

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

.
UNITED STATES CUSTOMS SERVICE,
PACIFIC REGION

Respondent

and

Case No. SA-CA-20052

NATIONAL TREASURY EMPLOYEES
UNION

Charging Party

.
John R. Pannozzo, Esq.
For the General Counsel

Stephanie J. Dick, Esq.
For the Respondent

Before: ELI NASH, Jr.
Administrative Law Judge

DECISION

Statement of Case

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party (herein the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the San Francisco Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by making a statement to an employee indicating that her career would be ruined if she provided a written statement on behalf of another employee faced with a proposed termination in violation of section 7116(a)(1) of the Statute.

Findings and Fact

1. In July 1991, Yolanda Martinez, a Lead Customs Aide at Respondent's Los Angeles Airport facility, began observing the work performance of a probationary employee, Roberto Mota. During the third week of September 1991, Mota received a proposed termination from Respondent. In late September 1991, Mota asked Martinez to write a statement on his behalf because Union Steward Pat Cullinane had indicated that this statement could help Mota. Respondent's reasons for proposing Mota's termination were that he made too many errors and was unprofessional. Martinez agreed to provide a written statement on Mota's behalf. The written statement was prepared on Monday, September 30, 1991, at Martinez' house, with the assistance of Union Steward Pat Cullinane and Mota's wife Colleen Garcia, who also works at Respondent's Los Angeles Airport facility. After it was completed, the statement was given to Mota and Cullinane.

2. On Wednesday afternoon, October 2, 1992, Martinez, while working with Kimberly Burke, received a telephone call from Supervisor Julie Ryan. The telephone call occurred between 2:00 p.m. and 3:00 p.m., on extension 2190 and the telephone was located on Mota's former work desk. Ryan needed Martinez to come down to her office right away. Upon entering Ryan's office, Ryan closed the door and initiated a conversation with Martinez. Ryan initially indicated to Martinez that Mota was not doing well and he belonged in private industry. Martinez responded that Mota had not been properly trained, but Ryan disagreed and stated that Mota had been given every opportunity and had not come up to par. The discussion between Ryan and Martinez briefly shifted to another unit employee, Rufus Marshall, before returning to Mota.

3. During the conversation, Ryan stated that the Union could not help Mota in any way. Martinez then informed Ryan that she had been asked to write a statement on Mota's behalf. Ryan responded to Martinez that: "I hope you don't do anything that could ruin your career." In order to avoid an argument with Ryan, Martinez immediately left Ryan's office and met with Union President Vernon Parriot in the Library. Martinez informed Parriot of Ryan's statement and asked Parriot if Respondent could hold writing this statement on behalf of Mota against her.

4. On Thursday afternoon, October 3, 1991, Ryan approached Martinez at her workplace and stated that "I didn't say you couldn't write statements", and that Martinez misunderstood her. Martinez responded that she had not

stated words to that effect. Mota's informal hearing took place on October 3, 1991, and Martinez' written statement was submitted on Mota's behalf. On October 4, 1991, Respondent terminated Mota.

5. Ryan denied that she made the alleged threatening statement to Martinez. However, consistent with Martinez' version of the events, Ryan admitted having this subsequent conversation with Martinez either that day or the next day in which Ryan stated: "I hope you don't misunderstand me" or words somewhat similar. This ensuing conversation between Ryan and Martinez took place after Ryan received a note on her desk from the Seaport Director. According to Martinez, this subsequent conversation with Ryan occurred on October 3, 1991, the day after the threatening statement.

6. Ryan, a new supervisor, was actively involved in the decision to terminate Mota. Ryan attended meetings with her immediate supervisor Deborah Brooks and labor-management personnel before the proposed termination. In late September, 1991, Ryan became aware of and was undoubtedly concerned about a congressional inquiry being made by Congressman Roybal's office in connection with the proposed termination of Mota. Although terminated, Mota was reinstated and at the time of the hearing worked for Respondent.

Conclusions

Based on all the foregoing and the entire record, including my assessment of the demeanor of witnesses, the conflicting testimony is resolved in favor of the witnesses for the General Counsel. In finding Martinez more credible than Ryan, it is noted that not even Ryan denies that the two discussed Martinez' making a statement on Mota's behalf. The only question is what was said. It is also noted that Ryan, after receiving a note from the Seaport Director concerning complaints that she was stopping people from giving statements on behalf of the Union, sought out only Martinez, to say that she hoped that Martinez did not "misunderstand" her. This attempt to straighten the record out, on the heels of her statement, indicates a deep concern by Ryan that she had overstepped her bounds in her earlier conversation with Martinez. I also reject Respondent's contention that Martinez cannot be credited because of a statement in an Equal Employment Opportunity case which gave a date different from the October 2, 1991 she testified to at the hearing. The clear import of her testimony is that the statement in support of Mota was prepared prior to the Mota hearing, and her failure to recall the exact date is

