

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

U.S. DEPARTMENT OF JUSTICE U.S. IMMIGRATION AND NATURALIZATION SERVICE, U.S. BORDER PATROL EL PASO, TEXAS Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1929 Charging Party	Case No. DA-CA-01-0453

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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MAY 13, 2002**, and addressed to:

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

SUSAN E. JELEN
Administrative Law Judge

Dated: April 8, 2002
Washington, DC

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

MEMORANDUM

DATE: April 8, 2002

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
U.S. IMMIGRATION AND NATURALIZATION SERVICE
U.S. BORDER PATROL, EL PASO, TEXAS

Respondent

and
CA-01-0453

Case No. DA-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1929

Charging Party

Pursuant to section 2423.27(c) of the Rules and Regulations 5 C.F.R. § 2423.27(c), 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

Statute (the Statute), 5 U.S.C. § 7116(a)(1)(2) and (4) by its conduct in issuing an employee a letter of counseling on March 12, 2001 and in the conduct of a supervisory Border Patrol Agent on February 7, 2001.

A hearing in this matter was held in El Paso, Texas, on October 23, 2001. 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 timely helpful 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.

Statement of the Facts

The American Federation of Government Employees, National Border Patrol Council (Council), is the exclusive representative of a unit of employees appropriate for collective bargaining at the U.S. Border Patrol (Border Patrol). The American Federation of Government Employees, Local 1929 (Union), is an agent of the Council for purposes of representing employees at the Border Patrol, including employees at the El Paso Sector. (G.C. Ex. 1(d) and 1(f)).

John Derrah is a senior Border Patrol Agent stationed in El Paso, Texas. He also serves as second vice president for the Union, and in that capacity, among other responsibilities, represents employees during investigative interviews and other official proceedings. (Tr. 16, 18) On February 7, 2001, Derrah was assigned to the Paso del Norte processing center. When he arrived there, he was asked to attend a meeting with Hector Lara, supervisory Border Patrol Agent, and bargaining unit employee Flavio Landeros. Lara gave Landeros a written copy of the Weingarten rights and requested that he write a memorandum outlining a recent incident. Derrah agreed to represent Landeros during this matter and informed Lara that he would be requesting official time to represent Landeros. (Tr. 18-19, 21).

Following standard procedures, Derrah filled out a Form G-955, used to request official time. The form (G.C. Ex. 2) is addressed to Curtis Logan, Lara's acting supervisor, with the date/time of the request noted as 02-07-2001, 11:05. Derrah requested four hours of official time since he was not sure if he would have to return to the El Paso office to discuss the matter with management officials. (Tr. 21-22) Derrah's Form G-955 was returned to him by Logan in about 30 minutes and his request for official time had been approved.

Derrah then began conducting his official Union business. (Tr. 24).

A short time later Lara approached Derrah and asked him if he didn't think two hours of official time would be sufficient. According to Derrah, he said no since he didn't know where he was going to have to travel, if they were going to have to travel and what exactly they were going to have to do in order to accommodate this request. (Tr. 25-26) Lara then said that Derrah had withdrawn his request for union time. Derrah denied this. Lara then said Derrah's request for union time was withdrawn. (Tr. 25-26).

Lara's version is slightly different. Derrah's acting supervisor had brought the request for official time to him, as a permanent supervisor. He initially concurred with the request for four hours, but later reflected on the matter and decided to reduce the request by two hours since he felt four hours was an excessive amount of official time for this particular matter. (Tr. 71-72) Lara added the following to the official time request "Mr. Derrah was advised that a memorandum from Mr. Landeros should not take more than 2 hrs. Mr. Derrah advised that was not sufficient time. Mr. Landeros was asked to continue his duties on the line." (G.C. Ex. 2; Tr. 72) When Lara told Derrah that the request for official time was reduced, he did not recall Derrah telling him why he thought he would need the four hours. (Tr. 72-73) Lara denied that he ever told Derrah that he was withdrawing his request for official time. (Tr. 73-74) Lara testified that Derrah became agitated and upset about his official time.

