

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY OFFICE OF ADMINISTRATIVE LAW
JUDGES WASHINGTON, D.C. 20424 UNITED STATES ARMY AIR DEFENSE CENTER, FORT BLISS,
TEXAS .

Respondent . and . Case No. DA-CA-20571 NATIONAL
ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R14-89 . Charging Party .
Robert P. Simm, Esq. For the Respondent

Christopher J. Ivits, Esq., and Joan M. Durkin, 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 the Union) against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for the Dallas Regional Office, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute by verbally abusing and physically assaulting a Union official who was engaged in representational activity. A hearing on the Complaint was conducted in El Paso, Texas 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 Union has been the exclusive collective bargaining representative of various of Respondent's employees. Around early February 1992 a unit employee received notices from management that it intended to suspend him for disciplinary reasons. The Union, as the employee's representative, undertook the responsibility of responding to the letters of proposed discipline. Although a reply was due within 10 days of the notice, Union Vice-President Sybille Kepp sought an extension of time to reply to the proposed action from the Directorate of Personnel Community Activities (DPCA). Kepp contacted Belle Hindley, the administrative coordinator for DPCA Director Gilbert Cole, and requested that the reply time be extended by 10 days. Hindley informed Kepp that she would take the matter up with Cole who was the deciding official for Respondent on the matter. Hindley called Kepp back that day and told her Cole would grant only a seven day extension to reply. Kepp replied that she needed at least 10 days and Hindley indicated she would speak again to Cole. Hindley later called Kepp and informed her Cole had granted a 14-day extension.

On or about February 12, due to sickness and work load, Kepp found she needed a further extension of time to assemble the reply to the suspension proposal. That morning she again talked to Belle Hindley about the matter. Hindley replied she would have to talk to Cole and on the following day Kepp called Hindley who informed Kepp that Cole would not grant a further extension of time. Kepp then asked to talk with Cole. Kepp explained to Cole why she was requesting additional time to submit a response but Cole was unmoved and told Kepp it was her problem and he wanted the response as scheduled. Kepp then spoke to Cecilia Arriola, Management/Employee Relations (MER) Officer for Respondent's Civilian Personnel Office (CPO), about Cole's refusal. Kepp indicated she was quite upset and explained that because of a heavy workload dealing with Respondent's work and Union duties, she needed the following week-end to work on the response but Cole had refused her a few extra days to present the response. Arriola told Kepp she would speak to Cole about the situation. Arriola contacted Cole and persuaded him to grant Kepp's 3-day extension request. Late in the day, Arriola called Kepp and told her Cole had granted her a 3-day extension but Kepp was still upset with Cole and expressed her displeasure that MER had to intervene and further questioned Cole's initial refusal to grant the extension. By this time, according to Kepp, she, by diligent work, had assembled the Union's response to the notice of proposed suspension and she did not need the extension and, according to Kepp, she told Arriola she could call Cole and tell him she didn't need the extension.⁽¹⁾

That evening Kepp called Carlos Hernandez, President of Local R14-22, which represented Respondent's Wage Grade employees.⁽²⁾ During the conversation Kepp told Hernandez of her problem with Cole and asked Hernandez for his advice. Kepp testified that, except for one document, she had assembled a packet of materials to present to Cole and asked Hernandez how she could let Cole know that she was complying with his time limitation that he had set ". . . but avoid the problem of a having an incomplete presentation." Hernandez suggested Kepp write a letter to Cole which stated she would supply the evidence supporting the Union's position on the day the verbal response was due.⁽³⁾ Such a procedure, according to Hernandez, would put Kepp in compliance with the time deadline. Kepp was unaware of this procedure but drafted a letter which stated she was complying with Cole's time limitation and would subsequently present all the evidence in the case when the parties met.

On the following day, probably, February 14, Kepp went to Cole's office accompanied by Hernandez.⁽⁴⁾ They asked Cole's secretary if they could meet with Cole and met Cole's administrative coordinator Hindley in her office, which was adjacent to Cole's office, and indicated they wished to see Cole. After a few minutes Cole came to his doorway and invited Kepp and Hernandez to come into his office.⁽⁵⁾ Cole sat behind his desk and asked Kepp what he could do for her. Kepp walked briskly straight to Cole's desk and told Cole she was there to comply with the time limitation that he set on her to reply to the suspension proposal and abruptly handed Cole a letter and asked him to sign a copy acknowledging receipt. Cole asked, "What is this?" The letter signed by Kepp was captioned "Responses to Letter of Proposed Suspension Without Pay . . ." and stated:

I am notifying you that I am complying with your request on the time limitation you set forth on 14

February 1992, in reference to Mr. Victor Powell's Proposed Letters of Suspensions Without Pay.

