

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS AND APPEALS BOSTON REGIONAL OFFICE BOSTON, MASSACHUSETTS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164, AFL-CIO Charging Party	Case Nos. BN-CA-02-0266 BN-CA-02-0434

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his/her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 17, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 13, 2003
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM
2003

DATE: February 13,

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: SOCIAL SECURITY ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
BOSTON REGIONAL OFFICE
BOSTON, MASSACHUSETTS

Respondent

and
CA-02-0266

Case Nos. BN-

CA-02-0434

BN-

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1164, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. §§ 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 03-21
WASHINGTON, D.C.

SOCIAL SECURITY ADMINISTRATION OFFICE OF HEARINGS AND APPEALS BOSTON REGIONAL OFFICE BOSTON, MASSACHUSETTS <p style="text-align: right;">Respondent</p> and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164, AFL-CIO <p style="text-align: right;">Charging Party</p>	Case Nos. BN-CA-02-0266 BN-CA-02-0434

Deborah L. Rose, Esquire
Mr. John J. Barrett
For the Respondent

Mr. Thomas R. Kaminsky
For the Charging Party

Gerard M. Greene, Esquire
Amita J. Baman, Esquire
Joanna M. Simmons, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.¹, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et

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For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial, "71", of the statutory reference, i.e., Section 7114(a)(2)(A) will be referred to, simply as, "\$ 14(a)(2)(A)".

seq., concerns whether formal discussions occurred when independent contractors, on behalf of Respondent, questioned witnesses by electronic mail and/or telephone pursuant to EEO requirements.

This case was initiated by a charge filed in Case No. BN-CA-02-0266 on February 11, 2002, which concerned employees at Respondent's Manchester, New Hampshire, office (G.C. Exh. 1(c)); the Complaint and Notice of Hearing issued on July 16, 2002; and the hearing was set for September 9, 2002. The charge in Case No. BN-CA-02-0434 was filed on April 18, 2002 (G.C. Exh. 2(a)), concerned employees at Respondent's Somerville, Massachusetts, office; the Complaint and Notice of Hearing issued on July 31, 2002; (G.C. Exh. 2(c))²; and the hearing was set for September 9, 2002. On August 28, 2002, the Notice of Time and Date of Hearing issued (G.C. Exh. 1(g)) and pursuant thereto, a hearing was duly held on September 10, 2002, in Boston, Massachusetts, before the undersigned. At the commencement of the hearing, the cases were consolidated. All parties were represented at the hearing and afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded an opportunity to present oral argument which the parties waived. At the conclusion of the hearing, October 10, 2002, was fixed as the date for mailing post-hearing briefs which time subsequently, on Motion by Respondent to which there was no objection, for good cause shown, was extended to October 31, 2002, and the General Counsel and Respondent each filed an excellent brief, received on, or before, October 31, 2002, which have been carefully considered. Upon the basis of the entire record, I make the following findings and conclusions:

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General Counsel's Unopposed Motion to Correct the Record by including Respondent's Answer, which was inadvertently omitted, is granted and Respondent's Answer is hereby incorporated as General Counsel's Exhibit 1(e).

FINDINGS

1. The American Federation of Government Employees, AFL-CIO (hereinafter, "AFGE") is the exclusive representative of a nationwide unit of Respondent's employees. The American Federation of Government Employees, AFL-CIO, Local 1164 (hereinafter, "Union") is an agent of AFGE for purposes of representing bargaining unit employees at Respondent's Manchester, New Hampshire, and Somerville, Massachusetts offices.

2. An allegation of discrimination, whether filed under the parties' Agreement as a grievance (Res. Exh. 5, Article 24, Section 8B, p. 4) or under the EEOC (Res. Exh. 3), must first be discussed with an EEO counselor. If not resolved informally by the counselor, the employee is given notice of the right to file a formal complaint under the statutory EEO procedure or a grievance under the parties Agreement. If a formal complaint is filed, the complaint will be investigated.

3. Respondent contracts out the investigation of formal complaints. Southwind Enterprises (hereinafter, "Southwind") on December 20, 2001, signed a contract with Respondent to investigate fifteen formal complaints, including those of bargaining unit employees Terry Cox and Denise Schellbach (Jt. Exh. 4). Mr. Michael Gear was assigned the investigation of Terry Cox's formal complaint (Jt. Exhs. 5a and b) and Ms. Dyanne Engberg was assigned the investigation of Denise Schellbach's formal complaint of (Jt. Exhs. 13, 13a and 14)