Following this discussion, Derrah then went to a supervisor's office, although it is used by both supervisors and unit employees, and started writing notes about what had happened. Lara followed him and instructed him to resume his normal duties. Derrah told Lara that he was interfering with his union activities, which Lara disagreed with. Derrah then said, "Well, we'll see who's competent." Lara asked if Derrah was calling him incompetent. Derrah said no, he wasn't calling him incompetent, but he was telling him that he intended to take action and "we'll see who is competent." (Tr. 28-29) Derrah then said he requested a lunch break. Lara asked if he wanted to take an enforcement lunch break. Derrah responded that he was entitled to a lunch break. Lara then asked if he was going to be performing union duties on his lunch break. Derrah said no. Lara then repeated his question in a sharp tone of voice. Derrah said no and left the office. Derrah was out of the office and Lara was standing in the doorway or just inside the office. Derrah turned around and walked back towards

Lara and told him "furthermore, it's none of your business what I do on my lunch break." Derrah testified that he said this in a "stern" voice, but did not raise his voice. (Tr. 30-31).

Lara's version is similar although he denied that he asked Derrah twice if he was going to be performing union duties on his lunch break. He did admit he asked one time. (Tr. 74, 76).

Lara testified that he saw three Border Patrol agents and two detainees in the general area during this "confrontation" with Derrah. (Tr. 75) Derrah did not recall seeing anyone in the area, but it was possible. (Tr. 31). Both men were wearing the official U.S. Border Patrol rough duty (green) uniform. (Tr. 32).

After Derrah took his lunch break, Lara called him into his office and provided him with a written document about his Weingarten rights. He told Derrah that he was writing him up for insubordination and unprofessional and disrespectful behavior toward him. (Tr. 36) Later Lara told Derrah that he was no longer writing him up for insubordination but for unprofessional and disrespectful conduct. Lara said that when Derrah told him that it was none of his business what he did on his lunch break, that was being disrespectful toward him and he was going to write a memorandum and put it in his file. (Tr. 39). Derrah later received a copy of a Memorandum For Patrol Agent In Charge, El Paso Station, dated February 7, 2001, on the subject of Unprofessional Conduct of John G. Derrah. (G.C. Ex. 3; Tr. 39).

Derrah testified that, after receiving the February 7 Memorandum, he spoke with John Hubert, Field Operation Supervisor, El Paso Station, and Mr. Lara's supervisor. (Tr. 40-41) He told Hubert that the Union would probably be filing a grievance or an unfair labor practice charge and wanted him to be aware of it. (Tr. 42) Hubert told him he would look into the situation. Hubert later told him that the February 7 Memorandum had been rescinded. (Tr. 43).

On February 15, 2001, Lara, at the direction of Mr. Hubert, rescinded the February 7, 2001 memorandum. (Tr. 89; G.C. Ex. 4).

On March 9, 2001, the Union, by John Derrah, faxed a Charge Against an Agency to the Federal Labor Relations Authority, Dallas Regional Office. The charge was also faxed to the Chief Patrol Agent, U.S. Border Patrol, El Paso District on the same date. (G.C. Ex. 1(a)).

On March 12, 2001, Hector Lara reissued the Memorandum, at the direction of Mr. Hubert. (Tr. 90; G.C. Ex. 5) The Memorandum is again addressed to Patrol Agent In Charge, El Paso Station, but has a new subject of Confrontation with Union Official. The March 12 Memorandum repeats the earlier Memorandum, with two additional paragraphs.¹ Lara testified that the first Memorandum was a disciplinary action but the second Memorandum was for a performance issue. Neither Memorandum is currently maintained in any working files involving John Derrah. Lara did give a copy of the March 12 Memorandum to John Derrah by placing it in his mailbox. (Tr. 90).

Issues

The issues in this case involve the conduct of John Derrah, bargaining unit employee and Union official, and Hector Lara, Supervisory Border Patrol Agent, on February 7, 2001, and the consequences that flowed from that conduct. The complaint alleges that the Respondent violated section 7116(a)(1) of the Statute by:

On or about February 7, 2001, Respondent, by Lara, reduced the amount of official time which had already been approved for Derrah, told Derrah he must seek supervisory approval before speaking to a witness on the telephone regarding the matter about which he was assisting the employee, and repeatedly questioned Derrah regarding whether he would be conducting Union business over his lunch hour.² (G.C. Ex. 1(d)).

