



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

OALJ 16-30

DEPARTMENT OF DEFENSE
MISSILE DEFENSE AGENCY
REDSTONE ARSENAL, ALABAMA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1858

CHARGING PARTY

Case No. AT-CA-15-0381

Brent S. Hudspeth
Mark D. Halverson
For the General Counsel

James J. Delduco
For the Respondent

Abner Merriweather
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On April 2, 2015, the American Federation of Government Employees, AFL-CIO, Local 1858 (Union) filed an unfair labor practice (ULP) charge against the Department of Defense, Missile Defense Agency, Redstone Arsenal, Alabama (Respondent/Agency/MDA). GC Ex. 1(a). On October 23, 2015, the Regional Director of the Atlanta Region of the FLRA issued a Complaint and Notice of Hearing alleging that the Respondent violated § 7116(a)(1) of the Statute by denying the Union's request to host lunch and learns in an Agency building where outside vendors were permitted to operate on a regular basis. GC Ex. 1(b). The Respondent timely filed an Answer in which it admitted certain allegations but denied violating the Statute. GC Ex. 2.

The case was initially scheduled for a hearing on December 10, 2015. GC Ex. 1(b). On November 24, 2015, the Respondent filed a Motion to Postpone the Hearing, asserting that the parties agreed that there were no material facts in dispute and that a joint stipulation of facts and a motion for a decision on the record would be filed. On November 25, 2015, the hearing was indefinitely postponed, however, the hearing was subsequently rescheduled and a hearing date set for May 10, 2016, after neither a stipulation nor a motion were filed. During the interim, the General Counsel filed a Motion for Summary Judgment on January 15, 2016, and a Brief in Support of the Motion (GC Br.), attaching General Counsel Exhibits 1 through 3. (GC Ex. 1-3). On January 26, 2016, a Reply and Cross-Motion for Summary Judgment (R. Br.), which included five attachments. (R. Attachs. 1-5).¹ On February 4, 2016, the General Counsel filed a Response to Respondent's Cross-Motion for Summary Judgment. (GC Resp. Br.). On February 17, 2016, the Respondent filed a Reply Brief to the General Counsel's Response. (R. Supp. Br.).

Motions for summary judgment filed under § 2423.27 of the Authority's Rules and Regulations are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). During a prehearing conference call on May 3, 2016, the parties agreed that despite their inability to agree upon a stipulation of facts, there was no genuine issue of material fact.

As the record demonstrates that it is appropriate to resolve this case by summary judgment, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Ex. 1(b). The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a bargaining unit of employees appropriate for collective bargaining employed by the Respondent. The Union is an agent of AFGE for the purpose of representing unit employees of the Respondent..

Redstone Arsenal (Redstone) is a Department of the Army installation near Huntsville, Alabama. Approximately 35,000 employees work at Redstone, of which approximately 19,500 are civilian federal employees. The other employees are either contractors or active duty military personnel. The Respondent is one of more than twenty organizations situated on the installation. Other organizations include the U.S. Army Aviation and Missile Command (AMCOM); the U.S. Army Aviation and Missile Research, Development, and Engineering Center; the U.S. Army Research, Development and Engineering Command (AMRDEC), and the U.S. Army Space and Missile Defense Command (SMDC). GC Ex. 3 at 1. The Respondent's mission is to develop a "layered ballistic missile defense system to protect the homeland, allies[,] and service members." R. Attach. 2 at 2. The Respondent is a Department of Defense Agency and is not a command or organization within the Department of the Army. *Id.*

¹ The Respondent referred to these documents as "attachments."

The MDA is located in the “Von Braun Complex,” which consists of four buildings: Von Braun I, II, III, and IV. *Id.* at 3. A parking lot surrounds the buildings, and the buildings form a circle around a courtyard. The Von Braun Complex is within half a mile of buildings occupied by AMCOM, AMRDEC, and SMDC. *Id.* at 2-3. The MDA “operates and occupies” Von Braun II, III, and IV. (Von Braun I is occupied by SMDC.) *Id.* at 3. About 4,125 Agency employees work at buildings in the Von Braun Complex. *Id.* These employees have telephone and internet access and can receive mail. *Id.* at 3-4.

