Office of Administrative Law Judges

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

MIAMI, FLORIDA

Respondent

and

NATIONAL TREASURY EMPLOYEES UNION

Charging Party

Case No. AT-CA-01-0123

Ruth Pippin Dow, Esquire

For the General Counsel

Craig L. Moses, Esquire

For the Respondent

Steven P. Flig, Esquire

William Harness, Esquire

For the Charging Party

Before: RICHARD A. PEARSON

Administrative Law Judge

DECISION

On March 30, 2001, the General Counsel of the Federal Labor Relations Authority, by the Acting Regional Director of its Atlanta Region, issued an unfair labor practice complaint, alleging that the Department of the Treasury, U.S. Customs Service, Miami, Florida (the Respondent or the Agency) violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by interfering with an employee's right to consult his union representative. The Respondent answered the complaint on April 24, 2001 and denied committing an unfair labor practice.

A hearing was held on this matter on June 7, 2001, in Miami, Florida, at which all parties were present and afforded the opportunity to be heard, to introduce evidence and to examine and cross-examine witnesses. The Respondent, the General Counsel and the Charging Party subsequently filed post-hearing briefs, which I have fully considered. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The National Treasury Employees Union (the Charging Party or the Union) is the exclusive collective bargaining representative for a nationwide unit of the Agency's employees. The parties have entered into a collective bargaining agreement covering many conditions of employment, including the assignment of overtime (See, e.g., Respondent Exhibit 2). They have also negotiated, in partnership, a National Inspectional Assignment Policy (NIAP)(Respondent Exhibit 8), which sets forth in much greater detail the rules and procedures for assigning overtime and which permits the negotiation of supplemental overtime agreements on the regional and local levels, as long as the supplemental agreements do not conflict with the principles of the NIAP (Respondent Exhibit 8, pp. 17-18 and Appendix Two).

NTEU Chapter 137 is the Union's agent for representing bargaining unit employees in South Florida, including the ports of West Palm Beach and Fort Pierce. Representatives of Chapter 137 and the Agency sit jointly on the West Palm Beach Port Partnership Council, which strives to resolve local problems consensually. Despite the length and

complexity of the NIAP, overtime issues are a common source of questions for Union stewards and for the Port Partnership Council.

At the Port of West Palm Beach (where Customs employees work at several locations at the international airport and the seaport), the initial work of assigning overtime is performed by a bargaining unit employee, known as the scheduling officer. This employee inputs daily overtime data into the computer system and maintains a ledger showing each employee's overtime earnings for the fiscal year. Pursuant to the NIAP, the employee with the lowest overtime earnings is normally entitled to first priority in overtime assignments. As employees report to work each day, they notify the scheduling officer whether they will or will not accept overtime that day.[1] The scheduling officer also gathers information from his supervisor and from other sources regarding what jobs may require overtime, and he then prepares the Overtime Assignment Schedule (OAS), which reflects the specific overtime assignments for each employee for that day. After preparing a draft of the OAS, the scheduling officer submits it to the Supervisory Customs Inspector for review, changes and final approval. The supervisor, not the scheduling officer, makes all decisions concerning overtime assignments. The West Palm Beach Port Partnership Council requires that the OAS be posted by 2:00 p.m. and that any amendments be made by 2:30 p.m. (See Charging Party Exhibit 1.)

This case focuses on a series of conversations between Supervisory Customs Inspector Luis Rodriguez and Customs Inspector Shawn Hinman on November 2 and 5, 2000, on the subject of overtime scheduling. The complaint alleges that during one of the conversations on November 2, Rodriguez "verbally harassed and intimidated" Hinman for consulting Union Steward Carl Picerno regarding an overtime question; it further alleges that on November 5, Rodriguez verbally counseled Hinman for contacting his steward on November 2 and "forbade Hinman from going to Picerno with any further overtime questions." The primary witnesses (Hinman and Rodriguez) disagreed on numerous aspects of what occurred and what was said, and neither of their stories fully stands up to scrutiny. However, after comparing their testimony to the descriptions of other witnesses and to

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[1] / The three shifts start at 8:00 a.m., 9:00 a.m. and noon. Therefore, the scheduling officer normally knows which employees are willing to work overtime some time shortly after noon.

supporting documents, a general line of truth becomes evident. For the sake of clarity, I will not describe each witness' testimony separately, but rather I will present my findings of what was said and done, and then I will explain my reasoning.

