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

MEMORANDUM DATE: March 30, 2005

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF LABOR
OFFICE OF WORKER'S COMPENSATION PROGRAMS
SAN FRANCISCO, CALIFORNIA

Respondent

and Case No. SF-CA-03-0285

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2391, 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

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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U.S. DEPARTMENT OF LABOR OFFICE OF WORKER'S COMPENSATION PROGRAMS SAN FRANCISCO, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2391, AFL-CIO Charging Party	Case No. SF-CA-03-0285

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 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 **MAY 2, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: March 30, 2005
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

U.S. DEPARTMENT OF LABOR OFFICE OF WORKER'S COMPENSATION PROGRAMS SAN FRANCISCO, CALIFORNIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2391, AFL-CIO Charging Party	Case No. SF-CA-03-0285

John R. Pannozzo, Jr., Esquire
For the General Counsel

David L. Pena, Esquire
Roz Itelson
For the Respondent

Barbara Brandt
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arose 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.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (hereinafter FLRA or Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 2391, AFL-CIO (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the San Francisco Regional Office of the Authority. The complaint alleges that the U.S. Department of Labor, Office

of Worker's Compensation Programs, San Francisco, California (Respondent) violated section 7116(a)(1) of the Statute by prohibiting the Charging Party's Steward Breda Kiely from representing unit employee Nubia Castro in connection with various Office of Workers Compensation Programs (OWCP) claims that she had filed. Respondent filed an Answer admitting in part and denying in part the allegations set forth in the Complaint.

A hearing was held in San Francisco, California, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Both the General Counsel and the Respondent filed timely post-hearing briefs which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Department of Labor's Employment Standards Administration (ESA) includes the Office of Workers Compensation Programs (OWCP) which administers programs that provide compensation to employees injured on the job. (G.C. Ex. 3) Shelby Hallmark is the OWCP Director in Washington, D.C. Edward Bounds serves as OWCP's Region IX - Pacific Regional Director. (G.C. Ex. 3) There are five divisions within OWCP, including the Division of Federal Employees Compensation (DFEC), which administers the Federal Employees Compensation Act (FECA). FECA provides workers compensation benefits for civilian employees of the United States who have suffered work-related injuries or occupational diseases. (G.C. Ex. 4) DOL has twelve district offices that administer FECA, including the district offices in San Francisco and Kansas City. (G.C. Ex. 3)

Approximately 1,500-1,600 employees work in OWCP, with just under 1,000 of those in DFEC. (Tr. 124) About 600-650 employees work as claims examiners. (Tr. 136) There are about 165,000-170,000 new cases filed with OWCP each year. (Tr. 153) Approximately 250,000 employees receive benefits yearly. (Tr. 153) Hallmark estimated that about 1,000 DOL employees file workers compensation claims yearly. (Tr. 153)

FECA claims submitted by Federal employees outside the Department of Labor (DOL) are adjudicated in the respective district offices. (Tr. 23) However, since at least 1990, all FECA claims submitted by DOL employees are adjudicated

only in the Kansas City District Office (Kansas City). (Tr. 24, 92, 137) Hallmark stated that having the claims adjudicated only in Kansas City was intended to avoid the appearance of favoritism, increase objectivity within the claims process and insulate OWCP from the possibility of a conflict of interest. (Tr. 136-137, 158-160) The Kansas City claims examiners are also responsible for adjudicating claims filed by Federal employees outside DOL. (Tr. 176) Other than the adjudication site, there is no distinction between DOL and other Federal employees regarding the processing of their respective claims. (Tr. 110-111, 144)

Typically, the initial claim decision is made by an adjudication unit and the matter is then moved to another unit to deal with a different aspect of the case, such as a suitability for work determination. (Tr. 161) Moreover, the appeal processes are identical for all employees, including a request for reconsideration to the district office, an oral or written appeal to Washington, D.C., or an appeal to the Employee's Compensation Appeals Board (ECAB) in Washington, D.C. (Tr. 24) The ECAB issues precedential decisions for OWCP and the claims examiners follow those rulings. (Tr. 24, 73).

