OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

DEPARTMENT OF THE AIR FORCE GRISSOM AIR FORCE BASE, INDIANA

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3254, AFL-CIO

Charging Party

Case Nos. CH-CA-30397

CH-CA-30398

Major David L. Frishberg

For the Respondent

Mr. Melvin D. Smith

For the Charging Party

Philip T. Roberts, 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 on the afternoons of August 13 and 14, 1992, denied prepatory time for Mr. Melvin D. Smith for discriminatory purposes; and/or interfered with, restrained or coerced Mr. Smith in the exercise of his rights. For reasons set forth hereinafter, I find that it did not.

This proceeding was initiated by a charge in Case No. CH-CA-30397 filed on January 28, 1993, alleging violation of §§ 16(a)(1), (2) and (5) of the Statute (G.C. Exh. 1(a)) and by a charge in Case No. CH-CA-30398 also filed on January 28, 1993, and also alleging violations of §§ 16(a)(1), (2) and (5) of the Statute (G.C. Exh. 1(c)). The Consolidated Complaint and Notice of Hearing issued on November 22, 1993, alleging violations only of §§ 16(a)(1) and (2) of the Statute (G.C. Exh. 1(e)) and setting the hearing at a date, time and place to be determined. By Notice dated December 8, 1993 (G.C. Exh. (i)), the hearing in this consolidated case, and for other cases, was set for January 26, 1994, in Indianapolis, Indiana. A hearing was duly held on January 26, 1994, in Indianapolis, Indiana in Case No. CH-CA-30596, one of the cases set for hearing on January 26, 1994, by the Notice of December 8, 1993; but the other cases were not reached and, because the parties were unable to agree on a date for rescheduling, at the conclusion of the hearing on January 26, 1994, all remaining cases were postponed indefinitely. Thereafter, General Counsel filed a Motion to Consolidate Cases (G.C. Exh. 1(b)); by Order dated February 9, 1994, the hearings in Case Nos. CH-CA-30390, 30397, 30398, 30478, 30491 and 30836 were rescheduled for February 24 and 25, 1994, in Kokomo, Indiana. (G.C. Exh. 1(m) and (o)) and pursuant there- to, a hearing was duly held on February 25, 1994, in Kokomo, Indiana, before the undersigned, in Case Nos. CH-CA-30397 and CH-CA-30398.

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 Respondent exercised. At the conclusion of the hearing, March 25, 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 April 25, 1994. General Counsel and Respondent each filed an excellent brief, received on, or before April 29, 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 and Discussions

The American Federation of Government Employees, Local 3254, AFL-CIO (hereinafter, "Union") is the exclusive representative of an appropriate unit of employees at Grissom Air Force Base, Indiana (hereinafter, "Respondent" or "Grissom"). Pursuant to the recommendation of the Base Closure Commission, approved by the President, Grissom, although not to be closed, is to drastically altered; the 305th Air Refueling Wing, an active duty unit, which had been the host unit at Grissom, will be deactivated and its planes distributed to other bases; and the 434th Air Refueling Wing, an Air Reserve Unit, which previously had been a tenant, will take over Grissom effective September 24, 1994 (Tr. 16). On February 12, 1992, the Union and Respondent signed ground rules for Base Realignment and for Contract negotiations (G.C. Exh. 2), pursuant to which realignment negotiations were to be held on Thursday mornings and contract negotiations were to be held on Friday mornings. The ground rules agreement further provided that, "The union teams (Contract and Realignment) will be given a total of 144 hours a week of official time . . . to be used for both negotiations and preparation time. This time is agreed to be used on Wednesdays, Thursdays and Fridays." (G.C. Exh. 2).

