OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF COMMERCE,

NATIONAL OCEANIC AND ATMOSPHERIC

ADMINISTRATION, NATIONAL OCEAN

SERVICE, COAST AND GEODETIC SURVEY, RIVERDALE, MARYLAND

Respondent

and

Case Nos. WA-CA-30663

AMERICAN FEDERATION OF GOVERNMENT

WA-CA-30834 WA-CA-31012 WA-CA-31015

EMPLOYEES, LOCAL 2640, AFL-CIO

Charging Party

Frances C. Silva

Counsel for the Respondent

Brian Anthony-Jung

Representative of the Charging Party

Stephen G. DeNigris

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

I. Statement of the Case

The unfair labor practice complaints in these cases allege that officials of Respondent violated section 7116(a)(l) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(a)(1), by making various threatening statements to a Charging Party (Union) representative which interfered with his protected activities. The complaint in Case No. WA-CA-31012 also alleges that a supervisor of Respondent discriminated against the Union representative with respect to a performance review because of his protected activities.

Respondent's answers to the complaints denied any violation of the Statute.

A hearing was held in Washington, D.C. The Respondent, Union, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs.

The General Counsel's witnesses consisted of Norman Rhodes, Penney Baile, and Brian Anthony-Jung. Respondent's witnesses included testimony from Kenneth H. Moyer, Mary Battle, Henry Carter, and Doris Gordon. In making the factual determinations, I have taken into account witness demeanor, partiality, potential bias, the likelihood of the event occurring in the manner described, and the ability of the witness to recall probative facts and circumstances. Based on all the testimony, including my observation of the witnesses and their demeanor, as well as consideration of the extensive arguments in the briefs bearing on the credibility of the witnesses, I have ultimately credited major portions of the testimony of Mr. Anthony-Jung. Based on the entire record, I make the following findings of fact, conclusions of law, and recommendations.

II. Findings of Fact[1]

A. Case WA-CA-30663

The Department of Commerce is an agency under 5 U.S.C. § 7103(a)(3). The National Oceanic and Atmospheric Administration (NOAA) is a primary national subdivision under 5 C.F.R. § 2421.5, and the National Ocean Service (NOS) is an activity under 5 C.F.R. § 2421.4. The Coast and Geodetic Survey (CGS) is a line office of NOS.

The American Federation of Government Employees, Local 2640, AFL-CIO (AFGE or Union), is a labor organization under 5 U.S.C. § 7103(a)(4), and the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining.

At all relevant times, Kenneth H. Moyer, Chief, Distribution Branch, CGS, and Henry Carter, Deputy

Chief, Distribution Branch, CGS,were supervisors under 5 U.S.C. §§ 7103(a)(10) and (11) and were acting on behalf of Respondent.

During early February 1993, bargaining unit employee Brian Anthony-Jung was appointed to serve as a member of the Union's negotiations team for the upcoming contract negotiations between Respondent and the Union. (Tr. 25-27).

On or about February 10, 1993, Brian Anthony-Jung was directed by his supervisor, Doris Gordon, to report to Branch Chief Kenneth Moyer's office. Anthony-Jung had never previously been called to Moyer's office. (Tr. 29).

Branch Chief Moyer and Deputy Branch Chief Henry Carter met with Anthony-Jung in Moyer's office. Moyer questioned Anthony-Jung about his usual work arrival time and then asked whether it was true he was going to be serving on the Union's negotiating team. (Tr. 31, 33). Anthony-Jung replied that he had not made a firm decision. (Tr. 33). At that point, Moyer handed Anthony-Jung an Alternative Work Schedule Form, (G.C. Exh. No. 2), and inquired as to his thoughts concerning the Union's and management's proposal. Anthony-Jung indicated that he had not read the proposal at that time and was unfamiliar with it. (Tr. 35).

Later, as Anthony-Jung and Carter left Moyer's office, Carter tried to obtain a definitive answer from Anthony-Jung about his role with AFGE. (Tr. 37). Anthony-Jung responded that he felt there were a lot of problems in the building, that he could help, and it would be good experience for him. (Tr. 37).