This organization will present all evidence in writing and verbally on the day of the meeting with you.

After reading the letter, Cole, with anger evident, rose and stated in a loud voice, "I'm not signing this crap". As he was rising, with forearm parallel to his body, Cole flipped the two pages at Kepp.⁽⁶⁾ The two pieces of paper glided across the three or four foot space between them and one fell to the floor and the other touched Kepp at chest level before falling to the floor. Kepp bent over and picked up the letters. Cole then asked Kepp when he was going to get the documents related to the case and Kepp, with voice escalating, replied she would provide them as soon as an appointment for a meeting on the matter was made with his

secretary. Cole shouted for Hindley to come into his office and Hindley appeared at his door.⁽⁷⁾ Cole asked whether a meeting had been scheduled regarding the notice of suspension and Hindley replied that a meeting was scheduled for the following Monday at 4:00 p.m. Kepp protested that she had not scheduled a meeting and Hindley indicated that Cecilia Arriola of the Management/Employer Relations Office had scheduled the meeting. Kepp objected to the scheduling since her workday ended at 3:00 p.m. and overtime was not authorized. She asserted that she was a Union representative, and management would have to work around her schedule. Hindley replied that overtime was authorized for Kepp and as Cole was the Director of the organization, they would have to work around his schedule.

Kepp continued protesting, indicating she had various personal reasons for her unavailability on the following Monday at 4:00 p.m. Hindley replied that they had not been notified of such reasons and Kepp loudly told Hindley, "You are not part of this conversation." Cole replied that Hindley was indeed a part of the discussion. Cole then stated he was not going to sign the letters, announced the meeting was ended and angrily tossed the letters back to Kepp across the desk. The desk was waxed and free of obstructions so the letters slid across the desk and onto the floor. Kepp picked up the letters exclaiming to Hernandez that he was her witness. Cole told Kepp she had better be at the meeting with the employee involved. Kepp asked Cole to lower his voice and to not point his finger at her.⁽⁸⁾ Kepp stated that neither she nor the employee would be at the Monday meeting. Cole indicated if they were not at the meeting the employee would be "hurt". Kepp stated she was going to get the matter "straightened out" with Cecilia Arriola and she and Hernandez left the room.

Kepp continued to represent the employee whose suspension was proposed. One suspension action was resolved at the scheduled February 17 meeting and the other was resolved a few weeks later at the third step of the parties' grievance procedure.

The record reveals that during the past 18 years during which Cole has been a supervisor in the Federal Government, he has been a deciding official in disciplinary actions in over one hundred situations and never saw a document such as the one Kepp presented to him on February 14. The record further reveals that except for unfair labor practice charges, while at Fort Bliss Cole never signed for the receipt of a document when dealing with a union official and indeed, prior to February 14, had never been asked by a union official to sign for receipt of a document.

Additional Findings, Discussion and Conclusions

The General Counsel contends Respondent interfered with, restrained and coerced Kepp and Hernandez when Cole allegedly "verbally abused and physically assaulted" Kepp during the meeting of February 14, 1992. Respondent essentially denies that Cole engaged in any conduct violative of the Statute during the meeting.

In Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 895-896 (1990), the Authority held that when determining whether management statements or conduct violate section 7116 (a)(1) of the Statute, an objective standard is applied and thus the question to be determined is whether, under the circumstances, the statement or conduct by its very nature would tend to coerce or intimidate an employee, or whether an employee could reasonably have drawn a coercive inference from the statement or conduct. The Authority went on to state that while the circumstances surrounding the event are taken into consideration, "the standard is not based on the subjective perception of the employee or on the intent of the employer". Id.

Generally, it has been widely recognized that for salutary reasons "robust" debate in labor disputes is tolerated. In Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974), a case decided under Executive Order 11491, the predecessor to the Statute in regulating

labor relations in the Federal service, the Supreme Court held:

. . . the same federal policies favoring uninhibited, robust, and wide-open debate in labor disputes are applicable . . . (418 U.S. at 273).

. . . we see nothing in the Executive Order which indicates that it intended to restrict in any way the robust debate which has been protected under the NLRA. Such evidence as is available, rather, demonstrates that the same tolerance for union speech which has long characterized our labor relations in the private sector has been carried over under the Executive Order. . . ." (*id.* at 275).