On the morning of August 13, 1992, Mr. Daro Carbury Johnson, jet engine shop foreman (Tr. 101), spoke to his supervisor, Mr. John Burks, engine shop foreman (Tr. 75) about his unusually heavy workload; the fact that he was short staffed (one employee - Joe Smith - was on TDY in Venezuela (Tr. 81, 103) and Mr. Melvin David Smith, a jet engine mechanic (Tr. 101), was on union duties (Tr. 103); and that he faced tight deadlines to swap out engines (Tr. 78, 104). Because no one else was available (Tr. 80), Mr. Burks told Mr. Johnson, "Well, we'll get Melvin back in here" (Tr. 105). Mr. Burks, at about 0730 (Tr. 90) went to the office of his

supervisor, Mr. Ronald R. Eller, maintenance superintendent (Tr. 89) and a management member of the realignment negotiating team (Tr. 90, 96) and asked if he were going to see Mr. Smith and when Mr. Eller said he would be seeing Mr. Smith, Mr. Burks said we need to have him come back to work this afternoon (Tr. 76, 77, 90) and after Mr. Burks explained the reason for having Mr. Smith come in (Tr. 77, 78, 80, 81, 90, 91) Mr. Eller concluded that circumstances warranted having Mr. Smith come back to work that afternoon (Tr. 93).

At the realignment negotiations on August 13, which began at about 0800, Mr. Smith, who was also Executive Vice President of the Union, was present as part of the Union's team and Mr. Eller was present as part of Respondent's team. During the course of the negotiations, Ms. Milicent Kidder, then, the Civilian Personnel Officer and Respondent's chief negotiator (Tr. 22), was trying to explain how the Civilian Personnel Office was going to safeguard things that would be done after the Reserves took over (Tr. 21). Mr. Smith testified that the Union had been concerned whether agreements made by active duty Air Force, i.e., the 305th Air Refueling Wing, would be honored by the Reserves, i.e., the 434th Air Refueling Wing. Mr. Smith commented, "I don't know why in the hell they'll listen to you. They don't listen to anybody else. The only people they care about is Macon, Georgia, Air Force Headquarters." (Tr. 22).

Mr. Smith testified that Mr. Eller, ". . . seemed to get pretty upset because I was talking about the Reserves . . ." and that Mr. Eller informed him ". . . that I needed to remember who I worked for, that these people were going to be running the base type stuff -- you know, these type comments and stuff -- when they were gone." (Tr. 22-23). At the first break, Mr. Eller went to Mr. Smith, who was sitting on the curb (Tr. 24), and told him he would have to go to work that afternoon (Tr. 24, 95). Mr. Smith stated that he responded: "'Well, hey, I got things I've got to do for the negotiating team and stuff this afternoon. Is it, like, imperative that I be there?' And he says, "Well, you've got to go to work this afternoon. We have a workload.' So, I requested that he put the request in writing, and he did. And at the next break he gave it to me in writing." (Tr. 24-25, 95, G.C. Exh. 3).

Mr. Smith reported for duty at the engine shop on the afternoon of August 13 and performed duties consistent with phasing an engine (Tr. 106, 110). The work was not finished on August 13 and Mr. Johnson asked Mr. Smith to return on the afternoon of August 14 (Tr. 110) and Mr. Smith asked that Mr. Johnson give him a statement in writing which Mr. Johnson did (G.C. Exh. 4, Tr. 110-111, 112).

General Counsel contends in effect, that, ". . . Respondent revoked Melvin Smith's official time for August 13 and 14 because of his remarks at the bargaining table on August 13 . . . ." (General Counsel's Brief, p.6). There is no dispute whatever that Mr. Smith made the statement that, "I don't know why in the hell they'll listen to you. They don't listen to anybody else . . . ."; nor that Mr. Eller told him, ". . . that I needed to remember who I worked for, that these people were going to be running the base . . . ." Further, there is no dispute whatever that Respondent required Mr. Smith to report to the engine shop for work on the afternoons of August 13 and 14 rather than using official time for preparation for negotiations; but did Respondent require Mr. Smith to work on these two afternoons in retaliation for his remarks at the negotiating table on August 13? I do not denigrate in any manner the importance of the Union scrupulously protecting its rights and prerogatives as bargaining representative, indeed, if it does not, most assuredly they will erode. Nevertheless, in all candor, this case is but a "tempest in a teapot".