The Agency buildings in the Von Braun Complex are “controlled access” facilities. *Id.* at 4. One cannot enter or exit an Agency building without an identification badge. A security clearance does not automatically entitle one to access the buildings. *Id.* Rather, access to the buildings is subject to Agency approval, which can be revoked at any time. *Id.*

On the first floor of Von Braun III is a hallway used by all building occupants. GC Ex. 3 at 1. In this area is a retail area with a snack shop, a coffee shop, a barbershop, and a dry cleaner. *Id.* The retail area also has space where visiting vendors set up tables and sell “novelty items of low value . . .” *Id.*; R. Attach. 2 at 4. Visiting vendors have included “What’s Popp’N,” which sells cotton candy and seventy-five flavors of popcorn; “\$5 Dollar Jewelry,” which sells jewelry and clothing accessories; and MAC Enterprises, which sells boots, shoes, leather goods, and suits. GC Ex. 3 at 4, 5. Retailers must be screened and authorized by Agency security personnel to enter Von Braun III. R. Attach. 2 at 4. There are no offices or meeting rooms in the retail area, and generally lunch is not eaten in the hallway. *Id.*

The Union represents approximately 10,000 professional and non-professional employees at Redstone. GC Ex. 3 at 1. About 200 bargaining unit employees who work for AMCOM, AMRDEC, or SMDC work in Von Braun II, III, or IV. *Id.* at 2. MDA employees are not unionized. However, the Union has attempted to organize Agency employees in the past by “position[ing] employees outside [Agency] buildings in an effort to obtain signatures from [Agency] employees.” R. Attach. 2 at 2-3; *see also* R. Supp. Br. at 5 n.5.

Abner Merriweather is the President of the Union. He is an electrical engineer at AMRDEC and does not work in Von Braun buildings II, III, or IV. He holds a security clearance of Secret. GC Ex. 3 at 1-2; R. Attach. 2 at 3. On at least one occasion, Merriweather has been permitted access to Von Braun III. R. Attach. 2 at 5. In his affidavit, Merriweather asserted that the Respondent has “never said or implied that they would grant me access to their facility [Von Braun III] if I submitted to and successfully passed any form of screening or background check.” GC Ex. 3 at 2.

On March 18, 2014, Merriweather sent an email on behalf of the Union to Agency Director John James, Agency Human Resources Director Donna Davis, and others, asking the Agency to “reserve[] locations [for the Union] to host daily lunch and learn[] events at all [Agency] [b]uildings from 7-17 April 2014.” R. Attach. 5 at 5. The Agency denied the request. In response, the Union filed a ULP charge, which was ultimately withdrawn. *Id.* at 6.

On February 10, 2015,² Merriweather sent an email to James, Davis, and others, in which he again asked for space to hold lunch and learns. Merriweather stated:

AFGE Local 1858 is requesting to host lunch and learns at the [Agency] facilities for our matrix Bargaining Unit employees. The Union is requesting to have the same privileges and or opportunities as other vendors that visit your facilities to host events to sell their service[s], good[s], and or products to the [Agency] workforce. ...

R. Attach. 1 at 1-2.

Davis replied by email on March 11. After summarizing Merriweather's request, and asserting that the request was similar to the previous request, Davis stated:

The Agency again denies your request. The status of certain vendors has no impact on this matter. If you want to conduct "lunch and learns" to educate your bargaining unit members, you have the option of hosting an event at your local office at Redstone Arsenal. You may also wish to contact the commands/agencies who employ your bargaining unit members. In addition, you have a website which would serve well as a conduit for any information about the union.

Id. at 1.

The Union filed the ULP charge in this case on April 2. GC Ex. 1(a). On September 15, Merriweather sent an email to Redstone officials criticizing the Agency's denial of the February 10 request. R. Attach. 4. Merriweather also indicated that the lunch and learns would be conducted "to update our [bargaining unit] employees on current workforce issues." *Id.*

POSITIONS OF THE PARTIES

General Counsel

The General Counsel contends that an agency that discriminatorily denies access to non-employee union representatives to conduct activities protected under § 7102 of the Statute will be found to have violated § 7116(a)(1) of the Statute. GC Br. at 3-4 (citing *Soc. Sec. Admin.*, 52 FLRA 1159, 1185 (1997) (*SSA I*), remanded sub nom. *NTEU v. FLRA*, 139 F.3d 214 (D.C. Cir. 1998), *decision & order on remand*, 55 FLRA 964 (1999) (*SSA II*)). The General Counsel argues that because the Agency permitted visiting vendors to set up tables in the retail area of Von Braun III to conduct commercial solicitation, but refused the Union's similar request to conduct lunch and learns in that area, the Agency improperly discriminated against the Union and thus violated § 7116(a)(1) of the Statute. GC Br. at 4-5.

² Hereafter, all dates are 2015, unless otherwise noted.

