

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

U.S. PENITENTIARY FLORENCE, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1301 Charging Party	Case Nos. DE-CA-50537 DE-CA-50625

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 his 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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 30, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: August 30, 1996
Washington, DC

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

MEMORANDUM

DATE: August 30, 1996

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. PENITENTIARY
FLORENCE, COLORADO

CA-50537 Respondent Case Nos. DE-
CA-50625 DE-

and

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1301

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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. PENITENTIARY FLORENCE, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1301 Charging Party	Case Nos. DE-CA-50537 DE-CA-50625

Steven R. Simon
Octavia R. Johnson
Counsel for the Respondent

Christopher G. Kester
Representative of the Charging Party

Timothy J. Sullivan
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The consolidated unfair labor practice complaints allege that Respondent, through the conduct of Robert Scullard, Assistant Food Service Administrator, and Anthony George, Supervisor, Recreation Department, made certain statements, during early 1995, to bargaining unit employees which violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1).

Respondent's answers denied the alleged statements and any violation of the Statute.

A hearing was held in Denver, Colorado. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.

Based on the entire record¹, including my observation of the witnesses and their demeanor, I conclude that a preponderance of the evidence establishes that Respondent violated section 7116(a)(1) as alleged, and make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

1. Case No. DE-CA-50537

In early February 1995, Jesse Weiser, a bargaining unit employee and representative of the Charging Party (Union), was contacted by David Collins, a bargaining unit employee and food line supervisor of inmates working in Food Service for the Respondent. Collins asked for the Union's assistance concerning a letter of counseling he had received from his supervisor, Robert Scullard, Assistant Food Service Administrator. Collins explained to Weiser reasons why he felt the letter was not justified.

After conducting some preliminary inquiries, Weiser met with Mr. Scullard on or about February 7, 1995 in an effort to informally resolve the matter. During the meeting, Scullard told Weiser, "I want to tell you something right now. You know, it doesn't matter what we do in here, it doesn't matter how we do it. Every time we issue these letters of counseling or anything else on these people, . . . you Union people are going to be coming in here, and you are going to be objecting to everything. I will tell you what I am going to do from now on. Whenever . . . my foremen run out of food, I am just going to write them up. That is an element . . . on their evaluations. And I will be legal in doing it."² Mr. Kerry McIntosh, a food service supervisor, was present during this portion of the conversation.

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Counsel for the General Counsel's unopposed motion to correct the transcript is granted; the transcript is corrected as set forth therein.

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Mr. Scullard, who is no longer employed by the Respondent, testified that he did not make the alleged statement or any statement that could be interpreted as threatening or intimidating during the meeting and did not believe

Mr. McIntosh was present. I have credited the contrary testimony of Mr. Weiser, whose detailed testimony I found forthright and convincing. Mr. McIntosh was not called as a witness.

2. Case No. DE-CA-50625

On or about April 28, 1995, Danny Ortiz, a recreation specialist and bargaining unit employee, met alone with Anthony George, Supervisor, Recreation Department. Ortiz told George that he (Ortiz) would like to have a roster committee set up to determine the shifts and days off in the Department and that Carl Mestas, a bargaining unit employee and Union Treasurer, would be willing to come in and talk to George about it.³

George replied that if Ortiz brought anyone from the Union into his office that he (George) would probably offend them.⁴ When Ortiz attempted to explain the advantages of a roster committee, George responded that the Union had no say-so in Recreation and that it was for Correctional Services only.

Later that same day, Ortiz took some purchase requests to George's office for his approval. As George was signing the documents, he told Ortiz that if he (Ortiz) wanted to move into

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The parties' collective bargaining agreement contains a procedure in Article 18 whereby the Union may participate in establishing a roster committee to determine the shifts and days-off for bargaining unit employees in each department. Employees may bid on shift assignments and days-off, and the roster committee then reviews the bids and finalizes the schedules. This process is accomplished once every quarter and the schedules remain in place for three month periods. Prior to the events in this case, Mr. George determined the schedules and days-off for all of the recreation specialists.