Thus a similar approach to acceptance of conduct and language conducive to open debate in labor relations is followed under the National Labor Relations Act. As the court stated in United States Postal Service v. NLRB, 652 F.2d 409, 411 (5th Cir. 1981), enforcing United States Postal Service, 251 NLRB 252 (1980), after the Postal Service came under the jurisdiction of the NLRB:

. . . The act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts. Both the Board and the courts have recognized that some tolerance is necessary if grievance meetings are to succeed at all; as we have noted before, "bruised sensibilities may be the price exacted for industrial peace." (citation omitted).

The Authority has also recognized that in the adversarial and frequently emotionally charged labor relations sphere, conduct of a "robust" nature occurs which, while neither defended nor endorsed, is nevertheless tolerated during meetings between representatives of labor and management as being within the ambit of protected or otherwise acceptable activity. See, e.g., Department of the Navy, Puget Sound Naval Shipyard, Bremerton, Washington, 27 FLRA 54 (1979), (chief steward shook fist in the face of foreman and said "I am going to get your ass. I filed an Unfair Labor Practice and if the Council doesn't get your job, then something is wrong."); Department of Treasury, Internal Revenue Service, Memphis Service Center, 16 FLRA 687 (1984), (steward called supervisor a "fool" while representing an employee the supervisor had placed on AWOL); Department of Health and Human Services, Social Security Administration, and Social Security Administration Field Operations, Region II (Health and Human Services), 23 FLRA 648 (1986), (manager's calling union representative a "little union shit" during a disagreement concerning official time authorization); Department of the Air Force, 63rd Civil Engineer Squadron, Norton Air Force Base, California (Department of the Air Force), 22 FLRA 843 (1986), manager's statement to union representative who misdirected a request for an extension of time to respond to a grievance that the representative was on the bottom of the ladder and if he was going to "stir shit" he should plan on getting some on himself); and Department of the Army Reserve Personnel Center, St. Louis, Missouri (Army Reserve Personnel Center), 32 FLRA 665 (1988), (manager loudly asked union representative who was talking to an employee about a potential grievance if the

representative had permission to meet with the employee).

With regard to physical contact between parties while involved in a labor-management dispute, the Authority in U.S. Department of Labor, Employment Training Division,

20 FLRA 568 (1985), stated:

As a general proposition, physical assaults upon employees while they are engaged in fulfilling their union representational responsibilities under the Statute will not be condoned. The Authority views resort to a physical response in the context of a labor-management dispute by either a union representative or a manager as generally beyond the limits of acceptable behavior at the workplace. However, the Authority also recognizes that resort to such behavior in certain limited instances and in response to particular situations may not rise to the level of an unfair labor practice under the Statute. Where, as in the instant case, the conduct involves innocuous physical contact occurring in the context of a highly charged situation, and which to an extent is provoked by the behavior of a union or management representative, no violation of the Statute will be found to have occurred.

Clearly, when an employee is engaged in union representation and is physically assaulted by a management representative and no question of provocation exists, such conduct would constitute interference, restraint and coercion in violation of section 7116(a)(1) of the Statute. See U.S. Department of Justice, U.S. Marshals Service and U.S. Marshals Service, District of New Jersey, 26 FLRA 890 (1987). However, in the case herein, I do not find that being struck by a piece of paper propelled from approximately three feet away constitutes a "physical assault" since there is lacking any element of the application of force sufficient to produce an injury or anticipation thereof.

As I view the facts herein, Kepp was angry at Cole's handling of her request for an extension of time to respond to the notice of proposed suspension. When Kepp entered Cole's office, Cole perceived an air of combativeness or defiance in Kepp's approach and the manner in which she abruptly presented him with the document for signature, a type of document unfamiliar to Cole, in effect changing the practice regarding the time to produce all the documents supporting the appeal of the disciplinary notice. Indeed, Cole had not been previously required nor been requested to acknowledge receipt of correspondence from the Union. While such a situation might not have produced anger in someone else, it did to Cole. His reaction was to immediately reject the document and return the two sheets of paper with a flip of the wrist in the direction of Kepp. The paper floated harmlessly through the three or four feet separating him from Kepp and touched Kepp at chest level before falling to the floor.⁽⁹⁾ When the two pieces of paper were rejected by Cole the second time, they merely slid off the desk onto the floor. Cole's words of rejection were loud and somewhat coarse, conveying his anger over Kepp's unexpected presentation. But the incident was isolated and Cole's further dealings with

Kepp disclosed no similar conduct specifically concerning this situation or any other matter.

