

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

U.S. SMALL BUSINESS ADMINISTRATION, WASHINGTON, D.C.

Respondent

and

Case No. WA-CA-21106

JOHN BARENO

Charging Party/Individual

Gail D. Reinhart

Christopher Holleman

Counsel for the Respondent

Ana de la Torre

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1), by the statements that three supervisors made to John Bareno which, under the circumstances, allegedly tended to coerce and intimidate Bareno in the exercise of rights protected by section 7102 of the Statute.

Respondent's answer admitted the allegations as to Respondent, the Union, and the charge, but denied any

violation of the Statute.

For the reasons set forth below, it is concluded that the statements were not made and that Respondent did not violate the Statute as alleged.

A hearing was held in Washington, D.C. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

At all times relevant, John T. Bareno was a Program Analyst for the Respondent in the Office of Program Support. His immediate supervisor was Rodney A. Lewis, Director, Office of Program Support. James L. Charney, Director of Program Analysis and Compliance, was his second level supervisor, and Robert Lineberry, Deputy Director, Office of Program Analysis and Quality Assurance (OPAQA), was his third level supervisor.

Bareno became Vice President of Solidarity, U.S.A. (Solidarity) in or about mid-February 1992. Prior to this time, Bareno had been a shop steward for the American Federation of Government Employees, Local 2532, the agent of the exclusive representative of Respondent's employees.

On April 2, 1992, Robert Wildberger, an employee of Respondent, advised Respondent, by letter to the Administrator, that Solidarity "is a new Federal sector labor union seeking to represent federal employees." He identified himself as President of Solidarity, but did not inform Respondent that Bareno was affiliated with Solidarity. On July 13, 1992, Respondent received a letter from the Authority's Denver Regional Office transmitting an election petition filed by Solidarity. One of the attachments to the letter indicated that Bareno was Executive Vice President of Solidarity. This was the first time Respondent learned that Bareno had any official connection with Solidarity.

1. The Alleged Statement By Lewis

John Bareno testified that sometime during mid-April 1992, Rodney Lewis called Bareno into his office and asked Bareno if he had a "death wish?" Bareno thought this to be an odd question, told Lewis that he did not have a death wish, and inquired what Lewis meant.

According to Bareno, Lewis responded that Wildberger had "these people upset," gesturing toward the Director's office, and, as Bareno's friend, he was advising Bareno to disassociate himself from Wildberger. Bareno testified that he replied that Wildberger was a friend and that he agreed with Wildberger's convictions about the need for a bona fide union. According to Bareno, Lewis responded that SBA already had a union.

Bareno testified that he replied that the current union was ineffectual, and Lewis told him Wildberger was using him and others to achieve his own personal goals and cautioned Bareno to stay away from Wildberger.

I credit the contrary testimony of Rodney A. Lewis. Mr. Lewis testified that sometime in April 1992, he did have a conversation in which he asked Bareno whether he had a death wish. Lewis testified that the conversation did not mention Wildberger, Solidarity, or Union activity, but dealt strictly with Bareno's work performance, namely his transmission of electronic mail (E-mail) messages which had engendered complaints. Lewis was frustrated that Bareno, despite being warned not to do so, had once again sent certain E-mail messages directly to senior officials without first allowing Lewis to review the messages for tone and clarity. He asked Bareno, "What's the matter? Do you have a death wish or something?"

Lewis testified that, sometime after the above conversation, he observed that, on a number of occasions, Bareno and Wildberger were away from their duty stations for long periods of time (over 15 minutes). He, therefore, cautioned Bareno that if these frequent absences were not job related, or were union related, they should cease until he made a proper request for representational time. Lewis did not, however, advise Bareno not to associate with Wildberger.

2. The Alleged Statement By Charney

Bareno testified that, in late April or early May 1992, James Charney called Bareno into Charney's office. According to Bareno, Charney said he had already met with Wildberger and was now going to get acquainted with Bareno. Bareno testified that Charney then made the comment that he "felt Wildberger was being disruptive and creating a lot of conflict, and that management was unhappy with that. I don't like it either." According to Bareno, Charney then asked Bareno why he was involved with Wildberger. Bareno said he responded, essentially as he had to Lewis, that given the conditions in the office, there was a need for a real union, and that's what he and Wildberger were about.

I credit the contrary testimony of James L. Charney. Mr. Charney first reported to work as the Director, Office of Program Analysis and Compliance on April 29, 1992, having been transferred to that position from SBA's Chicago Regional Office. Prior to reporting to OPAQA from Chicago, Charney did not know anything about Bareno, Wildberger, or Solidarity. He learned of Solidarity from a meeting with Mr. Wildberger on April 30, 1992 but did learn of Bareno's connection with Wildberger until July 1992 when the bylaws of Solidarity were received by SBA from the Denver region of the Authority. Mr. Charney met with Mr. Bareno on two or three occasions concerning his work assignments, but did not make any statements that he did not like the conflict Wildberger was causing, or suggesting that Bareno should not associate with Wildberger, or any similar statements.

3. The Alleged Statement by Lineberry

Mr. Bareno testified that, about the middle of May 1992, Robert Lineberry, Bareno's third line supervisor, called him into a meeting that Mr. Lewis also attended. According to Bareno, Lineberry told Bareno that it had been reported to him that Bareno had been observed that day having coffee with Wildberger. Bareno confirmed that this was true. Bareno stated that Lineberry then noted that SBA management was upset with Wildberger because he was causing a lot of problems, that he was concerned that Bareno was associating with

Wildberger, and that Bareno had best think about this. Bareno testified that he responded that he was not going to stop associating with Wildberger because they were friends and were working on a project to establish a new union.

I credit the contrary testimony of Robert Lineberry and Rodney A. Lewis. Mr. Lineberry testified that he did not make the statements attributed to him by Mr. Bareno in May 1992 or at any other time. He testified that he saw Mr. Bareno basically every day and did have a specific meeting with him and Mr. Lewis on April 8, 1992. Mr. Lineberry testified that, according to his notes, during this meeting he advised Mr. Bareno to avoid the perception that employees were socializing or conducting personal business on duty time. Mr. Lineberry testified that there was concern about Mr. Bareno being absent from his work station and taking a number of very visible breaks. Mr. Wildberger's name was not mentioned at the meeting; rather, the warning was general in nature.

Mr. Lewis also attended the April 8, 1992 meeting and did not at this meeting, or any other time, hear Mr. Lineberry advise Mr. Bareno not to associate with Mr. Wildberger.

Discussion and Conclusions

Section 2423.18 of the Rules and Regulations, 5 C.F.R. § 2423.18, based on section 7118(a)(7) and (8) of the Statute, provides that the General Counsel "shall have the burden of proving the allegations of the complaint by a preponderance of the evidence." Based on the credibility resolutions made above, it is concluded that the alleged statements were not made, and that a preponderance of the evidence does not establish that Respondent violated section 7116(a)(1), as alleged.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order.

ORDER

The complaint is dismissed.

Issued, Washington, DC, February 7, 1994

GARVIN LEE OLIVER

Administrative Law Judge

Dated: February 7, 1994

Washington, DC