

In the Matter of Arbitration Between  
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NATIONAL TREASURY EMPLOYEES UNION

AND

September 3, 2018  
RE: & February 12, 2019  
Email Grievances

DEPARTMENT OF HEALTH AND HUMAN  
SERVICES

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OPINION AND AWARD  
ROGER P. KAPLAN, ESQ., ARBITRATOR

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APPEARANCES:

For NTEU: Timothy B. Hannapel, Esq.  
National Counsel

For HHS: Lisa Honecзы  
National Labor Relations Officer

## STATEMENT OF THE CASE

On January 9, 2019, the parties notified the undersigned of his appointment as the Arbitrator in the above-captioned case. I held a hearing in Washington, DC on Thursday, September 12, 2019. Both parties had the opportunity to examine and cross-examine witnesses, as well as present evidence in support of their respective positions. The hearing was transcribed. The parties submitted timely post-hearing briefs, which I received on approximately November 4, 2019.

## ISSUES

The parties agreed on a stipulation of the issues. The issues are:

1. Did the Agency violate Article 8 and 9 and past practice in its response to the August 8, 2018 and January 18, 2019 emails to the Local

Union Chapter 282? If so what should the remedy be?

2. Was an unfair labor practice committed based upon 5 U.S.C. §7102 and 5 U.S.C. §7116(a)? If so, what should the remedy be?

PERTINENT PROVISIONS OF THE PARTIES COLLECTIVE BARGAINING AGREEMENT (CBA)

Article 3 - Mid-Term Bargaining  
Section 4 A.12.

The Union and the Employer will incorporate any agreement into a Memorandum of Understanding (MOU) and each party will sign the MOU.

Section 4 A.13.

Each MOU will contain a provision indicating an effective date and an expiration date. Any MOU will be subject to re-opening upon expiration or renewal of the national collective bargaining contract (this Agreement).

Article 8 - Dues Withholding  
Section 3

The Union agrees to do the following:

B. Assist as necessary in making SF-1187 forms available to all employees who need them, all forms are found at <http://www.opm.gov/forms/html/sf.asp>

Article 9 - Union Access To Employer Services

Section 2 The Union may use the Employer's... e-mail... to transmit or receive representational correspondence concerning the Employer's labor relations program. The Union is not authorized to

these mail systems for internal Union business (including but not limited to the solicitation of membership, election of Union officials, and collection of dues) as set forth in 5 U.S.C. § 7131(b)...

Section 7 Union transmissions (including electronic mail) are subject to the same standards that apply to all users. The Union may use broadcast e-mail (i.e., e-mails to broad groups of employees...) to communicate with bargaining unit employees concerning general representational matters related to the Employer's labor relations program. Union broadcast e-mails are subject to the same content requirements and must meet the same standards as material posted on bulletin boards.

The Union agrees to furnish the Employer... with broadcast e-mails (and any attachments) for compliance review at least one (1) day before they are sent to employees.

#### FACTS

Cassia Pangas, Esq. stated that she is an Assistant Counsel and National Field Representative for the National Treasury Employees Union (Union or NTEU). She stated that she has worked with one local NTEU chapter for approximately six (6) years. She has worked with Local Chapter 282 for approximately a year and a half in administering the Collective Bargaining Agreement (CBA) between

NTEU and the United States Department of Health and Human Services (Agency or HHS).

Pangas testified that the Union and HHS were involved in contentious negotiations over a new CBA in the summer of 2018. She stated that she was contacted by Mr. Michael Theodorakis, Executive Vice-President of Local 282, in connection with an email he submitted on August 8, 2018, to the Agency for review prior to sending the email out to bargaining unit employees over the Agency's email system. Pangas testified that Theodorakis told her the Agency rejected his email as written because of the inclusion of the word "join" in the email, and because he placed a link to Standard Form (SF) 1187 (Request for Payroll Deductions for Labor Organization Dues) at the end of the email.

Pangas stated that Theodorakis told her that he always included the SF 1187 link in his emails, and that the parties had negotiated to allow the Union to include the link.

She testified that Theodorakis sent her several examples where he had included the SF 1187 link in emails that were approved by the Agency. The Union introduced three (3) such emails as exhibits. Two (2) emails were dated in 2015 and a third email was dated in 2017.

Pangas testified that she filed a grievance on September 3, 2018. The grievance contended that HHS violated Article 8, Section 3(B), Article 9, Section 2 and Section 7(B), a 2011 agreement and past practice, as well as committed unfair labor practices.

