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

SOCIAL SECURITY ADMINISTRATION, INLAND EMPIRE AREA Respondent	
and	Case No. 8-CA-00259
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

Wilson G. Schuerholz
For the Respondent

Barbara Lawson
For the Charging Party

R. Timothy Sheils, 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. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Los Angeles Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by reducing the amount of an award paid to two employees because they participated in protected activity on behalf of the Union on official time.

A hearing on the Complaint was conducted in Los Angeles, California at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the America Federation of Government Employees, AFL-CIO (herein the Union) has been the exclusive collective bargaining representative of various of Respondent's employees. Respondent's Inland Empire Area (herein sometimes Area 6) consists of seven District offices, fifteen Branch offices and four Resident offices. Of the approximately 500 employees in the Inland Empire Area, about 80 percent or 400 employees are members of the collective bargaining unit.

In fiscal year 1989 (October 1, 1988 to September 30, 1989) the Inland Empire Area was selected to be one of a number of Social Security Administration units to be part of a pilot program termed the Budgetary Incentive Program. Under this Program Area 6 would have autonomous authority over its yearly budget allocated for employee salaries, benefits, travel, training, and the like. If during the fiscal year Area 6 could improve its productivity over the prior year, meet its numerical, timeliness and quality goals in processing its work and have its site manager (Area Director) receive at least a fully satisfactory performance rating, and the Area save a designated percentage of its budget for the fiscal year, then the Area could retain half of the money saved to divide among its employees however it chose under a concept termed "gainsharing." For the 1988 fiscal year Area 6 saved over $800,000.00 of its budget and met the other standards which qualified it to receive a portion of this amount for distribution to employees.

Area Director Robert R. McClure decided to distribute the amount to be awarded to employees by allocating an equal amount to all current employees, "from clericals to management people," regardless of grade, for each full month the employee performed agency work in Area 6 during fiscal 1989. Thus, in January 1990 the vast majority of employees received full shares of $806.00, and 43 employees received

partial shares based upon the number of months they worked in Area 6.[1/] Of the 43 employees receiving partial shares, some were employed for less than 12 months and some were on extended sick leave or leave without pay during the fiscal year. Part-time employees received reduced awards reflecting the amount of time worked in a pay period. Two full-time employees, Union representative Keith Wooten and Juan Quinones, received two month and three month award portions respectively. Wooten and Quinones had spent the remainder of the work-year on official time conducting Union representational activities.[2/] Area Director McClure explained that the awards to Wooten and Quinones reflected the amount of time they spent on Agency business. McClure concluded that official time on Union business was time away from Agency work which accomplished the goals Area 6 had to meet to obtain the gainsharing award.[3/]

Union representatives Wooten and Quinones pursued actions with the office of the Special Counsel contesting what it considered unequal treatment under the provisions of the Whistleblower Protection Act of 1989 (herein the WPA), but the actions were dismissed. On March 5, 1990 the Union filed the instant unfair labor practice charge alleging Respondent's above conduct constituted discrimination against Wooten and Quinones for having engaged in protected union activity. On April 18, 1990 Wooten and Quinones each filed petitions with the Merit Systems Protection Board (herein MSPB) seeking to appeal Respondent's failure to grant them monetary performance awards equivalent to co-workers, alleging that in their capacities as Union representatives they met the definition of "whistleblowers" under the WPA. A hearing on the matter was held before an Administrative Judge of the MSPB and on November 14, 1990 the Administrative Judge held the appellants failed to establish that the MSPB had jurisdiction over the matter.

1/ Individuals who left Area 6 employment before the last day of fiscal year 1989 received nothing.

2/ Area Director McClure based this payment on information received in a response to his inquiry to an Area District Manager seeking a statement regarding "employees not on duty in the Area the entire period."

3/ In the Inland Empire Area, 18 Union representatives received full gainsharing awards: 17 spent less than 30 hours during fiscal year 1989 on Union representational activities and one spent 71 hours on Union activities.

He further held that the assertion of Wooten and Quinones that their roles as Union representatives conferred upon them the status of "whistleblowers" within the meaning of the WPA was without merit.4/ On December 19, 1990 Wooten filed with the MSPB a petition for review of the Administrative Judge's decision. That petition is currently pending before the MSPB.

Discussion and Conclusions

The General Counsel essentially alleges Wooten's and Quinones' awards were reduced from full shares because their official time spent on Union activity was not considered when awards were calculated and accordingly, Wooten and Quinones were discriminated against because of their protected activity. Respondent contends that since the matter was argued before the MSPB, section 7116(d) precludes raising the issue before the Authority. Respondent also contends the same matter has been heard by the MSPB and under the doctrine of collateral estoppel may not now be challenged in this forum. Respondent further argues that its granting awards based upon time spent in performing agency work and not including official time spent on Union matters was without union animus and therefore did not constitute a violation of the Statute.

Section 7116(d) of the Statute provides:

> Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121(e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

The first sentence of this section indicates that if the allegation concerning whether Union representatives Wooten

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4/ After so finding, the Administration Judge found the Agency's decision on the awards was based upon the actual time Wooten and Quinones "spent working on official agency business as opposed to official union business."

and Quinones failed to receive full award shares could properly be raised under an appeals procedure, that matter could not be raised as an unfair labor practice. The allegation that Wooten and Quinones did not receive full gainshares because of their Union activities however presents an issue clearly cognizable as an unfair labor practice and the resolution of unfair labor practices is solely, to the exclusion of all other agencies, within the jurisdiction of the Authority. Thus, the first sentence of section 7116(d) does not apply to the situation herein. The second sentence in 7116(d) obviously addresses situations distinguishable from the facts of this case since neither matters under section 7121(e) and (f) of Title 7 nor an issue concerning electing to proceed under a grievance procedure is presented herein. Accordingly, I conclude section 7116(d) of the Statute does not serve as a defense against litigating this case before the Authority.

