UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

U.S. GEOLOGICAL SURVEY AND CARIBBEAN DISTRICT OFFICE, SAN JUAN, PUERTO RICO Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, 15TH DISTRICT Charging Party	Case No. BN-CA-31069

Stephanie E. Parle
For the Respondent

Orlando Ramos
For the Union

Carol Waller Pope, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
Administrative Law Judge

DECISION

Statement of the 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 sometimes the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Boston Region, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by terminating ten temporary employees because the Union informed Respondent it would file an unfair labor practice charge regarding the announced termination of five other temporary employees.

A hearing on the Complaint was conducted in Hato Rey, Puerto Rico, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

At all times material the American Federation of Government Employees, AFL-CIO has been the exclusive collective bargaining representative of various of Respondent's employees and the Charging Party has been the agent of AFGE for the purpose of representing those employees.

Respondent is a nonappropriated fund instrumentality engaged in performing research and work projects relating to ground water and surface water availability and contamination. It receives its funding through direct payments for Federal projects, payments for activities from other Federal agencies such as the Environmental Protection Agency and the Corps of Engineers and also from its cooperative program whereby it receives an allocation of money which may only be utilized by selling its services to Puerto Rico government agencies, where funds are matched by the Puerto Rico government, for research and water related projects.

In the spring of 1993, Respondent was having budget problems which had begun sometime previously, when Activity funding had been reduced. The 1993 fiscal year was particularly bad. By April 1993 the District's employment complement had been substantially reduced.

In addition to full-time employees, the District employed temporary employees to accomplish its mission. Temporary employees are appointed for a period not to exceed one year. However, some temporary employees received repeated one year appointments up to the three year limit and thereafter continued employment by receiving another temporary appointment to another job title. Others received appointments to permanent positions. Further, prior to April 1993, no temporary employee had ever been terminated before the expiration of the employee's temporary appointment. Rather, if the budget of the Caribbean District Office could not support the payroll costs, both permanent and temporary employees would be detailed to other district offices which would absorb their

salaries during the pendency of the detail. In fiscal year 1992, some 35 employees were detailed to other offices. In fiscal year 1993, 29 employees were detailed to other offices.

In April 1993, the District office attempted to renew the appointments of three temporary employees whose appointments expired at that time. The District office wished to have the three temporary employees' employment extended until July 1 at which time it would terminate the employees if the budget picture did not improve. However, the District was told by the Regional office that it would have to terminate the three temporary employees in order to arrive at a manageable personnel level due to the District's current budget condition.

On May 6, 1993, AFGE was certified as the exclusive collective bargaining representative of various of Respondent's employees pursuant to an election. The record reveals that in May 1993, after the Union was certified as the employees exclusive representative, members of District office management and their immediate supervisor, the Area Hydrologist, met with Regional office representatives to discuss how to approach dealing with the Union as well as how financial and personnel problems should be addressed.[1/] A substantial financial deficit was expected by the end of the District's fiscal year. The possibility of a reduction-in-force (RIF), transfers and furloughs were discussed as was the termination of temporary employees to improve the District's financial status. No decision was made at that time.

Management officials met again to discuss these matters in the morning of June 10, 1993. Although a majority of those present were of the opinion that all fifteen remaining temporary employees should be terminated immediately due to budgetary considerations, the ultimate decision was to terminate five employees and retain the remainder of the temporary employees until July 1, at which time the budget situation would be reviewed again.[2/]

1/ The District office is responsible to the Area office which, in turn, is responsible to the Regional office.

2/ The Puerto Rican government's fiscal year ends on June 30 and the Respondent's headquarters reviews the Agency's fiscal picture at that time and, at times, reallocations of funds are arranged between subordinate activities to weather a financial crisis.

On the afternoon of June 10, Respondent's representatives met with Union representatives for the first time since the Union was certified as the employees collective bargaining agent. Present for the Union was Pedro Romero, AFGE District 15 National Representative, as Chief Spokesperson, and four unit employees. Respondent was represented by Irwin Kantrowitz, Area Hydrologist, Arnold Zack, District Chief, Caribbean District, Stephanie Parle, Labor Relations Officer, Maria Margarita Irizarry, who at that time was Supervisory Hydrologist and District Labor Relations Officer, Anna Nieves, Administrative Officer, and Pedro Diaz, Chief of the Hydrologic Data Section. Kantrowitz informed the Union that he wanted to discuss a confidential matter. After some explanation about Respondent's funding process, Kantrowitz provided the Union with a budget document and stated that the Caribbean District was facing a substantial budget shortfall, particularly due to the Commonwealth of Puerto Rico's failure to execute their agreements for joint ventures from which much of Respondent's funding is derived. Kantrowitz stated that in an effort to show the Regional office that they were engaging in cost savings measures, they had to terminate five temporary employees. Kantrowitz referred to the temporary employees being terminated as "sacrificial lambs". He suggested that the Union become involved in determining the manner in which the five employees would be selected. The Union was then provided with a list of all fifteen temporary employees on duty, their grades, and appointment expiration dates. Zack explained to the Union that the temporary employees whose names were listed with an asterisk were considered essential because of the nature of their work and would be retained. Zack further stated that those temporary employees whose names were listed in pairs by brackets, were doing similar work and the release of one of the coupled pairs of employees would not affect the mission of the Agency. Kantrowitz requested that the Union provide input on which one of the bracketed pairs of employees should be selected for termination.

