

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

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND TINKER AIR FORCE BASE OKLAHOMA CITY, OKLAHOMA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 916, AFL-CIO Charging Party	Case No. DA-CA-02-0349

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 **MARCH 1, 2004**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: January 30, 2004
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: January 30, 2004

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
AIR FORCE MATERIEL COMMAND
TINKER AIR FORCE BASE
OKLAHOMA CITY, OKLAHOMA

Respondent

and

Case No. DA-CA-02-0349

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 916, 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
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF THE AIR FORCE AIR FORCE MATERIEL COMMAND TINKER AIR FORCE BASE OKLAHOMA CITY, OKLAHOMA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 916, AFL-CIO Charging Party	Case No. DA-CA-02-0349

Philip T. Roberts, Esquire
For the General Counsel

Preston L. Mitchell, Esquire
For the Respondent

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed on March 13, 2002, by the American Federation of Government Employees, Local 916, AFL-CIO (Union) against the U.S. Department of the Air Force, Air Force Materiel Command, Tinker Air Force Base, Oklahoma City, Oklahoma (Respondent). On July 23, 2002, the Regional Director of the Dallas Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing alleging that the Respondent committed unfair labor practices in violation of § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute) by

making a coercive statement to a bargaining unit employee and Union steward regarding his protected activity. 1

A hearing was held in Oklahoma City, Oklahoma. The parties appeared with counsel and were given an opportunity to present evidence and to cross examine witnesses. This Decision is based upon careful consideration of all of the evidence, including the demeanor of witnesses, as well as of the post-hearing briefs submitted by the parties.

Findings of Fact

The American Federation of Government Employees, AFL-CIO (AFGE) is the certified exclusive representative of a nationwide unit of employees appropriate for collective bargaining of the Department of the Air Force, Air Force Materiel Command. AFGE Local 916 (Union) is the agent of AFGE for the purposes of representing the bargaining unit employees at the Respondent's Tinker Air Force Base, Oklahoma City, Oklahoma. (G.C. Ex. 1(c) and 1(g))

Winfred Daniels has worked at Respondent's facility for over five years and is currently a Non-Destructive Inspector. He works in Building 3001 in the LPPPCN area. He has also been a steward on behalf of the Union for over four years. He is currently the steward in LPPPCNB and has previously been a steward in LPPPAEC and LPPPAEB. (R. Ex. 1 and 2; Tr. 10-11) As a steward Daniels has handled about 100 grievances at the first level of the grievance procedure, some at the second level and has been involved in some arbitration cases. (Tr. 11)

Herb Garrett is a production line supervisor and the second level supervisor in LPPPAE. He does not supervise Daniels' or his work area, although he also works in Building 3001. (Tr. 59-60)

The incident in question in this matter involves a conversation between Daniels and Garrett on December 12, 2001. 2 Both Daniels and Garrett agree on the date of the conversation, but disagree as to other elements.

Daniels works the swing shift from 3:30 pm to midnight. The first break during the swing shift is from 5:30 to 5:40

1

At the beginning of the hearing, the General Counsel requested to withdraw paragraph 11 of the Complaint. Having no objection from the Respondent, paragraph 11 was withdrawn.

2

All dates are in 2001, unless otherwise specified.

pm. According to Daniels, he was returning to his work area after his break, in which he made a trip to the ATM machine. (Tr. 13) As he was returning to his shop, he walked through Garrett's shop. (Tr. 28) Garrett was talking to another supervisor Stan Walkup when Daniels walked by. Garrett stopped Daniels and started talking to Daniels about not receiving designation letters for the Union and said that if he didn't receive the designation, he would assign his own stewards at his discretion. (Tr. 19) 3

According to Daniels, after the first part of this conversation, Garrett changed and all of the sudden told Daniels that he was trying to set him up. Garrett then said "If you set me up, I'll back lash on you so hard that you'll remember it." (Tr. 19) 4

Daniels said that he did not respond to Garrett, just looked at him and returned to work. He did not say anything else to Garrett and did not speak to him again that evening. (Tr. 19)