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A copy of the March 12, 2001, Memorandum is attached to this recommended decision as Exhibit A. In the Memorandum, Supervisory Border Patrol Agent Lara states that he informed Derrah at their meeting to discuss the manner in which he had spoken to his supervisor that "this would be an informal counseling and that this would become part of his performance record." (G.C. Ex. 5 at 2).

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In his presentation at the hearing and post-hearing brief, Counsel for the General Counsel only references Lara's conduct of questioning Derrah regarding whether he would be conducting Union business over his lunch house as a violation of section 7116(a)(1) of the Statute. No argument was made with regard to the other allegations of paragraph 14 of the complaint.

The complaint further alleges that the Respondent, through Lara, violated section 7116(a)(1)(2) and (4) by issuing a letter of counseling to Derrah on March 12, 2001.³

Discussion

General Counsel

Counsel for the General Counsel asserts that the Respondent violated section 7116(a)(1) and (2) by counseling John Derrah for "unprofessional conduct" on February 7 and March 12, 2001. The General Counsel asserts that Derrah was engaged in protected activity and the remarks he made were not in any way of such "an outrageous and insubordinate nature" as to remove them from the protection of the Statute. *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7, 11 (1995) (*Grissom AFB*). The General Counsel further asserts that the counseling memos at issue do constitute disciplinary action and therefore can form a basis for a violation of section 7116(a)(2) of the Statute. *U.S. Department of Veterans Affairs Medical Center, Northhampton, Massachusetts*, 51 FLRA 1520 (1996). Further the counseling memos restricted section 7102 rights and therefore violated the Statute. *Ogden Air Logistics Center, Hill Air Force Base, Utah*, 34 FLRA 834 (1990).

Counsel for the General Counsel further argues that the Respondent violated section 7116(a)(4) of the Statute by reinstating the counseling for John Derrah in retaliation for his having filed an unfair labor practice charge. The February 7 memorandum had been rescinded by Lara, at the direction of upper level management. Following the Union's filing the unfair labor practice charge in this case, Lara, at the direction of upper management, reissued the counseling memorandum on March 12, this time entitled Confrontation with Union Official. Using the *Letterkenny* analysis, the General Counsel asserts that Derrah was engaged in protected activity and this activity was a motivating factor in the issuance of the March 12 memorandum. Further, he disputes that the Respondent has presented any evidence to show that there was a legitimate justification for reissuing the memo. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air*

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Interestingly, Counsel for the General Counsel would find that the Respondent violated section 7116(a)(1) and (2) of the Statute on February 7 and March 12, 2001 when it counseled John Derrah for "unprofessional conduct." I do not find, however, that the complaint mentions the February 7, 2001 Memorandum, but instead focuses on the March 12, 2001 Memorandum.

Logistics Center, Robins Air Force Base, Georgia, 55 FLRA 1201, 1205 (2000) (Warner Robins AFB).

Finally, the General Counsel argues that the Respondent violated section 7116(a)(1) of the Statute when its agent questioned John Derrah about whether he would be doing union business during his lunch break. Employees have a statutory right to engage in union activity during lunch and other non-work times. *Department of Commerce, Bureau of the Census, 26 FLRA 719, 721 (1987)*. The General Counsel argues that asking Derrah whether he intended to do union work during his lunch break had a reasonable tendency to chill the free exercise of rights under section 7102 and argues that Lara's statement must be viewed in the context of the discussion regarding Derrah's use of official time.

Respondent

Respondent asserts that at the time of the confrontation between Derrah and Lara, Derrah was not acting in his capacity as a union official. Derrah was not taking the two hours of official time allowed him because he did not feel it was sufficient. He then asked for a "law enforcement break", which Lara granted. Derrah was not performing union business. Respondent further asserts that a supervisor's counseling of an employee regarding his concerns about the employee's behavior does not rise to the level of a formal disciplinary action. Lara further testified that he was not aware that an unfair labor practice charge had been filed when he counseled Derrah on March 12, 2001. Respondent asserts that Lara's conduct towards Derrah was not prompted in any way by anti-union animus and there was no violation of the Statute.

