

UNITED STATES OF AMERICA

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

U.S. PENITENTIARY FLORENCE, COLORADO	
Respondent	
and	Case No. DE-CA-50259
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1301	
Charging Party	

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 30, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: August 30, 1996
Washington, DC

UNITED STATES OF AMERICA

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

MEMORANDUM
1996

DATE: August 30,

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. PENITENTIARY
FLORENCE, COLORADO

Respondent

and

Case No. DE-CA-50259

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1301

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. PENITENTIARY FLORENCE, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1301 Charging Party	Case No. DE-CA-50259

Steven R. Simon
Octavia R. Johnson
Counsel for the Respondent

Carl Mestas
Representative of the Charging Party

Michael Farley
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, through the conduct of Captain Terry Hines, made certain statements, during mid-December 1994 and on or about January 3, 1995, to bargaining unit employees, the President and Vice President of the Charging Party (Union), which violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116 (a)(1).

Respondent's answer denied the alleged statements and any violation of the Statute.

A hearing was held in Denver, Colorado. The parties were represented and afforded full opportunity to be heard,

adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs.

For the reasons set out below, I conclude that a preponderance of the evidence establishes that Respondent violated section 7116(a)(1) as alleged.

The General Counsel presented the testimony of Dale Lewsader, a unit employee and President of the Union, and Christopher Kester, a unit employee and Vice President of the Union, who testified as to the alleged statements of Captain Terry Hines.

The Respondent contended that the complaint should be dismissed because the original and amended charge were untimely filed and the amended charge presented an entirely new and separate charge. The Respondent also presented the testimony of Captain Hines who denied the alleged statements, stated that he had never had a complaint filed against him in some 16 years as a supervisor, and that he had received reports that Lewsader and Kester were out to get him.

Based on the entire record, including the arguments of counsel concerning the credibility of the witnesses, I have credited the testimony of Mr. Lewsader and Mr. Kester in making the findings that Captain Hines made the remarks attributed to him. I found their testimony inherently probable in light of the surrounding circumstances, the workplace background, and my observation of the witnesses and their demeanor. Accordingly, I make the following findings of fact, conclusions of law, and recommendations based on the entire record:

Findings of Fact

The Statements and Their Background

During September 1994, Captain Terry Hines, a supervisory correctional officer of Respondent, issued a revised post order which changed the hours of work for all number one officers assigned to the housing units on the evening watch. The hours of work for these officers, which had been 4:00 p.m. to 12:00 midnight, were changed to 3:45 p.m. to 12:00 midnight.

Based on an employee complaint to the Union in early November 1994, Christopher Kester, a unit employee and Union Vice President, conducted an investigation and determined that although the officers were obliged to work 15 minutes in addition to their regular eight-hour shift, they were not

being compensated for that additional time. As a result of Kester's inquiries, the Union decided to pursue a grievance on behalf of the affected employees.

On approximately December 15, 1994, Dale Lewsader, a unit employee and Union President, had a brief meeting with Captain Hines in Hines' office. At the outset of the meeting, Hines told Lewsader that he had a problem with the overtime issue that "you guys are pursuing." Lewsader asked Hines what he was referring to, and Hines explained that if he was mandated to pay all the affected employees backpay for the additional 15 minutes, then he was going to hold every employee responsible for it by making employees stay until their prescribed time in the post orders.

In response, Lewsader told Hines that he couldn't do that, to just leave the issue alone as "we are looking at it." Hines replied, "No, . . . if the Union is going to pursue this and these employees are going to go ahead and get relieved early, I will just make them come up here, and they can stand by the lieutenant's office until the prescribed times in the post orders, and they can leave then."

Hines was referring to discontinuing a practice at the Respondent whereby employees can report for duty up to 30 minutes before the scheduled start of their shifts. As a result of employees reporting for duty early, the employees being relieved by the incoming employees are permitted to leave work prior to the scheduled end of their shifts. This arrangement, which allows employees to begin and end their shifts earlier than the watch schedules indicate, does not normally result in any employee working less than eight hours as required by the schedule.

At a labor-management relations meeting on December 29, 1994, Respondent announced that the hours of work for the number one officers assigned to the housing units on the evening shift were being returned to 4:00 p.m. to 12:00 midnight effective that day. As a result, the Union requested to table its request for overtime for such officers until it could obtain the names of the affected officers from Captain Hines.