Breda Kiely is a claims examiner for the OWCP at the San Francisco District Office, San Francisco, California. (Tr. 5, 21) Kiely independently adjudicates highly complex disability and death claims filed by Federal employees within Region IX. (G.C. Ex. 5; Tr. 66) She has a wide range of duties, including: entering into plea agreements, managing medical evidence, conducting claimant conferences, resolving conflicts concerning a claimant's condition, applying/developing strategies, negotiating, mediating, drafting and issuing determinations. (G.C. Ex. 5; Tr. 25, 70, 78-80) Kiely exercises independent judgment in resolving conflicts regarding factual and medical evidence, including a claimant's symptoms. (G.C. Ex. 5; Tr. 66-68)

Kiely became a steward for the Charging Party in early 2001. In late April or early May 2001, she was asked by Nubia Castro, a DFEC employee in the same office in San Francisco, to represent her regarding her two OWCP[1] claims. (Tr. 35-36) Kiely had not represented Castro prior to becoming a steward. (Tr. 91) Castro had filed an occupational injury claim based on bilateral carpal tunnel on January 12, 2000 and had filed an occupational injury claim based on cervical back strain on March 23, 2001.

[1] Castro's various claims were alternately referred to as OWCP claims and FECA claims. Her claims were all filed pursuant to the Federal Employees' Compensation Act.

(Stipulations at Tr. 3) In connection with these claims, Kiely also represented Castro in connection with a light duty job offer to a bill resolution contact representative position beginning on March 14, 2002. (G.C. Exs. 8 and 9; Tr. 40-41)

Castro's OWCP claims were filed with and adjudicated by the Kansas City District Office, which handles all workers' compensation cases filed by DOL employees. (Tr. 91, 141) An authorization of representation, which permitted the agency to release information regarding Castro's cases to Kiely, was executed and submitted to Kansas City. (Tr. 34) Kiely was not compensated by Castro for her representation. (Tr. 39-140) Kiely represented Castro for fourteen months, until July 9, 2002. (G.C. Ex. 18) During this time period, Kiely forwarded correspondence to Kansas City on the Charging Party's letterhead and was copied as Castro's representative on letters from Kansas City. (G.C. Exs. 8-11, 13-15, 17) Kiely's representation of Castro in her OWCP claims was discussed at a labor-management meeting within the San Francisco District Office in the summer or fall of 2001. (Tr. 36-37, 60-61).

On July 9, 2002, Bounds sent a memorandum to Kiely, advising her that "OWCP has a longstanding policy that FECA employees (even if they're stewards) should not be representatives in FEC cases because of the potential conflict of interest." Referring to a policy statement issued by Hallmark in 1994,[2] Bounds informed Kiely that she would not be recognized as the claimant's representative for any Federal employees (other than herself) who are FECA claimants, and requested that Kiely inform Castro of the

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[2] The General Counsel objected to the introduction of this 1994 Memorandum, which is similar to the 2002 Memorandum discussed below, on the grounds that it had not been properly furnished during pre-hearing disclosure, pursuant to section 2423.23 of the Authority's Rules and Regulations. Respondent's Exhibit 1 was received into evidence and the General Counsel renewed his objection to its receipt in his brief. I find, however, that R. Ex. 1 is properly admitted. Respondent specifically referenced the 1994 Memorandum in his pre-hearing disclosure and there is no evidence that the General Counsel was unaware of its actual contents or that his presentation was harmed by the later receipt of the document. Therefore, the General Counsel's objection is denied and R. Ex. 1 remains part of the record.

need to find another representative outside of the program. (G.C. Ex. 18; Tr. 53-54, 56)[3]

On July 1, 2002, Hallmark issued a Memorandum addressed to OWCP Regional Directors on Representation of FECA Claimants. The Memorandum stated, in its entirety:

