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Monday, June 24, 2013

Federal Labor Relations Authority
Office of the General Counsel
ATTN: Appeals
1400 K Street NW, Second Floor
Washington, DC 20424-0001

Dear Sir or Madam:

Please accept this letter as my Appeal of the FLRA letter dismissing Case No's. [SF-CA-12-0543], and [SF-CO-12-0544]. I received the two dismissal letters, signed by Regional Director Perata, on May 24, 2013.

Background

I submitted two Unfair Labor Practice ("ULP") filings on August 10, 2012, one against my former employer ("FAA"), and the other against my former union ("NATCA"). The two were filed jointly because a core charge was a collusion, and because the history of these charges involves both FAA and NATCA in a very contentious relationship, going back to early 2007 (and earlier, related to the 'Whitebook' work rules imposed by FAA in 2006).

Argument

In accordance with 5CFR2423.11(e), the General Counsel's Rules and Regulations, this Appeal should be granted on the following grounds:

1. the Regional Director's erred in allowing the wholesale disregard of evidence attached to the ULP's, and herdecision thus did not consider material facts that would have resulted in issuance of a complaint; [2423(e)(1)]
2. the Regional Director's decision is based on an incorrect statement of the applicable rule of law. [2423(e)(3)]

For each of these two grounds for granting an appeal, and in accordance with the ULP Appeal Q&A sheet attached to Regional Director Perata's dismissal letter, I am presenting the following argument:

Section 2423(e)(1): ***Regional Director's decision did not consider material facts that would have resulted in issuance of a complaint.***

Both dismissal letters included this statement, within paragraph one:

> *"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."*

The effect of this broad declaration is to discard all evidence I submitted as exhibits to ULP filings. The resulting dismissal letters essentially contained no Material Facts, and yet it took FLRA nine months to arrive at this 'decision'. As is noted further on within this letter, I attached these exhibits as evidence so as to aid FLRA in producing a thorough – and efficient – investigation. It seems blatantly inappropriate that an office charged by Congress with 'investigating', would instead choose to throw away and ignore the evidence, especially in view of the extensive history of FLRA ULP's that preceded these dismissals. For a brief analysis of these ULP's, please see attached, **A Chronology of Related ULP's**.

As a consequence of this error, there is an enormous list of Material Facts that were not addressed in the investigation. These were presented in the documents that were filed. Both affidavits lay out the chronology, and identify the relevant exhibits. For example, there is an **Overview** at page and page 3 of the Supplemental Affidavit (it summarizes what happened, each calendar year, as the case was delayed onward for nearly five years).

For convenience, all of these documents are also viewable online, with links to quickly open each exhibit. The ***Affidavit*** contents are viewable at http://aireform.com/?page=479; the ***Supplemental Affidavit*** contents are viewable at http://aireform.com/?page=5881.

To aid in focusing your analysis of this appeal, here is a list of five of the key 'missing material facts':

(1). The Retaliation Window, 4/5/08 to 5/15/08:

> [see ***8/28/12 Affidavit, Exhibits #29-34***] – LR Specialist Dick Fossier had been handling the Lewis case for the first 14-months that Lewis was locked out, and mostly being paid administrative leave to stay home. Lewis had been fully medically recertified on 1/10/08. By early April 2008, a decision was made to reassign the Lewis case to Ros Marable. So, Mr. Fossier sent Ms. Marable an email on 4/5/08. It slandered Lewis as having never certified in twenty years, called him a 'slimeball', and claimed he had been AWOL at times.[1] A key part of that email continues to be redacted, but was

[1] Of course, all three are outrageously incorrect. Lewis was never AWOL He had served for many years, fully certified at four different towers; he also served many years fully certified to work oceanic traffic, while awaiting a delayed radar training class at Oakland Center.

defined within documents submitted to a U.S. District Court.[2] Ms. Marable drafted a 14-day suspension proposal. District Manager Andy Richards issued Lewis a letter advising ***'a return to work plan'*** would be discussed. On 5/1/08, Lewis withdrew ULP [SF-CA-08-0087] and sent Labor Relations Specialist Glen Rotella a copy of a signed **Settlement Agreement** related to that ULP. On 5/7/08, Mr. Rotella forwarded on PDF copies of that signed settlement (which include grievance NC-08-79364-CCR, as a key part of the settlement) to Andy Richards and others. Just a week later, Ms. Marable began re-drafting the 14-day suspension proposal as a REMOVAL. All three officials (Marable, Rotella, and Richards) should be able to provide valuable sworn affidavits. A Complaint will confirm that this change from a 14-day suspension proposal to a removal proposal was entirely motivated by the protected activity (filing grievance NC-08-79364-CCR), and that Lewis did nothing to add to charges because he was locked out from work from 2/16/07 onward. This piece of grievance history provides evidence of FAA's inclination toward a bad-faith handling of the Lewis case, and toward damaging Lewis.