Carter replied that he should not worry about the problems in the building, that there were better ways of getting experience. Carter then stated, "Brian should be worried about Brian." Carter's facial expression was angry and his voice was louder than a conversational tone. (Tr. 37-38).

Anthony-Jung became a Union Vice President in March 1993. He began serving on the Union negotiating team at about the same time. (Tr. 27).

On or about April 6, 1993, Anthony-Jung, on behalf of another bargaining unit employee, filed a grievance under the negotiated grievance procedure. (Tr. 40-41; G.C. Exh. No. 3). Anthony-Jung served Carter with the grievance since he was the next level supervisor above the immediate supervisor. (Tr. 44).

Carter stated that he could not recognize Anthony-Jung as AFGE's representative. Anthony-Jung replied that he was indeed the Union representative. Carter then asked Anthony-Jung if he was sure he wanted to do this. (Tr. 44). When Anthony-Jung replied that he was sure, Carter then stated in an angry manner and loud voice, "Well, don't say that I didn't warn you." (Tr. 45).

B. Case WA-CA-30834

On or about June 20, 1993, Anthony-Jung personally served several unfair labor practice charges on

Kenneth Moyer in his office. Moyer at that point told Anthony-Jung, "Your job in the Union is becoming a full-time job." (Tr. 45-46). Anthony-Jung testified that he felt this comment by Moyer meant that his job was in jeopardy. (Tr. 45-47, 49).

On July 21, 1993, Anthony-Jung served several unfair labor practice charges on both Moyer and Carter. (Tr. 49).

On July 22, 1993, Anthony-Jung presented Carter with an official time request. Carter looked at the request and did not appear to be pleased. Carter stated to Anthony-Jung that his job could be abolished, that he was spending far too much time in the Union, and that the Agency was paying his salary and not the Union. Carter continued that the Agency was looking into the matter. Carter then inquired if Anthony-Jung still wanted official time. When Anthony-Jung answered in the affirmative, Carter stated, "Don't say I didn't warn you." (Tr. 50-52). The statements were not made in an attempt to resolve a conflict between management's right to manage efficiently and the employee's right to engage in protected activity.

C. Case WA-CA-31012

Doris Gordon, at all relevant times, was Chief, Accounting and Order Processing Unit, CGS, NOS, NOAA. Gordon was a supervisor under 5 U.S.C. §§ 7103(a)(10) and (11) and was acting on behalf of Respondent.

On August 6, 1993, Union Vice-President Brian Anthony-Jung was called to a meeting with Gordon at which he was given a performance progress review by Gordon. A performance progress review is not an official rating. It is a progress report to let the employee know what the employee has to do in order to obtain a fully satisfactory rating. (Tr. 130, 141). Mr. Anthony-Jung's review indicated that his performance was marginal in every category. (G.C. Exh. No. 4; Tr. 52-56).

Gordon stated that she was rating Anthony-Jung lower because of his Union activities; that since he was in the Union, he was not there to actually perform the job so his rating was less. Gordon indicated to Anthony-Jung that the people upstairs had problems with him because of the negotiations and that she had no choice but to rate him poorly. She stated that if she were to rate him based solely on what he had done, she would have given him the highest rating. (Tr. 55-56). The statements were not made in an attempt to resolve a conflict between management's right to manage efficiently and the employee's right to engage in protected activity.

In all of his other reviews, Anthony-Jung had always received an evaluation of fully successful. (Tr. 55).

D. Case WA-CA-31015

On or about August 24, 1993, Respondent circulated a newsletter article entitled "Rip-Off #4" throughout Respondent's Riverdale, Maryland facility.(2) Moyer subsequently apologized for the circulation of the article by memorandum to the Union. (G.C. Exh. No. 8). In pertinent part, Moyer wrote:

It has come to my attention that an article disparaging Unions was distributed to bargaining unit employees. I assure you that I did not direct or approve this distribution.

On September 2, 1993, Union Vice-President Brian Anthony-Jung called Kenneth Moyer to discuss an unrelated matter. The conversation turned to the newsletter topic and how Anthony-Jung did not believe that Moyer's apology to the Union had been sincere. (Tr. 62-63).

