

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF PRISONS  
FEDERAL CORRECTIONAL INSTITUTION  
FORREST CITY, ARKANSAS

Case No. DA-CA-00401

Respondent

and

AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 922

Charging Party

Steven R. Simon, Esquire

For the Respondent

Kenneth Brown, Representative

For the Charging Party

Sandra J. LeBold, Esquire

John F. Gallagher, Esquire

For the General Counsel

Before: SAMUEL A. CHAITOVITZ

Chief Administrative Law Judge

## DECISION

### Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq.* (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), 5 C.F.R. § 2411 *et seq.*

This proceeding was initiated by an unfair labor practice charge filed by the American Federation of Government Employees (AFGE), Local 922, AFL-CIO (AFGE Local 922/Union), against the U.S. Department of Justice, Federal Bureau of Prisons (FBOP), Federal Correctional Institution, Forrest City, Arkansas (FCI/FCI Forrest City). The Regional Director of the Dallas Region of the FLRA, issued a Complaint and Notice of Hearing. The Complaint alleges that FCI Forrest City the, violated section 7116(a)(1) of the Statute by its conduct in directing a Union official, under threat of discipline, to answer questions and provide an affidavit concerning his conversations with two bargaining unit members about an incident that occurred at the prison. FCI filed an Answer denying the allegation.

A hearing was held in Memphis, Tennessee, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The GC of the FLRA and FCI filed timely post-hearing briefs which have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended Order.

### **Findings of Fact**

#### **A. Background**

AFGE is the exclusive collective bargaining representative for an appropriate nationwide consolidated unit of employees at FBOP. AFGE Local 922 is the agent of AFGE for purposes of representing bargaining unit members employed at FCI Forest City. At all times material Bryan Lowry was President of AFGE Local 922.

## **B. Lowry's Conversation With Union Members**

On October 22, 1999, Lowry received a telephone call at his home from Wally "Duke" Vansandt. Vansandt is a paramedic and a member of the bargaining unit. Vansandt contacted Lowry because Lowry was the Union President. Initially, Vansandt spoke with Lowry's wife who explained Lowry was outside and unavailable. Vansandt became angry and stated that he had to speak to Lowry because it was a Union issue.

Lowry came to the telephone and spoke to Vansandt. Vansandt said he was upset about a conversation he had with a co-worker, Roger Payne, also a member of the bargaining unit. Payne is a Physician Assistant and Union Vice President. Vansandt was so upset that it was difficult for Lowry to understand what he was saying. Vansandt told Lowry he thought that Payne had acted inappropriately for a Union Vice President and that Vansandt was going to contact the "labor board." Lowry asked Vansandt if he wanted to report the matter or if he wanted Lowry to take care of the matter. Vansandt told Lowry that he wanted Lowry to talk to Payne about the situation.

Later that day or the next day, Lowry spoke with Payne. Payne told Lowry it was a misunderstanding and there was no longer a problem between the two men. Lowry told Payne that if Vansandt contacted him in the future, Payne should refer Vansandt to Lowry. A short time later, Lowry told Vansandt the same thing. He told Vansandt that if he needed Union representation, he did not need to speak with Payne. He should go directly to Lowry.

## **C. Vansandt Contacts FCI Officials**

On the same day Vansandt first spoke with Lowry, Vansandt also complained about the incident to several FCI Forrest City management officials including Virginia Simien, Assistant Health Service Administrator, Associate Warden Van Buren and Warden Marvin Morrison. Vansandt also filed a written complaint with the Warden. In the complaint Vansandt describes the incident and quotes Payne as saying:

he (Payne) had heard that I (Vansandt) thought that he was out to get me. . . . that what he had heard had hurt his feelings and something like he was offended to find out that I did not know that if he was out to get me that I would be got. . . . He went on to say that he heard that I thought that he and Dr. Prince were out to get me. . . . that he had got rid of to (sic) bosses here a subordinate like me would be know (sic) problem. . . . This behavior should not in my opinion be coming from the union Vice (sic) President, or any other staff.<sup>(1)</sup>

#### **D. FCI Forrest City Officials Question Lowry**

Some five months later, on March 13, 2000, Lowry was told to report to the Special Investigative Supervisor (SIS), Lieutenant Brian Byrne. SIS Byrne told Lowry that he was conducting an investigation and Payne was the subject of the investigation. Byrne told him that he wanted to question him about his conversations with Vansandt and Payne regarding the October 22 1999 incident. He also wanted to take Lowry's affidavit concerning this matter.