Respondent

The Respondent argues that it did not violate § 7116(a)(1) of the Statute. Specifically, the Respondent asserts that *SSA* does not apply because the Union did not seek to engage in solicitation of bargaining unit employees or Agency employees. At the same time, the Respondent asserts that “[i]n all likelihood, [Merriweather’s] request was not a genuine attempt to communicate with members. The Union has attempted to organize the Agency in the past by soliciting signatures from employees outside of Agency buildings.” R. Supp. Br. at 5 n.5. The Respondent adds that “private meeting[s]” are not held in the hallway, and that “no one eats lunch in this hallway.” R. Br. at 6. Finally, the Respondent asserts that it has a right to control “security procedures,” and suggests that the lunch and learns would have interfered with these procedures. *Id.* at 7.

ANALYSIS AND CONCLUSIONS

Although Redstone is a missile facility, one does not need to be a rocket scientist to understand the Respondent has violated the Statute under the present facts. Section 7102 of the Statute protects employees 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 a ULP for an agency to interfere with, restrain, or coerce any employee in the exercise of their § 7102 rights. Section 7102 gives employees the right to solicit membership on behalf of a union in non-work areas during non-work time. *U.S. Dep’t of the Treasury, IRS, Ogden Serv. Ctr., Ogden, Utah*, 42 FLRA 1034, 1050 (1991); *see also Okla. City Air Logistics Ctr. (AFLC), Tinker AFB, Okla.*, 6 FLRA 159, 162 (1981). Lunch and learns conducted by a union constitute an exercise of forming, joining, or assisting a labor organization within the meaning of § 7102 of the Statute, and attendance at such events is an exercise of the right protected under § 7102 to solicit membership. *U.S. Dep’t of the Navy, Naval Air Station, Pensacola, Fla.*, 61 FLRA 562 (2006). The Authority has held that employees have the right to distribute literature on behalf of a union in non-work areas during non-work time. *IRS, N. Atl. Serv. Ctr. (Andover, Mass.)*, 7 FLRA 596 (1982). In *Dep’t of the Air Force, 3rd Combat Support Group, Clark Air Base, Rep. of the Phil.*, 29 FLRA 1044, 1048-50 (1987) (*Air Force*), the Authority held that the respondent, a component of the Department of Defense, violated § 7116(a)(1) when it denied a union’s request to distribute handbills at a military base, even though the actor did not have a bargaining relationship with the union, which represented employees of another component of the Department of Defense at the installation, and even though the handbills would have been distributed on “quasi-public” areas of the base.

In addition, the Authority has concluded, that under certain circumstances, employees have a right to “learn the advantages” of labor organizations from non-employee organizers on agency property, pursuant to §§ 7102 and 7116(a)(1) of the Statute. *SSA I*, 52 FLRA at 1184. In addressing the question of rights relating to access to agency property and distribution of union literature by non-employee union representatives, the Authority considers whether the agency discriminated against the non-employee union and whether there were other reasonable methods the non-employee union could have used to communicate with employees. To establish a violation, the General Counsel must show *either* that the agency acted in a discriminatory manner *or* that there were no other

reasonable methods of communicating with the employees. *Id.* at 1185. Applying this analysis, the Authority has held that an agency discriminated against a non-employee union, in violation of § 7116(a)(1) of the Statute, by denying it permission to distribute information on the agency's premises after having granted similar access to other organizations. *SSA II*, 55 FLRA at 967. Suffice it to say, this precedent is controlling to the facts in this case.

It is not disputed that Merriweather, though an ARMDEC employee at Redstone, is not an employee of the Agency. Further, it is not disputed that Merriweather's request sought to allow non-employee Union representatives such as himself to conduct lunch and learns, or that the lunch and learns would be conducted in non-work areas during non-work time. It is disputed, however, whether the lunch and learns would be used for solicitation.

As discussed above, lunch and learn activities are typically associated with union solicitation. Further, Merriweather indicated in his February 10 email that solicitation was one of the reasons for holding the lunch and learns. Specifically, Merriweather stated that he was requesting the lunch and learns so the Union could have "the same" privileges and opportunities as other vendors that "sell their service[s]," i.e., engage in solicitation. GC Ex. 2. In addition, Merriweather explained that the Union sought to act like vendors and solicit "the [Agency] workforce," a group that includes unrepresented Agency employees whom the Union had tried to organize in the past. GC Ex. 2; R. Attach. 2 at 3. Because Merriweather stated that the Union sought to act as a vendor and solicit unrepresented Agency employees as well as current bargaining unit employees who were not all dues paying members of the Union, it is clear that solicitation was one purpose of the lunch and learns. That Merriweather asked that the lunch and learns be held in a high-traffic retail area, rather than in a conference room, further supports the conclusion that solicitation was the intent.

