

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

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DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT, REGION X
SEATTLE, WASHINGTON

Respondent

and

Case No. 9-CA-90655

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 3294, AFL-CIO

Charging Party

.....

John H. Vandermolen, Esquire
For Respondent

Susan E. Jelen, Esquire
For the General Counsel

Before: BURTON S. STERNBURG
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. Section 7101, et seq., and the Rules and Regulations issued thereunder.

Pursuant to amended charge first filed on September 13, 1989 by American Federation of Government Employees, Local 3294, AFL-CIO, (hereinafter called the Union), a Complaint and Notice Hearing was issued on March 30, 1990, by the Regional Director for Region VII, Federal Labor Relations Authority, Denver, Colorado. The Complaint alleges in substance, that the Department of Housing and Urban Development, Region X, Seattle, Washington, (hereinafter called the Respondent), violated Section 7116(a)(1) of the Federal Service Labor-Management Relations Statute,

(hereinafter called the Statute), by virtue of the actions of Branch Chief Charles Hayman in telling unit employee John Kalivas that Respondent would retaliate against him, Mr. Kalivas, for filing a grievance.

A hearing was held in the captioned matter on June 20, 1990, in Seattle, Washington. All parties were afforded the full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues involved herein. The parties submitted post-hearing briefs on July 20, 1990, which have been duly considered.^{1/}

Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Findings of Fact

The Union is the exclusive representative of a nationwide unit of professional employees and a nationwide unit of nonprofessional employees, including those professional and nonprofessional employees employed at Respondent's Region X in Seattle, Washington.

Mr. John Kalivas has worked at the Respondent's Title I Service Center since September 1986. At all times material, Mr. Charles Hayman was his immediate supervisor; Mr. Frank Rogers was the Branch Chief; and Ms. Judith Johnson was the Title I Service Center Director.

^{1/} Respondent also filed a "Motion to Dismiss, or in the Alternative to Supplement the Record" with a post hearing affidavit of Chris Wilde, a Personnel Management Specialist for Respondent. Mr. Wilde's affidavit concerns and Inspector General's report on Mr. Kalivas which was received after the close of the hearing. Respondent, who is of the opinion that the IG's report bears on Mr. Kalivas' credibility, seeks to have the IG's report made a part of the record.

Respondent's Motion to Supplement the Record is hereby denied since Mr. Kalivas has not been given the opportunity to contest on the record any adverse conclusions or findings made in the IG's report. See U.S. Dept. of Justice, U.S. Marshals Service, 26 FLRA 890, 895-897; Dept. of the Interior, 31 FLRA 267, 275. The Motion to Dismiss, which is predicated on Section 7118(a)(4)(A) of the Statute, is hereby denied for reasons which will be set forth Infra.

On May 30, 1989 a grievance was filed on behalf of Mr. John Kalivas. The grievance concerned Respondent's continuing failure to promote Mr. Kalivas. On June 6, 1989, a first step grievance meeting was held and the Respondent issued its "Response" to the grievance which was signed by his immediate supervisor, Mr. Hayman. The Response set forth the reasons why Respondent was of the opinion that Mr. Kalivas did not deserve a promotion.^{2/} At the same meeting, Respondent also delivered to Mr. Kalivas a memorandum dated June 5, 1989 regarding an alleged security violation by him. The memorandum, which was signed by his supervisor, Mr. Hayman, stated in the last line as follows:

Therefore, I am cautioning you that any recurrence of such act or similar one could result in severe administrative action being taken against you.^{3/}

According to the uncontroverted testimony of Mr. Kalivas, during the summer of 1989, he learned that his supervisor Mr. Hayman was attempting to get copies of his, Mr. Kalivas law school transcripts. Mr. Kalivas then went to Mr. Hayman's office and asked him what was the purpose of the inquiry and told him that his law school grades were none of his business. Mr. Hayman then told him that he had been instructed by Mr. Rogers to get anything he, Mr. Hayman, could on Mr. Kalivas since he, Mr. Kalivas, had filed a grievance.^{4/} Mr. Kalivas then told Mr. Hayman that his law school grades were none of his business and that the law school was not going to give the grades to him.^{5/}

^{2/} The grievance is currently pending arbitration. The Union has been representing Mr. Kalivas throughout all the stages of the grievance.