Analysis

Section 7116(a)(2) of the Statute provides that it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" Under the analytical framework set forth in *Letterkenny Army Depot, 35 FLRA 113 (1990)*, in determining whether the Respondent violated section 7116(a)(2) of the Statute, the General Counsel must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and that consideration of such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* at 118. If the General Counsel makes this required *prima facie* showing, the respondent may seek to establish, by a

preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the consideration of protected activity. *Id.*

In this matter Derrah had been requested by a unit employee to represent him in an investigation, specifically to assist him in writing a report about a particular incident. Derrah, following the guidelines for requesting official time, filled out a request for official time and was originally granted four hours of official time. The problem started, however, when Supervisory Border Patrol Agent Lara reconsidered the request and then decided to reduce the official time amount to two hours. Although the witnesses disagree⁴ on whether or not Derrah "withdrew" his request for official time when the full four hours was reduced, it is clear that Derrah declined to continue his official Union business with only two hours of official time. He, therefore, was told to return to his normal border patrol duties. Both Derrah and Lara were clearly upset and frustrated by the other's conduct. Parties in a collective bargaining relationship must be free to discuss differences vigorously and at times comment strongly on the merits of each other's position. Nevertheless agency representatives must be careful not to cross the line and make statements which would tend to interfere, coerce or intimidate employees in the exercise of their rights under the Statute. At the same time, employees must not engage in conduct of such "an outrageous and insubordinate nature" as to remove them from the protection of the Statute by constituting flagrant misconduct. *Department of the Navy, Naval Facilities Engineering Command, Western Division San Bruno, California*, 45 FLRA 138, 156 (1992) (*Naval Facilities Engineering Command*); *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, 390 (1990) (*Tinker AFB*).

The first question then becomes whether Derrah was engaged in protected activity during his last discussion with Lara. Although he was not on official time at the time of the comments at issue, Derrah had clearly been dealing with Lara in his capacity as a Union official during the entire morning. He had been called into Lara's office for the specific purpose of representing unit employee Landeros and had made his official time request for that purpose. He and Lara then had a disagreement about the amount of

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I find the differences in testimony between Derrah and Lara on the events of February 7, 2001, inconsequential in making my determination in this matter.

official time and they were, in fact, discussing the use of official time. Respondent appears to argue that Derrah cannot be engaged in protected activity unless he is on official time. This, however, is clearly incorrect. See *Air Force Flight Test Center, Edwards Air Force Base, California*, 53 FLRA 1455 (1998) (Union representative disciplined for conduct which occurred during discussion of request for official time prior to start of official time. Authority found that the conduct occurred during the course of protected activity.); See *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 (1992) (*El Paso Border Patrol Sector*) (Authority found grievant was engaged in protected activity under section 7102 of the Statute when he sought approval of official time and Leave Without Pay requests in order to perform Union duties. Consequently, the remarks made by the grievant to the supervisor that led to the grievant's discipline were made during the course of protected activity and were themselves protected unless the remarks exceeded the boundaries of the Statute.)⁵

The question then becomes whether Derrah's conduct and language were so intemperate and outrageous to be flagrant misconduct and thus removed from the protection of the Statute. Section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization, or refrain from such activity, without fear of penalty or reprisal. *El Paso Border Patrol Sector*, 44 FLRA at 1402. A union representative has the right to use "intemperate, abusive, or insulting language without fear of restraint or penalty" if he or she believes such rhetoric to be an effective means to make the union's point. *Naval Facilities Engineering Command*, 45 FLRA at 155 (quoting *Old Dominion Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1984)). Consistent with section 7102, however, an agency has the right to discipline an employee who is engaged in otherwise protected activity for remarks or actions that "exceed the boundaries of protected activity such as flagrant misconduct." *Tinker AFB*, 34 FLRA at 389 (citation omitted). Remarks or conduct that are of such "an outrageous and insubordinate nature" as to remove them from the protection of the Statute constitute flagrant misconduct. *Naval Facilities Engineering Command*, 45 FLRA at 156; *Tinker AFB*, 34 FLRA at 390.

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This decision is particularly interesting since it involves the same parties at the same location. Respondent did not make any attempt to distinguish this decision from the instant matter.