On November 2, Mr. Hinman was substituting for the regular scheduling officer, who was on leave, and this required him to work at Mr. Rodriguez's office at the port. As reflected in the OAS for November 2 (Respondent Exhibit 6), Inspector Lynch had the lowest overtime earnings of those employees available to work overtime, and she therefore had first priority on overtime assignments; Inspectors Brown and Hinman were second and third in line, respectively. In gathering information as scheduling officer that morning, Hinman learned that an overtime assignment would be needed to inspect a vessel, The Tropic Jade, that was scheduled to arrive at 7:00 p.m. Hinman was also advised that two additional inspectors would need to work at the Seaport from 8:00 a.m. to 9:00 the next morning (November 3), and this would need to be recorded on November 2's OAS.[2] Since Lynch had first priority for overtime, she would normally be given the Tropic Jade assignment, which was more lucrative than the two others; this would leave the two 1-hour assignments the next morning for Brown and Hinman. But since Ms. Brown normally works at the Air Cargo facility on a 9:00 a.m. to 5:00 p.m. shift, and the two assignments the next morning were at the Seaport, Hinman felt that this would pose a conflict: after completing her overtime assignment at 9:00 a.m., Brown would not be able to report to Air Cargo until at least 9:30. Hinman felt that this conflict (sometimes referred to as a "cross-port issue") warranted an exception to the normal assignment priority, especially since Ms. Lynch regularly works at the Seaport and could work the 8-9 a.m. assignment there immediately before her regular shift began at 9:00.

Because Hinman was uncertain who should be given the Tropic Jade assignment, he phoned Carl Picerno, a Senior Inspector who is also the Union's Chief Steward for West

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2/ Respondent Exhibit 6 also reflects that an employee was assigned overtime from 4:00 p.m. to 8:00 p.m. at the Port of Entry (POE), but that assignment is not relevant to the facts of this case.

Palm Beach.[3] After a brief discussion, Picerno advised Hinman, and Hinman agreed, that Lynch should get the 8:00 a.m. Seaport job and Brown should get the Tropic Jade job. (Regardless of whether Lynch or Brown had been assigned to the Tropic Jade job, Hinman, as the third inspector in line, would have received the other 8:00 a.m. Seaport job.)

Hinman then discussed the various overtime assignments with Rodriguez, who disagreed with Hinman and stated that Lynch should get the more lucrative job, even if this would require Brown to travel across the port the next morning. This first conversation occurred some time between noon (after the employees on the 12-8 shift had reported and had a chance to notify Hinman of their availability for overtime) and 1:00 p.m. It appears that Hinman then prepared an initial draft of the OAS, which he showed to Rodriguez a short time later, at which time another discussion of the overtime priorities occurred.[4] During one or both of these discussions, Hinman told Rodriguez that he had spoken to Carl Picerno, who felt that Brown should be assigned to the Tropic Jade inspection and that Lynch should be assigned to one of the Seaport jobs the next morning. Upon hearing that Hinman had consulted with Picerno, Rodriguez began to get angry, and as the discussion continued, Rodriguez began yelling at Hinman, "You're always going to Carl with everything." When Hinman disputed this, Rodriguez insisted, "You always do, and you'll probably go to him about this, and when you do, I welcome it." He then threw the OAS paperwork at Hinman and told him to change it the way Rodriguez wanted it done.

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[3] / The precise time of this telephone call is unclear. Hinman testified that he first tried to ask Supervisor Rodriguez about the overtime issue, but that Rodriguez was busy at the time. Rodriguez disputes these assertions, but it is not really material whether Hinman tried to discuss the problem first with his supervisor or with his steward.

[4] / At the hearing, Respondent Exhibit 6, the official version of the OAS for November 2, was admitted into evidence. None of the witnesses was certain whether an earlier draft of this document had been prepared, or how it differed from the final version, but the testimony of both Hinman and Rodriguez suggests that an earlier draft was likely. This draft was then thrown away when Rodriguez ordered Hinman to change it. Although the existence of a preliminary draft helps to explain the sequence of events most plausibly, this issue is not material to my conclusions of law.