Later the same evening, still December 12, Daniels received a message through his supervisor that he needed to speak to Stan Walkup, a supervisor under Garrett. Daniels went to Walkup's office, closed the door and sat down. According to Daniels, Walkup said that it was wrong of Garrett to say what he said, that Garrett had Daniels mixed up with another steward who was going around soliciting complaints in Garrett's area and that Walkup had tried to explain to Garrett that Daniels had nothing to do with that. (Tr. 19-20)

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Apparently, three employees in Garrett's shop had requested that Daniels represent them in some concern. The Union had a specific steward assigned to Garrett's shop, but employees are allowed to designate any other steward as their representative. The Union obtains a designation form which is forwarded to the supervisor of the employee so that the steward can be released. There appeared to be some time gap in the processing of these requests and the actual designation of the steward by the Union. Daniels was eventually designated to represent one of the employees, but not the other two. (Tr. 19)

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The charge in this matter alleges there were two conversations between Garrett and Daniels on December 12, one at 1510 hours and the other at 1730 hours. On cross examination, Daniels denied that there were two conversations, asserting that there were two parts to the conversation, but only one conversation on December 12. (Tr. 24-25)

This conversation ended. 5 Two days later Daniels reported the incident with Garrett to his Chief Steward and the unfair labor practice charge was filed March 13, 2002. (G.C. Ex. 1(a); Tr. 21-22)

Garrett's version of the conversation differs from that of Daniels. Garrett's work area is separated by a small fence and then cabinets and equipment. It is not permissible to cut through his work area, which is a small passageway but not an aisle or walkway. (Tr. 60-61) Garrett works the day shift, which is 6:45 am to 3:30 pm, but he normally leaves between 4:30 and 5:00 pm, before the first swing shift break. Garrett talked to Daniels sometime before the first break, when he saw Daniels in his shop. He told Daniels that he was in the shop area without safety glasses and that Daniels knew the requirement about safety glasses. Garrett stated that he also told Daniels that he did not need him there stirring up trouble. Garrett stated that Daniels had been encouraging other people, that he did not represent, to file grievances in Garrett's work area during work time. Garrett testified that he believed Daniels was doing that when he approached him, as there was no other reason for Daniels to be in the work area, since it was not a break or lunch time. (Tr. 64-65) Garrett denied that he told Daniels he would "lash back" at him. (Tr. 65) No one was with Garrett when he spoke with Daniels. (Tr. 69) On cross-examination, Garrett admitted that he did not see Daniels stopping to talk with anyone in his shop regarding the Union on this date. (Tr. 68)

Ruling on Motions

After receipt of the Respondent's brief, Counsel for the General Counsel timely filed a Motion to Strike, requesting that certain facts and documents referenced in the Respondent's brief be stricken as they are not a part of the record in this case and should not be considered in my decision.

The first reference relates to a series of inferences that the Respondent asserts discredits the testimony of Winfred Daniels. Respondent refers to the Office of the General Counsel's policy that a quality investigation must contain an affidavit, answer to interrogatory or confirming letter from the Charging Party's primary witness or witnesses. Since the Complaint refers to two conversations taking place on December 12, 2001, between Daniels and

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Stan Walkup was not called as a witness by either the General Counsel or the Respondent.

Garrett, Respondent asserts that the Dallas Regional Office must have taken an affidavit from Daniels and this affidavit must have referred to two conversations. Respondent asserts that this affidavit contradicts Daniels' testimony at the hearing and thus his testimony should be discredited. The General Counsel further asserts that the Respondent makes similar speculative inferences regarding what Daniels' affidavit says about Stan Stapp or Stan Walkup.

The General Counsel argues in its Motion to Strike that Respondent was aware that if he had asked for a copy of the Winfred Daniels' affidavit at the hearing, Counsel for the General Counsel would have been obliged to provide it to him as *Jencks* material, citing the Office of the General Counsel's Litigation Manual, Part 2, Section T. The General Counsel argues that Respondent's counsel had the opportunity to place Daniels' affidavit on the record during the hearing and failed to do so, that the General Counsel would have then had the opportunity at the hearing to conduct redirect examination, and therefore that the Judge should ignore this line of argument altogether.

