Department of Justice, Office of Justice Programs and AFSCME, Local 2830

[ALJ] A MEETING TO INFORM AN EMPLOYEE OF DISCIPLINARY ACTION DID NOT IMPLICATE THE EMPLOYEE'S WEINGARTEN RIGHTS

The union alleged that the agency violated 5 USC 7114(a)(2)(B) when a supervisor issued a letter of proposed suspension to a unit employee without affording the employee union representation during the discussion.

The ALJ determined that the meeting in question was not an "examination" under section 7114(a)(2)(B) because the sole purpose of the meeting was to inform the employee of a management decision that had already been reached. The fact that the employee initiated a discussion of the events underlying her suspension did not transform the meeting into an examination that triggered her Weingarten rights.

The ALJ also determined that the meeting in question was not held "in connection with an investigation" because it was not designed to obtain facts or determine the cause of a particular incident. Moreover, the employee could not reasonably have believed that the meeting would result in disciplinary action. In the Judge's view, the disciplinary action in this case was a *fait accompli*, and the meeting was merely the vehicle by which the employee was informed of the discipline. Finally, the employee's statements that she requested union representation at two distinct points during the meeting lacked credibility. Therefore, the Judge dismissed the ULP complaint. *98 FLRR 1-4012; WA-CA-70652; (04/29/98)*

0199-4883/

Lobbying Rights

U.S. Department
of Transportation

**Federal Aviation
Administration**

800 Independence Ave., S.W
Washington, D.C. 20591

SEP 13 1999

Michael Derby, Esq.
Counsel to the Professional Airways
Systems Specialists
1150 17th Street, N.W.
Washington, DC 20036

Dear Mr. Derby:

The General Counsel has asked me to issue supplemental guidance regarding lobbying restrictions applicable to Federal employees. As you will recall, the General Counsel issued guidance on this matter in February. You wrote to her in June expressing your concern that the guidance did not address the lobbying rights of members of labor organizations. By copy of the July response to you, she requested that supplemental guidance be issued to ensure that managers and supervisors are fully aware that representational activities of labor organizations and their members are not prohibited by anti-lobbying restrictions.

Enclosed you will find the supplemental guidance that is being distributed to all FAA employees. The supplemental guidance explains that lobbying restrictions applicable to Federal employees do not restrict members of labor organizations from presenting the views of their organization to members of Congress or the general public. The guidance refers to the statutory authorization for representational lobbying and the Federal Labor Relations Authority's precedent allowing such activities.

I hope this supplemental guidance addresses your concern on this issue. If you have any further questions, please contact Mr. Jerry Mellody of my staff on 202-366-4099.

Sincerely,

Nicholas G. Garaufis

Nicholas G. Garaufis
Chief Counsel

Enclosure

U.S. Department of Transportation

Federal Aviation Administration

Memorandum

Subject: **INFORMATION**: Supplemental Guidance on Federal Employees' Lobbying Restrictions

Date: SEP 13 1999

From: Chief Counsel

Reply to Attn. of:

To: All Employees

This memorandum supplements guidance on lobbying restrictions applicable to Federal employees issued on February 4 by the Office of the General Counsel. That guidance served as a reminder of governmentwide restrictions on lobbying activity by employees of the Executive branch. **Lobbying restrictions applicable to Federal employees, however, do not restrict members of labor organizations from presenting the views of their organization to members of Congress or the general public.** Indeed, the Federal sector labor-management relations statute specifically authorizes representational lobbying and, consistent with Federal Labor Relations Authority precedent, such activities are not prohibited by the anti-lobbying restrictions discussed in the General Counsel's February 4 memorandum.

If you have any questions regarding this supplemental guidance, please contact the Office of the Chief Counsel Personnel Labor Law Staff on 202-366-4099 or your servicing Regional or Center Counsel office.

Nicholas G. Garaufis

Nicholas G. Garaufis

Attachment

PAST PRACTICE QUIZ

passtimes

Is a past practice binding on the Agency? Yes, an established **past practice** can be as binding on an agency as a written collective bargaining agreement (CBA). However, to be a binding past practice, certain criteria must be satisfied. Here are some examples which will help define the boundaries of the past practice concept.