^{3/} Other than putting the memorandum into evidence, there was no attempt by the General Counsel to show that Mr. Kalivas had not committed the security violation, that the warning was unwarranted, or that it was in retaliation for filling the grievance.

^{4/} The Complaint alleges that this conversation occurred on or about June 26, 1989.

^{5/} Although Mr. Kalivas attended law school, he does not work for Respondent as an attorney.

Further, according to the uncontroverted testimony of Mr. Kalivas, during other conversations which occurred around the same time, Mr. Hayman told him that he had stirred up a real hornet's nest by filing the grievance and that Respondent was trying to get anything on him that it could.^{6/}

As noted in footnote 1, supra, Respondent takes the position that the charge underlying the instant Complaint was untimely filed and that the Complaint should be dismissed for lack of jurisdiction pursuant to Section 7118(a)(4)(a), which provides that "no complaint shall be issued based on any unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority".

In connection with the foregoing contention of the Respondent, the record indicates that the original charge in this matter was filed on September 13, 1989 and alleged that on or about June 6 and July 6, 1989, the Respondent, in violation of Sections 7116(a)(1) and (8), interfered with, restrained and coerced Mr. Kalivas by "turning him in to the HUD Inspector General on trumped up charges and by falsely accusing him of harassing women in the office in retaliation for the employee having filed two grievances."

The first amended charge filed on March 19, 1990, alleged that Respondent violated Section 7116(a)(1) by virtue of the action of Branch Chief Hayman in "telling a unit employee words to the effect that after the employee filed a grievance, his second line supervisor, . . . had to do something to get back at the employee".

The Complaint which was issued on March 30, 1990 charged that:

On or about June 26, 1989, Respondent, through [Supervisor] Hayman told a unit employee words to the effect that since the employee filed a grievance, [supervisor] Rogers had to do something to get back at him.

Discussion and Conclusions

Respondent takes the position that the amended charge raised a new cause of action which is untimely since it is

^{6/} Mr. Hayman did not testify at the hearing.

predicated on events occurring more than six months prior to the date that the amended charge was filed with the Authority. The General Counsel, on the other hand, takes the position that since the matters raised in the amended charge were related to the events complained of in the original charge, i.e. interference with, restraint or coercion of John Kalivas in retaliation for filing a grievance, the amended charge was not untimely. In support of her position, General Counsel points out that a complaint need not be confined to the specific allegations of the charge, but may include other similar alleged violations of the Statute which are uncovered by the investigation. The newly alleged violations, however, must bear a relationship to the original charge and be based upon events which occurred within six months of the date that the original charge was filed.

As to the merits of the Complaint, it is Respondent's position that Mr. Kalivas' testimony should not be credited since it is imprecise and evasive. The General Counsel, of course, urges a credibility finding in favor of Mr. Kalivas.

With respect to the jurisdictional aspect of this case, I find, in agreement with the General Counsel, that action on the statement allegedly uttered by Mr. Hayman is not barred by Section 7118(a)(4)(A) of the Statute.

It is well established that the allegations of a complaint need not be confined to only the specific matters set forth in the charge. Additional allegations may be included in the complaint as long as such allegations have a relationship to the charge, are closely related to the events or matters complained of in the charge, and are, of course, based on events occurring within the 6 month period preceding the filing of the charge. Department of the Interior, Washington, D.C., 31 FLRA 267 at 276; Bureau of Land Management, Richfield, District Office, 12 FLRA 692, 698.^{7/}

In the instant case the gravamen of the original charge was retaliation or attempted retaliation against Mr. Kalivas for participating in a protected activity, i.e. filing a grievance. The retaliatory acts cited in the charge were alleged to have occurred during the period June - July 1989.