I also reject Respondent's contention that in view of the actions brought by Wooten and Quinones before the MSPB, the Authority is barred from considering the merits of the case on the theory of collateral estoppel. Essentially, the doctrine of collateral estoppel does not apply where the issues in the prior and subsequent cases are different. See U.S. Department of Justice, Immigration and Naturalization Service Border Patrol, El Paso, Texas, 38 FLRA 1256 (1991) at 1266; U.S. Department of Health and Human Services, Social Security Administration, Office of Hearings and Appeals, Region II and American Federation of Government Employees, Local 1760, 36 FLRA 448 (1990); U.S. Department of the Air Force, Scott Air Force Base, Illinois and National Association of Government Employees, Local R7-23, 35 FLRA 978 (1990) at 982-983; and Social Security Administration and National Council of Social Security Administration Field Operations Locals, Council 220 American Federation of Government Employees, AFL-CIO, 33 FLRA 743 (1988) at 754. The case before the MSPB filed by Wooten and Quinones concerns an allegation that the Agency denied them appropriate gainsharing awards because their activities as Union representatives constituted "whistleblower" conduct under the WPA. The case herein filed by the Union alleges the Agency discriminated against Wooten and Quinones because of their Union representational activities, conduct protected by the Statute. Thus, the issues posed by the MSPB litigation and the case herein are not the same and accordingly Respondent's defense of collateral estoppel is rejected.

I further reject Respondent's argument that its payment of reduced gainsharing awards to Wooten and Quinones did not

violate the Statute. Respondent contends that it did not reduce the amount of the gainsharing awards to Wooten and Quinones because of their protected activity but rather based shares on the amount of time an employee was engaged in productive work and Union activity on official time was not productive work. However, through Respondent's conduct, regardless of how stated, income was lost due to the Union representative's pursuing Union representational business on official time. In order for Area 6 personnel to qualify for gainsharing awards, the requisite goals were achieved by the composite efforts of the entire staff of Area 6. Having met the requisite goals, Area Director McClure decided to distribute gainsharing awards equally to all employees, regardless of pay level, based solely upon time on the job performing Agency business. To participate in a full share of the award an employee need not have shown to have produced any additional work or achieved any particular productivity, timeliness or quality goal in personal performance. As long as the Agency achieved the requisite goals, individual employees fully participated in the award without regard to any demonstrated personal efforts or specific linkage to Agency benefit. No standards of performance were set to qualify an award participant nor was the type of work performed considered. Time on the job, regardless of the task, was the only standard.

However, official time granted for Union representation by the Respondent to two employees was not considered qualifying time on the job. Wooten and Quinones were the only two employees who's time on the job did not quality as time performing Agency business. The foreseeable effect of such a standard of award payment is obvious - don't spend work time on Union representational duties, even if authorized by the agency, since it can adversely affect your compensation, even in situations where the amount of compensation is not specifically linked to production standards. Such effect is not changed or lessened by stating the method of payment positively rather than negatively. Time spent on Union business does not count as work time for gainsharing purposes is the reality.5/

5/ The record is not clear whether management officials who dealt with the Union on representational matters received gainsharing awards or if their time spent dealing with the Union was counted as time spent supporting goals relating to the awards.

Section 7131(d) of the Statute provides that employees representing an exclusive representative "shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest." Official time status was obviously granted to Wooten and Quinones. In my view to permit Respondent's system of distributing gainsharing awards as described herein would seriously deprecate the concept of "official time" and reduce an employees's Statutory right to engage in Union representational activity on official time to "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will" (per Mr. Justice Jackson in Edwards v. California, 314 U.S. 160 at 186, 62 S.Ct. 164 at 172.)

Accordingly, in view of the foregoing and the record herein I conclude Respondent's conduct of not including Union representative Wooten's and Quinones' official time spent on Union representational duties as work time, and thereby failing to pay Union representatives Wooten and Quinones full gainsharing awards, constituted discrimination within the meaning of section 7116(a)(2) of the Statute and interference, restraint and coercion within the meaning of section 7116(a)(1) of the Statute and recommend the Authority issue the following:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Social Security Administration, Inland Empire Area, shall:

1. Cease and desist from:

(a) Failing to include official time spent on union representational activities when computing employees' work time for the purpose of making gainsharing awards.

(b) In any like or related manner interfering with restraining or coercing its employees in the exercise of 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 Federal Service Labor-Management Relations Statute:

(a) Make whole employees Keith Wooten and Juan Quinones, representatives for the American Federation

of Government Employees, AFL-CIO, the exclusive collective bargaining representative, by paying them the balance of the full fiscal year 1989 gainsharing award of $806.00, to the extent not already paid.

(b) Post at its Area 6 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 the Area 6 Director 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 insure 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 for the San Francisco Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 29, 1991

SALVATORE J. ARRIGO
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail to include official time spent on union representational activities when computing employees' work time for the purpose of making gainsharing awards.

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 make whole employees Keith Wooten and Juan Quinones, representatives for the American Federation of Government Employees, AFL-CIO, the exclusive collective bargaining representative, by paying them the balance of the full fiscal year 1989 gainsharing award of $806.00, to the extent not already paid.

_____

(Activity)

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, San Francisco Regional Office, whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103.