Either during this second discussion or shortly thereafter, Rodriguez told Hinman that he had changed his mind about how to handle the assignments at the Seaport the next morning. Rodriguez realized that he could assign one of his Seaport staff, who would be working his regular shift, to perform the work there from 8:00 a.m. to 9:00 a.m., thereby eliminating one overtime job, and that he could better utilize his staff by extending the other overtime assignment from 8:00 a.m. to noon. Now that the Seaport job would extend beyond 9:00 a.m., neither Lynch nor Brown nor Hinman could perform the job, so the assignment fell to Mr. Hendrickson, whose shift normally began at noon. Hinman then prepared a new draft of the OAS, which is the document admitted into evidence as Respondent Exhibit 6. This version of the OAS complied partially, but not fully, with Rodriguez's instructions: in this document, Hinman assigned the Tropic Jade inspection to Ms. Lynch and he assigned the Seaport job the next morning to Mr. Hendrickson as instructed, but he also assigned the second Seaport job to Ms. Lynch, even though Lynch had not agreed to work multiple overtime assignments and even though Rodriguez had told him the second Seaport job would not be required. At this point, rather than giving the paperwork back to Hinman to correct, Rodriguez made the corrections himself in pencil on Respondent Exhibit 6 and approved the OAS for posting.

Three days later, on November 5, Rodriguez called Hinman into his office and informally counseled him concerning the events of November 2. In Rodriguez's view, Hinman had been insubordinate in repeatedly debating with Rodriguez and in seeking out Picerno's opinion concerning the overtime assignments, and Hinman had failed to carry out Rodriguez's instructions. Rodriguez told Hinman that he was not to seek out other employees' views (specifically identifying Picerno and Cocchini) after Rodriguez had instructed him how to do something (See Respondent Exhibit 9). This counseling was not made a part of Hinman's personnel record, but shortly thereafter the Union filed an unfair labor practice charge on Hinman's behalf.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel alleges that Supervisory Customs Inspector Rodriguez committed three violations of section 7116(a)(1): first, by "verbally harassing and intimidating" Hinman for contacting his Union steward on November 2; second, by verbally counseling Hinman on November 5 for the same action; and third, by forbidding Hinman from going to his Union steward with any further overtime questions. It argues that by yelling at Hinman and telling him he was "good about going to Carl", Rodriguez was interfering with Hinman's right under section 7102 to assist a labor organization. This interference was reinforced, in the General Counsel's view, by the verbal counseling of November 5, in which Rodriguez explicitly warned Hinman that his consultation of Picerno was "argumentative" and constituted a failure to follow supervisory instructions. The General Counsel contends that Hinman was engaged in protected activity when he telephoned Picerno for guidance concerning the overtime procedures, and that Rodriguez directly attempted to restrict Hinman from engaging in such activity.

The Agency defends Rodriguez's actions in a variety of ways. First, it argues that Hinman was not engaged in protected activity on November 2. As it states in its brief (at pp. 7-8), Hinman didn't contact Picerno "in his representational capacity" and didn't ask for time off to conduct union business; rather, Hinman called Picerno "not to ensure that the National Contract was being complied with, but rather, to manipulate the schedule to maximize his compensation . . . ." Thus the conversation between Hinman and his steward was "nothing more than a water-cooler conversation between two employees regarding non-union activity." Second, the Agency contends that even if Hinman was engaged in protected activity, Rodriguez acted on November 2 and 5 only to protect legitimate management concerns: specifically, to ensure that Hinman followed supervisory instructions and completed his work as ordered. In this view, Hinman was free to consult the Union regarding overtime questions, but he could not do so on working time, or as a pretext for evading his supervisor's orders.

Analysis

In general, the Authority's legal standard for evaluating whether an agency official has violated section 7116(a)(1) has been repeatedly stated in cases such as

Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 895-96 (1990), and *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994):

> The standard . . . is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. [35 FLRA at 895-96.]

Furthermore, the standard is not based on the subjective perceptions of the employee or on the intent of the employer. 49 FLRA at 1034.

