

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

PORTSMOUTH NAVAL SHIPYARD
PORTSMOUTH, NEW HAMPSHIRE
Respondent

and

Case Nos. BN-CA-20223

FEDERAL EMPLOYEES METAL TRADES

BN-CA-20624

COUNCIL, AFL-CIO
Charging Party

Ms. Janice A. De Roche-Champagne	For the Respondent	
Linda I. Bauer, Esquire	Peter F. Dow, Esquire	For the General Counsel
Before: WILLIAM B. DEVANEY	Administrative Law Judge	

DECISION

Statement of the Case

This proceeding, 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.⁽¹⁾, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated §§ 16(a)(5) and (1) of the Statute by unilaterally implementing a new policy of issuing tickets for on base traffic accidents and for appealing traffic violations. Respondent asserts that it made no change either in the issuance of tickets or in the appeal of citations.

This case was initiated by a charge in Case No. BN-CA-20223, filed on November 26, 1991 (G.C. Exh. 1A), which alleged violations of §§ 16(a)(5) and (1) of the Statute; and by a charge in Case No. BN-CA-20624,⁽²⁾ filed on February 28, 1992 (G.C. Exh. 1A-2), which also alleged violations of §§ 16 (a)(5) and (1) of the Statute. The Complaint and Notice of Hearing issued on May 20, 1992 (G.C. Exh. 1C), alleged violations of §§ 16(a)(5) and (1) and set the matter for a settlement call on July 6, 1992. By Orders dated August 31, 1992 (G.C. Exhs. 1D and 1D-2) the hearing was set for October 23, 1992, for a place to be determined; and by orders dated September 17, 1992 (G.C. Exhs. 1E and 1E-2) the hearing was set for October 23, 1992, in Portsmouth, New Hampshire, pursuant to which a hearing was duly held on October 23, 1992, in Portsmouth, New Hampshire before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, November 23, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on motion of Respondent, to which the other parties did not object, for good cause shown, to January 22, 1993. Respondent and General Counsel each timely mailed a brief, received on, or before, January 27, 1993, which have been carefully considered. Upon the basis of the entire record⁽³⁾, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings and Conclusions

The charge in Case No. BN-CA-20223, as noted above, was filed on November 26, 1991 (G.C. Exh. 1A), not November 11 as General Counsel's Brief states (General Counsel's Brief, p. 1). The parties state that the charge alleged implementation of a new policy of issuing tickets for traffic accidents⁽⁴⁾ (General Counsel's Brief, p. 1; Respondent's Brief, p. 1). This charge, in turn, translates as Paragraph 12 of the Complaint which alleges that, "In June, 1991, the Respondent implemented a new policy of issuing traffic tickets to unit employees involved in traffic accidents at the Shipyard." (G.C. Exh. 1C, Par. 12).

The charge in Case No. BN-CA-20624, as also noted above, was filed on February 28, 1992 (G.C. Exh. 1A-2) and alleged that, "On or about 25 February 1992 the Activity unilaterally implemented . . . NAVSHIPYD PTSMH INST. 5350.3 TRAFFIC COURT . . ." (G.C. Exh. 1A-2). This charge translated to Paragraph 14 of the Complaint which alleges that, "In June, 1991, the Respondent began implementing new procedures concerning traffic violations by requiring in-person appearances before the Traffic Administrator and eliminating the informal appeals procedure." (G.C. Exh. 1C, Par. 14).

The only change clearly shown on the record was a change not alleged, namely that on February 20, 1991, Lt. Manuel DeCourt was appointed Traffic Hearing Administrator and on February 20, 1991, he was transferred from Security to Legal (Code 107) (G.C. Exh. 3A [Mr. DeCourt was re-appointed July 23, 1992]; Tr. 43, 44, 48, 50-51, 55); or to the extent Mr. DeCourt's transfer was alleged, if all, it was not alleged until February 28, 1992, more than a year after his transfer and, pursuant to § 18(a)(4)(A), was barred since the record plainly shows that the Federal Employees Metal Trades Council, AFL-CIO (hereinafter, "Council" or "Union"), knew that Mr. DeCourt had been transferred, if not on February 20, 1991, when it occurred (Tr. 18, 23, 24, 31, 42, 43, 44, 88), then not later than on, or about May 1, 1991, when it received the minutes of the Traffic Safety Council meeting of May 1, 1991 (G.C. Exh. 3; Tr. 29, 30), on which Lt. DeCourt is shown as being in Code 107.

