Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
AIR FORCE RESERVE COMMAND

ROBINS AIR FORCE BASE, GEORGIA
Respondent Case No. AT-CA-80669

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 987
Charging Party

C.R. Swint, Jr. Counsel for the Respondent
Linda J. Norwood Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1) and (5), by repudiating a 1997 Base Parking Plan. The complaint alleges that Respondent refused to bargain in response to the Charging Party's requests to bargain on April 30 and May 7, 1998, over a 1997 waiver that Respondent received from the negotiated Plan.

The Respondent's answer asserted, in part, an affirmative defense that the complaint was barred by section 7118(a)(4)(A) of the Statute because the alleged unfair labor practice occurred more than six months before the filing of the charge with the Authority on June 12, 1998.

The parties' joint motion for a continuance of the hearing and a preliminary ruling on the issue of the timeliness of the charge was granted. The parties stipulated that the pleadings and certain other exhibits should be considered in determining the applicability of section 7118(a)(4)(A). They also filed briefs addressing the issue.

Upon consideration of the briefs and exhibits, and for the reasons set out below, I conclude that the Union's charge was filed more than six

months after the limitations period for filing under section 7118(a)(4)(A) commenced and grant the Respondent's request to dismiss the complaint.

Findings of Fact

The Respondent is a tenant activity at Robins Air Force Base, Georgia. The Charging Party (Union) is the exclusive representative for certain employees of the Respondent.

On August 26, 1997, Warner Robins Air Logistics Command (WRALC) implemented a new Base Parking Plan that it had negotiated with the Union. Shortly after its implementation,on or about September 4, 1997, Respondent's Vice Commander, Major General (MG) James Sherrard, sent a written request to the Commander of WRALC, MG Rondal Smith, asking for a waiver of the Plan because the Plan would reduce Respondent's reserved parking spaces from 153 to 42.(1)

Following this request, MG Smith contacted Union President Jim Davis and asked him if he would agree to a waiver from the Plan for the Respondent. Davis replied that he would not agree and that negotiations with the Union would have to be completed prior to the implementation of any waiver. MG Smith advised Davis that he was going to grant the waiver anyway.

On September 30, 1997, WRALC, by MG Smith, granted the Respondent a waiver from the Plan, thereby allowing the Respondent to keep its level of reserved parking spaces at approximately 153, instead of reducing the number to 42 as the Plan required.

Following MG Smith's unilateral action, the Union filed an unfair labor practice charge on November 28, 1997, alleging that the Respondent's action, through MG Sherrard and MG Smith, had repudiated an earlier 1994 memorandum of agreement about parking in which the Respondent had agreed to be bound by the Base Parking Plan.

This charge (Case No. AT-CA-80140) was investigated by the Atlanta Regional Office which, on April 23, 1998, declined to issue a complaint. The Acting Regional Director concluded that the Respondent did not repudiate the 1994 memorandum of agreement as it did not clearly and unequivocally bind the Respondent to all subsequent parking agreements as opposed to only a 1995 parking plan. The Acting Regional Director then proceeded to determine whether the Respondent and WRALC acted pursuant to the terms of the negotiated 1997 Base Parking Plan. He interpreted the 1997 Base Parking Plan and was "unable to conclude that WRALC or [the

Respondent] either repudiated the 1994 MOA or failed to comply with the requirements of the 1997 Parking Plan." The charge was dismissed.[2] (Jt. Exh. 7).

On April 30, 1998 and May 7, 1998, respectively, the Union, by its President Jim Davis, made two written requests to bargain over Respondent's "variance from the Robins ALC parking policy." The Respondent rejected both of these demands on May 1, 1998 and May 14, 1998, respectively. (Jt. Exhs. Nos. 8-10).

The charge was thereupon filed on June 12, 1998, alleging that by the May 1998 refusals to bargain the Respondent "has refused and continues [to] refuse to negotiate with the Union concerning the parking policy which was the subject of demands to negotiate by the Union on April 30, 1998 and May 7, 1998."

Discussion and Conclusions

Section 7118(a)(4)(A) of the Statute provides, in pertinent part, that: "[N]o complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority." The intent of this provision is to foster stable collective bargaining relationships and prevent the litigation of stale charges. *See Equal Employment Opportunity Commission, Washington, DC*, 53 FLRA 487, 495 (1997)(*EEOC*).

It is clear from the undisputed facts of this case that the alleged unfair labor practice occurred in Sepember 1997 when the Respondent sought and was granted a waiver from the Base Parking Plan without first negotiating with the Union. There is no dispute that the Union knew these facts in September 1997. Therefore, the charge filed in the instant case in June 1998, more than eight months after the waiver was granted, was untimely filed and the complaint based upon the change must be dismissed.