As the Respondent correctly notes, an agency's conduct is prohibited under section 7116(a)(1) only if it interferes with an employee's exercise of "any right under this chapter". Accordingly, before I can find that Rodriguez's conduct improperly coerced Hinman, I must find that Hinman was engaged in protected activity. While it has long been accepted that the participation by employees and union representatives in collective bargaining negotiations and grievance meetings constitutes protected activity under section 7102, it was only in 1992 that the Authority held that "the assertion by an individual employee of a right set forth in a collective bargaining agreement is protected . . . [under] section 7102 of the Statute." *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1037 (1992)("*DOL*"). In that case, the Authority noted that although the Statute does not protect all "concerted activity" by employees, an employee's assertion of a right emanating from a collective bargaining agreement assists the union that negotiated the agreement and is protected by section 7102. *Id.* at 1039-40.

On the other hand, the Authority has often cautioned employees that their participation in protected activity does not immunize them from discipline. *See, e.g., Harry S. Truman Memorial Veterans Hospital, Columbia, Missouri and American Federation of Government Employees (AFL-CIO), Local No. 3399*, 14 FLRA 103, 104 (1984)("*Truman Memorial Hospital*"). Management's right to take disciplinary action under section 7106(a)(2)(A) includes the right to discipline a union representative for activities which "are not specifically on behalf of the exclusive representative or which exceed the boundaries of protected

activity such as flagrant misconduct." *Veterans Administration Medical Center, Birmingham, Alabama and American Federation of Government Employees Local 2207*, 35 FLRA 553, 560 (1990); *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees Local 916, AFL-CIO*, 34 FLRA 385, 388-89 (1990)("*Tinker AFB*").

In this regard, supervisors may require that employees use their working time for work-related matters, but they may not apply such requirements only to union-related activity. *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, D.C.*, 54 FLRA 987, 1011, 1046 (1998). Discipline has been upheld by the Authority when a union president refused an order to return to his work site;[5] when an employee refused to wear safety earplugs until his union had been consulted;[6] and when a VA blood bank technologist refused to immediately terminate a telephone conversation conducting union business in order to process an emergency blood-matching order.[7] On the other hand, the Authority has held that a union official serving supervisors with copies of an unfair labor practice charge did not engage in "flagrant misconduct" when he refused the order of a security officer to leave the area, even though the Authority accepted a finding that the official's behavior was insubordinate. *Tinker AFB*, at 389-90.

It remains for me to apply these principles to the instant case. I start with the conclusion that Mr. Hinman was engaged in protected activity when he telephoned his union steward, Carl Picerno, to discuss the proper order of overtime assignments. It is evident from Hinman's testimony that the question for which he called Picerno involved the application of the NIAP and local agreements on this

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[5] / *Truman Memorial Hospital*, 14 FLRA 103 (1984).

[6] / *Veterans Administration Medical Center and American Federation of Government Employees Local 2386, AFL-CIO*, 34 FLRA 666 (1990).

[7] / *Veterans Administration Medical Center, Birmingham, Alabama and American Federation of Government Employees Local 2207*, 35 FLRA 553 (1990)("*VA Birmingham*").

subject;[8] indeed, a basic part of a scheduling officer's job requires the application of those agreements. The *DOL* decision is directly applicable here. In that case, the Authority held that "the assertion by an *individual employee*" of a contractual right is protected, and indeed the affected employee there (like Hinman) was not a union official. 43 FLRA at 1037, 1039 (emphasis added). Thus it does not matter whether Rodriguez knew that Hinman was contacting a union steward or another rank-and-file employee, as long as it concerned a matter relating to the application of the collective bargaining agreement. Similarly, it does not matter whether Hinman may have had mixed motives, some of which were self-serving, in contacting Picerno. Hinman may well have hoped that he could avoid getting one of the 8:00 a.m. Seaport assignments, so that he could be free to take another last-minute assignment, but employees usually stand to gain or lose when disputed contract provisions are interpreted. Section 7102 does not protect only academic interests, but also selfish, financial ones. The crucial question is