On January 3, 1995, Union Vice President Kester met with Captain Hines in his office. Kester inquired about the status of the list and a brief conversation ensued. Hines became irate and said he couldn't believe that the Union was going to push the issue and make him pay the 15 minute increments for overtime. Hines stated that if the Union pursued the matter, he would ensure that the staff's arrival

and departure times were more closely monitored. Kester asked Hines what he meant by that, and Hines stated, "Well, two can play this game." At that point, Kester terminated the conversation and left Hines' office.

The issue of overtime payments to the number one officers on the evening watch was subsequently resolved at the next labor-management relations meeting on January 26, 1995. The affected employees were provided with backpay in the form of overtime at the rate of one and one half times their regular pay for the period of September 14 to December 28, 1994.

The practice of employees assuming watches early and then departing early when relieved by incoming employees had not been changed as of the date of the hearing.

The Unfair Labor Practice Charges

The original charge in this case was filed on February 2, 1995. The charge was described as follows:

On Tuesday January 3, 1994, at approximately 3:45PM CPT. Terry Hines called S.O.S. Jay Clark (MR. Clark is not a Union Official) into his office. Mr. Hines instructed Mr. Clark to inform the officers (Bargaining Unit Employees) in the Correctional Services Department that if the Union or the Bargaining Unit Employees filed a grievance against him (CPT. Hines) in regards to an overtime issue that he (CPT. Hines) retaliate against all the Bargaining Unit Employees in his department. Thru means of intimidation and stricter compliance of policies. Due to the fact that CPT. Hines was interfering with internal Union business has in turn caused Union Bashing due to the fact that his threats resulted in Bargaining Unit Employee(s) to withdraw from the Union.

The first amended charge was filed on February 8, 1996 and was described as follows:

During mid-December 1994, Captain Terry Hines stated to Dale Lewsader, Union President, words to the effect that if the Union pursued an issue involving the payment of overtime to employees, then Hines would discontinue the practice of allowing employees to leave their assigned posts early, once relieved. In addition, on or about January 3, 1995, Captain Hines stated to Chris

Kester, Union Vice-President, words to the effect that if the Union pursued an issue involving the payment of overtime to employees, then Hines would more closely monitor the starting and quitting times for all Correctional Officers.

The Complaint, issued February 28, 1996, provided, in pertinent part, as follows:

15. During mid-December 1994, Respondent, through Captain Terry Hines, told Dale Lewsader, a unit employee and President of AFGE, Local 1301, words to the effect that if the Union pursued an issue involving the payment of overtime to employees, then Hines would discontinue the practice of allowing employees to leave their assigned posts early, once relieved.

16. On or about January 3, 1995, Respondent, through Captain Terry Hines, stated to Chris Kester, a unit employee and Vice-President of AFGE, Local 1301, words to the effect that if the Union pursued an issue involving the payment of overtime to employees, then Hines would more closely monitor the starting and quitting times for all Correctional Officers.

Discussion and Conclusions

A. The Complaint Was Based On A Timely And Sufficient Charge

Respondent claims that the charge and amended charge were untimely filed and, accordingly, the complaint fails. Respondent also contends that the amended charge and the complaint have no relationship with the charge and do not closely relate to the events cited in the charge.

In U.S. Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania, 40 FLRA 449, 455 (1991) (Bureau of Prisons), rev'd as to other matters sub nom. United States Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania v. FLRA, 988 F.2d 1267 (D.C. Cir. 1993), the Authority stated, in part, as follows:

The Authority has held that the issuance and contents of a complaint comply with the requirements in section 2423.12 of our Rules and Regulations if the allegations in the complaint bear a relationship to the charge and are closely