> In general, Federal employees are prohibited by law from representing others in prosecuting any claim against the United States, except in the proper discharge of official duties (18 USC 203 and 205). While an exception to this prohibition, allowing representation by Federal employees in certain types of actions, is found at 18 USC 205 (d), the exception applies only if representation would not be "inconsistent with the faithful performance of his/her duties".
>
> It has been the stated policy of OWCP for some years, and remains the policy, that an employee of the Federal Employees Compensation program should not act as a representative of any other Federal employee in a FECA claim, because such claimant representation creates a conflict of interest and is inconsistent with faithful performance of his or her duties. This is true even if the FECA employee is the union steward. This memo continues that policy and outlines the procedure used to implement it.
>
> When the National Operations Office or the Kansas City District Office becomes aware that a claimant's authorized representative is a FECA employee in a particular region, the District Director will notify the Regional Director, copying the OWCP Deputy. The Regional Director will advise the FECA employee who is acting in that capacity that representation of another employee in a FECA claim is not permitted, and that the FECA district office will no longer recognize him or her as the authorized

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[3] Castro was sent a letter on August 6, 2002 from Sheila Baker, Assistant Chief, Branch of Hearings and Review, informing her of the OWCP policy and advising her ". . . given that Ms. Kiely is a DFEC employee, it is not appropriate for her to act as your representative in any further interaction with this Office, and she will no longer be recognized as such. Please advise this office when and if you select new representation so it may be noted in the record." (G.C. Ex. 21; Tr. 56, 57)

> representative in the claim. If the employee is the local steward and the claimant is an OWCP employee in the region, the steward should notify NCFLL or Local 12, as appropriate, so that the union can provide the claimant with representation. At the same time, the district office (Kansas City or District 25) will notify the claimant in writing that it will no longer recognize the representative, copying the case file and the Branch of Hearings and Review.

(G.C. Ex. 20; Tr. 55, 56)[4]

Kiely has not represented Castro in her OWCP claims since July 9, 2002. The Charging Party filed the unfair labor practice charge in this matter on January 8, 2003. (G.C. Ex. 1(a))

ISSUE

Whether the Respondent violated section 7116(a)(1) of the Statute by prohibiting the Charging Party's Steward Breda Kiely from representing a unit employee in connection with various Office of Workers Compensation claims?

POSITIONS OF THE PARTIES

GENERAL COUNSEL

The General Counsel asserts that the Respondent should be found to have violated section 7116(a)(1) of the Statute by prohibiting Union steward Breda Kiely from representing Nubia Castro in her FECA claims. *U.S. Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service, National Office,* 41 FLRA 403 (1991)(*IRS*). Kiely's representation did not create an actual conflict of interest: she did not serve as an adjudicator for Castro's claims, did not exert any influence over the Kansas City examiners, but served as an effective advocate with regard to advising Castro concerning the process, forms, medical information, requests for reconsideration and appeal of the cervical strain denial. Further, Kiely approached her representation of Castro in the same manner as she would her adjudicator position, applying the five FECA principles or

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[4] G.C. Ex. 19 is identical to G.C. Ex. 20, without the letterhead or the date.

basics[5] to Castro's claims that she did in her adjudicator's role. Also, Kiely testified that she could faithfully perform her adjudicative responsibilities while simultaneously advocating Castro's FECA claims with the Kansas City District Office and the ECAB.

The General Counsel further asserts that Kiely's representation did not create an apparent conflict of interest. One of the reasons DOL transferred the adjudicative processing of workers compensation claims filed by DOL employees to Kansas City was to avoid any appearance of favoritism. There is no evidence that the Kansas City examiners treated Castro's claims any differently than any other employee. There are subjective factors involved in the processing of any claim, such as the office where the claim is filed and who is assigned the case. Further different claims examiners applying the same objective FECA criteria to any particular claim could arrive at different conclusions based on any number of non-representational reasons. Therefore, the General Counsel argues that it is impossible for the Respondent to establish that an apparent conflict exists between Kiely's advocacy and adjudication, based on the unlimited, non-representational, subjective considerations that exist with regard to a particular claimant's case and the respective claims examiner and office.

