

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. PENITENTIARY
LEAVENWORTH, KANSAS

Respondent

and

Case No. DE-CA-61001

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL
919

Charging Party

Steven B. Thoren, Esquire

For the General Counsel

Amy Whalen Risley, Esquire

For Respondent

President, Larry Raney

For the Charging Party

Before: JESSE ETELSON

Administrative Law Judge

DECISION

A disagreement arose over a policy regarding the wearing of smocks by food service employees at the U.S. Penitentiary, Leavenworth. The Charging Party (the Union) filed an unfair labor practice charge concerning the smock policy. This, in turn, led to certain remarks by Respondent's food service administrator, at a meeting of employees, concerning the filing of that charge. The complaint in the instant case

alleges that the food service administrator used "words to the effect that the [U]nion was spreading hate and discontent by filing [the charge] and that everyone was going to pay the consequences for it." These statements, it is further alleged, constituted an unfair labor practice in violation of section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute). Respondent denied that the administrator said what he is alleged to have said and that it committed an unfair labor practice.

A hearing was held in Leavenworth, Kansas, on April 29, 1997. Counsel for the General Counsel and for Respondent filed post-hearing briefs. Counsel for the General Counsel moved to correct the transcript of the hearing. The motion is granted. The following findings are based on the record, the briefs, my observation of the witnesses, and my evaluation of the evidence.

Findings of Fact⁽¹⁾

Background

The Union represents employees at the U.S. Penitentiary at Leavenworth, including those in the food service department, where bargaining unit employees supervise inmates in the preparation and serving of the institution's meals. A new department head, Food Service Administrator Randy Madan, took over in October 1995. He had come to Leavenworth from another institution within the Federal Bureau of Prisons and found the operations in the food service department unsatisfactory. Madan took a more hands-on approach to the management of the department than his predecessor did, and was stricter with regard to enforcing operational policy.

Madan offered to employees the purchase at Government expense of smocks to wear over their uniforms. He showed them the kind of smock he had purchased for employees at two other institutions. Receiving what he considered to be a favorable response, he ordered the smocks. They arrived in the spring or early summer of 1996 and were distributed to the employees.

When the weather turned hot, some of the employees found it uncomfortable to continue wearing the smocks. There is a dispute, which I find it unnecessary to resolve, as to whether each of the employees was told that wearing the smocks was mandatory at all times, at some times, or not at all.

The ULP Charge and the Labor Relations Climate

A hearing in a consolidated unfair labor practice case involving these parties had been scheduled for the latter part of August 1996. Numerous unfair labor practices by Respondent had been alleged and several food service department employees were the alleged targets of unlawful actions. The consolidated complaints included allegations of two unfair labor practices involving conduct by Madan.

On June 16, Union President Larry Raney, who was in home duty status in connection with events with which the scheduled unfair labor practice hearing was concerned, signed an unfair labor practice charge. A copy was delivered to Respondent's assistant human resources manager on June 21. The charge was not filed with the Authority until August 12, 1996. It alleges that:

On June 14, 1996, Mr. Randy Madan, FSA[,] changed the uniform of the cook foreman and has ordered the Union Steward to [wear] a long sleeve jacket which is not part of the uniform policy. The union has asked the agency to negotiate this change and they refused. The union has asked the agency to sign a statement that they are refusing to negotiate this change and they continued to refuse to provide this to the union.

Mr. Randy Madan said go ahead and file your bullshit ULP.

At some point the unfair labor practice charge was shown to Madan. In late August, aside from the hearing in the earlier unfair labor practice case, which was held from August 21 to August 23, events affecting the food service department resulted in more than the usual number of employee meetings.

The Meeting at Which Madan Remarked on the ULP Charge

Madan called one or more meetings of employees on August 26 or 27. He brought a copy of the charge to one of these meetings, and it was his

best recollection that he read it aloud. Madan also testified that he said, "I don't know who's spreading the lies and the hate and discontent." He testified that he told the employees that if they did not want to wear the smocks, that they could give them back, and that "you guys didn't have to wear the smocks if you didn't want to." Madan continued, as he testified, "[B]ut I am tired of all the lies and hate and discontent that's going on in the department. . . . Now, we've got all these folks sitting here. Bring it up now. Let's discuss it right now." No one responded to that invitation.

