



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
SAN FRANCISCO REGION

901 Market Street, Suite 220
San Francisco, California 94103-1791
(415) 356-5000 Fax:(415) 356-5017

May 22, 2013

RCVD 5-24-13 (38)

Jeffrey N. Lewis
28242 S. Salo Rd.
Mulino, OR 97042

Re: Federal Aviation Administration
Washington, D.C.
Case No. SF-CA-12-0543

Dear Mr. Lewis:

The Region investigated your charge that the Federal Aviation Administration, Washington, D.C. (Activity) engaged in an unfair labor practice by colluding with the National Air Traffic Controllers Association, AFL-CIO (NATCA) to discriminate against you and obstruct your due process and grievance rights. To the extent that you are raising allegations regarding incidents that occurred prior to February 10, 2012, those allegations are untimely since they were not filed within six months of the alleged violations.¹ Also, allegations regarding due process are not within the jurisdiction of the FLRA. As far as the allegation that the Activity violated the Statute in February 2012, by entering into an agreement with NATCA, I find this action did not constitute a violation of the Statute.

The evidence revealed that on May 1, 2008, you filed a grievance that included allegations about loss of sick and annual leave and medical expenses. The grievance was denied by the Activity at Step 1 and Step 2. Although you left the Activity on May 5, 2009, an arbitration hearing on the grievance was set for February 2012. Shortly before the hearing, the Activity and NATCA settled the case. The settlement involved the conversion of some sick and annual leave into paid administrative leave and reimbursement for certain medical expenses. You did not approve of the settlement and you made that clear to the Activity and NATCA.

You allege that the Activity's actions violated sections 7116(a)(3), (4) and (5) of the Statute. Section 7116(a)(3) of the Statute applies to an agency's duty to other labor organizations and is

¹ Section 7118(a)(4)(A) of the Statute states that: *[n]o complaint shall be issued on any unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority. See e.g. DHS, Customs and Border Prot., El Paso, Tex., 65 FLRA 422, 423 (2011).*

not relevant to this case.² Also, all the allegations you raised with respect to section 7116(a)(4) of the Statute are untimely and will not be addressed further.

Section 7116(a)(5) requires an agency to bargain in good faith with a union.³ Bargaining in good faith, as described in section 7103(a)(12) of the Statute, includes approaching negotiations with a sincere resolve to reach an agreement, meeting at reasonable times and convenient places as frequently as needed, and avoiding unnecessary delays. Those requirements are not at issue in this case. Even if there was collusion between NATCA and the Activity, this does not constitute bad faith negotiations within the meaning of the Statute. In addition, Authority case law provides that an agency can, under certain circumstances, violate section 7116(a)(5) by failing to bargain over changes in working conditions of bargaining unit employees.⁴ In this case the parties mutually agreed to the settlement and thus a failure to bargain is also not an issue. The Activity and NATCA were within their rights to enter into the agreement. And the agreement, at least in part, addressed the issues raised in the grievance.

For all of these reasons, the Activity did not violate the Statute in this case and I am dismissing your charge.

Right to file an appeal

If you wish to appeal this decision, you must mail, hand-deliver, fax or email, your appeal by **June 24, 2013**, at this address. A **June 24, 2013**, postmark is sufficient for a mailed copy:

Federal Labor Relations Authority
Office of the General Counsel (Attn: Appeals)
1400 K St., N.W., Second Floor
Washington, D.C. 20424-0001
Fax No. 202-482-6608
Email: ogc.appeals@flra.gov

You must send a copy of your filing to the San Francisco Office. If you would like an extension, you must send your request to the Office of the General Counsel, by June 19, 2013. If you file an appeal by email, or request an extension of time by email, please put the case number in

² See e.g. *DOD, Dep't of Army, U.S. Army Air Def. Ctr., and Fort Bliss, Fort Bliss, Tex.*, 29 FLRA 362, 365 (1987).

³ To determine whether a party has bargained in good faith, the Authority looks at all of the factors set out in section 7103(a)(12) of the Statute and considers the situation as a whole. *United States Dep't Air Force, HQ, AFLC, Wright-Patterson AFB Ohio*, 36 FLRA 912, 915-17 (1990).

⁴ *United States Army Corps of Eng'rs, Memphis Dist., Memphis, Tenn.*, 53 FLRA 79, 81 (1997).

the subject line of your email message. To learn more about the standards for appeal, you can go to http://www.flra.gov/OGC_Appeals.

Sincerely,



Jean M. Perata
Regional Director

Enclosures: Questions and Answers About Appeals

cc:

Julia Akins Clark, General Counsel
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Federal Labor Relations Authority
1400 K Street NW, Second Floor
Washington, D.C. 20424-0001

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Federal Aviation Administration
Western Pacific Region
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Lawndale, CA 90261

ATTACHMENT

Questions and Answers about Unfair Labor Practice Appeals to the Office of the General Counsel, Federal Labor Relations Authority

Q #1: What are the grounds for granting an appeal and what must my appeal establish to be granted?