It is agreed by all parties that on June 6, 1991, Respondent submitted to Mr. Arnold C. Paul, President of the Council, and to the presidents of three other unions representing other portions of Respondent's employees (Mr. Clinton R. Schoff, President, AFGE; Mr. Wayne D. Roberts, President, International Federation of Professional and Technical Engineers; and Mr. William D. Lanouette, President, International Association of Firefighters) proposed: Traffic Court Procedures and Table of Penalties, [NAVSHIPYD PTSMH INSTRUCTION 5350.3] (G.C. Exh. 2; Tr. 19, 29); that negotiations began with all four unions during the summer of 1991 (Tr. 19, 44-45); and that negotiations are continuing (Tr. 45), except that the Council on, or about, February 25, 1992, walked out because Mr. Paul thought Respondent had already implemented its proposal (Tr. 22).

A. Alleged New Policy of Tickets for Accidents

General Counsel points to the statement in the minutes of the Traffic Safety Council meeting of May 1, 1991, that,

1. . . .

"d. In the past when there were accidents on the shipyard, we were not citing people.

From now on we will be doing citations at the scene with a follow-up." (G.C. Exh. 3, 1.d)

Mr. Paul said he, ". . . never thought they ever got traffic tickets for a traffic accident due to the fact I understand the Navy used to pay for the accident" (Tr. 35), and Mr. Donald Roy, Chief Steward of Local 156, Operating Engineers, who stated that he had been dealing with employees involved in traffic accidents since 1984, testified that he was not aware of any tickets given before June, 1991, for traffic accidents (Tr. 104); but stated that he was aware that three had been issued after June, 1991, as follows: 1. Harold Brownell was given a ticket on October 29, 1991, for an accident which occurred on that date for which he filed an accident report (G.C. Exh. 6; Tr. 99); 2. Paul Rivard for an accident on December 10 or October 10, 1991 [the month is unclear] (G.C. Exh. 8; Tr. 102);⁽⁵⁾ and 3. Thomas E. Wood for an accident on April 14, 1992.

I found Mr. DeCourt, called by General Counsel, pursuant to Rule 611(c) of the Federal Rules of Evidence as a witness identified with an adverse party, a very credible witness and he testified, inter alia,: (a) that he has been involved with security at the Shipyard for about 20 years (Tr. 69) and has been Traffic Administrator for 12 years (Tr. 69); (b) that it has been a policy to give tickets for accidents for as long as he could remember (Tr. 65, 85-86); and, in response to questions by Ms. Bauer, he testified,

"A . . . I think you asked me if they had given tickets. And I said our practice has been yes. At different times it would fluctuate depending on the amount of accidents.

"Q And have you - - did I request that you show me any copies of tickets for accidents that were given before June of 1991?

"A Yes you did.

"Q And were you able to produce any?

"A Yes.

"Q Not to - - produce any for bargaining unit employees of accidents?

"A I don't know if it was for bargaining units, but I did produce tickets that were given in accidents. (Tr. 66)

. . .

"Q . . . What I'm asking you is (sic [were]) the only tickets that you produced for accidents were (sic) for people in the military?

"A I don't believe so. I think at the time, too, I also told you that most tickets are only kept for one year. You asked them for three years, and we were able to find some.

"Q You were able to find some previous to June of 1991?

"A I believe so.

"Q Do you have them here today?