Counsel for the General Counsel further argues that Enclosures 4 and 5 to Respondent's brief were not offered into evidence at the hearing and were apparently generated after the close of the hearing, are without probative value and cannot be considered in deciding this matter.

The Respondent filed a timely Agency Response to Motion to Strike and Motion for Sanctions, asserting that the General Counsel has failed to provide any legal basis for refusing to consider the Respondent's arguments or for not allowing the Respondent's correction of the record and related arguments concerning the existence of Stan Stapp. Respondent also requests an order to show cause why Counsel for the General Counsel should not be found to have attempted to commit a fraud upon this tribunal by knowingly providing false information regarding the existence of Stan Stapp.

I do not find the issue of whether Mr. Stan Stapp exists or does not exist material to rendering a decision in this matter. While the General Counsel did list a Stan Stapp as a witness in his prehearing disclosure, such a witness was not called and no testimony elicited during the hearing by either party mentioned Mr. Stapp. Therefore I am unwilling to draw any inference regarding the existence of Mr. Stapp and his possible relevance to the hearing. While the Counsel for the General Counsel could have been more clear that he was not calling Mr. Stapp as a witness, even though he had been named in the prehearing disclosure, I do

not find any attempt to commit a fraud upon the court and I therefore deny the Respondent's request for an order to show cause in this matter.

Since there is no evidence that Mr. Stapp is material to this matter, I will grant the General Counsel's Motion to Strike the exhibits attached to the Respondent's brief as not in evidence in the record. Further I deny the General Counsel's motion with regard to the Respondent's arguments relating to the affidavit of Winfred Daniels, as this is part of the Respondent's argument that Daniels' testimony should not be credited. I will not strike the references to the General Counsel's Litigation Manual as this is a public document available to all parties.

Positions of the Parties

General Counsel

The General Counsel asserts that the evidence in this matter supports a finding that the Respondent, through Garrett, made coercive statements to one of the Union's stewards regarding his protected activities, in violation of section 7116(a)(1) of the Statute. The General Counsel submits that both Daniels' version and Garrett's version would tend to coerce or intimidate a reasonable person in violation of the Statute. To the extent it is necessary to determine which of the two versions is true, the General Counsel asserts that Daniels' version of the remark should be credited.

Respondent

Respondent asserts that the General Counsel has failed to provide sufficient credible evidence that the alleged statement to Daniels by Garrett was made. Respondent asserts that Daniels' testimony was internally inconsistent and that his overall testimony was not credible. Further Respondent argues that Daniels' testimony was inconsistent with other available testimony and evidence, as well as the charge, the complaint prior to amendment and the General Counsel's prehearing disclosure.

Respondent finally argues that Daniels had no right entering the work areas where he was not the shop steward without following the strict procedures of the Master Labor Agreement and was not engaged in protected activity. Respondent therefore asserts that Garrett telling Daniels that he was "stirring up trouble" (Tr. 65), cannot be construed as a threat, but rather was a statement of opinion, not dissimilar to that found in *Oklahoma City Air*

Logistics Center (AFLC), Tinker Air Force Base, Oklahoma, 6 FLRA 159 (1981).

Analysis

Section 7102 of the Statute protects employees in the exercise of the right to form, join, or assist a labor organization, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116(a)(1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise of their section 7102 rights. The legal standard for determining whether comments by agency officials violate section 7116(a)(1) is set forth in *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 895-96 (1990)*:

The standard for determining whether management's statement or conduct violates section 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. . . . In order to find a violation of section 7116(a)(1), it is not necessary to find other unfair labor practices or to demonstrate union animus. . . . While the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or on the intent of the employer.

(Citations omitted). See also *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994)*.

