

FEDERAL LABOR RELATIONS AUTHORITY

Guidance on Electronic Notice Dissemination

Office of the General Counsel

5/27/2011

A. Policy

This Guidance sets forth the General Counsel's policy to seek the electronic dissemination of Notices to All Employees (for Agency Respondents) and the electronic dissemination of Notices to All Members and Employees (for Labor Organization Respondents) as a traditional remedy in all unfair labor practice (ULP) cases where the Respondent customarily communicates with its employees (and members) by electronic means.

B. The Authority Has Broad Remedial Power

Pursuant to Section 7105(g)(3) of the Federal Service Labor-Management Relations Statute (the Statute), the Authority's remedies "may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter." Section 7118 of the Statute addresses the prevention of unfair labor practices, and paragraph (a)(7) sets forth the broad scope of the Authority's ULP remedial authority to order an Agency or Labor Organization Respondent to

cease and desist from any unfair labor practice in which the agency or labor organization is engaged;

require the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and require that the agreement, as amended, be given retroactive effect;

require reinstatement of an employee with backpay in accordance with § 5596 of this title [The Backpay Act]; or

require any combination of these actions or "such other action as will carry out the purpose of this chapter."

The broad grant of remedial power in Section 7118(a)(7) for the Authority to order "such other action as will carry out the purpose of this chapter" is tempered only by reference to the purpose of the Statute, which embodies the balance of interests between and among employees, unions, and agencies. Indeed, the Authority and the courts have concluded that Congress intended to provide the Authority with broad remedial powers. Thus, in *American Fed'n of Gov't Employees v. FLRA*, 785 F.2d 333, 336 (D.C. Cir. 1986), the United States Court of Appeals for the D.C. Circuit found that Congress intended the Authority's ULP remedial authority to be similar to that granted the NLRB under the National Labor Relations Act. See also *Fed. Bureau of Prisons, Wash., D.C.*, 55 FLRA 1250, 1258 (2000).

In general terms, the Authority has defined its broad objective that ULP remedies should be "designed to recreate the conditions and relationships that would have been had there been no unfair labor practice." *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 160 (1996) (*F.E. Warren AFB*) (quoting *U.S. Dept. of Justice, Bureau of Prisons, Safford, Ariz.*, 35 FLRA 431, 444-45 (1990)). In addition, while the deterrence of future violations is not the principal objective of the Authority's remedial orders, it "is also

certainly a desirable effect of a remedy.” *Id.*, at 445 (citation omitted).

C. The General Counsel Will Seek the Electronic Dissemination of Remedial Notices

It is the General Counsel’s policy to seek the electronic dissemination of Notices to All Employees (for Agency Respondents) and the electronic dissemination of Notices to All Members and Employees (for Labor Organization Respondents) as a remedy in all ULP cases where the Respondent customarily communicates with its employees (and members) by electronic means. The Authority’s remedial principles must take into account the increasing prevalence of electronic means of communication at the workplace. Thus, in addition to traditional physical posting of paper notices, a Respondent should be required to disseminate remedial notices electronically when the Respondent customarily communicates with its employees or members by electronic means.

The Authority has distinguished in its decisions between traditional remedies and nontraditional remedies. Thus, in *F.E. Warren AFB*, at 161 (1996), the Authority noted that it had “developed several ‘traditional’ remedies, including a cease-and-desist order accompanied by the posting of a notice to employees that meet the criteria of a remedy, and which are provided in virtually all cases where a violation is found.”¹ It has become customary for many, if not most, government agencies to communicate operational and employment-related information to their employees by electronic means, whether it be by email, intranet, or other electronic communication system. It is therefore the General Counsel’s position that the current notice posting language, which requires posting “in conspicuous places, including all bulletin boards and places where notices to employees [and members] are *customarily* posted” (emphasis added), is broad enough to encompass electronic distribution of remedial notices as a “traditional” remedy.