"A I don't know if they brought them or not." (Tr. 67);

(c) Mr. De Court further testified that, even though he had approved the minutes of the May 1, 1991, meeting (Tr. 68), the statement in 1.d was incorrect; ". . . because we were. And I think we do have tickets that will verify that" (Tr. 71); "Q . . . When you produced documents -- when Ms. Bauer requested the documents of traffic citations for employees who were involved in traffic accidents on the shipyard, isn't it true that you provided her with many tickets? A Yes." (Tr. 78-79); the record shows a traffic ticket given on July 23, 1990, to a Mr. Mike E. Ackley (Res. Exh. 1; Tr. 73, 74, 75) who was in the bargaining unit (Tr. 92, 110), and another issued in 1989 to a Shop 6 employee (Tr. 82, 83, 84); and a number of other tickets, some of which were parking tickets (Tr. 82), but at least one other was a ticket issued in 1989 for an accident to a military person, and not all of the tickets were reviewed by Mr. DeCourt (Tr. 83).⁽⁶⁾

Mr. DeCourt credibly testified that for nearly 20 years prior to June, 1991, it had been Respondent's policy to give tickets [citations] for accidents and his testimony was fully corroborated by documentary evidence, some of which (Res. Exh. 1) was introduced as an exhibit and some which General Counsel had was not introduced as exhibits⁽⁷⁾ which showed that Respondent had issued traffic tickets [citations] for accidents prior to June, 1991, indeed, that it issued at least one in 1990 and at least one in 1989, which was about the same number it issued in 1991 (two) and 1992 (one). Accordingly, as a preponderance of the evidence does not establish that in June, 1991, Respondent implemented a new policy of issuing traffic tickets to unit employees involved in traffic accidents, the allegations of Paragraph 12 of the Complaint must be dismissed. United States Immigration and Naturalization Service, United States Border Patrol, Del Rio, Texas, 46 FLRA No. 84, 46 FLRA 923, 928-929 (1992) (hereinafter, "U.S. Border Patrol, Del Rio"); U.S. Department of the Treasury, Internal Revenue Service, Louisville District, Louisville, Kentucky, 42 FLRA 137, 142-143 (1991) (hereinafter, "IRS, Louisville District").

B. Alleged new procedures concerning traffic violations by requiring in-person appearances

Mr. Paul testified that on, or about, February 25, 1992, Mr. DeCourt, "more or less" told him that he was meeting with people (Tr. 22) and because, ". . . it looked to me like the traffic court was in -- was being taken care of. In other words, it was already going" (Tr. 22), he got up and walked out of the negotiating session and filed an ULP. (Tr. 22). Mr. Paul's charge (G.C. Exh. 1A-2) became, more narrowly, that, "In June, 1991, the Respondent began implementing new procedures concerning traffic violations by requiring in-person appearances before the Traffic Administrator and eliminating the informal appeals procedure." (G.C. Exh. 1C, Par. 14). Given the seemingly directive instructions in Mr. DeCourt's appointment as Traffic Hearing

Administrator of February 20, 1991, that he hold "Traffic Hearings at least once weekly" (G.C. Exh. 3-A) and an impression that Mr. DeCourt was "meeting with people", had I been in Mr. Paul's position, I might have reacted as he did; nevertheless, the record shows overwhelmingly, and, actually, without contradiction, that Mr. Paul's fears never materialized and that, in fact, no change whatever took place with respect to the handling of traffic violations.

Mr. Paul conceded that since February, 1992, he had called Mr. DeCourt about traffic tickets, as he always had, and that Mr. DeCourt had taken care of ". . . all of them since then." (Tr. 24). Mr. Draper stated that he had represented quite a few employees with parking violations, especially in the power plant, over the years; that he had "brought" some of those parking problems to Mr. DeCourt; that Mr. DeCourt resolved, "Most of them" (Tr. 88); that he had also 'brought' tickets to a Mr. Tim Reedy, who was Security Manager, since removed from that job (Tr. 89); and that other than Mr. Reedy or Mr. DeCourt, he has never "appealed" traffic tickets to anyone else (Tr. 89). Mr. Roy stated that he had taken traffic tickets to Mr. DeCourt, "usually tried to get them worked out with Mr. DeCourt. I have brought tickets -- parking tickets -- that's primarily the only thing that I've brought to Mr. DeCourt." (Tr. 111).

