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M E M O R A N D U M

TO: Moe Biller

FROM: Susan L. Catler SLC

DATE: June 9, 1992

RE: New EEO Case Processing Regulations
57 FR 12634 (April 10, 1992) Effective October 1, 1992
File: 50-95/1-15

On June 4, 1992, Edgar Williams relayed a question from Omar Gonzalez. Omar called about a new EEO regulation. He will ask at the President's Conference what the APWU is going to do about it.

The new regulation, 5 CFR 1614.301(c), permits the Postal Service to hold an EEO charge in abeyance, without investigating it, if a grievance is filed over the same matter. The EEO charge will be processed only after the grievance is finished.

The APWU filed comments objecting to the EEO's original proposal, which was even worse. The proposed reg required all postal EEOs be held if a grievance on the same matter was filed. The final regulation permits the USPS to hold the EEO, but only if they give written notice to the employee that they are going to hold it. The new regulations will go into effect October 1, 1992.

Because litigation is not likely to be successful and legislation in this area is very risky and unlikely to move, you may have to use this as an example of why we need a new occupant at 1600 Pennsylvania Avenue.[1]

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[1] After the USPS starts holding EEO charges, you may want to discuss with top management why encouraging workers to ask the Union to drop a grievance so that they can move forward with their EEOs is not in the USPS's interest in light of the enhanced remedies now available through the EEO process. However, this discussion should wait until the Postal Service discovers the reg.

We have evaluated the possibility of litigation and have concluded that, based on the arbitrary and capricious standard that would be applied by Reagan and Bush appointees, we have virtually no hope of success.

With respect to legislation, a bill currently pending before the full Post Office and Civil Service Committee, H.R. 3616, would wipe out the new regs by having the EEOC, not federal agencies themselves, do the initial investigation. However, there is a great likelihood that any opening of the Federal/Postal EEO law would result in adding an election requirement for Postal employees, so like all other Federal employees Postal Workers would be able to file either a grievance or an EEO charge, not both as they can currently. In addition, Myke Reid reports that the management associations are trying to kill the bill because they believe it does not treat them, the ones who are accused of discrimination, fairly. Unless someone besides AFGE really pushes for the bill, it appears destined to die.

Attached as background are the following:

A. A memo comparing the problematic provisions in the proposed and final regulations and discussing the APWU's comments on these sections.

B. A copy of the joint comments filed by the APWU and the NALC on January 2, 1990.

C. A copy of your testimony on March 5, 1990, before two Subcommittees.

If you would like, I will give you a copy of the whole final regulations, but they are very long and detailed.

cc: William Burrus
Myke Reid

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57 FR 12634 (April 10, 1992)
Effective October 1, 1992.
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The APWU filed comments on January 2, 1990, and presented testimony on March 5, 1990, responding to several sections of proposed regulations to restructure the Postal/Federal sector EEO complaint process, as published in the Federal Register on October 31, 1989. The final regulations are out. A discussion of the three sections objected to by the APWU follows:

1. The final regulations do not adopt the APWU's position that the EEO investigation should not be delayed because a grievance was also filed. Proposed Section 1614.301(c) provided that for persons employed by agencies not covered by 5 U.S.C. 7121(d) appeals to the Commission shall be held in abeyance during the processing of a grievance covering the same matter as the complaint.

The APWU opposed this rule, which singles out employees of the Postal Service, arguing that the Commission has no authority to deprive Postal employees of their statutory right to dual file discrimination complaints on matters which have also been grieved. The APWU explained that Postal employees are not covered by 5 U.S.C. 7121(d), which precludes a Federal employee from filing an EEO claim and a grievance simultaneously. The APWU further argued that the Commission's deferral policy is inappropriate because the individual's right to bring an EEO claim could be postponed indefinitely if the Union's grievance is appealed to arbitration.

In final form, Section 1614.301(c) reads:

> When a person is employed by an agency not subject to 5 U.S.C. 7121(d) and is covered by a negotiated grievance procedure, allegations of discrimination shall be processed as complaints under this part, except that the time limits for processing the complaint contained in §1614.106 and for appeal to the Commission contained in §1614.402 may be held in abeyance during processing of a grievance covering the same matter as the complaint if the agency notifies the complainant in writing that the complaint will be held in abeyance pursuant to this section.

57 FR 12634, 12655 (April 10, 1992)

The substance of the Commissions revisions, based on the objections of the APWU and others, is noted in the Preamble to the Final Regulations:

> We recognized that there may be some individual circumstances where holding the complaint in abeyance would not be appropriate. Therefore, we have revised the section [1614.301(c)] to permit rather than require agencies not subject to 5 U.S.C. 7121(d) to hold complaints in abeyance. Whenever an agency does so, it must notify the complainant.