In determining whether conduct can be considered flagrant misconduct the Authority has set forth relevant factors in striking the balance between the employee's right to engage in protected activity and the employer's right to maintain order and respect for its supervisory staff on the jobsite: "1) the place and subject matter of the discussion; 2) whether the employee's outburst was impulsively or designed; 3) whether the outburst was in any way provoked by the employer's conduct; and 4) the nature of the intemperate language and conduct." *Grissom AFB*, 51 FLRA at 12; *U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, D.C.*, 55 FLRA 875 (1999) (colloquy between a management representative and union representative did not constitute flagrant misconduct); *Bureau of Indian Affairs, Isleta Elementary School, Pueblo of Isleta, New Mexico*, 54 FLRA 1428 (1998) (Union representative's business card did not constitute flagrant misconduct) and *El Paso Border Patrol Sector*, 44 FLRA at 1395 (Union representative **calling supervisor "asshole" and "a space cadet" during private telephone conversations, while the grievant was off-duty, and did not involve any defamatory utterances**).

In reviewing the totality of the confrontation, the evidence fails to show that Derrah's conduct was in any way flagrant misconduct and it therefore remained protected activity. Even though his final comment may have been overheard by other employees and/or aliens, there is no evidence that this comment had any effect, deleterious or otherwise, on the work environment. His comments to the supervisor were related to their immediate dispute regarding the necessary amount of official time. Although Derrah was agitated about the conflict, his remarks were not defamatory, derogatory or in any way "outrageous."

The March 12, 2001 Memorandum was in direct response to Derrah's conduct on February 7, which has been found to be protected. The Respondent has failed to show that Derrah's conduct was flagrant misconduct and therefore outside the protection of the Statute. Therefore issuance of the March 12 Memorandum was a violation of section 7116(a) (1) and (2) of the Statute.⁶

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The February 7, 2001 Memorandum was rescinded a week after it was issued and is not referenced in the unfair labor practice charges or in the Complaint. Since there is no allegation in the Complaint regarding the February 7 Memorandum, I make no determination regarding whether its issuance was violative of the Statute.

In order to establish a violation of section 7116(a) (1) and (4) of the Statute, the Authority applies the same analytical framework it uses in alleged violations of section 7116(a) (2), found in *Letterkenny Army Depot*, 35 FLRA at 113. *Warner Robins AFB*, 55 FLRA at 1205.

In this matter the evidence clearly establishes that Derrah was engaged in protected activity in both his conduct on February 7, 2001 and in the filing of the unfair labor practice charge in this case on March 9, 2001. The February 7 Memorandum had been rescinded before the unfair labor practice charge had been filed.⁷ Three days later, the counseling is reissued, virtually the same as the initial Memorandum, with only a few additions. Further both Derrah and Lara testified that John Hubert, who did not testify, was involved in this process. Derrah testified that John Hubert told him that the Memorandum had been reissued because he filed the unfair labor practice. (Tr. 43) Lara testified that John Hubert directed him to reissue the Memorandum and that there was no reason the patrol agent in charge could not consider the memorandum for a performance issue. (Tr. 90).

The Respondent argues that the March 12 Memorandum was not a disciplinary action but concerned a performance issue regarding the manner in which a Union official spoke to his supervisor. Whatever it is called, the Memorandum became a part of Derrah's performance record. Further it sets forth restrictions on behavior that is protected under section 7102 of the Statute. No convincing defense was presented to explain the reissuance of the Memorandum. Further the Respondent offered no explanation of the timing of the reissuance of the Memorandum, immediately following the filing of the unfair labor practice charge. It is concluded that the Respondent has not demonstrated, by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the consideration of protected activity. Therefore, I find that the issuance of the March 12, 2001 Memorandum violated section 7116(a) (1) and (4) of the Statute.

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Although Lara testified that he had no personal information regarding the filing of the unfair labor practice charge, the charge was faxed to the Chief Patrol Agent at the El Paso district. The Respondent did not offer any evidence that it was not aware of the unfair labor practice charge on March 9, 2001. The Memorandum was then reissued on the following Monday, March 12, 2001.