[8] / Hinman's testimony at the hearing was rather confused initially as to precisely whose assignments were in dispute, but in the end his testimony was quite consistent on this point with Rodriguez. After reviewing the record and Hinman's demeanor, I attribute the confusion to poor trial preparation by his counsel rather than to any untruthfulness on Hinman's part. When he was first questioned by counsel for the General Counsel, it was apparent that Hinman had not seen Respondent Exhibit 6 or any of the OAS paperwork for several months, and he was only shown Respondent Exhibit 6 on cross-examination. After reflecting on the contents of that document, he testified that he believed the proper order of assignments under the contract was to give the Seaport assignment to Lynch, who normally worked at the Seaport, and to give Brown the Tropic Jade assignment. That is also how Rodriguez described the dispute, or at least part of the dispute. Although Hinman and Rodriguez disagreed about many aspects of their November 2 discussions, they do not significantly disagree on this point. Union Steward Picerno's testimony was quite vague as to the precise details of the dispute, but even his testimony indicates that Hinman called him and "asked my opinion on how the overtime should be done. . . . I believe it was where one inspector was going to get an assignment and then another inspector should get an assignment afterwards." Tr. at 19. Regardless of whether the disputants exchanged citations to articles and sections of the NIAP, it is clear that there was a dispute as to how to assign overtime, which is a subject directly covered by the NIAP and related agreements.

whether a contractual issue was involved in the Hinman-Rodriguez discussion over which employee should get which overtime assignment on November 2, and it is clear here that there was a legitimate question as to how the NIAP overtime rules were to apply. Hinman felt the Tropic Jade assignment should go to Brown, while Rodriguez felt it should go to Lynch, and this disagreement directly related to the rules for overtime assignments set forth in the NIAP and other agreements. Therefore, Hinman's consultation of Picerno was protected activity under section 7102.

I do not accept the Respondent's argument that Hinman's activity was unprotected because he did not consult Picerno in Picerno's "representative capacity" or ask for time off to conduct union business. As I explained in the paragraph above, it doesn't matter whether Hinman contacted his union steward or a fellow employee, as long as he was "assert[ing] a right that emanates from a collective bargaining agreement". *DOL* at 1039. Furthermore, the record is clear that Rodriguez understood that Hinman had contacted his union steward to bolster his argument concerning the overtime assignments. Rodriguez testified that in his second or third conversation with Hinman on November 2, Hinman told him, "I called Carl and Carl says that this is the way to do it." Tr. at 241. Rodriguez understood that "Carl" was Picerno, and he was quite familiar with Picerno's status as steward, because the two of them served on the West Palm Beach Port Partnership Council. Moreover, because the dispute concerned a contractual matter (overtime assignments), Hinman did not have to request official time to consult Picerno (a right that he did not have in any case, as he was not a Union official) for the conversation to be protected. The Authority has rejected the notion that an employee must be on official time in order to engage in protected activity. *See, Air Force Flight Test Center, Edwards Air Force Base, California*, 53 FLRA 1455, 1462-63 (1998); *American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, Immigration and Naturalization Service, El Paso Border Patrol Sector*, 44 FLRA 1395, 1401 (1992); *see also, U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas*, OALJ Decision No. 02-32 (April 8, 2002), slip op. at 9-10. While Hinman's failure to consult his steward on nonworking time may reflect on the degree of his alleged misconduct, it does not convert protected into unprotected activity.

The next issue is whether Rodriguez, by his words and actions on November 2, interfered with, restrained or coerced Hinman's right to seek the advice of his steward concerning the disputed overtime rules. Here, the precise sequence of conversations on November 2 and the precise words of those conversations become hotly disputed and the truth is quite muddled, but I am convinced that Rodriguez coerced Hinman, even if I fully accepted Rodriguez's testimony (something I do not do). Rodriguez testified (Tr. at 239-48) that after several conversations with Hinman about who should perform each overtime assignment, Hinman showed him the OAS (Respondent Exhibit 6), which did not fully comply with Rodriguez's prior instructions. Rodriguez then testified (Tr. at 241-42):

> I considered it as a refusal on his part. . . . And I said, why did you – why are you going to ask advice from Mr. Picerno as to whether you're going to do as I ask you to do or not? I'm the supervisor here.

Rodriguez admitted that he was "very bothered and . . . peeved" at Hinman at that point (Tr. at 241), but he denied that he yelled or raised his voice to Hinman (Tr. at 257-58).