4. Respondent's Office of Civil Rights and Equal Opportunity issues a Letter of Authorization which makes clear that the person assigned is conducting the investigation on behalf of the Respondent and states, in part, ". . . You are, therefore, required to furnish sworn or affirmed testimony by affidavit, without a pledge of confidence, about matters pertaining to the complaint (Jt. Exhs. 5b, 13a); and advises the supervisors in the concerned office that, ". . . 45 Code of Federal Regulations (CFR) (Part 73) requires all employees to assist Investigators . . . This . . . includes the giving of the statements or evidence. The standards further provide, at § 73.735-1201, that violations of the standards may be the cause for disciplinary action. . . ." (Jt. Exhs. 2, 3, 11). Respondent retains the right to order a contractor to remove an investigator (Tr. 148-150, 157) At the end of the investigation, the investigator submits a Report of Investigation to Respondent (Tr. 106, 147). Respondent may require the investigator to gather additional

information (Tr. 155). Respondent remains responsible for the content and timeliness of the investigation (Jt. Exh. 18; Tr. 117, 146, 151).

5. In mid-afternoon on January 29, 2002, Mr. Gear called Ms. Rosanne Moore, a bargaining unit employee at the Manchester Office of Hearings and Appeals, and identified himself. He then asked Ms. Moore if she had knowledge of what Ms. Terry Cox did for work. Next, Mr. Gear asked if she had any knowledge of Ms. Cox's problems with management and Ms. Moore said she had no first hand knowledge. Mr. Gear then asked Ms. Moore what her position was and after Moore had told him, Mr. Gear began asking questions about Moore's performance and at this point, Ms. Moore told Mr. Gear she did not see the relevance of this line of questions; Mr. Gear decline to explain the relevance and Ms. Moore terminated the call (Tr. 61-62).

Ms. Moore then spoke to Mr. Thomas A. Kaminsky, OHA Vice President of the New England Region, whose office was just a couple of doors from Ms. Moore's, and told him about Mr. Gear's telephone call (Tr. 63). Mr. Gear did not contact Ms. Moore further; did not send her an affidavit or confirming letter (Tr. 63). Ms. Moore did not request Union representation when Mr. Gear called her (Tr. 65).

6. On January 28, 2002, Ms. Engberg sent an e-mail to Ms. Coleen Barry, a member of the bargaining unit who worked in the Somerville office, in which she explained she needed to interview Ms. Barry about the formal complaint filed by Ms. Schellbach and gave her an option of being interviewed by telephone at work or at home (G.C. Exh. 3; Tr. 75, 76). Ms. Barry replied that she would prefer being interviewed at home and an appointment was made for Wednesday, January 30, 2002, at 6:30 p.m. (Tr. 88, 89, 94). The telephone interview lasted about twenty minutes and, with Ms. Barry's knowledge, was tape recorded (Tr. 94-95). Ms. Engberg told Ms. Barry she would be sending her a statement of their conversation, to make any corrections, sign it and return the statement to Ms. Engberg (Tr. 90).

On January 31, 2002, Ms. Barry forwarded a copy of the e-mail from Ms. Engberg to Mr. William T. Ross, who works in the Boston Tele-Service Center in Boston, and who is Area II, Vice-President of Local 1164 (Tr. 67, 75, 95) and on January 31, 2002, Ms. Barry discussed the interview with Ms. Susan Conrad, an employee in the Somerville office and who is Executive Vice-President of Local 1164 (Tr. 70, 95, 96).

When Ms. Barry got the first e-mail from Ms. Engberg requesting the interview, Ms. Barry talked to Ms. Conrad who told her to forward copies of anything she received to Mr. Ross (Tr. 95-96).

On March 1, 2002, Ms. Engberg e-mailed Ms. Barry a statement based on their January 30, 2002, conversation (G.C. Exh. 4a, b; Tr. 90-91). Except for her middle name which Ms. Engberg got wrong (Tr. 95), the statement (Affidavit) was entirely accurate. (*id.*)

7. In late winter, 2001,³ while working at Respondent's Somerville, Massachusetts, office, Ms. Kathy Houba-Kane received an e-mailed from Ms. Engberg stating that she needed to interview her in connection with Schellbach's formal EEO complaint (Tr. 77, 97). Ms. Houba-Kane responded that she would prefer being interviewed by telephone at home and Ms. Engberg arranged a time a few days later for the interview. Ms. Engberg called, she told Ms. Houba-Kane that the conversation would be recorded (Tr. 98) and promised to send a copy to her home address (*id.*) Ms. Engberg did not send a copy to Ms. Houba-Kane's home address (Tr. 99); but a few weeks later Ms. Houba-Kane did receive the statement by e-mail at work (*id.*)

After Ms. Houba-Kane received the first e-mail, she informed the Union (Tr. 100-101).