The General Counsel contends that the charge filed by the Union in June 1998 alleges failures to bargain in May 1998 which are obviously timely, and it should be given an opportunity at a hearing to show that the Respondent's continued reliance on the 1997 waiver and failure to comply with the Plan constituted a repudiation of the Plan and a violation of the Statute as alleged in the complaint.

The position of the General Counsel would have merit if the alleged May 1998 failures to bargain were not over the September 1997 waiver.[3] Several exhibits have been stipulated for purposes of this motion, but none of the exhibits allege, and no exhibit or testimony has been proferred to allege, that the Respondent has changed conditions of

employment concerning the Base Parking Plan since the waiver was granted in September 1997.[4] The Union in May 1998 specifically requested to bargain the "variance from Robins ALC parking policy," and these requests are also specifically described in the complaint as "two written requests to bargain . . . over the AFRC's waiver from the 1997 Base Parking Plan."

The General Counsel recognizes that a repudiation of a collective bargaining agreement is not a continuing violation,[5] and requests that, if it is found that the

allegations of the complaint are inextricably linked with the September 1997 waiver, the statute of limitations applicable to the fall 1997 conduct should be tolled for equitable reasons. If it is found to be equitable to toll the statute of limitations on the fall 1997 conduct, Counsel for the

General Counsel moves to amend the complaint to specify that the 1997 conduct repudiated the Base Parking Plan.

In *EEOC*, 53 FLRA at 498-99, the Authority discussed the the statute of limitations found in section 10(b) of the National Labor Relations Act and the First Circuit's statement that equitable tolling is "appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his [or her] hands." *Kelley v. NLRB*, 79 F.3d 1238, 1248 (1st Cir. 1996)(*Kelley)* (quoting from *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). In *EEOC* the Authority also applied the factors that the court in *Kelley* identified as being generally weighed in assessing claims for equitable tolling. 79 F.3d at 1248. Those factors are: (1) lack of actual notice of filing requirements; (2) lack of constructive knowledge of filing requirements; (3) diligence in pursuing one's rights; (4) absence of prejudice to the defendant[6] and (5) a plaintiff's reasonableness in remaining ignorant of the notice requirement.

I agree with the Respondent that the Union was not prevented by circumstances beyond its control from missing the filing deadline. The Union had full knowledge in September 1997 of the negotiated Base Parking Plan and of the Respondent's seeking and receiving a waiver from the Plan without bargaining with the Union. It could have filed a charge at that time alleging a repudiation of the Plan. Instead it filed a charge alleging the repudiation of a completely different agreement concerning parking.

It is concluded that the Union's charge was filed more than six months after the limitations period for filing under section 7118(a)(4)(A) of the Statute commenced. There being no reason to toll the limitations period, the charge was untimely filed and the complaint based

upon the charge must be dismissed.

Based on the above findings and conclusions, the hearing scheduled for April 21, 1999, in Macon, Georgia is canceled, the Respondent's motion to dismiss is granted, and it is recommended that the Authority issue the following Order:

ORDER

The complaint in Case No. AT-CA-80669 is dismissed.

Issued, Washington, DC, April 8, 1999.

GARVIN LEE OLIVER

Administrative Law Judge

1. Paragraph 4.4 of the Base Parking Plan provided:

Reserved parking space requests above an organization's quota must be approved by the Installation Commander (or designated representative). All requests must be from the director, staff agency chief, or hosted unit commander in writing with AF Form 332 and diagram of the parking area to 78 SFS/SFOL for processing. Processing cannot be initiated until the obligation to bargain with the affected union has been determined and finalized. (Jt. Exh. 2.)

2. The Union appealed the Region's decision to the Office of the General Counsel which upheld the Region's decision on July 27, 1998.

3. The parties recognize that where occurrences within the six month limitations period may constitute unfair labor practices, earlier events, occurring outside the limitations period, may shed light on the character of the matters occurring within the limitations period. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 416 (1960).

4. *See Air Force Flight Test Center, Edwards Air Force Base, California*, 55 FLRA 116, 120 (1999)(December 1994 charge was timely where it alleged a refusal to bargain November 1994 changes in conditions of employment; General Counsel proved modifications in November 1994 of policies set forth in a April 1993 related policy; it was undisputed that the union's request to bargain the April 1993 policy was untimely).

5. *See EEOC*, 53 FLRA at 495 (citing *A & L Underground*, 302 NLRB 467 (1991)).

6. This factor cannot be the sole factor in tolling the statute of limitations. It must be paired with at least one other one. *EEOC,* 53 FLRA at 499; *Kelley*, 79 F.3d at 1250.