1. For the past two years, several bargaining unit employees have been parking their cars in spaces near the facility which are marked "reserved for visitors". No supervisor or manager was aware of these parking arrangements. When some visitors complained that there were no parking spaces for them, management directed that the employees stop parking in the spaces reserved for visitors. The employees complained that management had unilaterally changed a **past practice** without notice to and bargaining with the Union. Did management commit a violation?

2. For the past ten years, a Division Manager has allowed the Union to select who will be hired as a developmental from a list prepared by a joint Union-Management committee. During the years, this system has resulted in the hiring of many highly motivated individuals who have become some of the best employees in the region. The Division Manager retired and the new Division Manager immediately terminated the **past practice** of allowing the Union to make selections of new hires. Did the new Division Manager commit a violation by terminating the past practice

3. For the past two weeks, a new supervisor has allowed the employees to stop working 45 minutes before the end of their shift to clean up and prepare to leave the facility. Prior to this time, the employees were permitted 15 minutes for clean up. The facility manager disapproved of the increased clean up time and directed the old time frame to be reinstated. Did the manager commit a violation by terminating the 45 minute clean up period?

4. The CBA contains a provision that states that bargaining unit employees shall use the second row of parking spaces adjacent to the facility. However, for the past three years, bargaining unit members have parked in the first row along with the supervisors and managers. A new facility manager directed that the employees stop using the first row and park where the contract says they are supposed to park. Did the manager commit a violation by ordering a change in the **past practice**?

A unilateral change by management in a valid past practice To constitute a **past practice** the practice at issue must satisfy the following tests:

1. The practice must involve a change in a **condition of employment**, which is defined as personnel policy or practice, whether established by rule, regulation or otherwise, affecting unit employees' working conditions. (In other words, just about everything having to do with your job.)

2. The practice must be clearly understood, known and consistently followed by both parties, the Union and Management for a reasonable period of time; or

3. The practice must be followed by one party and known, but not objected to by the other party, for a reasonable period of time; and

4. The practice must be consistent with law and government wide regulations.

If a valid past practice has been established by the parties, the practice cannot be changed by management unilaterally. Bargaining must take place. It is an unfair labor practice and a violation of the collective bargaining agreement for management to unilaterally change an established past practice. Thus, based on these guidelines, did management commit an unfair labor practice in the illustrations above?

In example No. 1, no valid past practice was established because management was not aware of the practice. In example No. 2, no valid past practice was established because the practice, of which management was fully aware, is contrary to the law. Section 7106 (a) of the Statute provides that hiring decisions are within management's exclusive jurisdiction. Thus, the practice impermissibly infringes on a management right guaranteed under the law. In example No. 3, no valid past practice was established because the practice was not in existence long enough to be considered a past practice. Finally, in example No. 4, a very strong argument could be made that a valid past practice was established, even though the practice was contrary to the express wording of the collective bargaining agreement. However, it is likely that the FLRA would be somewhat reluctant to issue a complaint against an agency that was attempting to bring the practice of the parties into compliance with the terms of the agreement.

Questions about labor relations matters? Send them to me at PASS HQ and I'll pick one or two for reply in this column next issue.

– PASS PAC

– recruitment activity – [illegible] appeals for [illegible].

I & I Quiz

Question & Answers

1. The Labor Relations Statute does not actually include the terms "impact and implementation" bargaining.

Answer True

5 USC 7106(b)(2) – Procedures that management will follow

5 USC 7106(b)(3) – Appropriate Arrangements for employees adversely affected by the exercise of a management right

2. Management is required to bargain with the union over all changes in conditions of employment.

Answer False

Changes that result from the exercise of a management right (7106) which are de minimis do not require bargaining (24 FLRA 403)

If the matter on how the change is to be implemented is already spelled out in CBA - No bargaining – "Covered by" doctrine (47 FLRA 1004)

3. A union's I & I bargaining proposal can not interfere with a management right.

Answer False

Can interfere but not excessively interfere

702 F.2d 1183

819 F.2d 306

Excessive interference test – KANG - (21 FLRA 24)

If the inference is not excessive, the proposal may constitute an appropriate arrangement and fall within the duty to bargain

4. Effect of changes on bargaining unit employees are not limited only to those experienced in the workplace.

Answer True

Intrusions on an employee's family, including transportation and babysitting issues, travel and educational plans have to be considered in determining impact (39 FLRA 1357, 46 FLRA 471,47 FLRA 419)

5. The discontinuance of the practice of distributing W-2 forms at the work site and mailing them to the employee's homes once a year was slight and did not require bargaining.