Finally, the General Counsel asserts that Respondent, through Lara, violated section 7116(a)(1) of the Statute by questioning Derrah whether he was going to do Union activity on his lunch break. Lara does not deny that he questioned Derrah, although he does deny that he did so more than once. I find whether he made the statement once or twice to be immaterial to the question of whether the comment violates the Statute. As stated above, section 7102 of the Statute guarantees employees the right to form, join, or assist any labor organization, or refrain from such activity, without fear of penalty or reprisal. *El Paso Border Patrol Sector*, 44 FLRA at 1402. Further parties with collective bargaining agreements must be free to engage in robust debate and to vigorously pursue their positions. And in this confrontation, I have found that the Union representative did not step outside the protection of section 7102 of the Statute. The question then is whether the Respondent's agent engaged in activity in violation of the Statute. I find that he did not. Lara's comment, taken in the context of the entire discussion, was not coercive or threatening, noting that he did not request specific details beyond his simple question.

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).

In this matter I find that the statement was not such that an employee could reasonably have drawn a coercive inference from the statement. It was not threatening or

intimidating and therefore not a violation of the Statute. I will therefore recommend dismissal of this allegation of the complaint.⁸

In conclusion, a preponderance of the evidence establishes that Respondent has engaged in an unfair labor practice within the meaning of section 7116(1)(2) and (4) of the Statute by issuing a counseling Memorandum to bargaining unit employee John Derrah because he engaged in protected activity under the Statute.

The General Counsel requests an additional remedy in this matter, specifically that a copy of the decision be furnished to Supervisory Border Patrol Agent Hector Lara. The Respondent did not object to this remedy at the hearing, although it did not feel it was necessary. Since access to the entire decision making process may be helpful in deterring future violative conduct, I will recommend this additional remedy be included. *F.E. Warren Air Force Base, Cheyenne, Wyoming*, 52 FLRA 149, 161 (1996).

Based on the above findings and conclusions, 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, it is hereby ordered that the U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas, shall:

1. Cease and desist from:

(a) Counseling any Union Officer, or any other bargaining unit employee, for engaging in any activity protected by the Federal Service Labor-Management Relations Statute.

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As stated earlier, the General Counsel did not argue whether the remaining allegations of paragraph 14 of the complaint were violations of the Statute. I find, however, that the evidence fails to support the allegation that the Respondent violated section 7116(a)(1) of the Statute by reducing the amount of official time which had already been approved for Derrah or by telling Derrah that he must seek supervisory approval before speaking to a witness on the telephone regarding the matter about which he was assisting the employee. (G.C. Ex. 1(d)).

(b) Counseling or otherwise retaliating against any Union Officer, or any other bargaining unit employee, for filing unfair labor practice charges with the Federal Labor Relations Authority.

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

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

(a) Rescind the counseling memorandum issued on March 12, 2001, to Union Officer John Derrah.

(b) Expunge any and all references to such counseling from all Service and Government records, including the Union Officer's personnel files.

(c) Delivery a copy of this Decision and Order to Supervisory Border Patrol Agent Hector Lara.

(d) Post at the U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas, where bargaining unit employees represented by the American Federation of Government Employees, Local 1929, 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 Luis E. Barker, Chief Patrol Agent, 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.

(e) 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 of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, April 8, 2002.

SUSAN E. JELEN
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Authority has found that the U.S. Department of Justice, U.S. Immigration and Naturalization Service, U.S. Border Patrol, El Paso, Texas, 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 rescind the counseling memorandum issued on March 12, 2001, to Union Officer John Derrah.

WE WILL expunge any and all references to such counseling from all Service and Government records, including the Union Officer's personnel files.

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 NOT counsel any Union Officer, or any other bargaining unit employee, for engaging in any activity protected by the Federal Service Labor-Management Relations Statute.

WE WILL NOT counsel or otherwise retaliate against any Union Officer, or any other bargaining unit employee, for filing unfair labor practice charges with the Federal Labor Relations Authority.

(Respondent/Agency)

Dated: _____ By: _____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its 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, IL 60603, and whose telephone number is: (312)353-6306.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-01-0453, were sent to the following parties:

CERTIFIED MAIL:

CERTIFIED NOS:

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