Respondent makes several arguments about what must be contained in the affidavit provided by Daniels during the investigation stages of the unfair labor practice charge. However, no affidavit from Daniels was presented during the hearing in this matter and is not a part of the record before me. I am unable to speculate regarding the contents, or lack of contents, of any document not a part of the record. The Authority has adopted the *Jencks* rule, which provides that a written statement obtained prior to hearing is disclosable for the purpose of cross-examination after the witness has testified. See *Department of Treasury, Internal Revenue Service, Memphis Service Center, 16 FLRA 687 n.1 (1984)*; *U.S. Small Business Administration, Washington, D.C., 54 FLRA 837 (1998)*. In this matter the

Respondent did not request a copy of any statement by Daniels during the hearing, for the purpose of cross-examination, and I cannot now speculate on any such statement which is not a part of the record. Therefore Respondent's arguments regarding the probable contents of any statement by Daniels are rejected.

Further I find that the testimony of Daniels was credible. He testified in great detail regarding the events that led up to the conversation with Garrett, the conversation itself and the subsequent conversation with Walkup. Contrary to the Respondent, I do not find Daniels' testimony inconsistent. Nor do I find Daniel's credibility lessened by the reference in the unfair labor practice charge to two conversations. Daniels was not responsible for filing the unfair labor practice charge and he consistently testified that he had only one conversation with Garrett, although there were two distinct parts to the conversation, with the latter part of the conversation including the remark at issue. Daniels' testimony regarding his subsequent conversation with supervisor Walkup was also consistent with Garrett's testimony regarding his concerns that Daniels' was soliciting complaints from unit employees within Garrett's shop and with his statement to Daniels that he did not need him stirring up trouble.

Under these circumstances, I find that Garrett did tell Daniels that "If you set me up, I'll back lash on you so hard that you'll remember it." (Tr. 19) I further find that such a statement interferes with employee rights under the Statute. *U.S. Penitentiary, Florence, Colorado*, 53 FLRA 1393 (1998) (Making statements to employees that if the Union pursues a demand for overtime payments on behalf of employees, then management will change an existing condition of employment); *Equal Employment Opportunity Commission, San Diego Area, San Diego, California*, 48 FLRA 1098 (1993) (Making statements to employees indicating that employees who file complaints against management through the union will suffer adverse consequences found to be unlawfully coercive); and *United States Department of Housing and Urban Development, Region X, Seattle, Washington*, 41 FLRA 363 (1991) (Telling an employee that he had "stirred up a real hornet's nest by filing [a] grievance" and that the agency was trying to "get anything on him that it could" held to be unlawfully coercive).

Therefore, I find that the Respondent violated section 7116(a)(1) of the Statute by the conduct of Garrett in telling Daniels that he would back lash against him. 6

It is therefore recommended that the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, it is hereby ordered that the U.S. Department of the Air Force, Air Force Materiel Command, Tinker Air Force Base, Oklahoma City, Oklahoma, shall:

1. Cease and desist from:

(a) Making statements to its employees, who are represented by the American Federation of Government Employees, Local 916, AFL-CIO, the agent of the exclusive representative, which interfere with, coerce or discourage any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to act for a labor organization in the capacity of a representative freely and without fear of penalty or reprisal.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at the Department of the Air Force, Air Force Materiel Command, Tinker Air Force Base, Oklahoma City, Oklahoma, where bargaining unit employees represented by the American Federation of Government Employees, Local 916, AFL-CIO are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Commander, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other

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I further find that the fact that Daniels was not on official time or in any official capacity as a Union steward at the time of this conversation is not relevant to the finding that such a statement is coercive.

places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, January 30, 2004.

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of the Air Force, Air Force Materiel Command, Tinker Air Force Base, Oklahoma City, Oklahoma violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make statements to our employees, who are represented by the American Federation of Government Employees, Local 916, AFL-CIO, the agent of the exclusive representative, which interfere with, coerce or discourage any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to act for a labor organization in the capacity of a representative freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Respondent/Activity)

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

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

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, Illinois 60603, and whose telephone number is: 312-353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-02-0349, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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DATED: January 30, 2004
Washington, DC