

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF DEFENSE DEPENDENTS
SCHOOLS

Respondent

and

OVERSEAS EDUCATION ASSOCIATION

Charging Party

Case No. WA-CA-20413

Leonard L. Bransford
Representative of the Respondent

H.T. Nguyen
Counsel for the Charging Party

Laurence M. Evans
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleged 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), when Respondent repudiated and refused to comply with an alleged agreement. The complaint alleged that the agreement was executed on June 19, 1991 by authorized representatives and concerned teacher identification cards, in resolution of grievance 90-14, applying to Respondent's Germany Region.

Respondent's answer admitted the allegations as to the Respondent, the Union, and the charge, but denied the allegations concerning the agreement, the repudiation, or any violation of the Statute.

A hearing was held in Washington, D.C. The Respondent, Charging Party, and the General Counsel were represented and

afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Overseas Education Association (OEA or Union) is the certified exclusive representative of a unit of employees appropriate for collective bargaining at the Department of Defense Dependents Schools (DODDS or Respondent).

OEA and DODDS were, at all relevant times, parties to a collective bargaining agreement. Article 7A, Section 2 provided, in part, as follows:

It is understood that the National Agreement or other agreements reached at the national level are controlling, and no agreements reached at the regional level shall amend or otherwise conflict with the provisions of this Agreement.

Article 38, Military Grade Equivalency, provided as follows:

Section 1

When an equivalent military grade is used for establishing entitlement to housing, travel, accommodations, etc., such grade level determination shall be made in accordance with the following:

Schedules C,D,E, and F Unit Employees	Equivalent Grade
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Steps 1-10	0-3
Steps 11 and above	0-4

Section 2

If the Military Departments place a grade equivalent on unit employee identification cards, the above military equivalent grades shall be used.

On December 21, 1990, Mr. Ronald Austin, General Counsel, OEA, submitted a national level grievance, identified as Association Grievance No. 90-14, to the Director of DODDS. The grievance alleged that DODDS had refused to issue an

identification card reflecting proper military grade equivalency (O-4) to Ms. Sherrill Jordan, Schweinfurt Junior High School, and similarly situated bargaining unit employees. Thereafter, on February 21, 1991, the Union amended the grievance to allege that unit employees' identification cards did not properly reflect GS-12 grade equivalences.

DODDS denied the grievance, and OEA invoked arbitration. Patricia Rivera, at that time Respondent's Chief of Management-Employee Relations for DODDS Germany, was assigned the case for DODDS since it related to Germany. She entered into settlement discussions with OEA representative, Jan Pepelnjak, the chief spokesperson for OEA in Germany.

Under a DODDS policy, Ms. Rivera was obligated to discuss the terms of a settlement of a grievance like 90-14 with the DODDS national office and secure approval before settling a case. The practice was that such approval could be oral and was not required to be in writing. Ms. Rivera had previously settled national level grievances.

Likewise, Ms. Pepelnjak of OEA sought guidance, advice, and approval of settlement proposals from the OEA office in Washington. Her contacts with OEA headquarters were handled by Mr. H.T. Nguyen, Deputy General Counsel.

Ms. Rivera also dealt with officials of the United States Army Europe (USAREUR) Civilian Personnel Office to ensure that that Office would issue implementing regulations following the execution of any settlement agreement. DODDS does not take applications for or issue identification cards. That is the responsibility of the servicing military department. Any settlement regarding identification cards would be ineffective unless USAREUR changed its existing regulation. However, USAREUR is not subordinate to DODDS and has independent authority to issue regulations and policies concerning matters within its jurisdiction.

Over a period of several months, Ms. Rivera communicated with DODDS Labor Relations official Martin Frantz by telephone and/or written faxes concerning her ongoing discussions regarding the terms of a draft USAREUR regulation and settlement with the Union. Rivera was duly authorized by Franz to enter into settlement discussions and to execute a final settlement of grievance 90-14.^{1/}

^{1/} Mr. Frantz acknowledged that he had communications with Ms. Rivera by telephone and faxes concerning the draft USAREUR
(continued...)

Mr. Frantz concurred in removing the GS-9 from the settlement agreement and in the duration of the identification cards. Shortly before the execution of the settlement agreement, Mr. Frantz raised a concern that the settlement agreement apply only to Germany. As a consequence, Ms. Pepelnjak, by hand, added "F" to Section I of the agreement which provided: "This applies to DODDS-Germany only."

Ms. Rivera executed the document for DODDS-Germany and Ms. Pepelnjak for the OEA on June 19, 1991. The agreement provided as follows:

19 June 1991

I. DODDS-Germany and the Overseas Education Association agree to the following with regard to teacher ID cards:

- A. Pay steps 1 - 10 will be identified as GS-11.
- B. Pay steps 11 + will be identified as GS-12.
- C. The GS equivalencies above will not impact on the LOA rate.