related to the events complained of in the charge. Bureau of Land Management, Richfield District Office, Richfield, Utah, 12 FLRA 686, 698 (1983); Department of the Interior, Washington, D.C. and Bureau of Indian Affairs, Washington, D.C. and Flathead Irrigation Project, St. Ignatius, Montana, 31 FLRA 267, 276 (1988). In Department of Defense Dependents Schools, Mediterranean Region, Naples American High School (Naples, Italy), 21 FLRA 849 (1986), the Authority adopted the judge's findings that: (1) the charge serves merely to initiate an investigation and to determine whether a complaint in a matter should be issued; (2) a charge is sufficient in an administrative proceeding if it informs the alleged violator of the general nature of the violation charged against him; and (3) where a procedural defect exists concerning the charge, a respondent must be prejudiced by the alleged defect. 21 FLRA at 861. Moreover, in analogous situations arising under the National Labor Relations Act, 29 U.S.C. §§ 151 et seq., courts have found that it is the function not of the charge but of the complaint to give notice to a respondent of specific claims made against it; that the purpose of a charge is merely to set in motion the machinery of an inquiry; and that the investigation may deal with unfair labor practices that are related to those alleged in the charge and grow out of those allegations while the processing is pending. See NLRB v. Fant Milling Co., 360 U.S. 301, 307-308 (1959).

If the complaint of February 28, 1996 alleged a violation on January 3, 1994, which was more than six months before the filing of the original charge on February 2, 1995, and the amended charge of February 8, 1996 bore no connection to the original charge and was a novel charge, Respondent would be correct that the complaint should be dismissed. However, these circumstances do not exist.

The original charge of February 2, 1995 alleges a statement by Captain Hines on Tuesday, January 3, 1994 to an employee named Jay Clark threatening to retaliate against all bargaining unit employees if the Union filed a grievance against him over the overtime issue. The amended charge of February 8, 1996 alleges a January 3, 1995 statement by Captain Hines to Chris Kester threatening to monitor the starting and quitting times if the Union pursued the issue involving the payment of overtime. The amended charge also included the allegation that Captain Hines made a statement

to Union President Dale Lewsader during mid-November 1994 that if the Union pursued an issue involving the payment of overtime to employees, then Hines would discontinue the practice of allowing employees to leave their assigned posts early, once relieved. The February 28, 1996 complaint basically matches the violations alleged in the amended charge.

Section 7118(a)(4)(A), with an exception not relevant here, provides that "no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority." The complaint in issue complies with this section as it alleges unfair labor practices which occurred on or about December 15, 1994 and January 3, 1995, all within two months prior to the filing of the original charge on February 2, 1995.

Further, it is also apparent that the allegations in the amended charge and complaint bear a relationship to the original charge, are closely related to the events complained of in the original charge, and are based on events occurring within the six-month period preceding the original charge, the standards required by the Authority. Bureau of Prisons, 40 FLRA at 455; Department of Housing and Urban Development, Region X, Seattle, Washington, 41 FLRA 363, 371-72 (1991); United States Department of Veterans Affairs, Washington, D.C. and Veterans Administration Medical Center, Amarillo, Texas, 42 FLRA 333, 339-40 (1991).

The amended charge changed an obvious typographical error with regard to the date of the alleged violation in the original charge from "Tuesday, January 3, 1994" to "on or about January 3, 1995." I agree with the General Counsel that the error would have been obvious to the Respondent as demonstrated by the fact that January 3, 1994 did not fall on a Tuesday, while January 3, 1995 did, and the common tendency of people to mistakenly use the date of the old year in the early part of a new year (here February 2).

In addition, both charges were filed against the same activity, identified the same management representative, Captain Hines, as the individual responsible for the alleged violation, and described alleged coercive statements by Hines to bargaining unit employees in response to the Union's pursuit of an issue involving the payment of overtime. Both charges describe Hines' statements as threats that management would require strict compliance with policies if the Union pursued an overtime issue.

While the original charge alleges that the coercive statement was made to a Jay Clark, the amended charge alleges such statement by Captain Hines to Chris Kester and an additional statement to Dale Lewsader. These employees, Kester and Lewsader, were also specifically identified in the complaint, thus giving Respondent adequate notice of the alleged violations. Thus, the allegations in the amended charge and complaint of unlawful statements by Captain Hines bear a relationship to the original charge of unlawful statements by Captain Hines and are closely related to the events complained of in the charge. Cf. Equal Employment Opportunity Commission, San Diego Area, San Diego, California, 48 FLRA 1098 (1993).

Further, as noted, a charge is sufficient if it informs the alleged violator of the general nature of the violation charged; only defects in a charge that prejudice a respondent will result in dismissal of a complaint. Bureau of Prisons, 40 FLRA at 455; U.S. Department of Justice, Office of Justice Programs, 50 FLRA 472, 476-77 (1995). Respondent has not pointed to any prejudice it suffered as a result of the procedures followed in this case. Accordingly, the facts and allegations in the complaint are properly before the Authority.