Attached to the grievance were Appendices A, B, C and D. Appendix A was four (4) emails all dated August 8, 2018, between Theodorakis and Ms. Peggy Lansbach-O'More with the Food and Drug Administration (FDA)<sup>1</sup>. The email Theodorakis wanted approved read in part, "It is critical for every FDA employee to join and **sign our**

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<sup>1</sup> FDA is a part of HHS.

**petition..."** The email also included, "**Note:**

**Standard Form 1187s (Request for**

**Payroll Deductions for labor**

**Organization Dues) are available at**

**www.nteu282.org"** [bold and type size in

original]. Lansbach told Theodorakis he could not include the word "join" in the above quoted language and could not include the link to the SF 1187 form. Theodorakis told Lansbach that join did not mean join the Union, but to join in signing the petition. Lansbach stuck to her position.

Appendix B is another series of emails mostly from 2011. The three (3) most pertinent emails are between Ms. Sharon Quinn Harris, National Counsel NTEU, Ms. Alexa Rukstele, NTEU National Representative and Mr. Ken Brown, head of the HHS National Labor Relations Office. Harris proposed the SF 1187 language in an email on August 23, 2011. Rukstele sent Brown an email dated December

1, 2011 asking for a response to Harris' email. Rukstele's email listed the subject as "Solicitation of Membership." Brown responded by email on December 2, 2011, "That language as written is acceptable."

Appendix C consists of emails in July/August 2018 wherein Lansbach told another Union local chapter that the phrase "show your support by joining NTEU today" would have to be removed, but did not mention the SF 1187 link. The above phrase appeared in the email immediately after the words, "I strongly encourage all of you to sign the petition."

Appendix D is a series of emails from 2016 and 2018. Ms. Julie Murphy, Director, Workforce Relations Division, Office of Human Resources, agreed with another NTEU Chapter's use of the SF 1187 link in an email in 2016. However, she backed Lansbach's denial of such use by Theodorakis in 2018.



Pangas filed the second grievance on February 12, 2019. The second grievance asserted the same violations as were asserted in the first grievance. This grievance asserted that the January 17, 2019, email (Appendix A to the grievance) that Theodorakis wanted to send to bargaining unit employees should not have been denied approval by the Agency. Appendix B to the grievance is a series of emails. Lansbach forwarded Theodorakis' request for approval to Mr. Derek Kushmerek, National Labor Relations Team, Workforce Relations Division, Office of Human Resources. Kushmerek denied the request on the basis that the three (3) topics (law authorizing back pay for furloughed employees, government fiscal year 2019 funding, and MLK holiday) were not items concerning representational matters related to HHS labor relations. He also objected to the SF 1187 link.

Appendix C is another series of emails that were approved by the Agency and sent by Theodorakis

and other NTEU locals to bargaining unit employees each year from 2015 to 2019. The topics covered in those emails were the same in some instances or very similar in other instances to the topics rejected by Kushmerek.

Theodorakis testified consistent with the testimony given by Pangas as to what he told her concerning his efforts to send the two (2) emails in question, his prior email communications over several years, and the way the Agency handled all those emails. Theodorakis testified that he has been the chief communicator for Local Chapter 282 for many years.

Theodorakis stated that he started including the SF 1187 link in his emails to bargaining unit employees in late 2011 or 2012. He did so even though he was concerned that the Union had not gotten an agreement in writing with the Agency that the SF 1187 language could be used.

Theodorakis testified that the use of the HHS email system was vital to the Union. He stated that the bargaining unit was large in number and spread out geographically. He testified that Agency bulletin boards were scarce, and that many employees work in buildings where there were no bulletin boards. According to Theodorakis, Agency email was the only effective and efficient way for the NTEU to communicate with bargaining unit employees.

Based on the inability of the parties to resolve this matter at the lower stages of the grievance procedure, the case proceeded to arbitration as set forth earlier in this decision.

#### DISCUSSION AND ANALYSIS

The Union had the burden to prove by preponderant evidence that HHS violated the CBA and/or committed an unfair labor practice. It also

had the burden to prove an established past practice existed. The parties raised several issues at the arbitration hearing. These matters will be discussed seriatim.

### "Join"

The email Theodorakis wanted approved read in part that it is critical for every FDA employee to join and sign our petition. HHS told Theodorakis that he could not include the word "join" in the email he wanted to send out over the Agency's email system to all bargaining unit employees.