1/ (...continued)

regulation and settlement of the grievance, but denied that he had ever given Ms. Rivera authority to enter into a settlement agreement. He insisted that Ms. Rivera once "had a go" with respect to the draft USAREUR regulation, which would implement any settlement, but she was required to submit any settlement agreement to the national office for approval. Mr. Frantz also testified that he subsequently told Ms. Rivera in a telephone call that the Director of Personnel did not approve of any grade equivalency other than that set forth in the contract. I credit Ms. Rivera's testimony that she received authority to execute a final settlement of the grievance from Mr. Frantz through their several communications regarding the terms of the draft USAREUR regulation and settlement with the Union. Ms. Rivera denied being told that the Director of Personnel did not approve of any grade equivalency other than that which is in the contract. Ms. Rivera was Chief of Management-Employee Relations, DODDS-Germany, from 1987 to June 1992. She was testifying under subpoena, and her testimony was direct, straight forward, and believable.

- D. Initial appointments to DODDS will be authorized ID cards with a two year life.
- E. All other unit employees will be authorized ID cards with a four year life.
- F. This applies to DODDS-Germany only.

II. This agreement is consistent with the current negotiated agreement.

III. This agreement settles Association Grievance 90-14 insofar as it applies to the Germany Region only.

On June 19, 1991, Mr. Rivera advised Headquarters USAREUR by fax that the settlement was executed and attached a copy. Ms. Rivera asked that USAREUR now finalize the publication of its regulation.

At some point thereafter, Mr. Frantz's supervisor, Director of Personnel Mervin Scott, learned of the settlement agreement and apparently disapproved. On July 11, 1991, Mr. Frantz sent a fax to Rivera's supervisor, Hayden Horne, Personnel Officer, DODDS-Germany, disavowing that he had ever authorized Rivera to enter into the settlement. Frantz requested a copy of the agreement.

On July 15, 1991, a copy of the agreement was provided to the DODDS headquarters office. There is no evidence that the agreement was disapproved pursuant to section 7114(c) of the Statute.

By memorandum of August 5, 1991, Mr. Scott advised the Director of DODDS-Germany, among other things, that the agreement conflicted with Article 38 of the negotiated agreement.

There is no evidence that Respondent advised OEA of its position until November 26, 1991. On that date, Respondent, by letter to OEA President Rollins, advised OEA that it had previously advised DODDS-Germany that "the agreement could not be recognized." Respondent stated that the agreement conflicted with the negotiated agreement and regional representatives did not have authority to settle national grievances. The letter stated, in part, "DODDS bargaining unit employees are not General Schedule (GS) employees and it would be incorrect to have such employees falsely represent themselves as GS-employees for any reason." Mr. Frantz testified that the purpose of the letter was to prevent the

agreement from proliferating to other DODDS regions, although this was not stated in the letter.

DODDS took no action following its August 5, 1991 and November 26, 1991 letters to prevent USAREUR from changing its regulation pursuant to Ms. Rivera's June 19, 1991 request. On March 6, 1992, USAREUR did issue a change to its publication controlling the issuance of identification cards for DODDS-Germany educators. The publication authorized the use of GS equivalency grades for unit employees consistent with the June 19, 1991 agreement. However, DODDS headquarters did not become aware of the existence of the USAREUR publication until approximately December 1992.

DODDS took no further action following its August 5, 1991 and November 26, 1991 letters to instruct DODDS-Germany to either honor or dishonor the agreement. Ms. Rivera, who had the responsibility for enforcing any USAREUR regulation as it applied to DODDS-Germany employees, received no further instruction in this regard as of June 1992. The last information she received from her supervisor, Hayden S. Horne, Jr., was that DODDS-Germany had received a letter from DODDS headquarters which, in effect, negated the agreement.

Discussion and Conclusions

The record establishes that the June 19, 1991 agreement, resolving a national level grievance as it applied to DODDS-Germany, was executed by representatives duly authorized at the national level. Therefore, since it was a national level agreement, it is not necessary to determine, as urged by Respondent, whether the June 19, 1991 agreement, as a regional agreement, conflicted with Article 38 of the National Agreement and was, therefore, null and void under Article 7A, Section 2 of that Agreement.^{2/}

^{2/} Contrary to Respondent, this determination, if appropriate, would not need to be decided by an arbitrator. In Internal Revenue Service, Washington, D.C., 47 FLRA 1091, 1103 (1993), the Authority held that when a respondent claims as a defense to an alleged unfair labor practice that a specific provision of the parties' collective bargaining agreement permitted its actions alleged to constitute an unfair labor practice, the Authority, including its administrative law judges, will determine the meaning of the parties' collective bargaining agreement and will resolve the unfair labor practice complaint accordingly.

There is no evidence that Respondent disapproved the agreement within 30 days from the date the agreement was executed in accordance with section 7114(c)(1) and (2) of the Statute or pursuant to the procedures of a controlling agreement pursuant to section 7114(c)(4). See National Treasury Employees Union, Chapter 52 and Internal Revenue Service, Austin District, 23 FLRA 720,721(1986) (where neither the controlling agreement nor agency regulations prescribe any time limit for completion of review by the agency head or a designee, the 30-day time limit mentioned in section 7114(c)(2) and (3) applies). Since Respondent did not advise the Union of its approval or disapproval of the agreement within the 30-day period prescribed in section 7114(c)(2), the agreement went into effect and became binding on the agency and the exclusive representative pursuant to section 7114(c)(3) of the Statute. See U.S. Department of the Treasury, Bureau of Engraving and Printing and International Plate Printers, Die Stampers and Engravers Union, Washington Plate Printers Union, Local 2, 44 FLRA 926,934-35(1992).