Mr. DeCourt is Parking and Traffic Administrator and has been for 12 years (Tr. 48, 69). Before his transfer, on February 20, 1991, to the legal department (Tr. 55, 56) where his supervisor is the legal officer [currently, Lieutenant Commander Wolensky] (Tr. 56), he had been in Security Police and his supervisor had been the Security Manager [Mr. Reedy]. The record is unclear, but the inference is that when the Parking and Traffic Administrator [Mr. DeCourt] was moved out of Security Police, the person in charge became, "Chief" [Security Chief (Tr. 34)] [Chief Small] rather than Security Manager (Tr. 24). Clearly, Messrs. Paul and Draper took traffic tickets to Mr. DeCourt and to Mr. Reedy; and Mr. Paul has taken at least one matter to Mr. DeCourt and to Chief Small (Tr. 24). Although Mr. Paul inferred that he only went to Mr. Reedy if he wasn't happy with his "appeal" to Mr. DeCourt (Tr. 23), I conclude from the testimony of Mr. Draper (Tr. 89) and of Mr. DeCourt that the Council, in fact, took traffic tickets either to the Security Manager [Mr. Reedy] or to the Traffic Administrator [Mr. DeCourt] (Tr. 57, 59). Mr. DeCourt testified, and I fully credit his testimony, that the Security Manager had never overturned a decision he, DeCourt, had made on a traffic ticket (Tr. 59).

More important, as concerns the specific allegation that in June, 1991, Respondent implemented a new procedure by requiring in-person appearances before the Traffic Administrator and eliminating the informal appeals procedure, Mr. DeCourt credibly testified that there was no change whatever (Tr. 55, 59, 64); that, notwithstanding the language of G.C. Exh. 3A, he does not hold, and never has held, weekly traffic hearings (Tr. 54); that the practice of discussing tickets over the telephone has not changed in any manner, e.g.,

"Q Before you were transferred to the legal code, you previously discussed tickets over the phone. Correct?

"A I do all the time.

. . .

"A . . . If a general foreman called me and said, 'I had two employees get a ticket last night. I held them over on the midnight shift.' He would indicate that on the back of

the ticket, and I would say that's all right. If you sign it as their foreman and say they got held over, send them down, and I would take care of that.

"Q And you do that over the phone?

"A That's done over the phone.

"Q And you wouldn't see them in person?

"A No.

"Q Do you do that today?

"A Definitely. It's the same practice.

"Q What if the employee called you?

"A He would tell me he worked over. I would say to the employee take it to your supervisor, have him give me a call, sign the ticket. He would indicate under remarks on the back of the ticket, and sign the time the person started work and the time he left work, and then I would take care of it from there. He would not have to come down.

"Q If a person has a violation and they decide that they want representation from the union, have you in the past discussed tickets with officers of the union?

"A Yes.

"Q Have you required people to come down in person?

"A Have I require them?

"Q Right.

"A No, only by their own choice." (Tr. 64-65).

Mr. Paul stated that before February 28, 1992, Mr. DeCourt "heard" cases only, ". . . if you called up and wanted it, he would hear it, yes" (Tr. 28). Mr. DeCourt stated that he held hearings, "Whenever anyone calls and wants to dispute a ticket. A lot of people get tickets; they don't want to dispute them. If they do and they request to come down, I say come on down, and I listen to them." (Tr. 54); and later emphasized that,

"Q . . . When you were the traffic manager, at what point did an employee have

to appear before you?

"A Only if he called me and wanted to do so.

"Q And now you hold hearings?

"A No, I don't hold hearings.

"Q You don't hold hearings?

"A Well, if somebody calls up, they want to dispute a ticket to come down and talk to me. If you want to call that a hearing, then it would be a hearing. But to say that I have scheduled hearings, the answer is no.

"Q Well, how do you dispute a ticket now?

"A Well, if you had a ticket and you weren't happy with it, you would call me up and say, 'I'd like to discuss this with you'. And I would say, 'Fine. Come down.'" (Tr. 63).