The Union caucused to consider Respondent's request and upon returning to the meeting, Romero stated that the Union would not participate in the selection of employees for termination; that the decision was up to management; and the Union would provide representation for terminated employees. After a management caucus, the meeting resumed and management announced the names of the five temporary employees they had selected for termination. Romero stated that three of the five employees were former Union organizers and were now dues paying members and informed management that the Union would challenge the announced terminations as discriminatory in an

unfair labor practice charge.[3/] Management caucused for ten minutes and upon returning to the meeting, Kantrowitz announced that all fifteen temporary employees would be terminated, not just five. With regard to the decision, Kantrowitz testified:

> The other ten, the other ten were the remaining employees. The reasoning in our deliberation was that if we -- if we eliminated all employees without selecting any to retain, we would not be accused of discrimination.

Zack stated that Respondent was positioning itself to avoid all possible charges of discrimination by obviously not discriminating between dues paying or non-dues paying employees. Also, testimony reveals that in response to Romero's questioning why all the temporary employees were being terminated in light of management's earlier statements that some of the temporaries were needed for specific projects, Parle stated that by terminating all the employees, the Respondent would have a better defense before the FLRA. In an effort to save the jobs, Romero offered to intercede in the matter by contacting local government officials to get the agreements executed. Respondent's representatives encouraged Romero to do so.

On June 14, 1993 all fifteen temporary employees were notified that effective July 10, 1993, they would be terminated. In the meantime Romero contacted various officials of the government of Puerto Rico and impressed on them the importance of promptly signing the cooperator agreements with Respondent and most, if not all, of the outstanding cooperator agreements were executed between June 10 and June 30. Nonetheless, on July 10, 1993, all fifteen temporary employees were terminated.

Since March 1993, Respondent has hired only one employee, a secretary/receptionist, and since the terminations two of Respondent's offices have been closed and training and travel have been curtailed. Total employment by Respondent was about 75 employees at the time of the hearing in this case, down from 128 in late 1991. Notwithstanding obtaining cooperative contracts from the Puerto Rican government and the above cost

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3/ The Union had provided management with a listing of dues paying members in advance of the meeting. However, that list indicated only two of the five employees selected for termination were Union members.

saving actions by Respondent, the 1993 fiscal year ended with a budget deficit of approximately $100,000.

Additional Findings, Discussion and Conclusions

Counsel for the General Counsel contends Respondent violated section 7116(a)(2) and (1) of the Statute by terminating the additional ten temporary employees, alleging the action was taken in response to the Union's threat to file an unfair labor practice charge over the termination of the five temporary employees Respondent originally planned to terminate. Counsel for the General Counsel also contends Respondent violated section 7116(a)(1) of the Statute by stating that the additional terminations were being implemented to put itself in a better position to defend against the threatened unfair labor practice charge. As a remedy, counsel urges that, inter alia, Respondent be required to rescind the 10 terminations, offer the employees reinstatement and make them whole for any loss of wages and benefits suffered while terminated.

Respondent takes the position that it terminated its temporary employees for legitimate financial reasons and the same removal action would have been taken regardless of what occurred during the June 10, 1993 meeting. Respondent also urges that the remedy proposed by counsel for the General Counsel is inappropriate for various reasons.

In Letterkenny Army Depot, 35 FLRA 113, 118-123, (1990) the Authority ruled that in a case involving alleged discrimination under section 7116(a)(2) of the Statute, the General Counsel must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion or conditions of employment. Even if the General Counsel makes the required prima facie showing, an agency will not be found to have violated section 7116(a)(2) of the Statute if the agency can demonstrate, by a preponderance of the evidence, that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken even in the absence of protected activity. Id.

In the case herein I find that Respondent decided on June 10, 1993, to effectuate the termination of the 10 temporary employees on July 10, 1993, along with the 5 other temporary employees previously scheduled for termination, because the Union announced it would protest the discharge of the five temporary employees by filing an unfair labor

practice charge on their behalf. In such circumstances, I conclude the ten temporary employees were "engaged in protected activity" within the meaning of Letterkenny. Cf. U.S. Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California, 38 FLRA 567 (1990). Further, I find and conclude that Respondent would not have taken the action of terminating the ten temporary employees effective July 10, if the Union had not announced it would file an unfair labor practice charge on behalf of the five employees scheduled for termination. Thus, the threatened unfair labor practice charge precipitated Respondent's action and was the motivating factor in the Agency's decision to terminate the ten employees.[4/] The statements made by Respondent's agents Zack and Parle during the June 10 meeting with the Union clearly convey that but for the threatened filing of an unfair labor practice charge, Respondent would not have concluded on June that the ten temporaries would be terminated. Rather, the decision of whether and when to terminate the ten employees would be left until after July 1 when Respondent's financial situation was to be reappraised.

