

64 FLRA No. 54

UNITED STATES
DEPARTMENT OF THE ARMY
HEADQUARTERS, 10th MOUNTAIN DIVISION
(LIGHT INFANTRY) & FORT DRUM
FORT DRUM, NEW YORK
AND
UNITED STATES
DEPARTMENT OF THE ARMY
U.S. ARMY MEDICAL ACTIVITY
FORT DRUM, NEW YORK
(Respondents/Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
AFL-CIO, LOCAL 400
(Charging Party/Union)

BN-CA-05-0227
BN-CA-05-0370

DECISION AND ORDER

December 30, 2009

Before the Authority: Carol Waller Pope, Chairman,
and Thomas M. Beck and Ernest DuBester, Members

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the Respondents. The General Counsel (GC) filed an opposition to the Respondents' exceptions.

The complaint alleges that the Respondents violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute) by instructing Charging Party representatives not to use official time to distribute fliers regarding a proposed regulatory change affecting bargaining-unit employees. The Judge concluded that the Respondent violated § 7116(a)(1) of the Statute.

For the following reasons, we dismiss the complaint.

II. Background

In February 2005, the Office of Personnel Management (OPM) proposed a rule to establish the National Security Personnel System (NSPS), a human-resources system that would govern "basic pay, staffing, classification, performance management, labor relations, adverse actions and employee appeals" for all Department of Defense employees. Decision at 5. In order to encourage bargaining-unit members to submit comments on the proposed rule, the Charging Party distributed, in nonwork areas, fliers containing information about NSPS and the dates of the month-long public comment period. *Id.* at 6.

Approximately one week prior to the end of the comment period, Respondent Fort Drum notified the Charging Party President that, under Article 6, § 2 of the parties' agreement, the fliers could not be distributed during official time.¹ *Id.* at 7. Subsequently, Respondent MEDDAC stated that it also would follow Respondent Fort Drum's policy in this regard. *Id.* at 8. For the remainder of the NSPS public-comment period, the Charging Party distributed the fliers only when its representatives were not on "duty time." *Id.* at 7. Subsequently, the Union filed ULP charges, and the GC issued complaints alleging that the Respondents violated § 7116(a)(1) of the Statute by instructing the Charging Party President not to use official time for activities involving the NSPS. *Id.* at 2. The complaints were consolidated for hearing.

III. Judge's Decision

The Judge stated that, under § 7102 of the Statute,² the Respondents could not restrict the Charging Party's publicity activities related to NSPS "in non-work areas during non-work times." *Id.* at 10-11. As there was no dispute that the distribution occurred in non-work areas, the Judge determined that the sole issue to be resolved

1. Article 6 of the parties' agreement concerns official time. Section 2 states, in relevant part:

[I]n order to draw a reasonable distinction between official and non-official activities, those activities concerned with internal management of labor organizations such as . . . distribution of literature will be conducted outside of regular working hours or in non-duty status Literature may be distributed to Employees in break rooms or handed out in break areas.

Decision at 3-4.

2. 5 U.S.C. § 7102 provides, in relevant part: "Each employee shall have the right to form, join, or assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right."

was whether “official time constitutes ‘non-work’ time for the purpose of engaging in representational activity.” *Id.* at 11.

The Judge found that official time, as created by § 7131 of the Statute,³ authorizes “employees to engage in certain labor-management relations activities under the Statute on ‘paid time,’ meaning they are released from their duties to perform such activities without loss of pay or leave.” *Id.* at 12 (citing *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 92 (1983)). He also found that the performance of representational activities does not constitute “work” under § 7106 of the Statute. Decision at 12 (citing *AFGE, Nat’l Council of HUD Locals 222, AFL-CIO*, 60 FLRA 311, 313 (2004) (*HUD*)). The Judge further stated that the Authority characterized official time as being “distinct” from duty and non-duty time. Decision at 12 (citing *Assoc. of Civilian Technicians, Old Hickory Chapter*, 55 FLRA 811, 813 (1999) (*ACT, Old Hickory*)). Based on the foregoing, the Judge stated that:

A reasonable argument could be made that, if official time constituted work time or if labor-management activities on behalf of a union constituted work [time, then] there would be no need for official time in the first place. I find that the very existence of statutory provisions providing for official time and the precedent explaining official time and the term “work” support a conclusion that official time does not constitute work time for purposes of construing employee rights under [§] 7102.