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Mr. George denied making the alleged statements in this case or saying anything like the alleged statements.

Mr. Robert D. Roberson, Supervisor of Education, testified that he did not hear Mr. George make any statement of this nature, although Mr. Roberson was not alleged to have been present when the statements were made. In finding that the statements were made, I have credited the testimony of

Mr. Ortiz. The testimony of Mr. Ortiz and Mr. Mestas, as well as portions of the testimony of Mr. George and Mr. Roberson, establish that both Mr. George and Mr. Roberson had, and maintain, negative attitudes toward the need for a roster committee. While not dispositive, I find that this background provides further support for Mr. Ortiz' testimony. Respondent offered an investigative report of Executive Assistant Joe D. Driver and affidavits of Wayne Barker and Sherry Beicker as bearing on the credibility of Mr. Ortiz and the Union leadership. These were rejected as Barker and Beicker were not called to testify at the hearing and thus were not subject to cross-examination and neither was the individual who made the proffered statement in the investigative report. See Defense Logistics Agency, Defense Depot Tracy, Tracy, California, 14 FLRA 475, 476 n.1 (1984) (Authority denied exception to Judge's failure to consider affidavit where affiant was not subject to cross-examination).

management, "You don't want to step on any toes."

Ortiz arranged through his second-level supervisor, Robert Roberson, Supervisor of Education, to have a meeting concerning the establishment of a roster committee on the following Wednesday. It was attended by Ortiz, Roberson, George, and Mestas, the Union representative. No agreement was reached concerning the establishment of such a committee.

Later that day, following the meeting, Ortiz and two other employees were discussing the roster committee when Mr. George interrupted and said, "If you guys want to play hardball, I can play hardball." One of the employees asked George what he meant by that. George replied, "Well, you will just have to wait and see."

After Union representative Mestas secured the intervention of Associate Warden Davis and Dawn Hellickson in the Human Relations Office, additional meetings were held among Roberson, George, Union representatives, and Ortiz. A roster committee was eventually established in the Recreation Department.

Discussion and Conclusions

Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, including the right to act as a labor organization representative, 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 by the employee of such right.

The Authority has held that the standard for determining whether management's statement or conduct violates section 7116(a) (1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although 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 the intent of the employer. U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994).

The Alleged Statement by Robert Scullard

As set forth in detail above, the record reflects that Assistant Food Service Administrator Robert Scullard told

Union representative Jesse Weiser, in effect, that if the Union was going to object to a letter of counseling, then "from now on" Scullard would write-up the food line supervisors anytime they ran out of food, because that was an element of their evaluations.

This statement would tend to coerce or intimidate the employee from representing the Union and, thus, attempting to resolve employees' complaints or investigating potential grievances. See Department of Treasury, Internal Revenue Service, 11 FLRA 290 (1983) (Union steward was exercising protected rights when he spoke with personnel officer in an attempt to resolve an employee's complaint); Department of Justice, Bureau of Prisons, Federal Correctional Institution, Butner, North Carolina, 18 FLRA 831, 833 (1985) (Employee's rights protected under section 7102 include the right to investigate and gather evidence to determine whether to file a grievance.) By threatening to retaliate against other employees because of this protected Union representational activity, Scullard was clearly attempting to discourage Weiser from any further representational activities in Food Service. If Weiser pursued the issue, Scullard would write-up other employees; if Weiser dropped the issue, he would fail to fulfill his representational duties. Such an intimidating, coercive statement interfered with protected rights and violated section 7116(a)(1) as alleged.

The Alleged Statements by Anthony George

1. The record reflects that when Danny Ortiz, a bargaining unit employee, told Anthony George, Supervisor, Recreation Department, that he wanted to seek the Union's assistance in establishing a roster committee that would govern the scheduling of Recreation employees' tours of duty, George told Ortiz that if he brought a Union representative into the Recreation Department that he (George) would offend him, and that the Union did not have any say in the Recreation Department because the Union was for Custodial Services only.