The record clearly establishes, and I conclude, that on June 10, 1993, there was no legitimate justification for Respondent's decision to terminate the ten temporary employees, the terminations were not based upon a legitimate economic justification nor would the discharges have occurred at that time in the absence of the exercise of protected activity. As the facts above indicated, management had decided against discharging the ten temporaries the very morning before it met with the Union and concluded it would re-evaluate the question at a later date. The only justification Respondent had for its subsequent June 10 decision to terminate was in reaction to the threat of an unfair labor practice charge. While regardless of the protected activity the same action might have been taken by Respondent at a later date, I conclude Respondent's decision and announcement on June 10, 1993, to terminate the ten temporary employees and its effectuation of that decision on July 10, 1993, constituted a violation of section 7116(a)(1) and (2) of the Statute. I also conclude that Respondent's announcement made at the June 10 meeting with the Union, which was attended by unit employees, constituted interference, restraint and coercion in violation of section 7116(a)(1) of the Statute.

4/ The ten employees were: Hector Rivera, Maria del Carmen Alvarez, Enrique Aviles, Livia Montalvo, Jerry Ortiz, Katherine Nieves-Peres, Wilfredo Montana, Miquel A. Soto, Virgon Negron, and Dyhalma Malava.

However, I reject counsel for the General Counsel's request for a remedy of reinstatement and full backpay. The record reveals that Respondent was having budget deficit problems which it was attempting to address without engaging in a RIF. Thus, in April 1993, three temporary employees were terminated when their appointments had expired. This was a break from the past practice of reappointing temporary employees. Thereafter, no new employees, temporary or permanent, save one secretary/receptionist, were hired up to the day this matter came to hearing, and travel and training have been curtailed. Further, in early June, before any unfair labor practice conduct occurred, Respondent decided that five temporary employees would be terminated before their appointments had expired. In these circumstances I conclude that there was no reasonable expectancy that the ten temporary employees discriminatorily terminated on July 10, 1993 would have been retained throughout the entire period during which they were in discharge status.

Respondent's financial picture improved somewhat by July 1, 1993, since substantial cooperator contracts were fulfilled. Accordingly, I conclude Respondent would not have discharged at that time the ten temporary employees which they deemed essential. However, Respondent's budget remained in a significant deficit posture. It is obvious that in periods of declining budgets that the procedure of continually transferring temporary employees to other activities would not remain a viable option. Indeed, no such choice was offered the three temporary employees terminated in April 1993, nor the five temporary positions scheduled for termination prior to Respondent meeting with the Union on June 10, 1993. In these circumstances herein I find it reasonable to conclude that, given Respondent's financial and budgetary status, the ten temporary employees would in all likelihood have been retained only until the end of the 1993 fiscal year and have been terminated at that time, regardless of when their individual appointments were due to expire.

Accordingly, in view of the entire foregoing and the record herein I conclude Respondent violated section 7116(a)(1) and (2) of the Statute as alleged and I recommend the Authority issue the following:

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 U.S. Geological Survey and Caribbean District Office, San Juan, Puerto Rico, shall:

1. Cease and desist from:

(a) Discriminating against temporary employees by discharging them because their collective bargaining representative threatened to file an unfair labor practice charge.

(b) Informing employees that it will discharge employees if an unfair labor practice charge is filed concerning the termination of other employees.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights protected 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) Make whole Hector Rivera, Maria del Carmen Alvarez, Enrique Aviles, Livia Montalvo, Jerry Ortiz, Katherine Nieves-Peres, Wilfredo Montana, Miquel A. Soto, Virgon Negron, and Dyhalma Malava for any loss of pay or benefits suffered as a result of the termination of their employment on July 10, 1993, for the period of July 10, 1993 through September 30, 1993.

(b) Post at its facilities copies of the attached Notice of forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Caribbean District Chief, 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director for the Boston Region, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, August 2, 1994

SALVATORE J. ARRIGO
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 NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against temporary employees by discharging them because their collective bargaining representative threatened to file an unfair labor practice charge.

WE WILL NOT inform our employees that we will discharge employees if an unfair labor practice charge is filed concerning the termination of other employees.

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 make whole Hector Rivera, Maria del Carmen Alvarez, Enrique Aviles, Livia Montalvo, Jerry Ortiz, Katherine Nieves-Peres, Wilfredo Montana, Miquel A. Soto, Virgon Negron and Dyhalma Malava, for any loss of pay or benefits suffered as a result of the termination of their employment on July 10, 1993 for the period of July 10, 1993 through September 30, 1993.

_____
(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 of the Federal Labor Relations Authority, Denver Region, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110-1200 and whose telephone number is: (617) 424-5730.