Madan denied that he referred to the Union or to any individual. However, he testified that he had said he was "tired of the hate, lies, and discontent" *at the point* of the meeting at which he had read the unfair labor practice charge (Tr. 175).

Among the employees present at this meeting were Union Steward James Healey and cook foremen (also called cook supervisors) Bruce Watt, Robert Liming, and probably Doyal Thomas Morris. Also present was Assistant Food Administrator Bruce Blackmon. Whether others who testified or who were mentioned by witnesses were actually present at this particular meeting is uncertain and ultimately not dispositive.

Bruce Watt, who took notes at the meeting for his personal use, as was his custom at employee meetings, confirmed that Madan mentioned the unfair labor practice charge. Watt characterized the meeting as being "primarily about the ULP" (Tr. 39). Complementing Madan's account in this respect, Watt perceived Madan as having connected the ULP charge to his discussion of the smocks. In Watt's words (Tr. 48-49):

Then [Madan] went into the--about the blue smocks. He says, I hear there's people have problems--the Union did a ULP and it appears, you know, they're just trying to stir up hate and discontent. . . . [He said] he wasn't really changing the uniform. It's in the Bureau purview to wear a blue smock. . . . [I]f we didn't like them, we could turn them back in, and . . . he said he wanted to address the individuals that wanted to play games; he says, When they twist and lie

and manipulate the truth about what he's trying to do, you know, he just felt he was in the right. He didn't appreciate it.

Then, according to Watt's testimony, and consistent with his notes, Madan said that 90 percent of the food service staff take care of business, and that 10 percent are "lames," and he would "take care of [them] [I]f they lie, cheat, and . . . connive, I'm going to get them." (Tr. 51, GC Exh. 3).

Watt was a highly credible witness, without any apparent axe to grind. His contemporaneous notes were not made with future litigation in mind and, although sketchy, offer substantial support for Watt's testimony. Further, significant details of his testimony, not included by Madan in his recounting of his own remarks, were corroborated by other witnesses called by both sides. For example, Healey, Liming, and Morris, the last a witness for Respondent, testified that Madan talked favorably about "90 percent" of the employees and unfavorably about the others. Both Healey and Morris had read Watt's notes, but Morris testified that they did not change his memory of the meeting. Morris testified that Madan said he would "turn the heat up" on those who were not among the 90 percent who were "conducive to the department." Testimony by Healey and Liming confirms that Madan used the expression "turn the heat up," although they attributed different language to Madan to describe those to be heated.

Morris was asked by Respondent's counsel whether Madan had stated that the Union was spreading lies, hate, and discontent. Morris answered in a manner that tends to corroborate Watt to the extent that Madan linked the ULP charge with the "lies, hate, and discontent." (This linkage is also consistent with Madan's testimony.) Morris answered: "Basically what [Madan] said [was] that there was some arbitration or ULPs going on at that time; and he said they were unfounded. He said basically, they--in his opinion, they weren't true." (Tr. 92.) Although the question elicited an implied denial that Madan's expressly accused the Union of "spreading lies, hate, and discontent," the implication remains that whoever filed the ULP charge was, according to Madan, doing just that.

Certain testimony of Assistant Food Administrator Blackmon, although elicited to negate the disputed allegations of the complaint, also implies a link between the filing of the charge and Madan's expression of displeasure. Blackmon placed Madan's remarks in the context of his being surprised and hurt by learning that a charge had been filed concerning the smocks. According to Blackmon, Madan reacted to this at the meeting by stating that:

If we can't communicate with each other, . . . we can't continue to operate as a team. . . . [I]f you got problems that . . . concern you that deeply, . . . [l]et's talk about it first. If we can't work them out within the [d]epartment, . . . we'll . . . proceed from there. . . . [T]his is a small department. We want to run it as a department. There's no need for us to go outside if we can handle things right here.

(Tr. 122-123.) Such remarks, taken alone, suggest that those who would go "outside" are not operating within the "team." If, as Morris testified, Madan also used words to the effect that he would turn the heat up on those 10 percent of the staff who were not "conducive to the department," a reasonable inference for the listener would have been that Madan was referring to those who were not operating within the "team." That reference, in turn, identified them with those who went "outside" by filing the unfair labor practice charge.