Decision at 12. The Judge then concluded that “official time equates to non-work time for purposes of employee[s]’ rights to engage in distributions and discussions under [§] 7102” and, thus, that the Charging Party had a right to distribute the NSPS fliers on official time. *Id.*

The Judge next examined whether the parties’ agreement allowed the Respondents to restrict flier distribution on official time. *Id.* at 13 (citing *Internal Revenue Serv., Wash., D.C.*, 47 FLRA 1091, 1110 (1993)). The Judge found that the limitations on “distribution of literature” found in Article 6, § 2 applied only if the content related to “the internal management of the labor organization.” Decision at 14. According to the Judge, the NSPS fliers were unrelated to the Charging Party’s internal organization and, thus, did not permit the

Respondents to restrict the distribution of these fliers during official time. *Id.*

Based on the foregoing, the Judge found that the Respondents violated § 7116(a)(1) of the Statute by “restricting the employees’ right to engage in discussions and distributions of material relating to NSPS in non-work areas during non-work times.” *Id.* at 15.

IV. Positions of the Parties

A. Respondents’ Exceptions

The Respondents argue that the Judge erred in finding that § 7102 of the Statute allows distribution of literature during official time created by § 7131, as Authority precedent holds that the use of official time to conduct those activities is subject to bargaining. Exceptions at 7-8 (citing *Gen. Servs. Admin.*, 9 FLRA 213, 214 (1982); and *NFFE, Local 2050*, 45 FLRA 289, 297 (1992)). The Respondents also argue that Authority precedent and OPM regulations establish that “official time is work time[,]” and that the Authority has “expressly and unambiguously rejected the argument that official time is non-work time for the purposes of employee[s]’ rights to engage in distributions and discussions under [§] 7102 of the [S]tatute.” *Id.* at 5, 6 (citing 5 C.F.R. § 551.424(b); and *ACT, Old Hickory*, 55 FLRA at 813).⁴ Finally, the Respondents argue that the Judge erred in finding that the GC had made a *prima facie* showing that the Charging Party’s rights had been violated. *Id.* at 11.

B. GC Opposition

The GC asserts that the Judge’s legal conclusions are consistent with regulations and Authority precedent. Specifically, the GC argues that the Judge’s decision comports with Authority precedent regarding §§ 7102 and 7131 of the Statute. Opp’n at 6. In addition, the GC contends that OPM regulations are irrelevant to the issue of § 7102 rights because they concern pay administration. *Id.* at 3. Likewise, the GC asserts that the Authority precedent raised by the Respondents “involve[d] statutory rights and purposes not at issue here.” *Id.* at 5. Finally, the GC argues that the record supports the Judge’s finding of a *prima facie* case. *Id.* at 7.

3. The text of 5 U.S.C. § 7131 is set forth *infra*, note 5.

4. 5 C.F.R. § 551.424 (b) provides, in relevant part: “‘Official time’ granted an employee by an agency to perform representational functions during those hours when the employee is otherwise in a duty status shall be considered hours of work.”

V. Analysis and Conclusion

Section 7131 of the Statute sets forth the rights and restrictions associated with the use of official time.⁵ Subsections (a) and (c) authorize union representative's official time for bargaining and certain Authority-related activities, and subsection (b) bars the use of official time for internal union matters. 5 U.S.C. § 7131(a)-(c). The use of official time for all other types of representational activities is subject to negotiation under subsection (d), which provides that union representatives in the bargaining unit "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." 5 U.S.C. § 7131(d).

