

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: May 16, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ELKTON, OHIO

Respondent

and

Case No. CH-CA-04-0345

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 607, AFL-CIO

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO Charging Party	Case No. CH-CA-04-0345

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JUNE 15, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

PAUL B. LANG
Administrative Law Judge

Dated: May 16, 2005
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO Charging Party	Case No. CH-CA-04-0345

Jaime Olson
For the General Counsel

Nicole Hogan
For the Respondent

Carl Halt
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On April 22, 2004, the American Federation of Government Employees, Council of Prison Locals, Local 607 (Union) filed an unfair labor practice charge against the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio (Respondent). On July 28, 2004, the Acting Regional Director of the Chicago Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that, on or about April 17, 2004, Lieutenant Doug Johnson told Jonathan Bush, a member of the bargaining unit represented by the Union, that he could not allow Bush to work overtime because of the Union. It was further alleged that Johnson's statement was an unfair labor practice in violation of §7116(a) (1) of the Statute.

A hearing was held in Cleveland, Ohio on October 20, 2004. All parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Preliminary Matters

The General Counsel has submitted two motions to correct the hearing transcript. Since neither motion has been opposed and the proposed corrections are not crucial to the relevant issues, both of the motions are granted.

Positions of the Parties

The General Counsel maintains that on Saturday, April 17, 2004¹, Bush asked Johnson if he could work overtime from 10:00 a.m. to 2:00 p.m. on April 18.² Johnson responded in an aggravated tone, stating that Bush could not "fucking do that." According to the General Counsel, Johnson further stated that the Union had filed a grievance and that he could not assign overtime. When Bush asked why not, Johnson replied, "Because of your fucking union." The General Counsel argues that Johnson's denial of raising his voice and using profanity is not credible because the Respondent did not call Lieutenant Mooney as a witness in spite of the fact that he was present during the conversation.

The General Counsel further maintains that Bush was upset about his encounter with Johnson and discussed the matter with Carl Halt, the President of the Union. Halt told Bush that the Union had filed a grievance over the denial of night differential pay to employees who had worked overtime which had been assigned prior to the commencement of the administrative workweek.

The Respondent maintains that Johnson explained to Bush that he could not be assigned to work overtime as requested prior to 12:01 a.m. When Bush asked why, Johnson told him that he should speak to the Union. The Respondent denies

1

All subsequently cited dates are in 2004 unless otherwise indicated.

2

It is undisputed that Johnson was a Shift Lieutenant and that his duties included the assignment of overtime to Correctional Officers such as Bush.

that Johnson used the word "fucking" during his conversation with Bush and argues that Bush's testimony on that point is not credible because he did not use the word in a written statement which he submitted following the incident. Furthermore, the General Counsel did not call any of the other Correctional Officers who allegedly heard the conversation as witnesses.

The Respondent argues that Johnson's comment to Bush could not reasonably have been construed as being either coercive or as threatening retaliation because of protected activity.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. The American Federation of Government Employees (AFGE) is a labor organization as defined in §7103(a)(4) of the Statute and is the exclusive representative of a unit of employees of the Federal Bureau of Prisons which is appropriate for collective bargaining. The Union is the agent of AFGE for the representation of bargaining unit employees assigned to the Respondent.

On March 11 the Union filed a grievance (GC Ex. 2) alleging that the Respondent had:

. . . knowingly and willfully violated Federal Pay Regulations, The Fair Labor Standards Act, Master Agreement and Program Statement 3000.02 in that [the Respondent] knowingly and willfully failed to pay shift differential to all staff that worked overtime that [had] been scheduled prior to the administrative workweek.

The grievance was filed by Halt on behalf of the Union and was still active as of the date of the hearing (Tr. 14).

In mid-April Johnson was working as a relief lieutenant; his duties included the assignment of overtime. At some point after the filing of the grievance but prior to April 17 Johnson was instructed by Captain Odom, his superior, not to schedule overtime for the forthcoming administrative workweek (which begins on Sunday) prior to 12:01 a.m. on Sunday. Johnson was not told the reason for the order and did not ask (Tr. 36, 37). Prior to Johnson's conversation with Odom he would assign overtime by referring to a sign-up list that was posted from 8:00 a.m. on Wednesday to 4:00 p.m. on Saturday. Correctional Officers who were interested in working overtime would put their

names on the list. Johnson would then assign overtime in order of seniority and would call the assignees at home.

On Saturday, April 17 Bush approached Johnson and asked if he could work overtime from 10:00 a.m. to 2:00 p.m. on April 18. It is undisputed that Johnson told Bush that he could not schedule the overtime prior to 12:01 a.m. on April 18 and that Johnson made some reference to the Union. There is, however, a significant difference in the positions of the parties concerning the remaining details of the conversation. Bush testified that, when he asked Johnson about overtime, Johnson said that he "couldn't fucking do that" and that he spoke in a "very aggravated" tone. Bush also testified that Johnson mentioned that the Union had filed a grievance and that, when he asked why his overtime could not be scheduled on Saturday, Johnson said, "Because of your fucking union". Bush stated that he was upset that the Union would interfere with his overtime. He was also "stunned" by Johnson's tone of voice because Johnson was normally soft spoken.

