

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

UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0922, AFL-CIO Charging Party	Case No. DA-CA-01-0408

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/her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **SEPTEMBER 3, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

SUSAN E. JELEN
Administrative Law Judge

Dated: July 30, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: July 30, 2002

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FORREST CITY, ARKANSAS

Respondent

and
CA-01-0408

Case No. DA-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 0922, 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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 02-52
WASHINGTON, D.C.

UNITED STATES DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0922, AFL-CIO Charging Party	Case No. DA-CA-01-0408

Steven R. Simon, Esquire
Douglas W. Curless, Esquire
For the Respondent

Kenneth Woodberry, Esquire
John F. Gallagher, Esquire
For the General Counsel

Roger Payne, President Local 0922
For the Charging Party

Before: SUSAN E. JELEN
 Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an Unfair Labor Practice charge filed by the American Federation of Government Employees, Local 0922, AFL-CIO (the Union), against the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas (the Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director, Dallas Region of the Federal Labor Relations Authority (the Authority). The complaint alleged that the Respondent violated section 7116

(a) (1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), by the conduct of one of its supervisors making a statement that interfered with, restrained and coerced employees in the exercise of their rights under the Statute.

A hearing in this matter was held in Memphis, Tennessee on January 18, 2002. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent filed helpful, timely briefs.

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 American Federation of Government Employees, Council of Prison Locals (the Council), is the exclusive representative of a unit of employees appropriate for collective bargaining at the Bureau of Prison (the BOP). The American Federation of Government Employees, Local 0922 (the Union), is an agent of the Council for purposes of representing employees at the BOP, Federal Correctional Institution, Forrest City, Arkansas (the Respondent). (G.C. Ex. 1(b), 1(g)).

BOP and the Council are parties to a Master Agreement, effective from March 9, 1998 through March 8, 2001. (G.C. Ex. 2; R. Ex. 1) Article 32 of the Master Agreement covers procedures for arbitrations. Section e states "The arbitration hearing will be held during regular day shift hours, Monday through Friday. Grievant(s), witnesses, and representatives will be on official time when attending the hearing. When necessary to accomplish this procedure, these individuals will be temporarily assigned to the regular day shift hours. No days off adjustments will be made for any Union witnesses unless Management adjusts the days off for any of their witnesses." (G.C. Ex. 2 at 69; R. Ex. 1; Tr. 14-15).

There are approximately 115 bargaining unit employees at the Forrest City facility. The facility has three main shifts: day shift, from 8:00 am. to 4:00 pm.; evening shift, from 4:00 pm. to midnight; and morning shift, from midnight to 8:00 am. (Tr. 28, 44)

An arbitration hearing between the parties was scheduled for November 15, 2000 at Forrest City, Arkansas.

Prior to the hearing the Union sent the Respondent a list of employees it intended to call as witnesses to the arbitration. The Union requested that employees' shifts be changed to the day shift so that they could be on official time for the arbitration hearing, in accordance with Article 32 of the parties' master agreement. Some of the witnesses did have their shift changed, but at least three employees, two unit employees and one supervisor, did not have their shifts changed to the day shift. (Tr. 24)

Steve Smith is a bargaining unit employee and was a correctional officer at the time of the arbitration hearing. He was working the morning shift, midnight to 8:00 am. at the time of the arbitration hearing. Some time prior to the arbitration hearing, he received a message at home from Lt. William "Toby" Ward, the day watch operations lieutenant. Smith returned the call and was informed his morning shift would not be changed to the day shift. On November 14, Smith had a brief conversation with Lt. Ward in his office that lasted only 2 to 3 minutes. According to Smith, Lt. Ward advised him that he would be staying over as a witness for the arbitration hearing. Smith requested that he be roster-adjusted to the day shift. (Tr. 30) Lt. Ward stated "that there would be no roster-adjustment to the day shift because the powers-that-be wanted the witnesses, the other union witnesses to be mad having to stay over and work all night." (Tr. 31, 77). Lt. Ward also stated that Captain Smith was working on getting the employees overtime [.] (Tr. 31)

On November 15, Smith worked the morning shift from midnight to 8:00 am. He then reported to the arbitration hearing, where he stayed until he was released at 2:45 pm. Smith then went home. Smith reported for work on November 16 at his regular schedule time of midnight to 8:00 am. (Tr. 47). Smith reported to the Union President Roger Payne his conversation with Lt. Ward. (Tr. 32)

Lt. Ward denied that he made any such statement to Smith. He did not recall having any conversation with Smith regarding his shift change request. (Tr. 51-52).

Captain Melvin D. Smith testified that on the day of the arbitration hearing, he learned that two employees had not had their shifts changed. Overtime had not been authorized for the employees, but Captain Smith corrected this and the two unit employees, who were witnesses for the Union at the hearing (Steve Smith and Bowden), were paid overtime for November 15. One employee who was a supervisor and a witness for the Respondent at the hearing was given comp. time (Lt. Sherman). (Tr. 67, 69-70; G.C. Ex. 3)

Discussion and Conclusions

Section 7102 of the Statute protects each employee in the exercise of their 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 legal standard for interpreting comments by agency officials under section 7116(a) (1) is set forth in *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 895-96 (1990):

The standard for determining whether management's statement or conduct violates section 7116(a) (1) 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. . . . In order to find a violation of section 7116(a) (1), it is not necessary to find other unfair labor practices or to demonstrate union animus. . . . while 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 on the intent of the employer.