(2). Glen Rotella's email to Hamid Ghaffari & Mike Hull, on 7/17/08: [see ***8/28/12 Affidavit, Exhibit #40***] – LR Specialist Glen Rotella had worked to settle ULP [SF-CA-08-0087], and FAA emails show he was very concerned about what others were doing. He was the only LR Specialist to act to clean up the improper discipline. He sent an email to the two lead NATCA officials, sharing some of his concern and ensuring they were aware of a situation that he felt (as a past union official himself) they needed to work on. This piece of grievance history provides evidence of NATCA's inclination toward doing nothing constructive, and failing their duty of fair representation in the Lewis case.

(3). Mark Shapiro's Apparent Ruse on 8/27/08: [see ***8/28/12 Affidavit, Exhibit #41, and 4/27/13 Supplemental Affidavit, Exhibits #4-#5***] – Mark Shapiro was in charge of all arbitrations at NATCA Headquarters. He signed a letter to Melvin Harris, asking for an arbitration on NC-08-79364-CCR. The letter was dated 8/27/08, and Lewis was emailed a PDF copy at that time by Kevin Sills. The appearance was that NATCA was pushing for an arbitration. But, the evidence suggests strongly that this Shapiro-to-Harris letter was never actually sent. NATCA is required to send it with a certified return receipt; Lewis made a certified letter request, which was received by NATCA, but NATCA failed to provide Lewis with a copy. When Mr. Lewis contacted Mr. Harris' office in late 2008, he was told they have nothing on file. And, reasonably, they should have nothing on file, when you look at the other records. LR acting manager Dan Castrellon authored the grievance denial letter on 9/25/08, a full month after Mr. Shapiro claims to have requested an arbitration. Mr. Castrellon had email exchanges with Mike

[2] A Vaughn Index and a Magistrate Judge's decision identified it as a proposed disciplinary action that was not the same as the discipline eventually taken; i.e., it was either a suspension, or a letter of reprimand.

Hull on 8/4/08 and again on 9/5/08, requesting time extensions … both of which Mr. Hull happily granted. It is simply inconceivable that Mr. Shapiro would be setting up an arbitration (and committing his union to pay for an arbitrator) on 8/27/08 with Mr. Hull feeling no pressure to arbitrate, and granting time extensions on both sides of 8/27/08. No request had yet been made to NATCA Headquarters. This piece of grievance history provides evidence of bad faith at NATCA Headquarters, to the point of commiting a fraudulent deception, which gravely damage Lewis.

(4). Dan Castrellon's ignoring Ros Marable's concerns, on 9/25/08: [see ***8/28/12 Affidavit, Exhibit #43 & #45, and 4/27/13 Supplemental Affidavit, Exhibits #4-#5***] – Dan Castrellon was acting manager at the FAA Labor Relations office in L.A. Ros Marable was assigned the task of researching Lewis' case and drafting letters related to the removal proposal. Ms. Marable's research showed no sick leave reimbursement had been made, as required for the 5/1/08 ULP settlement. She sent an email to Mr. Castrellon which directly noted this problem. Mr. Castrellon ignored it; he finished his draft of the grievance denial letter (which he signed and sent to Hamid Ghaffari on 9/25/08), and included a statement on page three, insisting the sick leave had been fully reimbursed. He knew it was a lie, yet sent the letter anyway. Had Mr. Castrellon not lied about this, the grievance would have been properly handled and, in all likelihood, the removal would have been stopped.[3] This piece of grievance history provides evidence of Dan Castrellon's capacity for running a Labor Relations office willing to take bad faith actions in the Lewis case.