Mr. DeCourt credibly testified that there was no change whatever; that in-person appearances were not, and are not, required; and that the informal appeals procedure has not been eliminated. Accordingly, as a preponderance of the evidence does not establish that in June, 1991, Respondent began implementing new procedures by requiring in-person appearances before the Traffic Administrator and elimination of the informal appeals procedure, the allegations of Paragraph 14 of the Complaint, also, must be dismissed. U.S. Border Patrol, Del Rio, supra; IRS, Louisville District, supra.

Having found that Respondent did not violate §§ 16(a)(5) and (1) of the Statute as alleged, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case Nos. BN-CA-20223 and BN-CA-20624 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: December 7, 1993

Washington, DC

APPENDIX

CORRECTIONS TO TRANSCRIPT

CASE NOS. BN-CA-20223 AND BN-CA-20624

PAGE	LINE	FROM	TO
1	8	--	add BN-CA-20624
2	4	Federal Employees Metal Trades Council	Delete
2	10	Federal Employees Metal Trades Council	Delete
4	9	No. 4 Received	Rejected p. 98
5	6	Seattle	C.I.O.
6	13	prevent	present
13	13	DN-CA-20223	BN-CA-20223
18	18	construction	instruction
21	23	Shock	Schoff
33	19	counsel	Council
34	23	Arthur	Alta
69	15	--	Add "3" following

"General

Counsel's

Exhibit"

104 13 no not

Page 1, line 14, and thereafter throughout the transcript wherever it appears, change the name "DEVANAY" TO "DEVANEY".

Page 56, line 3, delete the number "1130" and substitute therefore the number, "107".

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(5) will be referred to, simply, as, "§ 16(a)(5)".

2. For reasons that wholly escape me, although these cases were consolidated and a consolidated Complaint issued (G.C. Exh. 1C), separate notices issued in each case. Moreover, separate formal exhibit files were prepared and the formal exhibits in Case No. BN-CA-20624 were not supplied. The Regional Office, at the request of this Office, has supplied the formal exhibits in Case No. BN-CA-20624 which, on my own motion, I hereby incorporate as part of the record as G.C. Exh. 1. To distinguish duplicating exhibits in one file from another, inasmuch as they bear the same identification, I have re-marked the duplicating exhibits in Case No. BN-CA-20624 by appending after the letter the number 2. Thus, G.C. Exh. 1A in this file is now G.C. Exh. 1A-2.

3. General Counsel's motion to correct transcript, to which there was no objection, is granted. In addition, on my own motion, initially at page 1, line 14, and thereafter throughout the transcript where ever it appears, the spelling of my name will be corrected from "Devanay" to "Devaney". Further, on my own motion, at page 56, line 3 the number "1130" is deleted and the number "107" substituted therefore. Accordingly, the transcript is hereby corrected as set forth in the Appendix.

4. In truth, the charge does not say what Respondent did. The charge states,

"On or about 29 October 1991, the Portsmouth Naval Shipyard, by its agent and representative M.J. Decourt, Traffic Administrator, Code 107 Unilateral changed the working conditions of Unit employees on the Shipyard by not negotiating with . . .[FEMTC], the exclusive representative. The new Policy.

By these and other actions the Portsmouth Naval Shipyard has interfered with, restrained and/or coerced it's (sic) employees in the exercise of their rights as assured them in the Act." (G.C. Exh. 1A).

5. Mr. Roy had requested, and was furnished (G.C. Exh. 5), all accident reports from November, 1989, to November, 1991, within Code 452 (Motor Vehicle Operators).

The ticket, for the most part, is nearly illegible but seems to show a Government registration [item 9]; under Other Violations [14]: "Improper Parking [or Backing]"; and in item 15, Remarks: "This individual used bad judgment in backing up causing an auto accident and damage to another vehicle."

6. Mr. Paul stated that some type of a court case had been filed against a Mr. Harten, an employee out of the ship fitting shop, through the State of Maine because, ". . . he had an incident where he was pulled up at the gate. The officer told him to get out, and he ran off. . . ." (Tr. 37); but Mr. Paul did not say he had an accident - only that "he had an incident" and Mr. Paul did not know whether he was given a traffic ticket (Tr. 37, 38).

7. Inasmuch as General Counsel called Mr. DeCourt as a witness, Respondent did not call any witnesses.