Based on these facts alone, it is evident that Rodriguez let Hinman know that he was "very bothered and peeved" that Hinman had questioned his instructions and asked the union steward and other employees for their opinion on the matter. Looking at the events and conversations of November 2 objectively, as the case law requires, a reasonable employee would be threatened by Rodriguez's response. It is clear that Rodriguez equates "shopping for opinions" about overtime assignments (Respondent Exhibit 9) with insubordination. In so many words, Rodriguez felt compelled to let Hinman know that he was the supervisor, not Picerno or other inspectors. By equating union consultation with insubordination, Rodriguez communicated to Hinman that such behavior could result in disciplinary action, and this implicit message was made explicit on November 5, when Rodriguez called Hinman into his office for a verbal counseling (Tr. at 248 and Respondent Exhibit 9). This was indeed coercive, as it would tend to intimidate an employee from consulting his steward again.

When presented with conflicting testimony from two participants in a dispute (both of whom have very subjective impressions of the event), it is often difficult to evaluate the event objectively or to determine how a "reasonable" employee would be affected by the words used. In this case, however, we have the luxury of hearing testimony from an employee (Stacy Brown) who approaches the mythical standard of reasonableness and objectivity. She only witnessed a small part of one of the conversations between Hinman and Rodriguez on November 2, but her observations are significant in evaluating the other witnesses' testimony and the parties' arguments. Ms. Brown worked at the Air Cargo facility until noon on November 2 and then reported to the facility where Hinman and Rodriguez were working. She estimated that she arrived there between 12:15 and 12:30 p.m., and after a brief conversation with Hinman at that time, she went into the break room to put away her lunch and returned to Hinman's office. When she got back to Hinman's office, she:

> . . . realized that Luis was yelling at Shawn. I just stood there. . . . I just kind of froze. . . . And Luis was just going on about – well, he was very upset that Shawn had gone -- had made a telephone call to Carl to get assistance on how the overtime was to be done. . . . he was yelling . . . And they were very close to each other, probably like I don't know, a foot and a half away from each other. [Tr. at 197-98.]

This testimony reveals two significant facts. First, it supports Hinman's description of Rodriguez's behavior and contradicts Rodriguez's testimony, in that it shows that Rodriguez was indeed quite angry and was yelling at Hinman. This, in turn, supports the conclusion that Rodriguez was acting in a coercive and intimidating manner. Second, Ms. Brown's testimony places the argument at the earliest stage of the 12:00-2:00 p.m. time period in which the events of November 2 occurred. This also contradicts Rodriguez's testimony. According to Rodriguez, he spoke to Hinman at least twice, and perhaps more, about how to assign the overtime jobs, before Hinman mentioned that he had contacted Picerno, and it was only when the 2:00 p.m. deadline for posting the OAS was getting near that Rodriguez got upset that Hinman was refusing to obey him. This, according to Rodriguez's account, would support the Agency's theory that Rodriguez had been very patient with Hinman's "debating" about overtime; that Rodriguez was not upset at Hinman's consulting the Union but rather at Hinman's insubordinate refusal to assign the jobs as Rodriguez

ordered. Ms. Brown's testimony severely undercuts this theory: instead, it is apparent that Rodriguez got upset very early in the discussion, on or around 12:30, long before the OAS had to be posted. And it was apparent to Brown that a source of Rodriguez's anger was that Hinman had contacted Picerno.

Other factors also negate the Agency's argument that Rodriguez was simply instructing Hinman to follow his orders, not to refrain from contacting the Union. The Agency's argument is premised on the contention that Hinman had been resisting Rodriguez's instructions to the point of insubordination, and that is clearly the impression Rodriguez sought to portray of Hinman in his testimony. But the premise does not stand up to the facts. It is clear, for instance, that Hinman complied with most, if not all, of his supervisor's instructions on how to complete the OAS. Initially, Hinman had argued that Ms. Brown should be assigned the Tropic Jade job, while Rodriguez insisted that Ms. Lynch should get it. Hinman then (apparently) prepared an initial draft of the OAS, which Rodriguez later told him to change.[9] Rodriguez testified that he told Hinman that he had reconsidered the two Seaport assignments in their second or third conversation, when Hinman brought him the first draft of the OAS. At that time, he told Hinman that he had decided to eliminate one of the 8:00 overtime jobs and to extend the other one until noon. (The latter decision left Hendrickson as the only person available for the 8:00-12:00 job.) The revised draft of the OAS shows that Hinman complied with Rodriguez's instructions to assign Lynch the Tropic Jade job and to extend the second Seaport assignment.[10] This sequence of events undercuts the Agency's contention that Hinman was being insubordinate in refusing to comply with supervisory instructions. While the revised draft of the OAS prepared by Hinman did not fully conform to Rodriguez's instructions, it substantially did so. More significantly, on the issue that had precipitated Hinman's call to Picerno and triggered his disagreement with