(5). NATCA's concealment of Arbitration-Lead Jay Barrett until late January: [see ***8/28/12 Affidavit, Exhibit #41, and 4/27/13 Supplemental Affidavit, Exhibits #68 & #86-#90***] – Mark Wilson served as NATCA's lead for the Lewis arbitration until just two weeks prior to the scheduled 2/16/12 and 2/17/12 hearing. In fact, Mark Wilson had identified himself as the lead in a 10/12/11 email to arbitrator Lindauer. So, on 1/26/12, when FAA lead advocate Bobby Rodriguez heard that some guy named Jay Barrett was the NATCA lead, he abruptly emailed Mr. Wilson asking for an explanation. Mr. Wilson claimed that Mr. Barrett had been the lead since summer. A look at the email records shows this is false. In fact, Mr. Barrett was completely removed from the case until he sent Lewis an email on 2/1/12 to get up to speed. This appears to have been a bait-and-switch that ensured the two leads (Rodriguez and Barrett) were not actually meeting and conferring during the final six month period, leading up to the just two weeks before the scheduled hearing. This piece of grievance history goes to bad faith by the union, and a failure of the duty of fair representation (by not actually

[3] It is important to note, Mr. Castrellon was 'driving the train' so to speak on both the grievance and the removal. He was the acting manager; he was issuing orders to Ros Marable on the removal, and he actually drafted the Step Three grievance denial response letter (9/25/08) for NC-08-79364-CCR. He would be the one official most capable of correcting this mistake.

having the appropriate official engaged in the process during the critical final months).

I contend that FLRA's thorough investigation of this charge should properly include producing records of conversation[4] for dozens of FAA and NATCA officials. A few of the most critical (and most efficient, for the collection of info to justify a complaint) include: FAA LR Specialists Glen Rotella and Ros Marable, FAA air traffic managers Andy Richards and Mark DePlasco, NATCA officials Kevin Sills and Mike Hull, and even Pamela Richards (former FLRA agent).

Section 2423(e)(3): *Regional Director's decision is based on an incorrect statement of the applicable rule of law.*

On both dismissal letters, at Footnote #1, Regional Director Perata has cited Section 7118(a)(4)(A) of the Statute. No reference is made to the larger context of that part of the Statute, contained in Section 7118(a)(4)(B). That section discusses 'tolling', which is critically important in cases such as this, where key records have been aggressively concealed from disclosure. The text in Section 7118(a)(4)(B) reads:

> "If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of -- (i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or (ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period, the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice."

Despite this clear language, Regional Director Perata has rejected a clearly appropriate application of 'tolling', and dismissed all of the evidence that I presented. Bear in mind, much of that evidence was not presented as 'obtained within the past 6-months'; no, much of this evidence was presented primarily as background, to fill in the case details, so that FLRA's agent could be very efficient at proceeding to a Complaint. Then, too, much of this evidence had been concealed by FAA for many years, which significantly impeded my right to a Due Process

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[4] As per the published FLRA ULP investigative procedure handout, this should include affidavits taken over the phone, and letters of confirmation for some or all of those calls. In this case, Glen Rotella had some exceptional details to share, from his experience and observations (see his email to NATCA officials Ghaffari and Hull, ***at 8/28/12 Affidavit, Exh.40***). After ostensibly reviewing both the 8/28/12 Affidavit and 4/27/13 Supplemental Affidavit (as well as their exhibits), FLRA Agent Vanessa Lim spoke with Glen Rotella. No records were produced, because Mr. Rotella's involvement in the case history was before 2/10/12. Thus, Regional Director Perata has signed off on a pair of dismissals without having seen even the most egregious evidence of agency/union malfeasance.

defense against agency's many false allegations. Presenting these records shows the extent of FAA's improper concealment practices. And, it seems outrageous that a Charging Party submitting a solid and organized collection of official agency records should be dismissed by an FLRA that apparently does not want to expend resources doing their duty.

I respectfully suggest: FLRA needs to get a clear view on the importance of using 'tolling' to help damaged federal employees and to help contain federal agency abuses of authority. For, if FLRA fails to do this, they are effectively condoning practices by federal managers that will waste huge resources and destroy federal workplace morale. Worse, FLRA is perpetuating the Public illusion that FLRA is helping protect federal employees, when in fact they are providing cover for unacceptable agency and union practices.

I also respectfully suggest: there is a serious problem with the present design of the ULP investigation process. As it now stands, an aggrieved employee faces a rigid 6-month deadline for filing, but certainly must not file until he/she has strong enough evidence to ensure a full and fair decision by FLRA. The manner in which FLRA conducts their investigations – with all witnesses interviewed 'in confidence' – ensures that nobody is accountable for the statements that are made. So, defendants who want to avoid the issuance of a complaint have an incentive to distort the facts, to neutralize the charges. They can simply lie, and nobody will ever know.