In *National Treasury Employees Union and Bernsen*, 53 FLRA 1541, 1549 (1998)(*Bernsen*), the Authority stated that whether an objectively reasonable person, with knowledge of all the facts and procedures, would question an employee's ability to perform their official duties and act as a manager and/or representative of a labor organization is an appropriate standard for analyzing whether section 7120(e) has been violated. In *Bernsen*, the Authority concluded that neither the agency or union violated section 7120(e) of the Statute by permitting an employee to simultaneously serve as both a chapter president of the union and an ethics official with the agency. The Authority further noted that the potential for conflict does not equate to an apparent conflict of interest. *Bernsen* at 1554. The General Counsel asserts that the Respondent's arguments are premised on mere potential for conflict, rather than any actual or apparent conflict.

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[5] The adjudicative process involves the application of five FECA principles or basics: (1) timely filed; (2) Federal employee; (3) fact of injury; (4) injury occurred during the performance of duty, and (5) a causal relationship, which is a medical issue. (Tr. 26-27)

The General Counsel asserts that Bounds' July 9 prohibition concerning Kiely's representation of Castro was unreasonable. Inasmuch as the decision to grant or deny Castro's claims was based on medical and factual evidence that was being evaluated by independent claims examiners in the Kansas City District Office, there was simply no likelihood that a conflict might occur.

The General Counsel further asserts that Article 15, Section 2D. of the parties' collective bargaining agreement (CBA) does not preclude Kiely from representing Castro in her FECA claims. Article 15 contains the parties' grievance procedure and Article 15, Section 2D. lists the matters excluded from coverage under the negotiated grievance procedure. OWCP proceedings are not one of the excluded statutory appeals procedures referenced in that Article. The Respondent did not offer any bargaining history to support its position, and the General Counsel asserts that there is no basis for concluding that the CBA precludes the union's representation of OWCP claimants.

The General Counsel affirmatively asserts that the plain language of Article 8, which provides official time for stewards and National Council of Field Labor Local (NCFLL) representatives with regard to grievances and appeals, supports the Charging Party's right to represent OWCP claimants. Article 8, section 2 A.2 states, in pertinent part, that "Subsection 1. above includes time to investigate, prepare, and, if required, participate in an . . . OWCP proceeding." The language of the CBA was clarified after the Authority's February 19, 1991 decision in *American Federation of Government Employees, National Council of Field Labor Locals and U.S. Department of Labor, Mine Safety and Health Administration, Denver, Colorado,* 39 FLRA 546, 547 (1991)*(Mine Safety),* in which it denied the agency's exceptions to an arbitration award that granted official time and travel expenses to attend a statutory appeals hearing before OWCP.

The Charging Party's stewards, while on official time, have represented OWCP claimants on about fifteen occasions since the above language was inserted into the CBA. In addition, stewards, while on official time, have represented employees in other statutory appeals procedures, such as EEOC and MSPB proceedings. And stewards have represented OWCP employees in connection with other third party matters.

Respondent's publication entitled FECA Questions and Answers, Publication CA-550, revised in January 1999, states in Section A-9 that: "A Federal employee may not serve as a representative unless he or she is an immediate family

member of the injured worker or is acting in his or her official capacity as a union representative." In this matter, Kiely was acting in her official capacity as a Charging Party representative concerning Castro's various claims. Further, the authorization of representation executed by Castro conformed with Respondent's policy concerning the release of information to representatives and Kiely acted in accordance with that policy for fourteen months.

In order to remedy the unfair labor practice, the General Counsel submitted that the Respondent should not be allowed to continue to enforce that portion of Shelby Hallmark's July 1, 2002 memo, which restricts stewards from representing bargaining unit employees concerning their workers compensation claims. The General Counsel further requests that Respondent be required to rescind and expunge the July 9, 2002 memorandum from Regional Director Edward Bounds to the Union Steward Breda Kiely and the August 6, 2002 memorandum from Sheila Baker to Nubia Castro.

RESPONDENT

The Respondent first asserts that it is within the sole discretion of the Secretary of Labor, and her designee, the Director of OWCP, to determine the appropriate means by which FECA hearings should be conducted, including whether or not its own claims examiners should act on behalf of claimants before the agency. The Respondent notes that Congress has conferred on the Secretary of Labor absolute authority to enforce and administer FECA. 5 USC § 8145. *Woodruff V. U.S. Dept. of Labor, Office of Workers Compensation Programs*, 954 F.2d 634, 640 (11th Cir. 1992). The Supreme Court has held that this type of exclusive authority granted to an executive agency warrants substantial deference to the agency's construction of its enabling statute by federal courts. *Woodruff*, *supra* at 640, citing *Federal Election Commission v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37, 102 S.Ct. 38, 44 (1981).