57 FR at 12639.

2. The APWU was successful in having the final regulations permit cross-craft reassignment as reasonable accommodation for handicapped Postal employees if the employee wants reassignment and it does not violation a collective bargaining agreement. 57 FR at 12652, 12638. Proposed Section 1614.203(g) contained language, stating that:

> [A]n employee of the United States Postal Service shall not be considered qualified for reassignment to a position in a different craft or for any reassignment that would be inconsistent with the terms of a collective bargaining agreement covering the employee.

54 FR 45747, 45755 (October 31, 1989).

The APWU objected on the ground that it was overbroad and appeared to result in a wholesale prohibition against cross-craft reassignments which would work to the detriment of a handicapped Postal employee who desired to be reassigned instead of retiring on disability. The APWU also noted that cross-craft reassignments within the Postal Service are not necessarily in violation of the Service's collective bargaining agreements, pointing to Article 13 of the National Agreement and Subchapter 540 of the ELM.

The APWU requested that Section 1614.203(g) be amended to 1) require the Postal Service to honor requests for reassignment by handicapped employees as a reasonable accommodation where such reassignment was not inconsistent with the terms of any CBA, and 2) make clear that the availability of such reassignment would not affect the employee's entitlement to disability retirement.

In final form, Section 1614.203(g) reads in pertinent part:

> [A]n employee of the United States Postal Service shall not be considered qualified for any offer of reassignment that would be inconsistent with the terms of any applicable collective bargaining agreement.

57 FR at 12652.

This language should be read in light of the Preamble to the Final Regulations which states:

> If such a [cross-craft] reassignment is permitted by the applicable agreements and otherwise consistent with this section [1614.203(g)], we agree that it should be required. Accordingly we have revised the section to require reassignment in the Postal Service unless prohibited by applicable collective bargaining agreements.
>
> If an employee is unable to perform his job and declines an offer made in compliance with this section [1614.203(g)], the agency has completely fulfilled its obligation under this section; the agency should not and cannot cite this section as authority for a non-consensual reassignment. We do not believe that this section conflicts with the rights of employees or the obligations of agencies under applicable disability retirement systems.

57 FR at 12638.

3. The APWU's position on interest on back pay was also adopted in the final regs. Proposed Section 1614.501 expressly barred the payment of interest on back pay awards to applicants or employees under Title VII or the Rehabilitation Act based on the conclusion that the Back Pay Act of 1966, 5 U.S.C. 5596, did not serve as a waiver of sovereign immunity for this purpose.

The APWU objected to the application of this section to Postal employees based on the Supreme Court's decision in Loeffler v. Frank, 486 U.S. 549 (1988), where the Court specifically held that interest may be recovered from the Postal Service in suits under Title VII because 39 U.S.C. 401(1) of the Postal Reorganization Act of 1970 constitutes a waiver of sovereign immunity from awards of interest.

In final form, Section 1614.501 reads in pertinent part:

> Interest on back pay shall be included in the back pay computation where sovereign immunity has been waived.

57 FR at 12659.

The Preamble to the Final Regulation notes that this revision was made with the APWU's comments in mind:

> A few commenters also noted that the proposal went too far when it stated that interest may never be paid on back pay awards under part 1614 since sovereign immunity has been waived for some agencies, e.g., the Postal Service. . . . Consequently, the regulation provides for payment of interest where sovereign immunity has been waived.

57 FR at 12641-42.

171 Cont.

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JOINT BARGAINING COMMITTEE

Moe Biller
President

(202) 842-4200

American Postal Workers
Union (AFL-CIO)
1300 L St., N.W.
Washington, D.C. 20005

January 2, 1990

Office of the Executive
Secretariat
Room 10402, Equal Employment
Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

Dear Sir:

The National Association of Letter Carriers, AFL-CIO ("NALC"), and the American Postal Workers Union, AFL-CIO ("APWU"), by their undersigned attorneys, hereby jointly submit the following comments with respect to the Commission's proposed restructuring of the Federal sector EEO complaint process, as published in the Federal Register on October 31, 1989.

The APWU is the collective bargaining representative of all employees of the United States Postal Service ("Postal Service") in the clerk, maintenance, motor vehicle, and special delivery crafts. The NALC is the collective bargaining representative of all employees of the Postal Service in the city letter carrier craft. NALC and APWU (hereafter "the Unions") have been parties to successive collective bargaining agreements with the Postal Service since 1971.

1. Section 1614.203(g) of the proposed regulation contains language, apparently derived from 5 U.S.C. 8337(a) and 8451(a)(2)(D), stating that "an employee of the United States Postal Service shall not be considered qualified for reassignment to a position in a different craft or for any reassignment that would be inconsistent with the terms of a collective bargaining agreement covering the employee." The inclusion of this language in the regulation appears to result in a wholesale prohibition against cross-craft reassignments in the Postal Service.

