DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

28178

FILE: B-212695 **DATE:** May 7, 1984

MATTER OF: Local 3062, American Federation of Government Employees, Recoupment of Erroneously Withheld Dues

DIGEST:

1. Section 7115(b) of Title 5, United States Code, requires that union dues allotments terminate when an employee is no longer in the bargaining unit. Therefore, neither management nor the union should knowingly continue or permit dues withholding for an employee who is no longer in the bargaining unit.

2. When dues are erroneously withheld from an employee who is no longer in the bargaining unit, that employee is not entitled to repayment of the erroneously withheld amount if the employee failed to take the steps necessary to cancel voluntary dues withholding. Certifying and disbursing officers, and other accountable officers are advised not to take recoupment action against the union in such circumstances.

3. Agency erroneously continued to withhold dues from an employee who was transferred to another location out of the bargaining unit. Upon discovery of the error, the agency recouped the erroneously withheld amount from the union and paid it to the employee. The union received the erroneously withheld dues in good faith and without fraud or misrepresentation, and therefore collection of that amount from the union is waived under 5 U.S.C. § 5584 and the union may be reimbursed.

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Local 3062, American Federation of Government Employees, AFL-CIO (AFGE), has requested a decision, pursuant to 4 C.F.R. § 22 (1983), concerning union dues recouped by the National Park Service from AFGE Local 3062 and paid to Gary R. Jensen. The agency was served with a copy of the union's submission but filed no response or comments. 4 C.F.R. § 22.4(c). We hold that certifying and disbursing officers, and other accountable officers should not recoup erroneously withheld amounts where an employee has left the bargaining unit and has failed to take the steps necessary to cancel voluntary dues withholding. In this case, the overpayment to the union is waived under 5 U.S.C. § 5584.

FACTS

AFGE Local 3062 is the exclusive bargaining representative of a bargaining unit of wage-grade employees at the Lake Mead National Recreation Area, Boulder City, Nevada. The employing agency is the National Park Service, Department of the Interior. Since 1971, a collective bargaining agreement between Lake Mead and AFGE Local 3062 has provided for dues withholding for bargaining unit employees. In November 1980, Mr. Gary R. Jensen, a member of the bargaining unit, executed a Form 1187 for the voluntary allotment of union dues.

In April 1981, Mr. Jensen was transferred to the Crater Lake National Park in Oregon. Neither Local 3062 nor any other union has exclusive recognition at Crater Lake, and therefore, the collective bargaining agreement between AFGE Local 3062 and Lake Mead no longer applied to Mr. Jensen. Nonetheless, the Finance Office of the National Park Service in Washington, D.C. continued to withhold union dues from the paycheck of Mr. Jensen, and those dues were paid to AFGE Local 3062. Mr. Jensen never executed a Form 1188 to cease voluntary allotment of union dues, or otherwise acted to terminate his dues withholding or his union membership.

On November 23, 1982, the Finance Office stopped withholding dues from Mr. Jensen and paid him $120, the amount of union dues that had been deducted from his salary since he had transferred to Crater Lake National Park. The Finance Office then deducted $120 from the next remittance check to AFGE Local 3062.

The union filed an unfair labor practice charge with the Regional Office of the Federal Labor Relations Authority, Case No. 9-CA-30328, dated April 11, 1983. By letter dated June 29, 1983, the Regional Director refused to issue a complaint based upon Department of the Air Force, 3480th Air Base Group, Goodfellow Air Force Base, Texas, 9 FLRA No. 48 (1982). In that case, the Authority found that it was not an unfair labor practice to recoup dues erroneously withheld from employees who were no longer in the bargaining unit. The union advises that no appeal of the dismissal of the charge was filed.

The Union's Position

The union asks that the agency be required to pay the union the $120 it recouped. The union relies on our decision in Fort Stewart/Hunter Army Airfield, 59 Comp. Gen. 710 (1980), in which we modified earlier decisions and held that, to the extent the proceeds of the erroneously withheld dues allotments inure to the benefit of the employee, there is no obligation on the agency to recoup the dues from the union.

The union also argues that only the employee, and no one else, may take action to terminate dues withholding. The record indicates that the union representatives involved were of the understanding that the union had no power or authority to terminate an individual's dues withholding.

Discussion

Discontinuance of Allotments

We first point out that the union is not correct in arguing that only Mr. Jensen had the right to terminate his dues allotment authorization. While Mr. Jensen had the right to continue his union membership after he transferred out of the bargaining unit, the right to have his union dues paid through dues withholding terminated when he transferred out of the bargaining unit. Section 7115(b)(1) of Title 5, United States Code (1982), specifically provides that dues withholding with respect to any employee shall terminate when the agreement between the agency and the exclusive representative ceases to be applicable to the employee.

Since the statute is explicit in this regard, neither management nor the union should continue or permit dues withholding for an employee who they know is no longer in the bargaining unit. Both parties to the agreement should make a reasonable effort to insure the accuracy of dues allotments and alert certifying and disbursing officers, and other accountable officers, to employees whose dues withholding must be discontinued because they are no longer in the bargaining unit.