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General Counsel says, "During late winter 2002" (General Counsel's Brief, p. 17); but this, obviously, is in error as the hearing was held in September, 2002. Moreover, the witness, testifying on September 10, 2002, said "last winter" (Tr. 97), so it is clear that she was interviewed in late winter, 2001.

CONCLUSIONS

It is true that neither Southwind's employees nor Respondent informed the Union of the interviews of Ms. Moore, Ms. Barry or Ms. Houba-Kane; however, both Ms. Barry and Ms. Houba-Kane informed the Union of their impending interviews by Ms. Engberg, i.e., before the interview; and Ms. Barry discussed the interview with the Union. Ms. Moore was interviewed by Mr. Gear at work and had no opportunity to inform the Union before the interview; but she did discuss the interview with the Union after the fact.

No employee, i.e., Moore, Barry or Houba-Kane requested representation at the interviews.

INTERVIEWS WERE FORMAL DISCUSSIONS

§ 14(a) (2) (A) of the Statute provides:

"(a) (2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at--

(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit . . . concerning any grievance or any personnel policy or practices or other general condition of employment;" (5 U.S.C. § 7114(a) (2) (A)).

This, of course, is the right of the Union and is not dependent on the wishes of the employee.⁴ The Authority has stated that,

"For the § 7114(a) (2) (A) right to attach, there must be:

(1) a discussion; (2) that is formal;
(3) between an agency representative and a unit employee or the employee's representative; and (4) concerning any grievance or any personnel policy or other general condition of employment. Gen. Servs. Admin., 48 FLRA 1348, 1354 (1994) (GSA)."

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I specifically do not express any opinion as to the Union's right to be present at an EEOC formal complaint interview if the employee objects to the presence of the Union.

United States Department of Energy, Rocky Flats Field Office, Golden, Colorado, 57 FLRA 754, 755 (2002).

There is no doubt that the interviews constituted a "discussion". The questions and answers lasted ten to twenty minutes. Nor is there any doubt that the discussion was "formal". Each investigator had a pre-determined agenda of what he, or she, wanted to inquire about. Indeed, since Ms. Engberg prepared an affidavit for Ms. Barry and for Ms. Houba-Kane in question and answer form it strongly appears that Ms. Engberg had written questions she asked each employee. The interviews were recorded; participation by employees was mandatory; and failure to cooperate would be subject to discipline. Nor were the interviews any less, "formal discussions", because they were conducted by telephone. Veterans Administration Medical Center, Long Beach, California, 41 FLRA 1370, 1379-80 (1991).

Plainly, the interviews were between a representative of Respondent and bargaining unit employees.

Because the interviews were in connection with formal EEOC complaints, Respondent asserts that the formal discussions did not concern a "grievance". The Authority in Luke Air Force Base, Arizona, 54 FLRA 716 (1998) (hereinafter, "Luke AFB"), rev'd sub nom. Luke Air Force Base v. FLRA, 208 F.3d 221 (9th Cir. 1999), cert. denied, 121 S. Ct. 60 (2000), held that formal discussions concerning EEOC proceedings were "grievances" within the meaning of the Statute. Following the reversal of Luke AFB, by the Ninth Circuit Court of Appeals, the Authority, in a substantially like case, U.S. Department of the Air Force, 436th Airlift Wing, Dover Air Force Base, Dover, Delaware, 57 FLRA 304 (2001) (hereinafter, "Dover AFB"), reviewed in depth its decision in Luke AFB and the Ninth Circuit's unpublished decision, and the majority, Chairman Cabaniss dissenting, adhered to its decision in Luke AFB. Dover AFB, supra. The United States Court of Appeals for the District of Columbia Circuit, in No. 01-1373 (Dover AFB), on January 17, 2003, denied the Air Force's petition for review and granted FLRA's cross application for enforcement of its order. In Department of Defense, Defense Contract Management Agency, Defense Contract Management Agency East, Indianapolis, Indiana, Case No. CH-CA-01-0652, OALJ 03-15, in a decision issued on January 24, 2003, I reviewed at some length, Chairman Cabaniss' dissent in Dover AFB; the majority's decision in Dover AFB; and the Court of Appeals decision in Dover AFB.

Suffice it to say, the Authority in Dover AFB, stated in part,

"Section 7114(a) (2) (A) of the Statute broadly provides for union attendance at meetings concerning any grievance. To ascertain the scope of the term grievance in § 7114(a) (2) (A), the first place to look is the Statute's express definition of grievance in § 7103(a) (9).

"The express language of § 7103(a) (9) provides no basis for limiting the definition of grievance, as the Respondent argues here, so as to exclude complaints brought pursuant to EEO statutory procedures. To the contrary, the Statute defines grievance as:

"any complaint--

(A) by any employee concerning any matter relating to the employment of the employee[.]