Bush spoke to Halt about the matter at which time Halt told him about the grievance.³ When Bush submitted a written statement about the incident he did not mention that Johnson had used the word "fucking" because Judy Allen took the statement⁴ and he was uncomfortable using the language (Tr. 29).

Johnson testified that he simply told Bush that he could not schedule him for overtime until the next day. When Bush asked him why, Johnson told him that it was because of the administrative workweek and that he should "see his union". Johnson acknowledged that he was aware of a dispute between the Respondent and the Union concerning the overtime pay differential, but testified that he did not mention the dispute during his conversation with Bush. According to Johnson, he did not become aware that a grievance had been filed until several weeks after his conversation with Bush. Johnson also acknowledged that he did not agree with Captain Odom's order that he not schedule overtime until 12:01 a.m. on Sunday; Johnson did not like waking people up at 12:01 a.m. (Tr. 37-41).

3

It is unclear whether Bush was eventually allowed to work overtime on April 18. The issue is not crucial to this Decision because the General Counsel has not alleged a violation of §7116(a)(2) of the Statute.

4

Although neither party has asked that I take official notice of the identity of Judith Allen, it is a matter of record that she is an employee of the Authority.

Halt testified that on April 19 he spoke with Bush about Bush's conversation with Johnson. After Bush informed Halt of Johnson's comment about his (Johnson's) inability to schedule overtime before 12:01 a.m. on Sunday, Halt told Bush about the grievance. Halt also told Bush that Johnson had spoken improperly by referring him to the Union.

Halt also testified that on or about October 3 (after the issuance of the Complaint and Notice of Hearing) Johnson approached him at a high school football game and asked if "this whole thing can go away" if he apologized for his comment to Bush (Tr. 15-18).

Upon review of the evidence I have concluded that it is more likely than not that Johnson raised his voice and used profanity in his conversation with Bush. The inconsistency between Bush's testimony and his written statement is adequately explained by his reluctance to use profanity. Furthermore, I find it significant that counsel for the Respondent did not question Johnson about his use of profanity or his tone of voice, nor did he call Lieutenant Mooney to rebut Bush's testimony. It is less significant that the General Counsel did not call other Correctional Officers who were also present because those employees may have been reluctant to testify against a supervisor.

Discussion and Analysis

§7116(a) (1) of the Statute prohibits actions by an agency which "interfere with, restrain or coerce" employees in the exercise of their rights under the Statute. Under §7102 of the Statute, employees' rights are defined as:

. . . the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal

In determining whether the actions or speech of agency representatives are coercive, the Authority has adopted an objective standard. That standard is not based upon the subjective perceptions of the employee or the intent of the employing agency. Rather, the controlling factor is whether, under the circumstances, the conduct in question would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the action, *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994).

A review of the evidence indicates that, while Johnson's language and tone of voice were intemperate, they could not reasonably be construed as coercive. In the first place, Bush's request for overtime had nothing to do with his status as a bargaining unit employee or with his relationship with the Union.⁵ Secondly, Johnson's statement to Bush could not reasonably have led Bush to believe that he would not be assigned overtime because of his status as a bargaining unit member. If that were true, then Johnson would have stopped assigning overtime altogether, since all Correctional Officers are members of the bargaining unit. The only reasonable interpretation of Johnson's statement was that Bush would not be approved for overtime when he submitted his oral request.⁶ Once Halt informed Bush of the grievance that had been filed over a month before, Bush should have understood that, in refraining from assigning overtime prior to Midnight on Sunday, the Respondent was doing no more than acquiescing, whether or not permanently, to the Union's position, as stated in the grievance, that the "early" scheduling was improper and even unlawful.⁷ Although Bush could have reasonably surmised that Johnson was annoyed with the Union, there was no basis for his feeling threatened by Johnson or the Respondent or being otherwise discouraged from supporting the Union.

It would be difficult to imagine any basis for the General Counsel's claim of coercion if Johnson would have controlled his anger and either explained the situation to Bush or simply referred him to the Union. Johnson's outburst, while regrettable, is simply not sufficient to support the charge against the Respondent.

For the foregoing reasons, I have concluded that the Respondent did not commit an unfair labor practice by virtue of Johnson's statement to Bush on April 17. Accordingly, I recommend that the Authority adopt the following Order:

5

There is no evidence that Bush was any more active in Union affairs than any other member of the bargaining unit.

6

Bush testified that he approached Johnson because he (Bush) had not put his name on the overtime list prior to 4:00 p.m. on Saturday (Tr. 23).

7

The General Counsel has not alleged that the Respondent's change to the method of assigning overtime was a unilateral change to conditions of employment in violation of §7116(a) (5) of the Statute.

ORDER

IT IS HEREBY ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C. May 16, 2005.

PAUL B. LANG

Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. CH-CA-04-0345 were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

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Dated: May 16, 2005
Washington, DC