By day, a sheltered yard is our refuge, the trees and shrubs comforting and sheltering friends; but at night, a strange sound, and our refuge becomes a menace, that big dark shape must be a lurking intruder - no, no there

it is - that dark blob, can you see it crouching down, right there! Mr. Smith was unhappy that his cozy pattern of negotiating Thursday and Friday mornings and using the afternoons for "prep" time was interrupted. And, like the noise at night, he now saw Respondent's every word a threat - otherwise, why would they make him report for work. To be sure, as viewed by the General Counsel, there is some evidence that could support Mr. Smith's dark suspicions. First, there is the undeniable fact that he was told he had to work shortly after his comment about the Reserves and Mr. Eller's remark that he needed to remember who he worked for, that these people [the Reserves] were going to be running the base. Second, Mr. Smith testified that Mr. Johnson told him his having to work Thursday and Friday afternoons would probably continue through September (Tr. 32). Mr. Johnson denied having made any such statement (Tr. 118) and I find Mr. Smith's testimony unconvincing both as to the alleged duration and as to his purported inquiries the following week as to whether he would be working on Thursday and Friday afternoons (Tr. 33) for the reason that Mr. Smith had demonstrated, both with Mr. Eller and with Mr. Johnson, that he would work only if it were imperative (Tr. 24, 25, 95) and that the instruction be in writing (Tr. 24-25, 110-111, 112). Mr. Smith seemed resolute that he did not expect to work, indeed, he also testified, ". . . as far as I can remember, I was never told I had to go back to work again." (Tr. 32), and to have inquired about working the next week is at odds with that resolve. Third, Mr. Smith testified that in December, whether 1992 or 1993 is uncertain (Tr. 43), Mr. Johnson said, "Well, John Burks sets the workload. That way he can control how much official time goes out of the shop." (Tr. 44). The materiality of a statement in an unrelated matter, made long after the occurrence involved herein is highly doubtful. Moreover, what this means, I am afraid to say I don't know. That Mr. Burks, the engine shop foreman, sets the workload must, to a considerable extent, be true; but that he manipulates the workload to control Mr. Smith's official time, as General Counsel asserts (General Counsel's Brief, p. 10), is not so clear. In any event, any such assertion as to the period involved is dispelled by record of official time granted Mr. Smith (Res. Exh. 4). Fourth, Mr. Smith testified that when Mr. Johnson on Thursday told him he would ". . . have to come in tomorrow, too" (Tr. 28) he, Smith, had stated, ". . . I was planning on taking annual leave tomorrow. . . ." (Tr. 28) and that Mr. Johnson told him, ". . . Well, you need to let me know because I need to get your time card marked and turned in if you're going to be on annual leave tomorrow." (Tr. 28). Mr. Johnson testified that Mr. Smith did not protest the fact that he was being asked to come back on the 14th (Tr. 112); that, "All he asked me to do was write him a letter (Tr. 112). Mr. Johnson further testified that Mr. Smith had not said "This is wrong" as to his being asked to work (Tr. 112, 113). I question that Mr. Smith made any such statement; but if he did and if Mr. Johnson, in effect, told him he would approve annual leave, it does not disprove the workload requirement; but it certainly demonstrates that Mr. Johnson was not "punishing" Mr. Smith by having him work and, further, it certainly demonstrates that Mr. Smith did not consider his presence for negotiation preparatory purposes on the 14th critical in the slightest. Fifth, that Mr. Bobby R. Stephens, an engine mechanic and shop steward (Tr. 63), testified, based on his examination of some work records (Tr. 65), that, "Well, this shows me that we've got the same amount of people, from what I can tell by looking at this, all through the month of August. The whole month of August -- it looks like its July through August. It's got the same amount of workload, from my judgement." (Tr. 66). However, on cross-examination, Mr. Stephens admitted that he did not know who was present for duty in July and August; and did not know what the work requirements were for the period (Tr. 69-73). Consequently, Mr. Stephens' testimony is of no probative value.

As opposed to the foregoing, I have carefully considered the testimony of Messrs. Johnson, Burks and Eller and find their testimony wholly credible and supported by the evidence. Accordingly, I find that Respondent had a workload problem as the result of the time constraints for completion of engine swapping for aircraft scheduled for transport to the "bone yard", i.e., storage in Arizona (Tr. 78-79, 102-103, 104- 105), as the result of accumulated work and as the result of staff shortage. General Counsel's comment that, "One must question how much the loss of that one employee affected workload since the diagnostician only 'helps . . . out during the afternoons.'" (Tr. 103). "(General Counsel's Brief, p. 9), completely misrepresents the facts. With the diagnostician , Joe Smith, on TDY in Venezuela, the duties had to be taken over by another employee. Thus, Respondent Exhibit 3 shows that Mr. Demma served as engine diagnostician on August 13 and then "Phase