The posting of notices is critical to accomplishment of the Authority’s remedial purposes of enforcing employee rights and preventing unfair labor practices. Notices inform employees of their rights and of the Authority’s role in protecting the free exercise of those rights. Thus, in *Nat’l Guard Bureau*, 57 FLRA 240, 245 (2001), the Authority

¹ The Authority also identified other remedies that require some form of affirmative action by the respondent as established, or traditional, remedies. For example, a retroactive bargaining order (*Dept. of Veterans Affairs Med. Ctr., Asheville, N.C.*, 51 FLRA 1572, 1580-81 (1996) (RBO was appropriate since it was not possible to restore the status quo)); the grant of backpay (*U.S. Dept. of the Air Force, Aerospace Maint. and Regeneration Ctr., Davis-Monthan AFB, Tucson, Ariz.*, 64 FLRA 355, 361 (2009) (backpay required to remedy ULP based on repudiation of drug-testing agreements)); and the release of improperly withheld information (*Internal Revenue Serv., Austin Dist. Office, Austin, Tex.*, 51 FLRA 1166, 1182 (1996)) have been cited as traditional remedies. Some of these traditional remedies, such as *status quo ante* as a remedy for a failure to bargain violation, have given rise to criteria of their own. See e.g., *Fed. Corr. Inst.*, 8 FLRA 604, 606 (1982) (setting criteria for *status quo ante* remedies where Respondent failed to bargain over impact and implementation of a change); *Fed. Deposit Ins. Corp.*, 41 FLRA 272, 279 (1991) (holding that standard remedy where Respondent failed to bargain over substance of a change is *status quo ante*, absent special circumstances). Other than to state that traditional remedies are routinely granted as a matter of course whereas nontraditional remedies require independent justification, the Authority has not clearly identified the factors which differentiate a traditional remedy from a nontraditional remedy.

described the remedial purposes of posting a notice to include demonstrating to employees that the Authority will vigorously enforce rights guaranteed by the Statute, and that the Respondent recognizes and intends to fulfill its obligations under the Statute. Notices also inform employees of the steps required of the Respondent to remedy its violation of the Statute and deter future violations by providing assurances that future violations will not recur. The achievement of these remedial goals will not be realized, however, where the traditional posting of paper notices on bulletin boards is inadequate to reach employees and members who are more accustomed to receiving important information from their agency or union electronically and do not typically look for such information on bulletin boards. Electronic communications are now the norm in many workplaces, and it can be expected that the trend of increased use of electronic methods of communication will continue.

In recognition of technological changes that have elevated email, intranet, listserves, electronic bulletin boards, social networks, and other electronic means of communication as the primary means of communication in many of today's workplaces, the General Counsel has determined that where these methods of electronic communication are normally employed, such methods should be required to assure that notices are adequately communicated to employees (and members). Indeed, where a Respondent customarily employs electronic means of communication with its employees or members, this fact reflects a judgment that electronic means are the most effective means of reaching the intended audience. The Authority's notices are of sufficient import to be communicated in the manner deemed most appropriate by the Respondent for its own communications.

The General Counsel's policy of seeking electronic notice dissemination is consistent with the position taken by the National Labor Relations Board. Thus, in *J. Picini Flooring*, 356 NLRB No. 9 (Oct. 22, 2010), the Board held that its traditional notice language, which, like the FLRA's remedial language, requires the posting of notice in all "conspicuous places," is broad enough to encompass the dissemination of notices by electronic means where a Respondent customarily uses such means to communicate with its employees. As the Board stated:

Given the increasing reliance on electronic communication and the attendant decrease in the prominence of paper notices and physical bulletin boards, the continuing efficacy of the Board's remedial notice is in jeopardy. Notices posted on traditional bulletin boards may be inadequate to reach employees and members who are accustomed to receiving important information from their employer or union electronically and are not accustomed to looking for such information on a traditional bulletin board.... As a matter of general policy, it follows that, in addition to physical posting, notices should be posted electronically, on a respondent's intranet or internet site, if the respondent customarily uses such electronic posting to communicate with its employees or members. Similarly, notices should be distributed by email if the respondent customarily uses email to communicate with its employees or members, and by any other electronic means of communication so used by the respondent.