5 U.S.C. § 7103(a) (9) (A) (emphasis added). By its plain terms, the Statute's broad definition of grievance encompasses any employment-related complaint, regardless of the forum in which the complaint may be pursued. . . ." (57 FLRA at 308).

The District of Columbia Circuit Court of Appeals stated, in part,

"Section 7103(a) (9) defines 'grievance' as any complaint . . . by any employee concerning any matter relating to the employment of the employee.' 5 U.S.C. § 7103(a) (9). Although the Air Force contends that the EEO proceeding initiated by Jones is not a grievance within the meaning of section 7103(a) (9), our decision in NTEU demonstrates otherwise. See 774 F.2d at 1186-87 (holding that a grievance includes both those complaints filed pursuant to a negotiated grievance procedure and those filed pursuant to alternative statutory procedures). The Air Force suggests that NTEU is distinguishable because it involved a Merit Systems Protection Board ("MSPB") proceeding rather than an EEO proceeding; however, our analysis in NTEU relied upon the text, structure, and legislative history of the Act and did not rest on the type of grievance in question. See 774 F.2d at 1185-88. We find no reason to

distinguish NTEU; accordingly, we will read the term 'grievance' as we did in that case. . . ." (Slip op. at 6)

Accordingly, the interviews concerned a grievance within the meaning of the Statute.

The more interesting question is whether the Union was given an opportunity to be represented at the formal discussions. Because Mr. Gear called Ms. Moore at her desk, obviously, the Union had no opportunity to be represented at the interview, which I have found to have been a formal discussion.

On the other hand, Ms. Barry and Ms. Houba-Kane, each, when Ms. Engberg first sent an e-mail in which she explained that she needed to interview them in connection with a formal EEOC complaint filed by Ms. Schellbach, informed the Union of their impending interview. While Ms. Engberg did not give the Union notice of the Barry and Houba-Kane interviews, the employees did. Because the Union had knowledge of the interviews and, accordingly, had the opportunity to be represented at the Barry and Houba-Kane interviews, §14(a)(2)(A) was fully complied with.

Nevertheless, because the Union had no opportunity to be represented at the Moore interview, Respondent violated §§ 16(a)(1) and (8) of the Statute, and it is recommended that the Authority adopt the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority, 5 C.F.R. § 2423.41 (c), and §18 of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7118, the Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts, shall:

1. Cease and desist from:

(a) Conducting formal discussions with bargaining unit employees represented by the American Federation of Government Employees, Local 1164, AFL-CIO, concerning any grievance or any personnel policy or practices or other general condition of employment, including investigatory interviews in connection with formal EEO complaints, without affording the Union an opportunity to be represented at the formal discussions.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Notify all persons, in writing, including independent contractors and subcontracts, authorized to investigate formal EEO complaints on behalf of the Respondent, of the American Federation of Government Employees, Local 1164, AFL-CIO, right to notice and an opportunity to attend interviews held with bargaining unit employees as required by the Federal Service Labor-Management Relations Statute.

(b) Post at its facilities in all offices, in the Office of Hearings and Appeals, Boston Region, and in all offices of the Social Security Administration, Boston, Massachusetts, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms they shall be signed by the Director of the Office of Civil Rights and Equal Opportunity, Social Security Administration, Baltimore, Maryland, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to §2423.41(e) of the Authority's Rules and Regulations, 5 C.F.R. § 2423.41(e), notify the Regional Director, Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, MA 02110, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

WILLIAM B. DEVANEY
Administrative Law

Judge

Dated: February 13, 2003
Washington, D.C.

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the the Social Security Administration, Office of Hearings and Appeals, Boston Regional Office, Boston, Massachusetts, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with our bargaining unit employees represented by the American Federation of Government Employees, Local 1164, AFL-CIO, concerning any grievance or any personnel policy or practices or other general condition of employment, including investigatory interviews in connection with formal EEO complaints, without affording the Union an opportunity to be represented at the formal discussions.

WE WILL notify all persons, in writing, including independent contractors and subcontractors, authorized to investigate formal EEO complaints, of the American Federation of Government Employees, Local 1164, AFL-CIO, right to notice and an opportunity to attend interviews held with bargaining unit employees as required by the Federal Service Labor-Management Relations Statute.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Respondent/Activity)

Date: _____ By: _____
(Title) (Signature)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110, and whose telephone number is: (617)424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case Nos. BN-CA-02-0266 & BN-CA-02-0434, were sent to the following parties:

CERTIFIED MAIL:

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: FEBRUARY 13, 2003
WASHINGTON, DC