The Respondent therefore argues that for the FLRA to determine that OWCP must permit Breda Kiely to act contrary to OWCP's policy would constitute the FLRA substituting its judgment for the judgment granted by Congress exclusively to the Secretary of Labor. The Respondent further noted that in *National Treasury Employees Union, NTEU Chapter 51 and Internal Revenue Service, Wichita District Office*, 40 FLRA 614, 629-31, (1991)(*NTEU*) the Authority first requested an advisory opinion from OWCP regarding the scope of an arbitrator's authority with respect to matters implicated by

FECA in connection with exceptions to an arbitrator's award. *NTEU* at 623-624. The Authority then specifically disallowed that portion of the Arbitrator's award regarding the payment of medical expenses, reasoning that such a determination is within the exclusive province of the Department of Labor under FECA. *NTEU* at 630. "The arbitrator was not empowered to order remedial relief that falls within the exclusive purview of the FECA and its implementing regulations." *NTEU* at 633. The Respondent argues that the implication of this holding by the Authority is that matters regarding FECA are outside the purview of the Statute. Thus when OWCP determines that its claims examiners cannot represent claimants before the agency because to do otherwise would compromise OWCP's statutory mission, that decision is OWCP's alone to make. Accordingly, the Authority does not have jurisdiction or legal authority to determine whether or not an unfair labor practice was committed in this case.

The Respondent next argues that because there is no right to union representation in connection with the FECA claims process, no unfair labor practice occurred when OWCP advised Kiely that she was prohibited from representing a claimant in her FECA claim. The Respondent argues that the FECA claims process is not a dispute between employees and management and is not a grievance or subject to the grievance process. *See, NTEU, supra*. An employee's employing agency is not a party to a FECA proceeding. (Tr. 134) It is an inquiry conducted strictly by OWCP applying its rules and regulations and making a determination. While OWCP encourages union participation in the process, it does so not because it views a union right at issue but because OWCP believes that union representation will assist OWCP in adjudicating claims fairly and correctly and "is an important part of the program". (Tr. 126) The determination to be made by OWCP is not whether an employee has been adversely affected by an act of management or his or her employing agency but whether an employee has suffered physical or mental harm as a consequence of their employment. There is nothing within the claims process that is subject to negotiations because the claims process is not a term or condition of employment. The Authority has held that where discretion as to an action pertaining to conditions of employment resides with a third party outside the bargaining relationship, a proposal requiring an agency to take that action is outside the duty to bargain. *Patent Office Professional Association and U.S. Department of Commerce, Patent and Trademark Office*, 53 FLRA 625, 682-683 (1997).

Moreover the Statute expressly excludes from definition of "conditions of employment" "policies, practices, and

matters - (C) to the extent such matters are specifically provided for by Federal statute. . . ." 5 U.S.C. § 7103(a)(14)(C). The FECA process is plainly one covered by Federal statute. Thus OWCP's determination that its own employees cannot represent FECA claimants does not implicate a "condition of employment" and thus is not subject to bargaining. According, there is no cognizable union right implicated by OWCP's policy and thus no unfair labor practice has been committed.

The Respondent concludes by asserting that the Federal Service Labor Management Relations Statute does not authorize a Federal employee to act on behalf of a labor organization when such activities create a conflict or apparent conflict of interest or when such activity is incompatible with the faithful performance of his/her official duties. Thus, the Department of Labor did not commit an unfair labor practice by refusing to permit Kiely to represent a claimant before OWCP.