Theodorakis responded by informing the Agency that his use of the word "join" had nothing to do with soliciting employees to join the Union. According to Theodorakis, he was encouraging employees to join in signing the petition. Nevertheless, the Agency did not change its position on the need to remove the word "join."

At best the inclusion of the word "join" in the email was ambiguous. Theodorakis may not have

intended the use of the word "join" to encourage employees to join the Union, but the word could reasonably be interpreted as an attempt to do that.

The proposed language was join and sign the petition. The use of the word "and" indicates employees were being asked to do more than one (1) thing. The Union would have a better argument if the proposed language was "join in signing the petition."

Asking employees to join and sign a petition added nothing to simply asking them to sign a petition, if the stated goal was in fact only to get employees to sign the petition. The use of the word "join" was superfluous to accomplishing the NTEU's stated goal of encouraging employees to sign the petition.

At the same time HHS told Theodorakis to remove the word "join" from his email, it told another Union local chapter that the phrase "show your

support by joining NTEU today,"<sup>2</sup> had to be removed from the email. That language was overtly and clearly a solicitation to join the Union, and it was done in connection with the effort to have employees sign the petition. I find it reflective of the Union's mindset at the time to encourage not only the signing of the petition but also joining the Union.

Finally, the inclusion in the email of the link to the SF 1187 at the Union's web site lends support to the conclusion that the word "join" could reasonably be read as a solicitation to join the Union. I find that the Agency acted consistent with the CBA when it rejected the proposed email's inclusion of the word "join."

SF 1187 (Request for Payroll Deductions for Labor Organization Dues)

HHS rejected both emails Theodorakis wanted to send because he placed a link to SF 1187 (Request

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<sup>2</sup>The language appeared in the proposed email immediately after the words "I strongly encourage all of you to sign the petition."

for Payroll Deductions for Labor Organization Dues) at the end of both emails. The Agency maintained that inclusion of the link was a solicitation to join the NTEU.

The Union argued that the SF 1187 link was not a solicitation to join the Union. It contended that it was obligated under the CBA to assist employees with SF 1187s, that inclusion of the language was a long standing past practice and that the parties reached an agreement in 2011 to allow the language.

The contention that the parties reached an agreement in 2011 to allow the language in question is based on Brown's email response on December 2, 2011, "That language as written is acceptable." Brown was responding to the email in which Harris proposed the SF 1187 language and the follow-up email Rukstele sent Brown asking for a response to Harris' email.

Brown agreed to the language, but Brown had no authority to agree to something which was contrary to statutory requirements. If inclusion of the SF 1187 link was a solicitation to join the Union, Brown's agreement to allow the language cannot negate the statutory requirements.

The CBA sets out the procedure for mid-term amendments to the CBA. Article 3, Section 4 A.12. reads that the parties will incorporate any agreement into a Memorandum of Understanding (MOU) signed by each party. The Union acknowledged that there is no signed MOU covering the inclusion of the SF 1187 language in emails sent out over the Agency's email system. Theodorakis expressed his concerns internally within the NTEU in emails where he wanted to know if the Union received in writing the approval to use the SF 1187 language.

Theodorakis testified that he routinely included the SF 1187 language in his weekly emails going back many years. The Union provided examples



of such emails which were apparently approved by HHS. Based on Theodorakis' testimony, the examples provided by NTEU and the knowledge that the Agency had about what Theodorakis was doing, I find that the Union established the existence of a past practice of allowing the SF 1187 link to be included in email communications from the Union to bargaining unit employees through the Agency's email system. However, that is not the end of the inquiry.

As with the 2011 agreement, a past practice that is contrary to statutory requirements cannot negate the statutory requirements. Additionally, the Federal Labor Relations Authority (FLRA) recently held that a past practice in conflict with a clear unambiguous provision of a negotiated collective bargaining agreement cannot alter that agreement. The two (2) FLRA cases on point are U.S. Small Business Admin. and AFGE Local 3841, 70 FLRA 525, No. 107(2018) and U.S. Dept. of the Navy and

Bremerton Metal Trade Council, 70 FLRA 754, No. 152 (2018). Both cases established a change in FLRA precedent to now prohibit an arbitrator from finding that a past practice can alter the language and meaning of an unambiguous collective bargaining agreement. So if the past practice was in conflict with a statute or the CBA, the past practice cannot be relied upon to find in favor of the NTEU.