Anthony-Jung testified that during the course of the conversation, Moyer told him, "By the way, since I have you on the phone, and this is off the record, since there are no witnesses, I want you to know that I am ready for you." Anthony-Jung testified that he asked Moyer what he meant by this remark, and Moyer responded that Anthony-Jung should check his military record; that he would find Moyer was a great shot when he was in the MP's. (Tr. 64). Anthony-Jung had no knowledge of Moyer's military background or his career and interpreted Moyer's remark as a threat. (Tr. 64-65, 81).

Moyer's testified that he informed Mr. Anthony-Jung that he had been told by an employee that Mr. Anthony-Jung had said he was "going to get me." Moyer's stated, "I said to him that he should not be so confident that he could get me. I said, him saying that made me fear for my personal safety, and I also said that if he attacked me, I would try to defend myself with deadly force, that's what I said." (Tr. 95).

Moyer took the "going to get me" comment seriously because Mr. Anthony-Jung had told him sometime previously that he had been in the military and was wanted on criminal charges in Korea. Moyer also considered Mr. Anthony-Jung a "different kind of person" since he was reported to have eaten cat food at his desk. (Tr. 96-97).

Mr. Anthony-Jung testified that he put a cat food label on a tuna can and later ate it in order to play "along with the Agency's little game [of] feeling I was some kind of crazy nut or something." (Tr. 155).

III. Discussion and Conclusions

Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, 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 Authority has held that the standard for determining whether management's statement or conduct violates section 7116(a)(1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although 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 the intent of the employer. U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994).

With regard to Cases Nos. WA-CA-30663, 30834, and 31015, the circumstances surrounding Distribution Branch Chief Moyer's simply asking Mr. Anthony-Jung whether he was going to be a member of the Union's negotiating team, and stating, on or about June 20, 1993, that "Your job in the Union is becoming a full-time

job," when being served with an unfair labor practice charge, do not demonstrate violations of the Statute. The first was a simple inquiry, and the second was merely an off-hand comment concerning Mr. Anthony-Jung's increased Union activity. I also conclude that Mr. Moyer's comment on September 2, 1993 to Mr. Anthony-Jung about "being ready for him" or, in Mr. Moyer's version, "if . . . attacked, I would try to defend myself with deadly force," was based upon a misinterpretation of a comment by Mr. Anthony-Jung "to get management" as including a physical threat, was unrelated to Mr. Anthony-Jung's protected activities, and did not violate section 7116(a)(l) of the Statute, as alleged.

However, Deputy Chief Carter's statements, after being informed by Mr. Anthony-Jung concerning why he desired to serve the Union, that Mr. Anthony-Jung should not worry about the problems in the building, that there were better ways of getting experience, and he should just be worried about himself, would tend to coerce or intimidate the employee from assisting the Union and violated section 7116(a)(l) as alleged. Similarly, the circumstances of Mr. Carter's statements on April 6, 1993, upon being served with a grievance by Mr. Anthony-Jung, about whether Mr. Anthony-Jung "was sure he wanted to do this," and his subsequent angry statement,"don't say I didn't warn you," also violated section 7116(a)(l), as alleged, as did Mr. Carter's comments to Mr. Anthony-Jung on July 22, 1993, upon being presented with an official time request. There is no evidence that the statements were made in an attempt to resolve a conflict between management's right to manage efficiently and the employee's right to engage in protected activity.

Section 7116(a)(2) of the Statute provides that it is an unfair labor practice for an agency to encourage or discourage membership in a union by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. The Authority has stated that the framework in Letterkenny Army Depot, 35 FLRA 113 (1990) (Letterkenny) will be applied to cases of alleged discrimination under section 7116(a)(2). Letterkenny, 35 FLRA at 117. In Letterkenny, the Authority reaffirmed that:

> [i]n all cases of alleged discrimination, . . . 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 other conditions of employment.

Id. at 118.