The Respondent does not dispute that the Statute grants Federal employees, including DOL employees, the right to "form, join, or assist" a labor organization. 5 USC § 7102. This also includes the right "to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies." 5 USC § 7102(1). The Respondent does not dispute that unit employees, such as Kiely, have the statutory right to represent employees on behalf of the union in matters affecting conditions of employment, including in a statutory appeals process, such as the administrative EEO process. *IRS*, 41 FLRA at 413. Section 7120(e) of the Statute prohibits such representation where: "The participation or activity by a unit employee would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee." Respondent therefore takes the position that the representation of a Federal employee in connection with their workers compensation claim before OWCP by an OWCP claims examiner is prohibited by 7120(e).

The Respondent acknowledges the General Counsel's citation of the Authority's decision in *IRS*, in which the Authority found that the blanket prohibition of attorneys from representing agency employees in connection with their administrative EEO complaints was in violation of § 7116(a)(1) and that the agency failed to show that such representation created a circumstance that fell within the prohibition of 7120(e). However, the Respondent argues that the General Counsel's reliance on *IRS* is misplaced, first

noting that Kiely's job duties directly involve the substantive matter at issue in her representation of Castro, *i.e.*, Federal employee compensation claims. Further there is no inconsistency in the OWCP policy, which prohibits any OWCP employee from representing a FECA claimant. (R. Ex. 2; G.C. Ex. 20)

The Respondent further argues that the evidence establishes both an actual as well as an apparent conflict of interest. The Respondent argues that it is imperative that examiners do not put themselves in a position that would compromise their objectivity. And that it would be difficult for any claims examiner to jump back and forth across the table, alternatively as an advocate and then as an adjudicator, and maintain consistency in judgment and objectivity in analysis. The Respondent asserts that acting as an advocate for a claimant is an activity that is diametrically opposite that of a fair, objective and reasonable adjudicator of claims. An appropriate concern of OWCP is that it would have doubt regarding the quality of Kiely's adjudications of claims knowing that on occasion she argues against the Agency's position.

In conclusion, the Respondent argues that OWCP's determination that serving as an advocate would constitute a conflict of interest for an OWCP claims examiner ought to be given deference by the Authority, since the matter relates to OWCP's programmatic regulations, and since OWCP is in the best situation to assess what constitutes a conflict within its area of delegated responsibility.

STATUTORY LANGUAGE

5 U.S.C. § 7102. Employees' rights

> Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided under this chapter, such right includes the right –

(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

5 U.S.C. § 7120. Standards of conduct for labor organizations

(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chapter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

18 U.S.C. § 205, states, in pertinent part:

(2) Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in an agency of the United States, other than in the proper discharge of his official duties-

(1) acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim, in consideration of assistance in the prosecution of such claim; or

(2) acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or civil, military, or naval commission in connection with any covered matter in which the United States is a party or has a direct and substantial interest;

shall be subject to the penalties set forth in section 216 of this title.

. . .

(d)(1) Nothing in subsection (a) or (b) prevents an officer or employee, if not inconsistent with the faithful performance of that officer's or employee's duties, from acting without compensation as agent or attorney for, or otherwise representing-

(A) any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings....

ANALYSIS

JURISDICTION

Respondent initially argues that the Authority has no jurisdiction relating to its procedures regarding the OWCP process. In *NTEU*, *supra*, the Authority addressed exceptions to an arbitrator's award regarding the agency's failure to maintain a safe and healthful work environment. The Authority, as cited by the Respondent, did conclude that the portion of the arbitrator's award directing reimbursement for medical expenses and the provision of physical examinations was contrary to FECA, since those particular items were within the exclusive jurisdiction of the FECA and its implementing regulations and did not pertain to matters over which the agency may have separate authority to grant payment. "In our view, the Arbitrator was not empowered to direct the Agency to make payments that are exclusively governed by the FECA's implementing regulations. Our finding in this regard should not be interpreted as holding that the Arbitrator was not empowered to hear the issues raised in the grievance or that the issues were outside the scope of the negotiated grievance and arbitration procedure. Rather, we simply find that this portion of the award conflicts with law because only DOL can authorize the payments at issue." The Authority also found that the Arbitrator was fully within the scope of his remedial authority in directing the restoration of leave as part of his award.