^{7/} See Department of Interior, U.S. Geological Survey, 9 FLRA 543 for an excellent analysis by Judge Devaney on the function of the "charge" and the impact of Section 7118(a)(4)(A) thereon.

The amended charge alleged, in substance, that in June, 1989 Supervisor Hayman told Mr. Kalivas in answer to a question that since he had filed a grievance management had to take some retaliatory action.

Thus, it is clear that both the original and amended charges deal with retaliation for filing the May 30, 1989 grievance concerning Respondent's failure to promote Mr. Kalivas. In such circumstances I find that the statement allegedly uttered by Mr. Hayman has a close relationship to the original charge, that it occurred well within the time restraints set forth in Section 7118(a)(4)(A) and that it was properly included in the complaint. The amended charge appears to have been a good faith attempt by the Charging Party conform to the pleadings with the results of the Region's investigation, a superfluous action, since the allegation could have been included in the complaint without any amendment to the original charge.

Turning now to the merits of the Complaint, I find, based primarily upon the uncontroverted credited testimony of Mr. Kalivas, that during the summer of 1989 Mr. Hayman, in reply to a question from Mr. Kalivas concerning the reasons for Respondent's inquiry into Mr. Kalivas' law school grades, told Mr. Kalivas that he had been instructed by Branch Chief Rogers to get anything he could on Mr. Kalivas because he had filed a grievance.

In view of the above finding, and since it is well established that filing and processing grievances under a collective bargaining agreement is a protected activity within the meaning of Section 7102 of the Statute, I further find that Mr. Hayman's statement violated Section 7116(a)(1) of the Statute because it put Mr. Kalivas on notice that the processing of the instant or future grievances would bring retaliation from management. Department of the Air Force, Scott Air Force Base, Illinois, 34 FLRA 956, 965. There can be no doubt that a threat of retaliation would tend to chill an employee in the exercise of his statutory right to process a grievance under the collective bargaining agreement.

As part of the remedy herein, the General Counsel has requested that the June 5, 1989 memorandum dealing with an alleged security violation be rescinded. However, inasmuch as the validity of the memorandum was not contested at the hearing, I find no basis for concluding that the issuance of the memorandum was in retaliation for Mr. Kalivas' action in filing grievance. Accordingly, I will not order the memorandum to be rescinded.

Having found that the Respondent violated Section 7116(a)(1) of the Statute, it is hereby recommended that the Authority issue the following Order.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Housing and Urban Development, Region X, Seattle, Washington, shall:

1. Cease and desist from:

(a) Making statements to employees which interfere with, coerce, or restrain any employee from exercising the right accorded by the Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

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

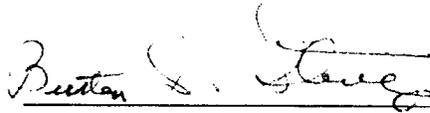
2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Post at all of its facilities within Department of Housing and Urban development, Region X, Seattle, Washington area 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 Regional Administrator, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director,

San Francisco 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 herewith.

Issued, Washington, DC, April 3, 1991.

A handwritten signature in cursive script, appearing to read "Burton S. Sternburg", is written above a horizontal line.

BURTON S. STERNBURG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY
AND TO EFFECTUATE THE POLICIES OF THE
FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make statements to employees which interfere with, coerce, or restrain any employee from exercising the right accorded by the Statute to file and process grievances under the negotiated grievance procedure freely and without fear of penalty or reprisal.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured them by the Federal Service Labor-Management Relations Statute.

(Activity)

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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Regional Office, whose address is: 350 South Figueroa Street, 3rd Floor, Room 370, Los Angeles, CA 90071, and whose telephone number is: (213) 894-3805.