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[9] / As noted earlier, this paper appears to have been thrown away when it was changed, and neither witness was certain what assignments were made in this draft. Thus it cannot be determined whether Hinman gave the Tropic Jade assignment to Lynch, as instructed by Rodriguez, when he first drafted the OAS.

[10] / The document also reflects that Hinman assigned Lynch the 8 a.m. Seaport job, which appears to have been inconsistent with Rodriguez's instructions. This is addressed in the paragraph below.

Rodriguez (i.e., the question of assigning the Tropic Jade job to Lynch or Brown), Hinman prepared the revised OAS as Rodriguez had instructed him.

Even Hinman's assignment of two overtime jobs to Ms. Lynch (which neither witness explained adequately) doesn't conform to Rodriguez's belief that Hinman was seeking to "manipulate" the rules so as to leave himself available for other, better overtime assignments. Once Rodriguez told Hinman that Hendrickson would get the extended Seaport assignment, it would have been clear to Hinman that he would not get either of the Seaport assignments, and that Hinman would be available for subsequent assignments. Regardless of whether Lynch or Brown received the first Seaport job (an assignment Rodriguez had in fact told Hinman to eliminate but which Hinman apparently misunderstood), Hinman knew it would not be assigned to him. There was, therefore, no self-serving motive for Hinman to assign Lynch both the Tropic Jade job and the Seaport job, and Hinman's actions were in no way insubordinate. While Rodriguez may have been justifiably annoyed that the OAS still required changes shortly before 2:00 p.m., Rodriguez had no justifiable basis for concluding that Hinman "w[ould] not carry out my orders" and "had no intention of doing what I told him to do." Tr. at 247.

In accordance with these facts, it is my conclusion that Hinman was not insubordinate to Rodriguez, and he did not defy his supervisor's orders concerning the overtime assignments. Rather, Hinman made several of the changes in assignments in accordance with Rodriguez's instruction, including the assignment of the Tropic Jade job, which had been the source of their contractual disagreement. His assignment of Lynch to two overtime jobs was not attributable to defiance on Hinman's part or to his discussion of the NIAP rules with Picerno. Moreover, I do not consider Hinman to have committed any misconduct by telephoning his union steward while working. The act of consulting the Union is protected by section 7102, as discussed earlier, and in the facts of this case, Hinman's conversation with Picerno was brief and did not detract in any significant way from the performance of his job. In this regard, Hinman's job was to prepare the overtime assignments, and his consultation with Picerno was directly

related to that effort.[11] The preparation of the OAS occurred over a two-hour period, and in this context, Hinman's brief telephone conversation with Picerno while on working time did not interfere with the performance of his work, and certainly did not constitute flagrant misconduct.

As explained earlier, I also find that Rodriguez's angry outburst to Hinman occurred at about 12:30 p.m., not at about 2:00 p.m. (as Rodriguez contends). This fact supports my conclusion that Rodriguez's outburst was precipitated by Hinman's statement that he had consulted Carl Picerno, not by Hinman's refusal to carry out Rodriguez's orders, and that it occurred long before the OAS needed to be posted. The outburst, which involved Rodriguez yelling at Hinman at very close range and accusing him of "shopping around" for other employees' opinions in order to "debate" Rodriguez and evade Rodriguez's orders, would reasonably coerce an employee and discourage him from consulting his union. It was not justified by a need to maintain supervisory authority. It was overtly threatening and violated section 7116(a)(1) of the Statute.