There is no dispute that Mr. Anthony-Jung was engaged in protected activity and management was aware of the activity. The statements of Supervisor Gordon linking Anthony-Jung's marginal performance review to his protected activity establishes that such activity was a motivating factor in the type of review he received. See Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 900 (1990). The statements were not made in an attempt to resolve a conflict between management's right to manage efficiently and the employee's right to engage in protected activity. In these circumstances, the General Counsel has established a prima facie case of discrimination under Letterkenny.

If the General Counsel makes the required prima facie showing, a respondent may seek to rebut that showing by establishing, by a preponderance of the evidence, the affirmative defense that: (1) there was a legitimate justification for its action; and (2) the same action would have been taken in the absence of protected activity. Letterkenny, 35 FLRA at 123.

Respondent attempted to show, through the testimony of Supervisor Gordon, that Mr. Anthony-Jung's work was less than satisfactory -- often other employees had to do his work; he spent inordinate amounts of time on

the telephone; he refused to make extra rounds delivering the mail; and he would disappear from the work site. Ms. Gordon acknowledged that she never took disciplinary action against Mr. Anthony-Jung because of his absence from the work site. I have credited Mr. Anthony-Jung's testimony as to Ms. Gordon's statements concerning the real reasons for the marginal performance review and have not credited Ms. Gordon's testimony as to Mr. Anthony-Jung's alleged deficiencies. Accordingly, Respondent has failed to demonstrate that there was legitimate justification for its action or that the same action would have been taken absent protected activity. It is concluded that Respondent violated section 7116(a)(l),(2), and (4), as alleged.

Based on the above findings and conclusions, it is 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 U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Riverdale, Maryland shall:

1. Cease and desist from:

(a) Making statements to employees which interfere with, coerce, or discourage any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to act for a labor organization in the capacity of a representative freely and without fear of penalty or reprisal.

(b) Discriminating against Brian Anthony-Jung by unlawfully taking into consideration in appraising his performance his activities on behalf of the American Federation of Government Employees, Local 2640, AFL-CIO, the exclusive representative of its employees.

(c) In any like or related manner, interfering with, restraining, or coercing 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) Rescind the August 6, 1993 performance review of Brian Anthony-Jung and, upon request, reappraise him without unlawfully taking into consideration his activities on behalf of the American Federation of Government Employees, Local 2640, AFL-CIO, the exclusive representative of its employees; and provide Brian Anthony-Jung with any benefits to which he would be entitled as a result of the reappraisal.

(b) Post at its facilities, where bargaining unit employees represented by the American Federation of Government Employees, Local 2640, AFL-CIO, are located, copies of the attached Notice on forms furnished

by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the NOAA Assistant Administrator for the National Ocean Service and shall be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted and shall be maintained for 60 consecutive days thereafter. 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, Washington 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, December 23, 1994

GARVIN LEE OLIVER

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 EMPLOYEES THAT:

WE WILL NOT make statements to employees which interfere with, coerce, or discourage any employee from exercising the rights accorded by the Federal Service Labor-Management Relations Statute to act for a labor organization in the capacity of a representative freely and without fear of penalty or reprisal.

WE WILL NOT discriminate against Brian Anthony-Jung by unlawfully taking into consideration in

appraising his performance his activities on behalf of the American Federation of Government Employees, Local 2640, AFL-CIO, the exclusive representative of our employees.

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

WE WILL rescind the August 6, 1993 performance review of Brian Anthony-Jung and, upon request, reappraise him without unlawfully taking into consideration his activities on behalf of the American Federation of Government Employees, Local 2640, AFL-CIO, the exclusive representative of our employees; and provide Brian Anthony-Jung with any benefits to which he would be entitled as a result of the reappraisal.

_____

(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 its provisions, they may communicate directly with the Regional Director, Washington Regional Office, whose address is: Washington Region, Federal Labor Relations Authority, 1255 22nd Street, NW, 4th Floor Washington, DC 20037-1206.

1. 1/ Where the findings relate to more than one of these consolidated cases, they have been appropriately considered, but generally not repeated.

2. 2/ In U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Riverdale, Maryland, Case No. WA-CA-31011 (1994), ALJ Decision Reports 113 (May 11, 1994), the Authority found that Respondent violated section 7116(a)(1) of the Statute by circulating the newsletter article.