

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

KIRTLAND AIR FORCE BASE
ALBUQUERQUE, NEW MEXICO

Respondent

and
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 2263, AFL-CIO

Case No. DA-CA-30136

Charging Party

Steven Sherwood, Esquire

For the Respondent

Charlotte A. Dye, Esquire

Susan E. Jelen, Esquire

For the General Counsel

Ms. Sandra Maturo

For the Charging Party

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 an employee was questioned, and if questioned, about a pending Merit Systems Protection Board case in which the employee was to be a witness for the Union, was the questioning a formal discussion, within the meaning of § 14(a)(2)(A) of the Statute, at which the Union was entitled to notice and the opportunity to be represented.

This case was initiated by a charge filed on October 30, 1992, alleging violations of §§ 16(a)(1), (5) and (8) of the Statute (G.C. Exh. 1(a)). The Complaint and Notice of Hearing issued on December 23, 1993 (G.C. Exh. 1(c)) alleged violation of §§ 16(a)(1) and (8) only and set the hearing for a date and location to be determined later. By Orders dated March 2 and 12, 1994, the hearing in this, and other cases, was set for April 11, 1994, in Albuquerque, New Mexico (G.C. Exhs. 1(e) and (f)) and by Order dated April 4, 1994 (G.C. Exh. 1(g)) was rescheduled for April 12, 1994, pursuant to which a hearing was duly held on April 12, 1994, in Albuquerque, New Mexico, 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, May 12, 1994, 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 June 12, 1994. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, June 17, 1994, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

Seldom has the testimony of witnesses been more divergent and so little effort made to temper the testimony of any witness.

Mr. Patrick Turrieta is a WG-5 materials handler in Respondent's Base Supply (Tr. 10). It is not disputed that Mr. Richard Lowe, Employee Relations Specialist, Civilian Personnel Office (Tr. 46), called Mr. Turrieta's supervisor and told him to have Mr. Turrieta report to his, Lowe's, office on the afternoon of October 19, 1992, to be questioned about his testimony in the upcoming MSPB case of Mr. Wayne Parker, and that Mr. Turrieta did report to Mr. Lowe's office on October 19 as instructed (Tr. 11-12; 47). There was no agreement on anything else.

Mr. Turrieta testified that his supervisor, Mr. Pete Panana, came to his, Turrieta's, office on October 18, 1992, and told him he was, ". . . required to go over to the Employee Management office . . . to see Mr. Richard Lowe at EMR office, Employment Management" (Tr. 11-12) and that Mr. Panana, ". . . told me that him [Lowe] and Mr. Elder wanted to ask me question (sic) regarding to the upcoming MSPB case." (Tr. 12), i.e., the MSPB case of Mr. Parker (Tr. 14). Mr. Lowe didn't recall whether he called Mr. Panana or Mr. Kernegay (Tr. 54). In any event, Mr. Panana was not called as a witness so that Mr. Turrieta's testimony that Mr. Panana came to his, Turrieta's, office and told him that Mr. Lowe and Mr. Elder wanted to question him is undenied. Mr. Turrieta testified that, not knowing where Mr. Lowe's office was located, he called Mr. Lowe (Tr. 13). Mr. Lowe couldn't recall whether Mr. Turrieta called him before the interview (Tr. 48), accordingly, as Mr. Lowe offered no rebuttal, Mr. Turrieta's testimony, that Mr. Lowe, after telling him where he was located, said, ". . . that him and Pat Elder needed to ask me a few question (sic) before the upcoming MSPB hearing . . ." (Tr. 13), is also undenied. Mr. Turrieta testified that when he got to the meeting, Mr. Lowe, ". . . said that I was there to answer some questions that him and Mr. Elder were (sic) ask me, to help me refresh memory was the term he used for the upcoming hearing." (Tr. 14).⁽²⁾ If, as it would appear (note, further his testimony in n.2), Mr. Turrieta said that Mr. Lowe and Mr. Elder wanted to refresh Mr. Turrieta's memory, this would be a strange statement for Respondent to have made. Mr. Lowe testified, "When he came to the office I told him that I wanted to discuss his testimony. [Later, Mr. Lowe amplified this statement a bit and testified, that before Mr. Turrieta's call, "The only thing I told him was that he had been identified as a witness to discuss leave procedures and practices in base supply and that's what I wanted to talk to him about." (Tr.

50) (see, also, Tr. 57)]. Mr. Turrieta said that he wanted his representative present. I told him to go ahead and call the representative and he made a telephone call. We proceeded to sit and wait for the representative to appear . . ." (Tr. 49).