NTEU contended that it was following its CBA obligation to assist in making SF 1187s available to employees. Article 8, Section 3.B of the CBA does state that NTEU shall assist "as necessary" in making SF 1187 forms available to employees who need them. It also notes that the SF 1187s can be found at an Office of Personnel Management (OPM) web site. The fact that NTEU agreed to assist in making SF 1187s available to employees does not trump the statutory and CBA prohibitions from soliciting employees to join the Union during duty hours. If the inclusion of the SF 1187 language

was a solicitation for Union membership, Article 8, Section 3.B is of no help to the NTEU.

Article 9, Section 2 authorizes the Union to use the Agency's email system to transmit or receive representational correspondence concerning the HHS labor relations program. The Union is specifically not authorized to use the email system for internal Union business, including but not limited to the solicitation of membership.

The SF 1187 is the form used by employees to authorize the withholding of Union dues.

Theodorakis was not simply providing a public service announcement about where an employee could find an SF 1187. The use of bold larger type

**("Note: Standard Form 1187s (Request for Payroll Deductions for labor**

**Organization Dues) are available at**

**[www.nteu282.org](http://www.nteu282.org)."**) and directing employees to

the Local 282 Chapter web site are clear

indications that Theodorakis was soliciting employees to join the Union.

The email Rukstele sent Brown requesting a response to the Union's proposed SF 1187 language listed the subject as "Solicitation of Membership." I find that the Union was well aware that the proposed SF 1187 language had to do with the soliciting of Union membership.

Representational Correspondence Concerning the HHS Labor Relations Program

Kushmerek denied Theodorakis' second email request in part on the basis that the three (3) topics (law authorizing back pay for furloughed employees, government fiscal year 2019 funding, and MLK holiday) covered in the attachments to the email were not items concerning representational matters related to HHS labor relations. He also objected to the SF 1187 link.

NTEU produced a series of emails that were approved by the Agency and sent by Theodorakis and other NTEU locals to bargaining unit employees each

year from 2015 to 2019. The topics covered in those emails were the same in some instances or very similar in other instances to the topics rejected by Kushmerek.

Article 9, Section 2 authorizes the Union to use the Agency's email system to transmit or receive representational correspondence concerning the HHS labor relations program. The CBA does not define "representational correspondence concerning the HHS labor relations program." The Union argued that it included anything other than what was specifically excluded in Section 2. The only things specifically excluded are solicitation of membership, election of Union officials and the collection of dues. The NTEU argument ignored the language "including but not limited to." That language makes it clear that the three (3) things specifically mentioned are examples, but not the only things excluded.

HHS claimed that the Martine Luther King Jr. flyer did not fall within the Article 9, Section 2 authorization to email representational correspondence. It asserted that the King Holiday had nothing to do with the HHS labor relations program. I find the Agency's interpretation of Article 9, Section 2 to be too restrictive.

NTEU represents bargaining unit employees in all matters related to their employment. Federal holidays are matters important to employees. By informing employees of holidays and the reasons for the holidays, the Union is promoting and reinforcing a benefit of employment. Employment benefits are clearly part of any labor relations program. HHS apparently agreed with the above interpretation in prior years when it did not object to the distribution of the King Holiday flyer by Theodorakis. I find that the Agency violated the contract when it objected to the distribution of the King Holiday flyer.

The email attachment which discussed the law authorizing back pay for furloughed employees was a matter of interest not only to the employees who were furloughed but to other federal employees who might be facing furloughs in the future. The Union represents employees who are furloughed or who may be furloughed. It has an interest in trying to keep employees from being furloughed, getting them back to work as quickly as possible and attempting to get them paid for the time they were furloughed.

The email attachment which discussed government fiscal year 2019 funding was a matter of interest to all federal employees. The NTEU advocates for increased government funding to expand and protect government jobs, which is in the interest of the bargaining unit employees it represents.

Keeping employees informed about furloughs and fiscal 2019 funding was representational correspondence concerning the HHS labor relations program. The attachments were no different than

the examples that were approved by HHS in prior years. Those examples included OPM data breaches, changes to the G Fund, government funding and increases for the Internal Revenue Service.

I find that the Agency violated the CBA when it objected to the distribution of the email attachments covering fiscal 2019 funding and the furloughs.