Further in *Mine Safety,* 39 FLRA 546, the Authority sustained an arbitrator's award finding that official time and travel expenses in connection with a grievant's OWCP hearing were authorized under the parties' collective bargaining agreement. The Authority noted in NTEU, footnote 7 that travel expenses for claimants in connection

with OWCP hearings are not specifically covered by the FECA's implementing regulations.

While the Respondent may argue that it has the sole discretion to promulgate a rule prohibiting representation of FECA claimants by FECA employees, the Authority stated in *IRS* at 416,

> Contrary to the Respondent, we find that an agency cannot by regulation prohibit employee activity protected by section 7102 of the Statute unless, as stated above, the agency can demonstrate that the activity would result in a conflict of interest under section 7120(e).

Therefore, while acknowledging DOL's authority to administer the provisions of the FECA, not all matters relating to the processing of FECA claims are outside the scope of the Authority. This matter directly pertains to employee activity protected by section 7102 of the Statute and not just the manner in which a FECA claim is processed. Thus the OWCP policy regarding representation by FECA employees of DOL employees in FECA matters falls within the purview of the Authority and the Respondent's defense is rejected.

Respondent further argues that there is no right to Union representation in connection with the FECA claims process, even though it encourages Union participation in the process. The General Counsel asserts that the parties' collective bargaining agreement does not specifically exclude the Union's participation in OWCP proceedings. Further, the plain language of Article 8 supports the Charging Party's right to represent OWCP claimants. And the Authority has allowed official time and travel expenses for Union representatives in connection with an OWCP hearing. *see Mine Safety*. Under these circumstances, Respondent's argument is rejected.

Prohibition against representation

The question then becomes whether the Respondent's decision to prohibit Kiely from representing Castro was a violation of the Statute will depend on whether Kiely's advocacy resulted in a conflict or apparent conflict of interest within the meaning of section 7120(e) of the Statute.

The appropriate standard for analyzing whether section 7120(e) of the Statute has been violated is "whether an objectively reasonable person, with knowledge of all the facts and procedures, would question an employee's ability to perform their official duties and act as a manager and/or representative of a labor organization." NTEU II, 53 FLRA at 1549.

In *Congressional Research Employees Association, IFPTE, Local 75 and Library of Congress, 59 FLRA 994 (2004)* (IFPTE), the Authority upheld an arbitrator's decision denying a grievance that the agency violated the CBA and the Statute when it reassigned work pertaining to collective bargaining and union recognition for the Department of Homeland Security from the union president to another employee. The Authority determined that the agency properly viewed its mission as requiring it to be above criticism in terms of maintaining the objectivity of its personnel and its work product as it provides research and information to Congress. Under these circumstances, the Authority agreed that there was an apparent conflict of interest under section 7120(e) and the agency was within its rights to reassign the work at issue.

In *IRS*, 41 FLRA 402, the Authority found that the agency violated section 7116(a)(1) of the Statute by precluding a bargaining unit employee/union representative (Joseph) from representing another bargaining unit employee (Foster) on behalf of the union in an EEO proceeding. Foster had filed an EEO complaint under the agency's EEO appeals procedure. Joseph was an attorney in the Office of the Chief Counsel and was also the Executive Vice President and Chief Steward for NTEU, Chapter 251. Joseph was ordered to stop his representation of Foster, on the basis of the General Counsel Directive No. 6, which had been interpreted as "prohibiting Chief Counsel attorneys from providing representation, even for Chief Counsel employees, in administrative and court hearings, including those involving EEO matters." The Authority first found that section 7116 (a)(1) of the Statute provided that it is an unfair labor practice for an agency "to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under [the Statute]." If an agency applies its regulations so as to prohibit unit employees from exercising rights under section 7102 of the Statute, such action constitutes unlawful interference with those rights in violation of section 7116(a)(1). *See U.S. Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California*, 38 FLRA 567 (1990); and *Department of the Commerce, Bureau of the Census*, 26 FLRA 719 (1987). *See also U.S. Department of the Navy, Naval Aviation Depot,*

Naval Air Station Alameda, Alameda, California, 36 FLRA 705 (1990). The Authority specifically rejected the agency's assertion that employees acting on behalf of a union do not have a right under section 7102 of the Statute to represent unit employees in a statutory appeal process. The Statutory right of employees to serve as union representatives extends to any of the procedures whereby the union represents the views of the union and the unit employees concerning conditions of employment, including statutory appeals procedures.