Mr. Turrieta testified he made no call from Mr. Lowe's office (Tr. 26). Mr. Turrieta testified, "He asked general questions at first. He asked me if I knew the employee that was going to be at the MSPB case. He asked me if I had worked in the same section with the employee, Mr. Parker, how long I had known Mr. Parker. Let's see, he asked something about if I was aware of the incident that caused the hearing and I told him I wasn't there the day that that happened. Let's see, he asked if I were aware of the leave policies within the area, pickup and delivery was the section that he was talking about, and, I told him that I was and they were not really in accordance with the regs, how they ran things, general questions of that type, he asked." (Tr. 14-15). In the midst of this, Mr. Turrieta said, ". . . I didn't see them taking any notes . . . and I thought if I'm there to provide information I thought somebody had to. So I asked them, I said, 'Aren't you supposed to have somebody take information down.' . . . He said he would take down the information." (Tr. 15).

Mr. Lowe testified that he asked no questions before Mr. Turrieta made his call about Mr. Turrieta's testimony as a witness and none after he made his call (Tr. 50-51).

Mr. Turrieta testified that Mr. Lowe repeatedly tried to get Mr. Elder on the telephone (Tr. 16). Mr. Lowe testified that at no time during the meeting did he try to contact Mr. Elder, (Tr. 55); indeed, that he did not call Mr. Elder until after Mr. Turrieta had left (Tr. 51). Mr. Turrieta stated that when Mr. Lowe asked him if Mr. Parker was a racist (Tr. 16), he felt uncomfortable and asked, ". . . if there was a rule or regulation that allowed him to question me" (Tr. 17); that Mr. Lowe said there wasn't a regulation (Tr. 17) and that he, Turrieta, ". . . told him at that point that if that was the case, I preferred not to answer any more questions until we got to the hearing. . . ." (Tr. 17). Mr. Turrieta said they then talked about jogging and running (Tr. 17, 18) but after that, Mr. Lowe started to ask questions in regard to the MSPB report and he, Turrieta, said, "You've already told me that I don't have to be here and this is voluntary and I prefer to answer any questions when we get to the hearing." (Tr. 18). Mr. Turrieta stated that, "I told him at that point, I probably needed to get back to work" (Tr. 18) and he left. Mr. Lowe denied he asked if Mr. Parker was a racist, indeed that "We didn't discuss Mr. Parker . . . Not at all." (Tr. 51). Mr. Lowe testified that while they waited for a Union representative to arrive after Mr. Turrieta's telephone call he and Mr. Turrieta talked about sports, physical fitness, aerobics (he said he knew Mr. Turrieta was an aerobics instructor) (Tr. 49-50); that after waiting 20 to 30 minutes, he, Lowe, said, "It doesn't look like anybody is coming, so it's time to go back to work." (Tr. 58). Mr. Turrieta said the meeting lasted, ". . . about an hour, an hour and a half as I recall." (Tr. 18) while Mr. Lowe said, ". . . twenty to thirty minutes. . . ." (Tr. 58).

Mr. Turrieta testified that Mr. Lowe called him on October 20; Mr. Lowe denied that he spoke to Mr. Turrieta after October 19th (Tr. 59). Mr. Turrieta stated that he reported his interview to Mr. W. Patrick O'Connor, in October 1992, Trustee of Local 2263 (Tr. 31), at the Union office (Tr. 20); but Mr. O'Connor's best recollection was that it was by telephone to him at his office in Denver, Colorado (Tr. 37). Mr. O'Connor stated that he called Mr. Lowe (Tr. 32); but Mr. Lowe testified that he never talked to Mr. O'Connor at any time on the telephone. (Tr. 52).

Mr. Turrieta had adamantly insisted that he was told on October 18, 1992, the day before the meeting, to report to Mr. Lowe's office on the 19th. He had so stated in his December 1992, affidavit (Tr. 27, 29), and at the hearing (Tr. 29); but on redirect, when General Counsel realized that October 18 had been a Sunday when

Mr. Turrieta did not work (Tr. 25, 28), Mr. Turrieta was then uncertain whether it was Friday the 16th or the morning of the 19th (Tr. 29).⁽³⁾ Mr. Turrieta said, as noted above, that Mr. Lowe asked him if Mr. Parker was a racist; he said Mr. Elder asked him the same question at the hearing (Tr. 26); but later said that no, it had been Mr. O'Connor who asked that question at the hearing (Tr. 30) (Mr. Elder testified that he made no inquiry of Mr. Turrieta during his testimony about Mr. Parker being a racist (Tr. 66)).