George's statements were obviously intended to discourage Ortiz from involving the Union in any matters within the Recreation Department and, particularly, in the establishment of a roster committee. Such comments interfered with the employee's rights to assist the Union and have the Union act for and represent his interests, and violated section 7116(a)(1) as alleged. 5 U.S.C. §§ 7102, 7114(a)(1), 7121(b)(3); Navy Resale Systems and National Association of Government Employees, Local R4-45, 5 FLRA 311 (1981).

2. According to the record, George told Ortiz later in the day that if he wanted to move into management, "You don't want to step on any toes." Under all the circumstances, this statement would tend to restrain or coerce Ortiz in the exercise of his protected rights under the Statute because it indicated that seeking the Union's assistance concerning the conditions of employment in the Recreation Department would

"step on toes" and be bad for his career. Equal Employment Opportunity Commission, San Diego Area, San Diego, California, 48 FLRA 1098, 1107 (1993).

3. George's next statement in issue was made the following week to a group of employees, including Ortiz, who were discussing the establishment of a roster committee. This occurred sometime after a meeting of Union and management representatives earlier in the day at which no agreement was reached concerning a roster committee. George said, "If you guys want to play hardball, I can play hardball." When one of the employees asked George what he meant by that, George replied, "Well, you will just have to wait and see."

This statement is shrouded in some ambiguity. A common dictionary definition of "hardball," apart from baseball, is "strong, uncompromising measures taken to achieve a desired end." Webster's II New Riverside University Dictionary, 565 (1988). Because discussions with the Union on the issue of the establishment of a roster committee were just beginning, Mr. George could have been referring to these proceedings rather than to possible adverse consequences for Ortiz' efforts to involve the Union in the Recreation Department. Under all the circumstances, it would not be proper to "choose the unlawful and eschew the innocent of two equally available interpretations." United States Air Force, Lowry Air Force Base, Denver, Colorado, 16 FLRA 952, 961 (1984); Department of the Navy, Portsmouth Naval Shipyard, 6 FLRA 491, 496 (1981). Accordingly, a preponderance of the evidence does not support a violation of the Statute in this instance.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118

of the Statute, it is hereby ordered that the U.S. Penitentiary, Florence, Colorado, shall:

1. Cease and desist from:

(a) Making statements to employees, who are represented by the American Federation of Government Employees, Local 1301 (Union), the agent of the exclusive representative of its employees, to the effect that if the Union pursues an issue on behalf of one food line supervisor/foreman, then management will write-up all of the food line supervisors/foremen

(b) Making statements to its employees that would discourage them from seeking the Union's assistance or to the effect that seeking the assistance of the Union could prevent them from being promoted.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the 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 its facilities 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 Warden and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 30, 1996

GARVIN LEE OLIVER

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. Penitentiary, Florence, Colorado 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 to the effect that if the American Federation of Government Employees, Local 1301 (Union), the agent of the exclusive representative of our employees, pursues an issue on behalf of one food line supervisor/foreman, then management will write-up all of the food line supervisors/foremen.

WE WILL NOT make statements to our employees that would discourage them from seeking the Union's assistance or to the effect that seeking the assistance of the Union could prevent them from being promoted.

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 to form, join, or assist a labor organization, including the right to act as a labor organization representative, and the right, in that capacity, to present and process grievances and present the views of the labor organization to appropriate authorities.

(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 of the Denver Region,
Federal Labor Relations Authority, 1244 Speer Boulevard,
Suite 100, Denver, CO 80204-3581 and whose telephone number
is (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case Nos. DE-CA-50537 and DE-CA-50625, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. Steven R. Simon
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Octavia R. Johnson
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Mr. Christopher G. Kester
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REGULAR MAIL:

Jesse D. Weiser, Chief Steward
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Dated: August 30, 1996
Washington, DC