I am unable to determine the exact words that Madan used to describe those who were, in Morris's version, not "conducive to the department" and, in Watt's version, "lames." I do not, therefore, find that Madan did or did not use any of those words. However, I am persuaded that Morris and Watt each captured the essence of Madan's characterization, which, as amplified by Blackmon's testimony, placed those who went "outside" in an adversarial position to the department. I am not persuaded that, as is the import of Healey's and Liming's testimony, Madan made any explicit threats to retaliate against those responsible for filing the charge. However, he effectively attributed the "lies, hate, and discontent" to them and, while placing some emphasis on what he considered to be the falsity of the charge, conveyed the message that merely "go[ing] outside" was a bad thing to do. Thus, those who did so were implicitly among the 10 percent whom he would "take care of" or "get," or on whom he would "turn the heat up."

Conclusion

The objective standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is its

tendency, under the circumstances, to coerce the employee, or whether the employee could reasonably have drawn a coercive inference from it. This standard is not based on the subjective perceptions of the employee or on the intent of the employer. *Department of the Air Force, Scott Air Force Base, Illinois*, 34 FLRA 956, 962 (1990) (*Scott AFB*).

Respondent argues, among other things, that Madan's remarks should be evaluated under the principle that, when two equally available interpretations are available, it is not proper to "choose the unlawful and eschew the innocent" interpretation. *United States Air Force, Lowry Air Force Base, Denver, Colorado*, 16 FLRA 952, 961 (1984), quoting *Department of the Navy, Portsmouth Naval Shipyard*, 6 FLRA 491, 496 (1981). See also *U.S. Penitentiary, Florence, Colorado*, 52 FLRA 974, 983 (1997). In view of the Authority's "objective standard," as articulated and as applied in *Scott AFB*, I conclude that "the equally available interpretations" test, at least as applied to cases such as this one, is no longer viable. Thus, if an employee could reasonably have drawn a coercive inference from a statement, the fact that the statement had an "equally available" innocent interpretation can no longer shield it from the Statute's proscriptions. Rather, in order to serve as an effective shield, the innocent interpretation would have to be at least clear enough an indication of the meaning of the statement as to negate the reasonableness of the coercive interpretation.

As is evident from my findings of fact, a perception by the employees at the meeting in question that Madan's remarks implied a threat of retaliation against any employees responsible for the unfair labor practice charge would have been reasonable, based on the objective standard. There is no dispute over the filing of the charge being protected activity. Therefore, such an implied threat interfered with, restrained, or coerced employees in the exercise of a right under the Statute, within the meaning of section 7116(a)

The Remedy

In addition to the traditional cease and desist order and the posting of a notice to employees, Counsel for the General Counsel requests two "nontraditional" remedies that focus on Madan's personal role in this unfair labor practice and the fact that I found, in the previous cases heard in August 1996, that he had a role in an unfair labor practice that occurred in January 1996. The special remedies that the General seeks are (1) to include Madan's name in the posted notice to employees and (2) to direct Respondent to place a nondisciplinary entry in Madan's official personnel file to the effect that he was found to have violated the Statute.

The Authority determines the appropriateness of a nontraditional remedy, assuming that there is no legal or public policy impediment to its imposition, according to the same criteria as are applicable to other remedies that fall within the broad scope of its remedial powers. That is, the Authority will examine whether the remedy is reasonably necessary and would be effective to recreate the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the policies of the Statute, including the deterrence of future violative conduct. *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 161 (1996) (*F.E. Warren*).

Counsel for the General Counsel contends that including Madan's name on the notice to employees will deter future violative conduct by Madan and other supervisors and will inform other supervisors and managers of the conduct by Madan that led to the finding of a violation of the Statute. Only through such a notice, the General Counsel argues, will employees and supervisors believe that the violations will be remedied and that the Statute will be complied with. The General Counsel also asserts that an entry in Madan's personnel file is necessary to make clear that neither a violation of the Statute nor "such recidivist conduct by a supervisor" will be tolerated.

