Statute.5/

The contention is also made that the appellate procedures which been available to unit employees were negotiated and therefore the collective bargaining agreement encompassed two procedures to appeal adverse actions, the traditional grievance procedure and the administrative appeals procedure. Thus, it is urged that the appeals procedure is in effect a negotiated grievance procedure and Respondent violated the Statute by terminating a negotiated

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5/ In these circumstances I need not reach the question of whether the administrative appeals procedure was in fact "established by or pursuant to law" as that phrase was used in Aberdeen, supra, although an excellent case has been presented to support that conclusion, especially when considering the specific language of the Panama Canal Act, 22 U.S.C. section 3601 et seq., particularly section 3652, 3654 and 3671.

grievance procedure for challenging adverse action appeals. However, in National Labor Relations Board and National Labor Relations Board Professional Association, 35 FLRA 1116 (1990), the Authority held that nonpreference-eligible, excepted service employees, such as those herein, are precluded by law from challenging major adverse actions and performance based actions through the negotiated grievance procedure.6/ Therefore, if Respondent's administrative appeals procedure is, as contended, part of the negotiated procedure for challenging adverse actions, then such procedures would be contrary to law in the Authority's view and I am also constrained to conclude Respondent did not violate the Statute by terminating such procedures.

Accordingly, under existing Authority precedent I conclude Respondent's terminating the right of non-veteran excepted service professional and non-professional unit employees to elect to appeal adverse actions through the administrative appeals procedures contained in the parties' collective bargaining agreements did not violate the Statute as alleged. Further the record herein discloses no evidence that the Charging Party requested and was denied an opportunity to negotiate on the impact and implementation of Respondent's privileged termination of use of administrative appeals procedures to appeal adverse actions. Indeed, the Complaint did not allege such a violation of the Statute. In these particular circumstances any contention that the Charging Party was denied an opportunity to negotiate on the impact and implementation of the termination must be rejected. See Department of the Interior, U.S. Geological Survey, Conservation Division, Gulf of Mexico Region, Metairie, Louisiana, 9 FLRA 543 (1982), footnote 9, and See Department of Justice, United States Immigration and Naturalization Service, El Paso District Office, 25 FLRA 32 (1987). Therefore, in view of the entire foregoing and the entire record herein I recommend the Authority issue the following:

ORDER

IT IS HEREBY ORDERED that:

1. The Motion for Summary Judgment is granted.

6/ Chapter 752.1-4 of the Panama Canal Commission's regulations defines adverse actions to include those adverse actions set forth in 5 U.S.C. 7512.

2. The Complaint in Case No. 6-CA-80337 be, and hereby is, dismissed.

Dated: February 28, 1991
Washington, DC

SALVATORE J. ARRIGO
Administrative Law Judge