In some respects, I did not find Mr. Turrieta's testimony convincing at all. For example, while his testimony that Mr. Lowe asked if he knew Mr. Parker; if he was aware of the incident that caused the hearing, to which Mr. Turrieta said he wasn't there the day it had happened; and if he were aware of the leave policies in the pick up and delivery section, to which Mr. Turrieta replied that he was, appear wholly genuine and his testimony as indicated is fully credited. But his testimony that Mr. Lowe repeatedly tried to get Mr. Elder on the telephone appears contrived and was not convincing. Mr. Lowe may very well have said something to the effect that Mr. Elder wanted him, Lowe, to ask Turrieta some questions about his, Turrieta's, testimony, but, under Mr. Turrieta's scenario, Mr. Lowe having made the inquiry, trying to locate Mr. Elder makes little sense, nor the delay in Mr. Elder's appearance as an implied cause for the hiatus in the interview. Mr. Turrieta's professed uncomfortable feeling, his asserted inquiry if there was a rule or regulation that allowed Mr. Lowe to question him, his assertion that after he told Mr. Lowe he preferred not to answer any more questions they talked about jogging and running, and that he, Turrieta told Mr. Lowe that he, Turrieta, probably needed to get back to work, is wholly unconvincing and is not credited. On the other hand, Mr. Lowe's testimony that when he, Lowe, told Mr. Turrieta he wanted to talk to him about leave procedures and practices, Mr. Turrieta said he wanted a Union representative; that Mr. Lowe told Mr. Turrieta to go ahead and call; that Mr. Turrieta did call someone and signified that someone would show up soon; that they then waited for a Union representative to show up and, while waiting, talked about sports, physical fitness and aerobics; that he, Lowe, asked Mr. Turrieta no questions about his testimony either before or after Mr. Turrieta made his telephone call; and that after waiting for twenty to thirty minutes, he, Mr. Lowe, said, in effect, that it didn't look like anyone was coming so it was time to go back to work, is far more convincing, is consistent with the record and is fully credited. Thus, for example, both testified that there was a hiatus in the interview during which they engaged in small talk. That they did so while they waited for a Union representative to arrive, as Mr. Lowe testified, makes sense; but that they did so after Mr. Turrieta had said he didn't want to answer any more questions is not logical or convincing. Mr. Turrieta's statement, "Aren't you supposed to have somebody take information down" and Mr. Turrieta's statement that Mr. Lowe said he would take down the information, is more consistent with future action, *i.e.*, that Mr. Lowe had not yet asked and he, Turrieta, had not yet provided information. Mr. Lowe testified he asked no questions about Mr. Turrieta's testimony and he told Mr. Elder that he wasn't able to get any information (Tr. 51) and Mr. Elder confirmed that Mr. Lowe told him they did not discuss the Parker case (Tr. 66); that he hadn't been able to get any information from Turrieta about the leave procedure (Tr. 69), which, in turn, supports Mr. Lowe's testimony that he didn't ask about Mr. Turrieta's testimony. Mr. Elder credibly testified that he had Mr. Lowe interview Mr. Turrieta about leave policies (Tr. 68) which is consistent with Mr. Lowe's testimony that he told Mr. Turrieta he wanted to talk to him about leave procedures and practices. Moreover, Mr. Turrieta's testimony in other respects was not correct.

Conclusions

The Authority has made it clear that interviews by agency representatives with bargaining unit employees in preparation for third-party proceedings, including MSPB proceedings, are formal discussions. Veterans Administration Medical Center, Long Beach, California, 41 FLRA 1370, 1379 (1991), *en'd subnom.*, The Department of Veterans Affairs Medical Center, Long Beach, California v. FLRA, 16 F.3d 1526 (9th Cir. 1994); United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, 47 FLRA 170, 183 (1993).

However, in order to find that a union has a right to representation under § 14(a)(2)(A) of the Statute, it must be shown, as the Authority has consistently held, that the following elements exist:

"(1) there must be a discussion; (2) which is formal; (3) between one or more representative of the agency and one or more unit employees or their representatives; (4) concerning any grievance or any personnel policy or practice or other general condition of employment."

Veterans Administration Medical Center, Long Beach, California, supra, 41 FLRA at 1379;

United States Immigration and Naturalization Service, United States Border Patrol, El Paso,

Texas, supra, 47 FLRA at 183.

Here, as I have found, Respondent summoned Mr. Turrieta to question him about his testimony in a forthcoming MSPB proceeding and told him specifically that he was to be questioned about leave procedures and practices. At this point, before any questions had been asked about Mr. Turrieta's testimony, Mr. Turrieta said he wanted a Union representative, Respondent told him to call, which he did, and they then waited twenty or thirty minutes, engaging only in small talk and, as no Union representative appeared, the interview was terminated. Because there was no discussion concerning Mr. Turrieta's testimony, there was no formal discussion within the meaning of § 14(a)(2)(A), consequently, as no formal discussion took place, Respondent did not violate § 16(a)(1) or (8). Accordingly, it is recommended that the Authority adopt the following,

ORDER

The Complaint in Case No. DA-CA-30136 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Issued: September 9, 1994

Washington, DC

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)(1) will be referred to, simply, as "§ 16(a)(1)".
2. Indeed, after the meeting, Mr. Turrieta testified that he called Union President Sandra Maturo and told her the purpose of the questions was, "I was told to refresh me (sic) memory for this." (Tr. 19).
3. The record strongly suggests, despite Mr. Turrieta's denial (Tr. 28), that Mr. Turrieta was notified on Friday, October 16, 1992, to report to Mr. Lowe's office on Monday, October 19; and that he did call Mr. O'Connor in Denver on October 16.