The Unions submit that this prohibition against cross-craft assignments is overbroad. The referenced provisions of 5 U.S.C. 8337(a) and 8451(a) are designed to protect a disabled postal employee's right to disability retirement benefits when that employee is unable to perform useful and efficient service within the employee's craft. The statutes prohibit the Postal Service from defeating an employee's application for disability retirement by reassigning the employee to a different craft. However, in those cases where a handicapped postal employee who is unable to perform within his craft voluntarily elects not to apply for disability retirement status and instead wishes to continue employment with the Postal Service, the Rehabilitation Act should be construed to require the Postal Service to consider a cross-craft reassignment as a reasonable accommodation, provided only that such reassignment does not violate an applicable collective bargaining agreement.

Cross-craft assignments within the Postal Service are not necessarily in violation of the Service's collective bargaining agreements. For example, Article 13 of the National Agreement between the Postal Service, APWU, and NALC requires the Service to honor requests for temporary or permanent cross-craft assignments by ill or injured employees under specified circumstances. In addition, Subchapter 540 of the Postal Service Employee and Labor Relations Manual, which is incorporated by reference by the collective bargaining agreement, requires the Service under certain circumstances to assign employees who have been injured on the job to limited duty in other crafts. The change in the proposed regulation we suggest would treat handicapped employees in a manner which is consistent with this framework.

In sum, the Unions propose that Section 1614.203(g) of the proposed regulation be amended to require the Postal Service to honor requests for reassignment by handicapped employees as a reasonable accommodation, except where such reassignment would be inconsistent with the terms of an applicable collective bargaining agreement. The regulation should also state that the availability of such a reassignment shall not affect the employee's entitlement, if any, to disability retirement pursuant to 5 U.S.C. 8337 or 5 U.S.C. 8451.

2. Section 1614.301(c) of the proposed regulation provides that for persons employed by agencies not covered by 5 U.S.C. 7121(d) appeals to the Commission shall be held in abeyance during processing of a grievance covering the same matter as the complaint. The Unions oppose the application of this rule to employees in the Postal Service.

Postal employees, unlike their federal counterparts, have the statutory right to file discrimination complaints on matters which have also been grieved. Employees of the United States Postal Service are not covered by 5 U.S.C. 7121(d), the provision which requires Federal employees to elect either the EEO process or the negotiated grievance procedure and precludes them from filing in both fora on the same matter. While the Commission does have authority to issue regulations to carry out its responsibilities, those responsibilities do not include taking away individual rights granted by statute. Holding in abeyance without investigation allegations of discrimination filed by postal employees during the processing of a grievance covering the same matter does just that. As proposed in Section 1614.301(c), postal employees who want to exercise their right to have their discrimination allegations heard in the EEO process can effectively be deprived of their individual right to do so by their Union's determination that the same matter also violates the collective bargaining agreement, irrespective of whether the grievance raises issues of discrimination. As only the Union determines whether a grievance goes beyond the initial step, under the proposed regulation postal employees could be deprived of their statutory right to have their discrimination allegations considered in the EEO process for many months (conceivably years if the grievance is appealed to arbitration). Insofar as such a result is both inappropriate and beyond the Commission's authority, the Unions suggest that the Commission omit Section 1614.301(c) from the final regulations. The ability of postal employees to exercise their legal rights should not be affected by their Union's decision to enforce the collective bargaining agreement.

3. Proposed Section 1614.501 expressly bars the payment of interest on back pay awards to applicants or employees under Title VII or the Rehabilitation Act. This prohibition is based on the conclusion that the Back Pay Act of 1966, 5 U.S.C. 5596, does not serve as a waiver of sovereign immunity for this purpose.

This reasoning with respect to sovereign immunity is not applicable to the Postal Service. In Loeffler v. Frank, ___U.S.___, 108 S.Ct. 1965 (1988), the Supreme Court specifically held that interest may be recovered from the Postal Service in suits under Title VII:

> "We conclude that, at the Postal Service's inception, Congress waived its immunity from interest awards, authorizing recovery of interest from the Postal Service to the extent that interest is recoverable against a private party as a normal incident of suit."

Id. at 1970. The Court based this conclusion on the sue-and-be-sued clause of the Postal Reorganization Act of 1970, 39 U.S.C. 401(1) which the Court found constituted a waiver of sovereign immunity from awards of interest. Id. at 1969-70, 1974-75. Accordingly, the proposed regulation should be amended to provide for interest awards against the Postal Service.

Respectfully submitted,

American Postal Workers Union, AFL-CIO

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