#### Unfair Labor Practices

The Union protested that the Agency's actions resulted in the commission of several unfair labor practices, specifically violations of 5 U.S.C. §§ 7102, 7116(a)(1), 7116(a)(2), 7116(a)(8).

5 U.S.C. § 7102 makes it an unfair labor practice to inhibit an employee's right to join or refrain from joining a labor organization, including engaging in collective bargaining and presenting the views of the labor organization to heads of agencies. The NTEU asserted that 5 U.S.C. § 7102 was violated when the Agency attempted to prevent



employees from signing the petition. I find that the Agency did not attempt to prevent the Union from asking employees to sign the petition. Indeed the email was sent after the word "join" was removed. The email still asked employees to sign the petition. I find no violation of 5 U.S.C. § 7102.

7116(a) (1) makes it an unfair labor practice to interfere with any employee in the exercise of any right under this chapter. The NTEU claimed that the Agency attempted to cut off its communication with employees during contentious contract negotiations when it attempted to prevent NTEU from asking employees to sign the petition and when it later prevented NTEU from communicating about representational matters. For the reasons set out above, there was no violation with respect to the petition. However, HHS did violate 7116(a) (1) when it failed to approve the email attachments (law authorizing back pay for furloughed employees,

government fiscal year 2019 funding, and MLK holiday). That failure wrongly interfered with NTEU's right to communicate with bargaining unit employees concerning representational matters.

7116(a)(2) makes it an unfair labor practice to encourage or discourage membership in any labor organization. The Union argued that the Agency made it more difficult to join the Union by not approving the SF 1187 link in the emails. The argument itself buttresses the earlier finding that the inclusion of the SF 1187 link was a solicitation for Union membership. In any event, the Agency did not violate 5 U.S.C. § 7116(a)(2) because solicitations of Union membership through the use of the HHS email system was prohibited by the CBA and statute.

NTEU also cited to 5 U.S.C. § 7116(a)(8) as having been violated. 5 U.S.C. § 7116(a)(8) provides that it shall be an unfair labor practice to otherwise fail or refuse to comply with any

provisions of this chapter. NTEU did not articulate how HHS had otherwise failed or refused to comply with any other provision of the chapter. I find the Agency did not violate 5 U.S.C. § 7116(a)(8).

I considered all the arguments made by the parties, even if not specifically addressed in this decision. Of particular note, I considered the Agency's argument on the effect of the Federal Service Impasses Panel's decision with respect to the use of the Agency's email system in a subsequent contract. I found that decision to have no affect on the case before me.

#### Remedy

I found that the Agency violated Article 9, Sections 2 and 7 of the CBA and also violated 7116(a)(1) when it failed to approve the email attachments (law authorizing back pay for

furloughed employees, government fiscal year 2019 funding, and MLK holiday). Those attachments constituted representational correspondence related to the Agency's labor relations program.

As the remedy to the above violations, HHS shall post the below notice on all bulleting boards used by the Agency to communicate with bargaining unit employees. Additionally, the Agency shall transmit the below notice as an email attachment to all bargaining unit employees. The posting shall remain on bulletin boards for 60 days. The email attachment shall be sent one (1) time.

**NOTICE TO ALL EMPLOYEES**

Arbitrator Roger P. Kaplan, Esq. has found that the U.S. Department of Health and Human Services (HHS), violated the Federal Service Labor-Management Relations Statute (the Statute), and the parties' Collective Bargaining Agreement (CBA). He has ordered us to post and abide by this Notice.

We hereby notify employees that with respect to two (2) emails (August 2018 and January 2019) that Local Chapter 282 submitted for compliance review, we wrongly prevented the National Treasury Employees Union (Union) from using the HHS email system to communicate with bargaining unit employees on representational matters related to the HHS labor relations program.

We will not in any like or related manner interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute or the CBA.

U.S. Department of Health and Human Services

Dated: \_\_\_\_\_  
\_\_\_\_\_ (Signature)  
\_\_\_\_\_ (Title)

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

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AWARD

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After carefully considering the testimony of all the witnesses, the documentary evidence presented, and the post-hearing briefs, I find that:

1. The grievance filed on September 3, 2018 is denied;
2. The grievance filed on February 12, 2019 is granted in part and denied in part;
3. The Agency is ordered to post the included Notice on bulletin boards and to transmit the Notice by email as an attachment to all bargaining unit employees.

DATED: **DEC 09 2019**



Roger P. Kaplan, Esq.  
Arbitrator

Alexandria, Virginia