I am not persuaded that a sufficient basis has been laid to establish the necessity of either of these remedies for the purposes set forth in *F.E. Warren*. With respect to the inclusion of Madan's name on the notice to employees, I conclude that the objectives sought by the General Counsel will be satisfied by including in the notice, as the General Counsel has also requested, a description of the unlawful conduct that I have found to have occurred. The Authority has determined that the purposes served by the notice to be posted, in the format previously provided, would be enhanced by explicitly stating that the Authority has found the respondent to have violated the Statute, and has made such language a part of its standard notice. *United States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914, 916 (1996). Including Madan's name would serve no additional educational purpose, either for other supervisors or for employees. *Cf. Department of Veterans Affairs Medical Center, Phoenix, Arizona*, 52 FLRA 182, 186-87 (1996) (assertion that supervisors sought to be named in notice "stand in positions of authority before unit employees" did not establish such naming to be an appropriate remedy). Moreover, in the absence of a persuasive showing that such a remedy is necessary for its educational effect, its justification must rest largely if not solely on its deterrent effect. A remedy so grounded might well fall outside the broad scope of the Authority's remedial powers. *See United Steelworkers of America v. NLRB*, 646 F.2d 616, 629-30 (D.C. Cir. 1981) (*Steelworkers*).

In the same decision in which I found that Madan had a role in an

unfair labor practice involving these parties, I presented an exhaustive discussion of a number of requested nontraditional remedies, including the placing of a nondisciplinary entry in the personnel file of Respondent's warden, who was found to have made unlawful statements resembling to some extent those made by Madan in this case. I concluded there that such a remedy was not reasonably necessary under the *F.E. Warren* standard, and I see no need to repeat my lengthy rationale here. *U.S. Penitentiary, Leavenworth, Kansas*, Case Nos. DE-CA-60026 et al., OALJ 97-18 (Feb. 28, 1997) 68-71, *exceptions pending*. The only difference here is that, since I have previously found Madan to have participated in an unfair labor practice, albeit of a different nature, the General Counsel is able to make a nonfrivolous claim that he is a recidivist. However, I cannot accept the validity of that label, at least for remedial purposes.

In unfair labor practice cases, the justification for treating a repeating offender differently for remedial purposes is that his willingness to violate the law in defiance of past orders is thought to have a more pronounced effect on employees. *Steelworkers* at 631. In this case, Madan's conduct occurred before there was any finding that he committed an unfair labor practice or any order that he cease. Moreover, the unfair labor practice finding involving Madan has been contested and is under review by the Authority. I am skeptical of my power to treat my own finding as final by giving it the effect that the General Counsel would have me give it.

The General Counsel is perfectly justified in seeking innovative remedies that are tailored to the circumstances of particular cases or can be shown to have broad applicability. I continue to believe, however, that to the extent that the remedies currently being applied do not perform the functions for which they are intended, the problem lies more in the *when* than in the *what*. I recommend 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 Federal Service Labor-Management Relations Statute (the Statute), the U.S. Penitentiary, Leavenworth, Kansas, shall:

1. Cease and desist from:

- (a) Making statements to employees which discourage any employee

from exercising the rights accorded by the Statute to address concerns about conditions of employment and to act for a labor organization in the capacity of a representative or steward freely and without fear of penalty or reprisal.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights assured them by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Post at the U.S. Penitentiary, Leavenworth, Kansas, copies of the attached Notice on forms furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Warden, U.S. Penitentiary, Leavenworth, Kansas and shall be posted and maintained for 60 consecutive days in conspicuous places, including bulletin boards and all other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to Section 2423.30 of the Authority's Regulations, notify the Regional Director, Federal Labor Relations Authority, Denver Region, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, July 01, 1997.

JESSE ETELSON

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, Leavenworth, Kansas, 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, through any supervisor or management official, make statements to employees with words to the effect that employee who filed an unfair labor practice charge were spreading hate and discontent and that there would be adverse consequences for such employees.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(Activity)

Dated: _____ 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 its provision, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone number is: (303) 844-5224.

1. It is impossible . . . to have objective knowledge of the facts as they really are. Out of one and the same mass of facts, each of us, based on individual experience, decides what "the" facts are. What one has learned to regard as important is what one sees, what one most readily notes about a situation. . . . For lawyers in particular, such classifying is a tacit precondition for handling any legal dispute, for understanding fact situations.

Karl Llewellyn, *The Case Law System in America* § 42 (1989).