(Citations omitted). See also *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994).

The General Counsel asserts that Smith's testimony is credible and sets forth a violation of the Statute by threatening employees for engaging in protected activity, specifically testifying on behalf of the Union at an arbitration hearing. By telling Smith that Respondent was not going to roster-adjust employees that were scheduled to testify at the November 15 arbitration hearing because management was trying to make people who were staying to testify mad at the Union, the Respondent, by Lt. Ward, violated section 7116(a) (1) of the Statute.

The Respondent asserts several defenses. First it denies that Lt. Ward made the statement in question. Further it asserts that the alleged statement is implausible for a number of reasons: that Smith was a Union steward and

it was therefore unlikely that Lt. Ward would make such a statement to him; that Smith consistently requested and worked overtime; that Smith had asked for overtime for November 15 and the overtime actually worked was consistent with the length of overtime requested; and that it was not logical that the Respondent would attempt to make someone angry or upset by providing a requested pay status that gave additional compensation.¹

The Respondent argues that Smith has a significant history of requesting and being granted overtime. This does, in fact, appear to be correct. Respondent submitted a medical escort overtime sheet for the period of November 5 through November 18, 2000. (R. Ex. 3) The overtime sheet was posted on October 30, 2000, and Smith requested overtime for the week of November 14. Smith did, in fact, work medical escort overtime on Tuesday, November 14 and Thursday, November 16. Employees who sign up for overtime are entitled to accept or decline any offered overtime.

Respondent argues that because Smith has a practice of using overtime and was granted overtime on November 15, that the alleged statement, although not conceded, would not be coercive since Smith had asked for and had received overtime.

Respondent misses the point in this matter. The fact that Smith has used overtime on a fairly consistent basis is not relevant to the issue of whether a statement made to Smith was violative of the Statute. The fact that Smith was paid overtime on November 15, after he worked the morning shift, and until he was released as a witness in the arbitration hearing, adds nothing to the analysis of whether the statement at issue was made.

In his testimony Smith consistently stated that he was told by Lt. Ward that the "powers-that-be" were denying employees the opportunity to adjust their shifts so that they would be mad at the Union. This appears consistent with the chain of events set forth in the record. That is,

¹
Respondent also asserts that an adverse inference is raised by the non-appearance of Officer Bowden, who was named in a similar unfair labor practice charge. Since Officer Bowden was not a party to the allegations of this complaint, his testimony would not be relevant and I decline to take an adverse inference as a result of his non-appearance. Compare, *United States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914, 926 (1996) (adverse inference when responsible decision-maker, whose motivation was central to case, failed to testify).

Smith had requested that his shift be changed from the morning shift to the day shift, so that he could testify at the arbitration hearing during the day shift. The fact that he had earlier signed up for medical escort overtime does not negate the fact that for the day in question, he only wanted to work the day shift. When his shift was not changed, Smith worked the morning shift and then reported for the arbitration hearing. He remained in duty status until 2:45 pm. on November 15. There initially appeared to be some issue as to whether the employee-witnesses who worked overtime would be paid overtime, and Smith was informed by Lt. Ward of this potential problem. Even though Captain Smith eventually corrected this problem, the timing of the overtime pay issue corresponds with the roster-adjustment issue for some of the Union witnesses and adds credence to Smith's testimony. Considering the totality of the circumstances and Smith's consistent testimony, I find him credible with regard to the alleged statement. Lt. Ward was unable to recall any conversation with Smith on this issue, which seems unlikely given the context of the situation. Although he denies any such statement, Lt. Ward's memory is not as clear as that of Smith and I therefore credit Smith.

In finding the statement was made as alleged, I further reject Respondent's defense that such a statement would not be coercive given the overtime use of Smith. Any overtime use by Smith does not negate the coercive aspects of the statement by Lt. Ward.

Therefore, I find that the Respondent violated section 7116(a)(1) of the Statute by the conduct of Lt. Ward in telling Smith that there would be no roster-adjustment to the day shift because the powers-that-be wanted the Union witnesses to be mad having to stay over and work all night. I find such a statement to interfere with employee rights under the Statute. *U.S. Penitentiary, Florence, Colorado*, 52 FLRA 974 (1997); *U.S. Penitentiary, Florence, Colorado*, 53 FLRA 1393 (1998).

It is therefore recommended that the Authority adopt 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, it is hereby ordered that the United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, shall:

1. Cease and desist from:

(a) Making statements to its employees, who are represented by the American Federation of Government Employees, Local 0922, AFL-CIO, the agent of the exclusive representative, to the effect that management will not adjust the work hours of bargaining unit employees who are to be witnesses for the Union at an arbitration hearing and that management is doing this to make employees mad at the Union.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Post at its Forrest City, Arkansas, facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 0922, AFL-CIO 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 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago 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, July 30, 2002.

SUSAN E. JELEN
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 United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, 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 to our employees, who are represented by the American Federation of Government Employees, Local 0922, AFL-CIO, the agent of the exclusive representative, to the effect that management will not adjust the work hours of bargaining unit employees who are to be witnesses for the Union at an arbitration hearing and that management is doing this to make employees mad at the Union.

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.

(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, Chicago Regional Office, Federal Labor Relations Authority, whose address is: 55 West Monroe, Suite 1150, Chicago, Illinois 60603, and whose telephone number is: (312)353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-01-0408, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JULY 30, 2002

WASHINGTON, DC