There is no dispute that Kiely's function as a claims representative involves the processing of claims by individual Federal employees under the FECA. As Castro's representative, she became an advocate in the same program where she adjudicates claims. Kiely did not adjudicate Castro's claim, which was handled by the Kansas City office. Rather, in her capacity as a representative, she processed paperwork, sought additional medical information, and argued on behalf of Castro to the Kansas City office. This conduct took place over a period of fourteen months, until stopped on July 9, 2002.

The need for representation in processing any third party claim, including a claim under FECA, is not at issue in this matter. Nor are the rights set forth under section 7102 of the Statute. The Respondent has no issue with an employee such a Castro seeking representation in the processing of their claim, but asserts that it has established a policy that does not allow FECA employees from representing anyone, other than themselves, in actual FECA proceedings. This policy protects the Agency from any conflict of interest or appearance of conflict of interest.

In this particular matter, the General Counsel argues that Kiely's representation did not create an actual conflict of interest, noting that Kiely did not serve as an adjudicator of any of Castro's claims and that her claims were not even adjudicated in the same office where Kiely works, but rather in Kansas City. Kiely did not mediate or negotiate any of Castro's claims and did not exert any influence over the Kansas City claims examiners. The General Counsel further argues that her representation did not create an apparent conflict of interest. All employees are subject to the same adjudicative process. And OSHA transferred the adjudicative processing of workers compensation claims filed by DOL employees to one office, the Kansas City office, in part to avoid any appearance of favoritism. The Kansas City claims examiners did not know Castro and did not treat her differently than any other employee in the processing of claims. There is no evidence

that Kiely represented Castro in any way that differed from the manner in which she performed her adjudicative responsibilities.

In examining the evidence as a whole, however, I find that Respondent's actions in this matter did not violate the Statute as alleged. The Respondent has a legitimate interest in seeking to ensure that its processing of FECA claims is objective and fair and that it is free of any suggestion that is otherwise. Respondent has taken specific steps in determining how the processing of FECA claims will be accomplished, including specifying a single office (Kansas City) to process such claims. Limiting OWCP employees from processing FECA claims for anyone other than themselves is consistent with its concerns that the process be objective and fair.

In this matter, Kiely's representation of Castro was directly related to the work she does as a claims examiner for OWCP. As a claims examiner, Kiely is required to exercise both judgment and discretion, and she used her skills as a claims examiner in representing Castro. She was an effective advocate for a bargaining unit employee in the same program where she adjudicates claims. This situation is distinguishable from *IRS*, in which representation activities were at issue were not related to the attorney's regular job duties. Rather, I find the instant factual situation similar to that of *IFPTE*. Under these circumstances, I find a conflict between Kiely's ability to perform her official duties and act as union representative in this matter. *NTEU, supra.*

Therefore, I find that the Respondent did not violate the Statute by refusing to allow Kiely to continue her representation of Castro in her FECA claim.

Having found that the evidence does not support the allegation that the Respondent violated the Statute, it is therefore recommended that the Authority adopt the following Order:

ORDER

It is ordered that the complaint be, and hereby, is dismissed.

Issued, Washington, DC, March 30, 2005.

_____

SUSAN E. JELEN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. SF-CA-03-0285, were sent to the following parties:

_____

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

John R. Pannozzo, Jr. **7000 1670 0000 1175 5165**
Counsel for the General Counsel
Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103

David Pena **7000 1670 0000 1175 5172**
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-2428
Washington, D.C. 20210

Roz Itelson **7000 1670 0000 1175 5189**
U.S. Department of Labor
71 Stevenson Street, Suite 500
San Francisco, CA 94105

Barbara Brandt **7000 1670 0000 1175 5196**
AFGE, 2391
71 Stevenson Street, Suite 930
San Francisco, CA 94105

DATED: March 30, 2005
Washington, DC