Under section 7114(b)(5) of the Statute, the duty of an agency and an exclusive representative to negotiate in good faith requires that, if an agreement is reached, the parties are "to take such steps as are necessary to implement such agreement."

Respondent claims that it did not repudiate the agreement by advising the Union that the agreement could not be recognized. Respondent points out that USAREUR issued a controlling regulation after the agreement was signed and forwarded to it, and DODDS took no action to prevent this implementation of the agreement. Respondent insists that the purpose of Mr. Scott's letter -- that the agreement could not be recognized -- was to prevent this issue from spreading to the other regions.

In Department of Defense, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 40 FLRA 1211,1218 (1991), the Authority set forth its framework for determining whether a respondent has repudiated a collective bargaining agreement. The Authority stated that "the nature and scope of the failure or refusal to honor an agreement must be considered, in the circumstances of each case, in order to determine whether the Statute has been violated."

I agree with Counsel for the General Counsel that, contrary to Respondent, there is no meaningful difference between "not recognizing" and "repudiating" an agreement. One of the common dictionary meanings of "recognize" is "to perceive or acknowledge the validity or reality" and that of

"repudiate" is "to reject the validity [.]" Webster's II New Riverside Dictionary, 983,998(1988).

The record reflects that following the June 19, 1991 agreement, Ms. Rivera, then Chief of Management-Employee Relations, DODDS-Germany, forwarded the agreement to USAREUR and requested that Office to finalize the change in its regulation which would authorize identification cards with GS equivalencies consistent with the agreement. Respondent DODDS took no action to prevent USAREUR from issuing the regulation. However, in the meantime, on November 26, 1991, Respondent advised the Union that it had previously advised DODDS-Germany that the agreement could not be recognized and that "it would be incorrect to have [DODDS bargaining unit] employees falsely represent themselves as GS employees for any reason." The USAREUR publication was issued the following March 1992, although Respondent did not learn of it until approximately December 1992.

The record does not reflect that Respondent has since advised DODDS-Germany to honor the agreement. As of June 1992, Ms. Rivera, who had the responsibility for enforcing any USAREUR regulation as it applied to DODDS-Germany employees, had received no further instructions. Respondent's extant position that "it would be incorrect to have [DODDS bargaining unit] employees falsely represent themselves as GS employees for any reason" casts serious doubt on whether Respondent is implementing the agreement in good faith as required by the Statute.

Since the agreement applied to DODDS-Germany, and Respondent advised both DODDS-Germany and the Union that it could not recognize the agreement, and has taken no subsequent action following the publication of the USAREUR regulation to countermand this advice, I conclude under all the circumstances that Respondent repudiated the agreement. Thus, Respondent's action violated section 7116(a)(1) and (5) of the Statute, as alleged.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Defense Dependents Schools shall:

1. Cease and desist from:

(a) Failing and refusing to honor the June 19, 1991 agreement concerning teacher identification cards, in resolution of grievance 90-14, applying to its Germany Region, which was reached with the Overseas Education Association, the exclusive representative of an appropriate unit of its employees.

(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:

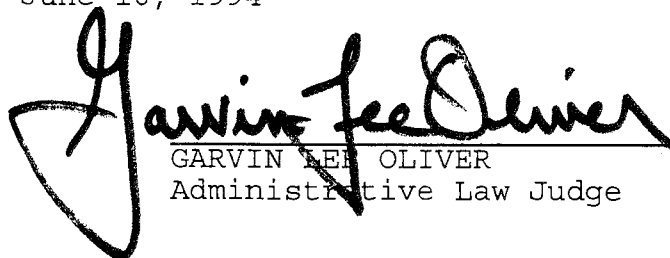
(a) Honor, abide by, and take such steps as are necessary to ensure the implementation of the June 19, 1991 agreement, including appropriate action to ensure that all unit employees with GS-11 on their identification cards, which should show GS-12, have this error corrected.

(b) Rescind its November 26, 1991 letter to the Overseas Education Association concerning the invalidity of the June 19, 1991 agreement.

(c) Post at its facilities in the German Region 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, 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 insure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Washington Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, June 16, 1994


GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail and refuse to honor the June 19, 1991 agreement concerning teacher identification cards, in resolution of grievance 90-14, applying to our Germany Region, which was reached with the Overseas Education Association, the exclusive representative of an appropriate unit of our employees.

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.

WE WILL honor, abide by, and take such steps as are necessary to ensure the implementation of the June 19, 1991 agreement, including appropriate action to ensure that all unit employees with GS-11 on their identification cards, which should show GS-12, have this error corrected.

WE WILL rescind our November 26, 1991 letter to the Overseas Education Association concerning the invalidity of the June 19, 1991 agreement.

(Activity)

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

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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Washington Region, 1255 22nd Street, NW, Suite 400, Washington, DC 20037, and whose telephone number is: (202) 653-8500.