For similar reasons, Rodriguez violated section 7116(a)(1) when he "informally counseled" Hinman on November 5. The counseling session was essentially a continuation, indeed a reaffirmation, of his unlawful conduct on November 2. Although it appears Rodriguez was calm and under control when he counseled Hinman on the 5th, in contrast to his angry outburst on the 2nd, he made it clear to Hinman that he was not to "shop around for guidance other than what I have provided" (Respondent Exhibit 9). As I have already explained in reference to the events of November 2, Hinman had a right to contact Picerno concerning a contractual issue, as long as the consultation did not interfere with the performance of Hinman's work; I have also explained that Hinman's conversation with Picerno did not interfere with his work on November 2. Therefore, the counseling session also violated the Statute.

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[11] / Compare the facts of this case with those of *VA Birmingham*, *supra*, 35 FLRA at 554, where an employee stayed on the telephone "for at least another 2 minutes" when he was urgently needed to process blood for a patient. In a "life-threatening situation" such as that which existed in *VA Birmingham*, even a brief delay in obeying a supervisor may constitute "flagrant misconduct."

I do not agree with the General Counsel, however, that Rodriguez "forbade Hinman from going to Picerno with any further overtime questions," as alleged in the complaint. This implies that Hinman could not consult the Union or another employee at any time, and I do not believe that was what Rodriguez was telling Hinman. Rodriguez was certainly prohibiting Hinman from "shopping around" for contrary opinions while he was working, and after Rodriguez had ordered him to do something, and that is why I concluded (in the paragraph above) that the November 5 counseling was unlawful. But Rodriguez's words to Hinman (best reflected in the notes prepared by Rodriguez himself in Respondent Exhibit 9) cannot reasonably be stretched to mean that he was prohibiting Hinman from contacting Picerno after work about a disputed overtime issue or from filing a grievance on the matter. This issue is purely theoretical, however, because the remedy against the Respondent would be the same, even if I found this additional violation of the Statute.

Remedy

The nature of the Respondent's violations here require that it cease and desist its unlawful conduct and post a notice to employees to advise them of that fact. The only real question is the extent to which the notice should be posted. The General Counsel asks for a "facility-wide" posting, although the precise geographic area of such "facility" is not clear. The Charging Party asks for a posting throughout the Miami Customs Management Center.

The record reflects that the employees affected by this case, as well as Supervisory Customs Inspector Rodriguez, serve in various Customs facilities in the Port of West Palm Beach, which includes the airport as well as the seaport. Mr. Rodriguez and Union Steward Picerno serve on a Port Partnership Council for West Palm Beach. The violations are specific and narrow, and there is no evidence that the violations extend outside the Port of West Palm Beach. That, therefore, appears to be the most appropriate area that should be covered by the notices. It is not necessary that the notice be signed by a particular individual, but rather it should be signed by an official of the Respondent who has responsibility for the Port of West Palm Beach.

Based on the foregoing, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of the Treasury, U.S. Customs Service, Miami, Florida (Respondent), shall:

1. Cease and desist from:

(a) Verbally harassing or intimidating any employee for seeking assistance from their union officials or from other employees by asking questions regarding the assignment of overtime.

(b) Counseling employees that they cannot seek assistance from their union officials or from other employees about the assignment of overtime.

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

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

(a) Rescind any and all references of the verbal counseling of Shawn Hinman received on November 5, 2000, from any informal or formal employee files, including Hinman's official personnel file.

(b) Post at its facilities at the Port of West Palm Beach where bargaining unit employees represented by the Union are located, 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 a responsible official of the Respondent 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 will be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 10, 2002.

_____
RICHARD PEARSON
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 Department of the Treasury, U.S. Customs ServiceMiami, Florida, has violated the Federal Service Labor-Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT verbally harass or intimidate any employee for seeking assistance from their union officials or from other employees by asking questions regarding the assignment of overtime.

WE WILL NOT counsel employees that they cannot seek assistance from their union officials or from other employees about the assignment of overtime.

WE WILL NOT 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.

WE WILL rescind any and all references of the verbal counseling of Shawn Hinman received on November 5, 2000, from any informal or formal employee files, including Hinman's official personnel file.

_____
Respondent/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 for the Federal Labor Relations Authority, Atlanta Regional Office, whose address is: Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270, and whose telephone number is: (404) 331-5300.