Engine 6274"; and again on August 14, Mr. Demma worked as engine diagnostician and then, "Work on Tech Order." Moreover, General Counsel conveniently overlooks the absence of Mr. Smith. The absence of another journeyman jet engine mechanic, Mr. Smith, had resulted in a total staff shortage of two. Respondent made it clear that planes began arriving from England in June (Res. Exh. 7); that they wanted to keep the best engines and, accordingly, were swapping engines before planes left for storage; and that over a period of time the workload had mounted (Tr. 104-105) until the deadline on the transfer of planes to storage made the need for additional manpower critical. Because no one else was available, Mr. Smith was ordered to return to work on the afternoon of August 13.

Mr. Smith was not needed to work on engine 5586 on Monday, August 17 (Tr. 127). [(2)] Indeed, Mr. Smith was on official time for all of that week, i.e., August 17, 18, 19, 20 and 21 (Res. Exh. 4) and for the entire pay period ending September 6, 1992 (August 24 - 28; August 31 - September 4) (Res. Exh. 4).

As noted above, Mr. Smith on the one hand asserted the urgency of his work at the bargaining table on August 14, yet at another point he said he was planning on taking annual leave for the 14th (Tr. 28); he went to great lengths to explain why no other "primary member" with expertise was available to "serve and negotiate" (Tr. 42): Mr. Hannah, Chief Negotiator, on active duty; Mr. Wasylensko, on vacation; and Mr. Brown, ". . . had no expertise in that area." [to write proposals] (Tr. 42 - 43); however, he avoided any mention of the alternates for the Contract Negotiations Team, of which the Union had designated four, including Fred Hartig, the President of the Union (Res. Exh. 7, Attachment 2).

The statement Mr. Eller made at the negotiating session on August 13 is the sort of statement frequently encountered and not a statement that conveys any threat. To be sure, Mr. Smith was free to say that the Reserves did not pay attention to anyone except their Headquarters; but Mr. Eller's statement to Mr. Smith that he needed to remember who he worked for, that the Reserves were going to be running the Base, does not strike me as a threat. But more important, General Counsel has not shown by a preponderance of the evidence that Mr. Smith's being ordered to work on the afternoons of August 13 and 14, rather than using official time for preparation for negotiations, was in retaliation for his statement at the negotiating session or that Respondent thereby interfered with, restrained or coerced Mr. Smith in the exercise of his protected rights. To the contrary, the record shows that Respondent had a need for the services of Mr. Smith to meet immediate workload requirements (See Article VII, Section 3 of the Parties' Agreement, Res. Exh. 2, p. 8); that the decision to call Mr. Smith back to work had been made before the negotiating session of August 13; and that Respondent, except on August 13 and 14 when his services were needed to meet immediate workload requirements, had not on any occasion denied Mr. Smith official time.

Accordingly, having found that Respondent did not violate § 16(a)(1) or (2) by instructing Mr. Smith to work on the afternoon of August 13 and 14, 1992, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case Nos. CH-CA-30397 and CH-CA-30398 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

DATED: August 8, 1994

Washington, D.C.

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)(2) will be referred to, simply, as,

"§ 16(a)(2)".

2. I am aware that, on cross-examination of Mr. Johnson by General Counsel, the following questions were propounded and answered as follows:

"Q. I'm handing you a copy of the work sheet on Engine No. 5586 . . .

. . .

"Q. Does this not reflect that this is the engine upon which Mr. Smith was working on the 13th and 14th?

"A. Yes, sir.

"Q. Does it not also reflect on Page 2 of this document that this engine was, in fact, finished on the 17th --

"A. That's correct . . . ." (Tr. 124)

The "work sheet on Engine No. 5586" was not otherwise identified. If General Counsel referred to Respondent

Exhibit 3, which is entitled "Daily Work Assignments", on the first page and on the second page is entitled "Daily Worksheet" and to the right is "ENG S/N:" and "#5586", then, although work was shown as having been performed on engine 5586 on Sunday, August 16, 1992, nothing is shown for

August 17, 1992.