



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
SAN FRANCISCO REGION

901 Market Street, Suite 470
San Francisco, California 94103-1791
(415) 356-5000 Fax:(415) 356-5017

May 22, 2013

RCD 5-24-13 (3p)

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

Re: National Air Traffic Controllers Association, AFL-CIO
Case No. SF-CO-12-0544

Dear Mr. Lewis:

The Region investigated your charge that the National Air Traffic Controllers Association, AFL-CIO (NATCA) engaged in an unfair labor practice by colluding with the Activity 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 NATCA violated the Statute in February 2012, by entering into an agreement with the Federal Aviation Administration (FAA), 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 FAA 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 FAA 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 FAA and NATCA. You allege that NATCA's actions violated sections 7116(b)(1), (2), (3), (4) and (5) of the Statute.

A union can violate sections 7116(a)(1) and (8) of the Statute by failing to fairly represent all employees included in its bargaining unit. The union's duty of fair representation comes from section 7114(a)(1) of the Statute. Where union membership is not the issue, a union breaches

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).*

the duty of fair representation under section 7114(a)(1) when it deliberately and unjustifiably treats one or more bargaining unit employees differently from other unit employees. A union does not violate the Statute by acting negligently. For the union to violate the Statute, the union must have acted arbitrarily or in bad faith, and the union's action must have led to disparate, discriminatory treatment of a bargaining unit employee.²

In this case, the evidence did not reveal that NATCA's decision to settle the grievance was arbitrary or grossly negligent. The settlement agreement addressed, at least in part, the alleged violations and reimbursed you for a substantial amount of money for leave time lost and medical costs. Also, the fact that other cases - which you assert were less meritorious - were taken to arbitration does not prove disparate or discriminatory treatment. The circumstances of individual grievances are so varied that a direct comparison is not warranted.

The majority of the allegations raised under section 7116(b)(2) of the Statute are untimely and will not be discussed. To the extent the charge alleges that the Union's acceptance of the settlement agreement was a violation of section 7116(a)(2), this allegation is without merit. A union can violate section 7116(a)(2) of the Statute by causing or attempting to cause an agency to discriminate in connection with an employee's hiring, tenure, promotion, or other conditions of employment.³ The evidence must prove that the employee was engaged in protected activity and that the activity was the motivating factor in the treatment of the employee. In this case, there is insufficient evidence that the decision to take the settlement - and thus allegedly enable management to take a discriminatory action - was reprisal for your having filed a grievance and an unfair labor practice.

Section 7116(b)(3) of the Statute concerns discrimination and reprisal against *members* of a labor organization. Since you were not a member of NATCA, this section is not relevant. In addition, section 7116(b)(4) relates to discrimination against an employee with regard to the terms or conditions of *membership in the labor organization*. There was no evidence presented that NATCA discriminated against you with respect to membership.

Finally, NATCA did not violate section 7116(b)(5) of the Statute by settling your grievance. Section 7116(b)(5) requires a union to bargain in good faith with an agency.⁴ Bargaining in good faith, as described in section 7103(a)(12) of the Statute, includes approaching negotiations with

² See e.g. *NFFE, Local 1827*, 49 FLRA 738, 746 (1994); *NFFE, Local 1453*, 23 FLRA 686, 691 (1986); *Tidewater Va. Fed. Employees Metal Trades Council /Int'l Ass'n of Machinists, Local No. 441*, 8 FLRA 217 (1982). A union has breached its duty if it is improperly motivated by irrelevant or undesirable considerations, or where its actions are wholly arbitrary or grossly negligent. *AFGE, Local 1457, AFL-CIO*, 43 FLRA 575, 579 (1991).

³ See e.g. *AFGE, Local 1931, AFL-CIO*, 34 FLRA 480, 488(1990).

⁴ 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).

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 FAA, this does not constitute bad faith negotiations within the meaning of the Statute.

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 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, Office of the General Counsel, Federal Labor Relations Authority, 1400 K Street NW, Second Floor, Washington, D.C. 20424-0001

Ryan S. Smith, Esq., Associate General Counsel, National Air Traffic Controllers Association, AFL-CIO, 1325 Massachusetts Avenue, N.W., Washington, D.C. 20005

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.