Id., slip op. at 3. The Board reasoned that it would be an abdication of its responsibility to adapt to the “changing patterns of industrial life” were it to “ignore the revolution in communications technology that has reshaped our economy and society.” *Id.* at 4. The Board rejected the contention that electronic posting should be considered an extraordinary remedy that should be compelled only in egregious ULP cases or to deal with recidivist violators, noting that only Respondents that customarily communicate with employees (or members) by electronic means would be required to post remedial notices electronically. *Id.* Finally, the Board held that “the burden of establishing whether electronic notice of any particular type should or should not be required appropriately rests with the respondent because of its knowledge of its own communication practices and systems and its possession of the evidence concerning those facts.” *Id.* n.14.

In a recent decision, one of the Authority’s Administrative Law Judges ordered the dissemination of a remedial notice by email. In *Department of Homeland Sec., U.S. Customs and Border Prot., El Paso, Tex.*, Case Nos. DA-CA-08-0179 & DA-CA-08-0180 (OALJ 10-03) (Jan. 27, 2010), the Administrative Law Judge (ALJ) analyzed the question of electronic posting in terms of the “twin lodestars” guiding any determination concerning the effectiveness of a notice, namely, those identified in *National Guard Bureau*: “does the notice posting demonstrate to employees that the Authority will vigorously enforce rights guaranteed under the Statute and that the Respondent recognizes and intends to fulfill its obligations under the Statute?” Under the facts of the case, the ALJ concluded that the General Counsel’s evidence “demonstrated that the greatest number of employees rely on their email as their primary source of information, and that the Respondent does as well.” The ALJ therefore recommended that in addition to requiring the Respondent to post physical copies of the Notice to All Employees, the Respondent should also distribute the Notice by email (“Disseminate a copy of this Notice signed by [the Respondent] through the Station’s email system to all bargaining unit employees at the [facility].”).

D. Investigation Procedures

As discussed above, in *J. Picini Flooring*, the Board held that henceforth it will include additional language in its notice posting provision to make clear that its traditional notice posting remedy will include the dissemination of notices by electronic means where the Respondent customarily communicates with its employees in that manner. *J. Picini Flooring*, slip op. at 3. Similarly, the General Counsel will seek to persuade the Authority to include such language in its remedial notice posting provision in all cases. Until the Authority agrees, however, it will be necessary to introduce evidence, in the ULP proceeding, concerning the customary means by which the Respondent communicates to its employees. Where the evidence shows that the Respondent customarily uses electronic means of communication with its employees or members, the General Counsel will seek an Order that directs the distribution of notices by comparable electronic means in addition to the physical posting of paper notices. The ultimate goal, however, is to convince the Authority to include this requirement in its orders as a routine matter, so that all Respondents who communicate with their employees by electronic means will be required to disseminate their notices in the same

manner. It should be emphasized, however, that the electronic dissemination requirement is not intended as a replacement for posting of the notice on a bulletin board; Respondents should also continue to be required to post paper notices in conspicuous notices for a period of 60 days, to insure that a notice will be available for employees' viewing for the full 60-day period.

In support of this policy to seek the electronic posting of notices, as part of the Region's investigation into ULP cases the Region will make inquiries, as appropriate, into how the charged party customarily communicates to its unit employees or members. The General Counsel's Investigating Agents will inquire regarding all means of such communication and will seek to ascertain the customary means by which such communication takes place. In ULP complaint cases where the evidence reflects that a Respondent typically communicates information to employees (or members) by means of email, posting on an intranet or the internet, or by any other electronic means, the General Counsel will seek a remedy to include dissemination of a remedial notice by those means, and will argue that the Authority should require electronic dissemination in all such cases.