Where the parties cannot agree on whether or not an employee is in the bargaining unit, procedures are available under 5 U.S.C. Chapter 71 to resolve such issues. See, for example, 5 C.F.R. § 2422.2(c). When it has been determined that an employee is no longer in the bargaining unit, dues withholding should be stopped immediately.

Recoupment Action

As noted by the union, in Fort Stewart, cited above, we held that the agency was not required to recoup erroneously withheld dues where the proceeds inured to the benefit of the employees. The rationale at 59 Comp. Gen. 710, 712 (1980), is as follows:

> "We are particularly constrained to that view because employees may be members of a labor organization whether or not they are members of a bargaining unit covered by a written agreement. Therefore, when an employee leaves a unit covered by a bargaining agreement, only the right to have his union dues paid by voluntary allotment ends. His union membership continues until he takes some action to terminate it. If through administrative error the allotment continues to be paid to the union, the employee is presumed to have knowledge of the fact his allotment has continued since in most cases the allotment is shown on Leave and Earnings Statements each pay period. Thus, the employee is or should be aware that his union dues are being paid by allotment, and he is in a position to know that such deductions are improper. In any case the employee does not lose the money in question since it is owed to the union.

> Further, the union is not being unjustly enriched, since it is entitled to dues from its members. See Matter of Sergeant Richard C. Rushing, USA, B-194692, July 24, 1979, in which it was held that the individual 'would not be entitled to a refund [of an allotment] if he had an interest in, or the proceeds from the allotment inured to his benefit.'
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> "It is our position that, to the extent that proceeds of the allotments inured to the benefit of the employees in this case in that their union dues were paid, there is no requirement to reimburse the employees. Further, in view of the difficulties which such reimbursements cause, they should not be made unless an individual case presents facts which would justify such action."

As noted above, the Authority in Goodfellow Air Force Base, 9 FLRA No. 48 (1982), relying on our decisions prior to Fort Stewart, held that it was not an unfair labor practice to recoup erroneously withheld dues from the union. That case was reversed on appeal by the U.S. Court of Appeals for the Fifth Circuit on the grounds that the agency had no right to recoup the overpayments from the current dues withholdings of other employees. The appeals court noted that the Authority had not considered our decision in Fort Stewart. AFGE Local 1816 v. FLRA, 715 F. 2d 224 (5th Cir. 1983).

In a later case involving the same issue, the Authority's Administrative Law Judge considered our decision in Fort Stewart, and found that recoupment in those circumstances was an unfair labor practice. That holding was reversed by the Authority in reliance on Goodfellow, prior to the reversal of the latter by the Fifth Circuit. Department of the Air Force, Griffiss AFB, New York, and AFGE Local 2612, 12 FLRA No. 50 (1983). An appeal of the Authority's decision in Griffiss is now pending in the Second Circuit. AFGE Local 2612 v. FLRA (Griffiss Air Force Base), Case No. 83-4145 (appeal filed August 11, 1983, and argument held February 10, 1984).

The issue of whether or not recoupment action in circumstances such as these is an unfair labor practice is for resolution by the Federal Labor Relations Authority and the courts. However, apart from that issue, certifying and disbursing officers, and other accountable officers are advised of the following to insure proper management of the accounts for which they are responsible.

When dues are erroneously withheld from an employee who is no longer in the bargaining unit, that employee is not entitled to repayment of the erroneously withheld amounts if the employee failed to take the steps necessary to cancel his authorization for dues withholding. Since the employee in these circumstances is presumed to have voluntarily retained his union membership, and the union is entitled to dues from its members, the employee is not entitled to reimbursement of the erroneously withheld amount. As is the rule with other types of allotments, the employee is not entitled to repayment when the employee was at fault or benefited from the payment. SP5 Neal B. Batts, Jr., USA, B-185820, February 11, 1977; Ollie N. Marshall, B-193400, January 31, 1979; Sergeant Richard C. Rushing, USA, B-194692, July 24, 1979. See also, 33 Comp. Gen. 309 (1954).

Accordingly, certifying and disbursing officers, and other accountable officers, are advised not to reimburse employees for erroneously withheld union dues in circumstances such as those presented in this case. Since the Government is not required to reimburse the employees, there should be no recoupment of the amounts erroneously withheld from the union.

Waiver

In the case before us, the National Park Service has recouped the $120 amount of erroneously withheld dues by deducting that amount from a remittance to AFGE Local 3062 of other employees' dues.

We have held that where the union receives erroneously withheld dues in good faith and without fraud or misrepresentation, the erroneous payments to the union may qualify for waiver under 5 U.S.C. § 5584. National Federation of Federal Employees, Local 1239, B-201817, 61 Comp. Gen. 218 (1982).

In the present case, the record shows that AFGE Local 3062 received the dues of Mr. Jensen in good faith and without fraud or misrepresentation. Accordingly, collection of the $120 from the union is waived under 5 U.S.C. § 5584 and the union may be reimbursed in that amount.

Milton J. Socolar

Acting Comptroller General
of the United States