I do not find that Cole intended to have the paper strike Kepp when he returned them to her nor do I find Cole intended to throw the documents on the floor. While Cole's language and conduct which occurred during a momentary flash of pique was unpleasant and offensive, and certainly not the hallmark of mature, professional labor relations, I do not find Cole's conduct and language during the meeting so egregious as to signify disdain for the collective bargaining process. Nor do I find evidence of an attempt to avoid or frustrate the processing of the response or avoid dealing with the Union or its particular representative. See, e.g., Department of the Treasury, Internal Revenue Service, Louisville District, 11 FLRA 290, 298 (1983). Rather, I find and conclude that the language and actions found to have occurred falls within the classification of "robust" exchange in a labor relations situation. Health and Human Services; Department of the Air Force; and Army Reserve Personnel Center.

Accordingly, in all the circumstances herein, I conclude Respondent's conduct as alleged did not constitute interference, restraint, or coercion within the meaning of section 7116(a)(1) of the Statute and I recommend the Authority issue the following:

ORDER

It is hereby ordered that the Complaint in Case No. DA-CA-20571 be and hereby is, dismissed.

Issued, Washington, DC, January 5, 1993

SALVATORE J. ARRIGO

Administrative Law Judge

1. 1/ Arriola did not recall Kepp saying she did not need the extension and according to Arriola the matter was left with Kepp having a 3-day extension to respond to the notice of suspension.
2. 2/ Kepp, as Vice President of Local R14-89, represented GS employees at the facility.
3. 3/ Up to this time Kepp followed the procedure of first supplying documentary evidence to support her case and then meet on a subsequent day to make an oral presentation. Through Kepp's manner and demeanor when testifying on this subject I received the impression that she was deliberately attempting to be vague regarding her phone conversation with Hernandez as to why she decided to adopt this "letter" approach instead of simply using the extension of time she sought and was granted. Indeed, her claim of waiting for one more paper to complete her presentation doesn't square with her testimony that she told Arriola that she had already prepared her case when told of the extension. In any event, it is clear that Kepp was angry at Cole for not

giving the 3-day extension more quickly and waiting until the end of the work-day before granting her request.

4. 4/ Hernandez had other business in the same building and joined Kepp when he discovered the party he was to meet was absent.

5. 5/ The following is largely a composite version of the credited testimony of Kepp, Hernandez, Cole and Hindley. Based upon my observation and evaluation of the witnesses' demeanor and the testimony as a whole, I found Hernandez to be basically a trustworthy witness to the extent of his personal observation and recollection of events while I find Kepp's testimony regarding this meeting to be less reliable. In evaluating Kepp as a witness I found, as above, that her testimony on various matters was somewhat evasive and misleading and I had the impression that during her testimony about this meeting she was attempting to suppress her irritation, if not anger, with Cole during the meeting for his refusal on the prior day to grant her the second extension of time to respond to the suspension proposal until virtually the end of her work-day. I generally found Cole and Hindley to be even less reliable witnesses when testifying regarding matters dealing with the crux of the allegations herein. I note that although both Cole and Hindley testified that Hindley was present throughout the entire meeting, a February 28, 1992 memorandum written by Hindley and signed by Cole inexplicably states that Hindley "witnessed the majority of the exchange between Mr. Cole and Mrs Kepp . . ." Although he attempted to convey a different impression, from my observation of Cole when testifying it appeared to me that he was quite capable of quickly escalating to anger if he felt his authority was being challenged or demeaned, which I find occurred at the meeting herein.

6. 6/ Kepp testified she had two copies of the letter, one for Cole and one to be signed and returned to her to acknowledge receipt.

7. 7/ Kepp and Hernandez testified Cole shouted at Hindley, "Get your ass in here." Cole and Hindley denied Cole used this language.

8. 8/ I find that during the conversation Cole, Kepp and Hindley all raised their voices from time to time and exhibited flashes of anger.

9. 9/ Hernandez's credited description of the position of Cole and Kepp and Cole's return of the document to Kepp does not support a finding that Cole threw the document at Kepp's face. Thus, Hernandez testified Cole was rising from a sitting position and his arm was parallel to his body when he "flipped" the paper toward Kepp who was three to four feet from Cole.