The Agency could have avoided ULP liability by establishing a non-discriminatory reason for the denial, but the Agency failed to do so, even though it gave itself nearly a month to draft a response. Instead, the Agency asserted that the "status of certain vendors has no impact on this matter," and also asserted that the Union could hold a lunch and learn at its office, or through its website. GC Ex. 2. These assertions do not explain why the Union should be treated differently from other visiting vendors, and it is apparent that the Agency denied the request because it came from the Union and it believed the Union would solicit unrepresented employees. By discriminating against the Union in this way, the Agency violated § 7116(a)(1) of the Statute. *SSA II*, 55 FLRA at 967.

The Respondent's arguments to the contrary are not convincing. In its brief, the Respondent contends that it was appropriate to deny Merriweather's request because no one meets or eats in the hallway. But it is unlikely that Union lunch and learns would cause any more disruption than that caused by vendors selling food items like popcorn and cotton candy. Moreover, the Respondent made no mention of disruption on May 11, when it denied Merriweather's request. Instead, all the Respondent referenced was other locations and means available to the Union. Further, it is not clear that the Respondent bothered to ascertain that the "lunch" portion of a lunch and learn, references when the interaction takes place, i.e., during a non-duty lunch time break, rather than the service of a meal.

The Respondent's claim that the Union would use the lunch and learns to provide updates to bargaining unit employees rather than solicitation is belied by its own admission that Merriweather's request indicated that one purpose of the lunch and learns was to organize unrepresented Agency employees. R. Supp. Br. at 5 n.5. Moreover, the lunch and learns could also be used to solicit current bargaining unit employees working in that building to become dues paying Union members. As for the "updates," it is safe to assume that the Union would be presented in a positive light, thus furthering the Union's solicitation efforts. For these reasons, the Respondent's arguments are misguided and they are rejected. In short, the Union wanted to solicit and that is precisely what the Respondent wanted to preclude within its building. Apparently, plying its employees with healthy treats like cotton candy was preferable to having them informed of their rights under the Statute.

Finally, the Respondent contends that it has a right to control its security procedures. While that is generally true, the Respondent cited no security concern when it denied Merriweather's request. Thus, this argument is yet another disingenuous attempt to justify the Respondent's actions after the fact rather than a legitimate concern expressed at the time of denial. Moreover, Merriweather holds a Secret security clearance and has previously been granted access to Von Braun III. There is no indication that he (or any other Union representative) poses any more of a security risk to the Agency than non-federal employee vendors hawking cotton candy, popcorn and trinkets in the retail area. Further, while Von Braun III is not open to the public and while Merriweather is not an employee of the Agency, he is an AMRDEC employee at Redstone, and it would be absurd to permit the Agency to discriminatorily bar Merriweather from soliciting for the Union at Von Braun III solely because he works within a different component of the Department of Defense. *See Air Force*, 29 FLRA at 1048-50. For these reasons, I reject the Respondent's internal security argument.

CONCLUSION

By denying Merriweather's request to engage in solicitation via lunch and learns while allowing visiting vendors to engage in commercial solicitation, the Respondent discriminated against the Union, in violation of § 7116(a)(1) of the Statute.

Accordingly, I recommend that the Authority grant the General Counsel's Motion for Summary Judgment, and deny the Respondent's Motion for Summary Judgment.

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Defense, Missile Defense Agency, Redstone Arsenal, Alabama, shall:

1. Cease and desist from:

(a) Discriminatorily denying requests by the American Federation of Government Employees, AFL-CIO, Local 1858 (Union), to conduct lunch and learns in the retail area at Von Braun III.

(b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured by the Statute.

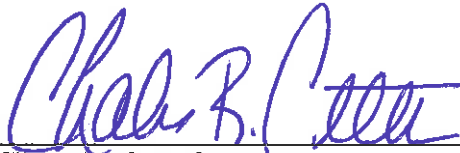
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Post at all facilities where bargaining unit employees represented by the Union 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 the Director of the Missile Defense Agency, Redstone Arsenal, Alabama, and shall be posted and maintained for sixty (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) In addition to physical posting of paper notices, Notices shall be distributed electronically, such as by email, posting on an intranet or internet site, or other electronic means, if such are customarily used to communicate with employees.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, Atlanta Region, in writing, within thirty (30) days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., June 20, 2016



CHARLES R. CENTER
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Defense, Missile Defense Agency, Redstone Arsenal, Alabama, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminatorily deny requests by American Federation of Government Employees, AFL-CIO, Local 1858 (Union), to conduct lunch and learns in the retail area at Von Braun III.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the rights assured by the Statute.

(Respondent/Agency)

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

This Notice must remain posted for sixty (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, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.