B. The Statements Made by Captain Hines Violated Section 7116(a)(1) of the Statute

Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, including the right to act as a labor organization representative, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116 (a)(1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of such right.

The Authority has held that the standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994).

As set forth in detail above, the record reflects that Captain Hines stated to unit employee and Union President Lewsader that he had a problem with the overtime issue the Union was pursuing, and if he was mandated to pay all the affected employees backpay, then he was going to hold every employee responsible for it by making employees stay until their prescribed time in the post orders. Similarly, Captain Hines stated to unit employee and Union Vice President Kester that if the Union pursued the matter, he would ensure that the staff's arrival and departure times were more closely monitored.

The record reflects that by referring to these arrival and departure times, Captain Hines was threatening, if the Union continued to process the grievance, to require strict adherence to the specified arrival and departure times, and thereby change a practice whereby employees could assume their watches early and then depart early if similarly relieved by incoming employees.

I conclude that, under the circumstances, the statements clearly conveyed the impression that changes in conditions of employment would be attributable to the pursuing of a Union grievance. Such statements would tend to coerce or intimidate the employees from exercising the statutory right to assist a labor organization, including acting as a labor organization representative, and from also exercising the statutory right to present and process grievances. See 5 U.S.C. §§ 7102, 7114(a)(1), 7121(b)(3)(A). As the General Counsel argues, such statement could also have reasonably coerced the Union from processing the overtime claim for fear that the Union would be blamed for causing the discontinuance of the early relief policy and thus face a decline in its standing among employees. Accordingly, such conduct violated section 7116(a)(1) as alleged. U.S. Customs Service, Region I, (Boston, Massachusetts), 15 FLRA 309 (1984) (agency violated section 7116(a)(1) when a supervisor told employees that the reason they lost the privilege of sitting on stools at work was as a result of a grievance being filed by an employee who had been denied the use of a stool).

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order¹:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Penitentiary, Florence, Colorado, shall:

1. Cease and desist from:

(a) Making statements to its employees, who are represented by the American Federation of Government Employees, Local 1301 (Union), the agent of the exclusive representative of its employees, to the effect that if the Union pursues a demand for overtime payments on behalf of employees, then management will change an existing condition of employment.

(b) Making statements, comments, or in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute to form, join, or assist the Union, including their right to act as a Union representative, and the right, in that capacity, to present and process grievances and present the views of the Union to appropriate authorities.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

1

Counsel for the General Counsel has requested as an additional remedy that Respondent be ordered to place an annotation in the official personnel file of Captain Terry Hines noting that his actions in this case were found to violate the Statute. Counsel states that this action would create a formal record of Hines' culpability and discourage similar actions in the future. Counsel has not directed my attention to any decision in similar situations where the Authority has concluded that the purposes of the Statute would be enhanced by such an order. However, since this is the third violation involving statements by supervisors of the Respondent (see decision in Cases No. DE-CA-50645 and DE-CA-50537 issued this date), I believe that, in addition to the customary posting, an order requiring Respondent to distribute a copy of the notice to all of its supervisors and management officials would assist in carrying out the purposes of the Statute in this instance.

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

(b) Reproduce and distribute signed copies of the attached Notice to all supervisory personnel and management officials.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 29, 1996

GARVIN LEE OLIVER
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, Florence, Colorado 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 make statements, comments, or in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute to form, join, or assist the American Federation of Government Employees, Local 1301 (Union), the agent of the exclusive representative of our employees, including their right to act as a Union representative, and the right, in that capacity, to present and process grievances and present the views of the Union to appropriate authorities.

WE WILL distribute to all supervisory personnel and management officials signed copies of this Notice.

(Activity)

Date:

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 any of its provisions, they may communicate directly with the Regional Director of the Denver Region, Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581 and whose telephone number is (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. DE-CA-50259, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Mr. Steven R. Simon
U.S. Department of Justice
Federal Bureau of Prisons
Labor Law Branch, West
522 North Central Avenue, Suite 247
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Ms. Octavia R. Johnson
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Washington, DC 20001

Dated: August 30, 1996
Washington, DC