Answer False

The de minimis standard does not apply to matters which are substantively negotiable (30 FLRA 922 Also 53 FLRA 1664) Now it does.

6. A management initiated change that will affect only one employee is automatically considered de minimis.

Answer False

Changes affecting only employee have been deemed to be more than de minimis (47 FLRA 419), (32 FLRA 832)

De Minimis Standard – HHS, SSA (24 FLRA 403) – Principle emphasis on nature and extent of the effect or reasonable foreseeable effect on COE's

7. The working conditions of supervisory and management personnel do not concern conditions of employment of unit employees and thus are not within the duty to bargain.

The working conditions of supervisory and managerial/personnel do not concern conditions of employment of unit employees and thus are not within the duty to bargain

Answer True

652 F.2d 191

952 F.2d 1434

47 FLRA 512

56 FLRA 288

8. Approximately three (3) years ago, a notice was sent to the union proposing to terminate a bargainable condition of employment within eighteen (18) months. No proposals were received from the union within the contractually – established period. However, the COE was not terminated at that time. You now want to terminate the COE but union representative demands a new notice and an opportunity to bargain. Since you have already provided the union notice, no new notice is required.

Answer True

58 FLRA NO. 166 - initial inaction means bargaining rights waived permanently

Other waivers cases -

16 FLRA 654; 44 FLRA 575, 51 FLRA 1532

9. A status quo ante remedy is required for any failure to I & I bargaining violation.

Answer False

FLRA has declined to order status quo ante remedies which would unduly disrupt agency operations.

Authority will consider the following factors in determining whether such a remedy is appropriate: 1) whether and when the union was given notice of the change: 2) whether and when the union requested bargaining over procedures or appropriate arrangements for employees adversely affected by the change; 3) the willfulness of the agency's conduct in failing to discharge its bargaining obligation; 4) the nature and extent of the adverse impact on unit employees; 5) whether and to what degree a status quo ante remedy would disrupt or impair the efficiency and effectiveness

FCI, Petersburg 8 FLRA 604

54 FLRA 914

10. An agency is required to respond to a union's proposals, even if none of them are within the duty to bargain, before implementing an intended change.

Answer True

Agencies are required to provide a response even if only to point out that the union's proposals are non-negotiable in order to meet its bargaining obligation

35 FLRA 764

55 FLRA 892

I & I QUIZ

Questions

1. The Labor Relations Statute does not actually include the terms "impact and implementation" bargaining.
2. Management is required to bargain with the union over all changes in conditions of employment.
3. A union's I & I bargaining proposal can not interfere with a management right.
4. Effect of changes on bargaining unit employees are not limited only to those experienced in the workplace.
5. The discontinuance of the practice of distributing W-2 forms at the work site and mailing them to the employee's homes once a year was slight and did not require bargaining.
6. A management initiated change that will affect only one employee is automatically considered de minimis.
7. The working conditions of supervisory and management personnel do not concern conditions of employment of unit employees and thus are not within the duty to bargain.
8. Approximately three (3) years ago, a notice was sent to the union proposing to terminate a bargainable condition of employment within eighteen (18) months. No proposals were received from the union within the contractually – established period. However, the COE was not terminated at that time. You now want to terminate the COE but union representative demands a new notice and an opportunity to bargain. Since you have already provided the union notice, no new notice is required.
9. A status quo ante remedy is required for any failure to I & I bargaining violation.
10. An agency is required to respond to a union's proposals, even if none of them are within the duty to bargain, before implementing an intended change.