The Authority, citing the legislative history of the Statute, has stated that, in addition to the amount of time, § 7131(d) "makes *all other matters* concerning official time for unit employees engaged in labor-management relations activity subject to negotiation . . ." *U.S. Dep't of the Air Force, HQ Air Force Materiel Command*, 49 FLRA 1111, 1119 (1994) (*Air Force*) (quoting H.R. Rep. No. 1403, 95th Cong., 2d Sess. 59 (1978), *reprinted in* Comm. on Post Office & Civil

Serv., House of Representatives, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print No. 96-7), at 705 (1979)) (emphasis in *Air Force*). Consequently, there is "no statutory entitlement to perform on official time representational duties of the type covered by [§] 7131(d) [of the Statute.]" *Air Force*, 49 FLRA at 1120 (citation omitted). Rather, any entitlement to official time to engage in activities covered by § 7131(d) arises under a negotiated agreement, not the Statute. *See, e.g., U.S. Dep't of the Navy, Naval Mine Warfare Eng'g Activity, Yorktown, Va.*, 39 FLRA 1207, 1213-14 (1991) (union entitlement to official time limited by terms of parties' agreement).

The right under § 7102 to "publicize matters affecting unit employees' terms and conditions of employment[.]" which includes distributing fliers, is an activity covered by § 7131(d). *NFFE, Local 2050*, 45 FLRA at 297. *See also, Dep't of the Air Force, Scott Air Force Base, Ill.*, 34 FLRA 1129, 1135 (1990) (flier distribution characterized as "publiciz[ing] matters affecting unit employees' terms and conditions of employment"). Thus, absent a collective bargaining agreement provision allowing such distribution on official time, the Charging Party does not have a right to use official time for this purpose.

In the present case, the Judge did not find, and there is no indication, that the parties' agreement allows for distribution of union literature on official time. Therefore, there is no basis for finding that the Charging Party has a right to use official time to distribute fliers concerning NSPS.

In finding a statutory right to distribute literature on official time, the Judge relied on *ACT, Old Hickory*, 55 FLRA 811, and *HUD*, 60 FLRA 311. Decision at 12. As discussed below, the Judge's finding is not supported by these decisions.

In *ACT, Old Hickory*, the Authority considered the negotiability of a proposal to allow union representatives to lobby Congress — an activity protected by § 7102 of the Statute — on official time. In finding that the proposal violated a federal statute restricting duty-time lobbying by Department of Defense employees, the Authority stated:

The Union essentially argues that there are only two categories of employee time: duty time and non-duty time. This is mistaken. Section 7131 of the Statute creates a distinct third category of time: official time, when an employee is per-

5. 5 U.S.C. § 7131 provides:

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by 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.

forming representational functions for the union while receiving compensation from the agency. Unlike regular duty time, an employee's activities on official time are not directed by the agency. Unlike annual leave, an employee's activities on official time are restricted by the Statute. In this connection, we note *that both official time and duty time -- unlike non-duty time such as annual leave -- "shall be considered hours of work."* 5 C.F.R. § 551.424(b).

Id. (emphasis added). Although the Authority stated that official time is "distinct" from regular duty time, that does not support the Judge's conclusion that official time is "non-work time" for purposes of exercising § 7102 rights. Nor does it support a conclusion that a union official has a statutory right to use official time to distribute literature.

In *HUD*, the Authority addressed whether representational duties performed on official time constitute "official agency duties." *HUD*, 60 FLRA at 313. Based on precedent defining the term "work" in § 7106 of the Statute, the Authority found that representational duties are not agency-assigned for purposes of a telecommuting statute and, therefore, do not qualify employees for telecommuting. *Id.* Cf. *Soc. Sec. Admin., Inland Empire Area*, 46 FLRA 161 (1992) (gain-sharing awards can be based on official time duties); *NAGE, Fed. Union of Scientists & Eng'rs, Local R1-144*, 42 FLRA 1285 (1991) (performance awards cannot be based on official time duties); *NTEU, Chapter 65*, 25 FLRA 373 (1987) (official time can be used to earn credit time); *Soc. Sec. Admin.*, 19 FLRA 43 (1985) (official time cannot be used to earn compensatory time); and *Patent Office Prof'l Assoc.*, 21 FLRA 580 (1986) (official time cannot be used to earn overtime). The Judge did not explain, and the record does not disclose, how this fact establishes a statutory right to use official time to distribute literature. Thus, there is no basis for finding that *HUD* supports the Judge's conclusion.

Based on the foregoing, we find that the Judge erred in finding that the Charging Party had a statutory right to use official time to distribute literature and concluding that the Respondent violated § 7116(a)(1) of the Statute by prohibiting such a use of official time.

VI. Order

The complaint is dismissed.