not fatally inconsistent therewith. In any event, it is found that Ryan did tell Martinez on October 2, 1991 that: "I hope you don't do anything that could ruin your career." The time of the conversation is corroborated by Chapter President Vernon Parriot, who testified that he spoke with Martinez about her conversation with Ryan on the afternoon of October 2, 1991, and that an unfair labor practice charge was initiated as a result of their conversation. Furthermore, I reject Respondent's suggestion that Martinez was untruthful because the person for whom she gave the statement was a friend. No evidence was offered to prove this point and it must be viewed as pure speculation by Respondent.

Respondent conceded that if the employee in question were a member of the bargaining unit, and if the alleged threat was made in connection with union activity, there would be a violation of section 7116(a)(1) of the Statute.

The alleged statement is certainly one from which an employee could reasonably have drawn a coercive inference that to assist the union might endanger her career. Department of the Treasury, Internal Revenue Service, Louisville District and National Treasury Employees Union, 11 FLRA 290, 298 (1983). Having already credited Martinez that the statement was made to her, it is found that the statement was a threat to a member of the bargaining unit. In this regard there is no evidence in the record to show that Martinez was a supervisor or that she acted in any other capacity which would exclude her from the bargaining unit. Further, her lead person status is hardly enough reason to exclude her from the bargaining unit. Moreover, if Respondent wanted to challenge her status, it had the opportunity to do so at the hearing. Failure to present evidence, on what is now claimed to be a major issue in the matter was in Respondent's hands. Since there is no evidence to the contrary, it is found that Martinez was an employee and bargaining unit member and the statement was made to her in that capacity.

Respondent misread the complaint in contending that it does not show a threat made in connection with union activity and, thereby does not state a cause of action. Based on Respondent's statement, questioning whether an employee or bargaining unit member was involved in the case, one must hypothesize that Respondent feels that the only right infringed upon here was that of employee Martinez. Nothing could be further from the law and even the Seaport Director was concerned that Ryan might be stopping "people" from giving statements to the Union. In disagreeing with

Respondent, it is my opinion that the complaint gives a plain enough statement of the act claimed to be an unfair labor practice to put Respondent on its defense. The complaint alleges that an employee was told her career would be ruined "if she provided a written statement. . . ." The written statement, it turns out, was one which was given to assist the Union in representing a probationary employee. Section 7102 gives employees the right to "assist" a labor organization without fear of penalty or reprisal. The essential part of the complaint, however, is that Respondent interfered with the exclusive representative's right to obtain statements to assist in representing a probationary employee at an informal meeting. See, National Agreement, Article 27, Section 5(c) and 6(c).*/ This gathering of information and subsequent representation, in my view, constitutes activity which is protected under the Statute. See generally, U.S. Department of Labor, Employment and Training Administration, San Francisco, California, 43 FLRA 1036 (1992). Thus, the threatening statement constituted an interference not only with Martinez' right to assist a union, but with the Union's broad right to perform its representational role.

Accordingly, it is found that Respondent violated section 7116(a)(1) of the Statute on October 2, 1991 when Supervisor Julie Ryan, upon discovering that Lead Aide Yolanda Martinez, intended to submit a written statement at an October 3, 1991 informal hearing regarding the proposed termination of probationary employee Roberto Mota, told Martinez, "I hope you don't do anything that could ruin your career."

Having found that Respondent violated the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the United States Customs Service, Pacific Region, shall:

*/ The charge in this matter clearly shows that the threat was directed at an employee if "she assisted the Union in an oral reply. . . ."

1. Cease and desist from:

(a) Interfering with, restraining and coercing its bargaining unit employees by making statements to employees indicating that providing a written statement on behalf of another employee faced with a proposed termination could ruin an employee's career.

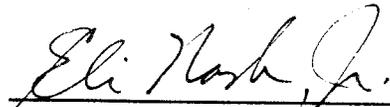
(b) In any like or related manner, interfering with, restraining or coercing its employees in the exercise of the rights assured them by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Post in its Pacific Region, Los Angeles, California, copies and the attached notice on forms to be furnished by the Authority. Upon receipt of such forms, they shall be signed by the Regional Commissioner 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 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing with 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, December 15, 1992



ELI NASH, JR.
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 indicating that providing a written statement on behalf of another employee faced with a proposed termination could ruin an employee's career.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed under the Federal Service Labor-Management Relations Statute.

(Activity)

Dated: _____ By: _____

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: 901 Market Street, Suite 220, San Francisco, CA 94103 and whose telephone number is: (415) 744-4000.