The grounds for granting an appeal are set forth in Section 2423.11(e) of the General Counsel's Rules and Regulations. An appeal may be granted if it establishes at least one of the following grounds:

1. The Regional Director's decision did not consider material facts that would have resulted in issuance of complaint. To establish this ground, your appeal:
 - a. States the material facts which were not addressed in the investigation;
 - b. States what evidence supports those facts; for example certain documents or testimony from a specific witness; and
 - c. Explains how those facts would result in the finding of an unfair labor practice.
2. The Regional Director's decision is based on a finding of a material fact that is clearly erroneous. To establish this ground, your appeal:
 - a. States the material fact which is clearly erroneous;
 - b. States what evidence establishes the material fact is clearly erroneous; and
 - c. Explains how a different factual finding would result in the finding of an unfair labor practice.
3. The Regional Director's decision is based on an incorrect statement of the applicable rule of law. To establish this ground, your appeal:
 - a. States what rule of law relied upon by the Regional Director is incorrect;
 - b. States why that rule of law is incorrect;
 - c. States what the correct rule of law should be; and
 - d. Explains how the application of the correct rule of law would result in the finding of an unfair labor practice.
4. There is no Authority precedent on the legal issue in the case. To establish this ground, your appeal:
 - a. States the legal issue for which there is no rule of law under Authority precedent; and
 - b. States the rule of law which you believe should be presented to the Authority.

- c. Explain how the application of that rule would result in finding an unfair labor practice.
5. The manner in which the Region conducted the investigation has resulted in prejudicial error. To establish this ground, your appeal:
- a. Describes the improper manner in which the investigation was conducted;
 - b. Explains why this manner of investigation was improper; and
 - c. Explains how this manner of investigation resulted in prejudicial error.

Your appeal must address the reasons why you believe one or more of the above five grounds have been satisfied. Appeals that do not establish at least one of these grounds are denied.

Q #2: What happens after I file an appeal?

You will receive written notification that your appeal has been received. The appeals review will be conducted by a Regional Office within the Office of the General Counsel, which did not investigate your case. The appeal review includes a review of your appeal and the evidence in the file obtained during the investigation. The Regional Office conducting the appeals review will submit a recommendation to grant or deny the appeal to the General Counsel. You will receive a written decision letter signed by the Deputy General Counsel on behalf of the General Counsel which: 1) grants your appeal and orders further investigation of specific factual issues or issuance of a complaint over a specific violation; or 2) denies your appeal because none of the grounds for granting an appeal have been established.

If your appeal is denied, you may receive an appeal denial form letter. Issuance of the appeal denial form letter reaffirms the Regional Director's decision and informs the appealing party that the appeal did not establish grounds for remand or reversal of the decision. When the Regional Director's analysis and determination are deemed correct, it is not necessary to restate in the appeal determination the factual and legal basis for the dismissal or the reasons why the Regional Director's decision was correct.

Q #3: How long will it take to get a decision?

Our goal is to issue a decision on your appeal within 90 days or less of the date on which your appeal is received.

Q #4: Is there any appeal of the decision on my appeal?

The decision on the appeal is final. Section 2423.11 of the Rules and Regulations sets forth the appeals process. Paragraph (g) of this section provides that the Charging Party may file a motion for reconsideration of the final decision if it can establish with particularity extraordinary circumstances which are supported by citations to Authority case law. The motion must be filed within 10 days after the date in which the General Counsel's decision is postmarked. The General Counsel's decision on a motion for reconsideration is final.

Q #5: Should I include any of my evidence with my appeal?

No. All of the evidence that you gave to the Region during the investigation is in the investigative file and will be reviewed. You do not need to submit any evidence you have already given the Region during the investigation. However, you may refer to that evidence in your appeal.

Q #6: May I submit new evidence not given to the Region?

No. No new evidence will be considered unless you can establish in your appeal that the evidence either did not exist during the investigation or that you could not have reasonably known about the existence of the evidence.

Q #7: Can I discuss the merits of my appeal with anyone from the Office of the General Counsel while my appeal is being decided?

No. The appeal process is not an investigative process. The decision will be based on your appeal and the investigative file. The Office of the General Counsel will notify you as soon as a decision is reached. If your appeal is granted, the case will be returned to the Regional Office and you will be contacted by the Region for further processing of the case.

Q #8: How many appeals are granted by the Office of the General Counsel?

Historically, since the enactment of the Federal Service Labor-Management Statute in 1979, the Office of the General Counsel has granted about 4-5% of the appeals of Regional Director's dismissals of unfair labor practice charges. During the last five fiscal years, 1988-2002, of the yearly average of 477 decided appeals, approximately 20 or 4.2% of the appeals were granted.

Q #9: Why are so few appeals granted?

Regional Directors make initial decisions on unfair labor practice charges using essentially the same evidentiary and legal standards that are applied during a review of that decision on appeal. Appeals are granted only in those cases where the appeal establishes one or more of the grounds listed above, that the Regional Director's decision to dismiss the charge should be revised or remanded.

If you have further questions about the appeals process, please contact any Regional Office, the Office of the General Counsel, or visit the FLRA website at www.flra.gov.