Within FLRA's (EEOC) decision,[5] there is a lengthy analysis of "Equitable Tolling." With the apparent intent to be fair and thorough in their analysis, the decision had this to say about statutes of limitations and tolling:

> "Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.....
>
> ...On the other hand, a defendant's right to be free of stale claims is frequently outweighed . . . where the interests of justice require the vindication of the plaintiff's rights. Burnett, 380 U.S. at 428. Courts have applied the doctrine of equitable tolling and suspended statutes of limitations where strict application [of the statute of limitations] would be inequitable. Phillips v. Heine, 984 F.2d 489, 491, (D.C. Cir. 1993)." (internal quotations omitted)

I contend that Regional Director Perata erred, when she decided to ignore essentially all evidence provided with ULP's [SF-CA-12-0543] and [SF-CO-12-0544]. Tolling was absolutely appropriate. Every exhibit provided should have been accepted and used so as to ensure a thorough investigation. That investigation should have concluded with either the issuance of a Complaint, or the issuance of a

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[5] ***EEOC, Wash. D.C., 53 FLRA 487 (1997) (EEOC)***

detailed letter with a fully detailed list of all Material Facts. None of that happened here. And so, I am sending you this appeal.

Conclusion

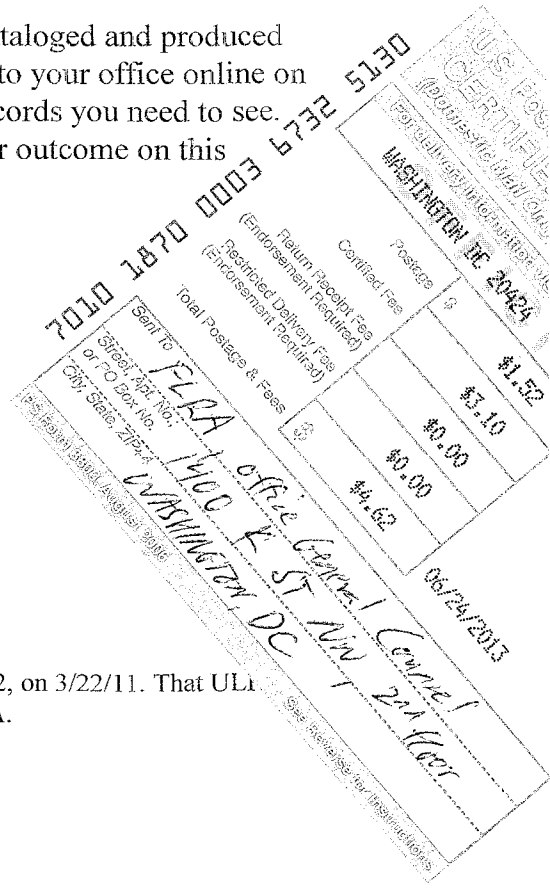
When Congress legislated FLRA into existance, they sought to create a quasi-judicial agency that would work to manage the relationship between a union and a federal agency, while also ensuring that individual employees would not be harmed by the reassignment of their grievance rights to unions. Their core objective was to protect the basic rights of citizens employed by federal agencies.

In this case, my rights were severely trampled – and continue to be trampled – by both my former employer (FAA) and my former union (NATCA). Any reasonable person, looking at this evidence, would see that this case is a travesty of injustice, such as should never be allowed within our federal workplaces. Any reasonable person, if they saw that FLRA was failing to step forward and perform their protective duty, would be shocked.

When I filed this ULP, I was not expecting that FLRA would get me back to work.[6] But, I was expecting that, at a minimum, FLRA would do a thorough investigation and produce a document that would ensure accountable and effective performance by FLRA. Such a document would clearly define the known Material Facts, and in the process would provide a damaged federal employee with needed validation (and credible support) for the charges being routinely ignored by FAA officials. It remains my belief that if FLRA did their duty, a Complaint would have been issued, a hearing would have produced important records, and both FAA and NATCA would have made amends for their horrible, collusive misbehavior.

Thank you for your consideration of this Appeal. I have carefully cataloged and produced digital copies of nearly every record for this case. I can send copies to your office online on short notice. So, please immediately advise if there are any other records you need to see. or if there is anything I can do to assist your achieving a full and fair outcome on this matter.

Sincerely,



Jeff Lewis

Attachments:

"A Chronology of Related ULP's (9p)

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[6] I did have precisely this expectation, though, when I filed ULP [SF-CA-11-0292, on 3/22/11. That ULP provided more than enough evidence to justify a Complaint and hearing by FLRA.