Lowry objected and told Byrne he was seeking information about protected activity and his conversations with Vansandt and Payne were privileged. Byrne said he would look into that and no questioning took place on that day.

On March 20, 2000, Lowry discussed this matter with Associate Warden Hector Ledezma. Lowry told Ledezma that the information was privileged. Lowry gave him a copy of A Guide to the Federal Labor Relations Authority Law and Practice, by Peter Broida and pointed out areas which supported his position that it would be an unfair labor practice for management to force him to disclose the content of conversations he had with bargaining unit employees on representational matters in his capacity as Union President. Ledezma told Lowry that the Agency had a right to question him

concerning the case.

On March 23, 2000, Lowry was again told to report to the Special Investigation Supervisor. Lowry requested Union representation and the request was granted. Byrne told Lowry he wanted to take his statement because he had spoken with both parties involved in the case. Lowry objected saying it violated the Statute. Lowry asked Byrne if he had Broida's book and he said yes. Byrne told Lowry the Prison could "get him" on failure to report but all they wanted was his statement. Byrne stated that Lowry must answer questions and was subject to disciplinary and adverse action if he did not cooperate in the investigation. Lowry continued to protest and requested that the interview be delayed to allow him to contact the Federal Labor Relations Authority.

The interrogation was delayed several times that day. Eventually, Lowry's supervisor, Captain Melvin Smith came into the meeting. He was accompanied by Judy Campbell, Assistant Human Resource Manager. Captain Smith gave Lowry a direct order to cooperate with the investigation. Lowry again requested time to contact the Federal Labor Relations Authority and for time to contact the Warden. Smith denied the requests and asked Lowry if he was refusing to cooperate. Lowry said no and that he would cooperate.

Thereafter, Byrne questioned Lowry concerning his conversations with Vansandt and Payne in October 1999. Lowry answered the questions and signed an affidavit which included those answers. Lowry was required to disclose the content of his conversation with Vansandt. He divulged what Vansandt told him and what he told Vansandt. He also was asked about his conversation with Payne. He relayed the content of the conversation to the best of his recollection. During the questioning, he was specifically asked about threats.

Byrne prepared an investigative report concerning the incident. He found that the evidence provided by Lowry was inconclusive. He also found that based on all the evidence, it could not be established that the allegations against Payne were true. As such, he concluded that the allegations were unfounded and the matter should not proceed further.

Paragraphs 8 and 9 of the FBOP's Standards of Conduct provide, in part, that it is a violation of these standards for an employee to use physical violence, threats or intimidation toward fellow employees and that an employee may not use abusive language when communicating with fellow employees and employees shall conduct themselves in a manner which will not be demeaning to fellow employees.

**E. The Parties Master Agreement**

Article 6 of the Master Agreement provides in pertinent part, as follows:

Article 6 - Rights of the Employee

Section a. Each employee shall have the right to form, join, or assist a labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise provided by 5

USC, such right includes the right:

1. to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials . . . .
2. to engage in collective bargaining with respect to conditions of employment . . . .

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against

any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules, and regulations, including the right:

1. to bring any matters of personal concern to the attention of any Management official . . . .

### **Analysis and Conclusions of Law**

#### **E. Statutory Provisions**

Section 7101 of the Statute provides, in pertinent part, as follows:

(a) The Congress finds that--

(1) experience in both private and public employment

indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them--

(A) safeguards the public interest,

(B) contributes to the effective conduct of

public business, and

(C) facilitates and encourages the amicable

settlements of disputes between employees

and their employers involving conditions

of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

#### § 7116. Unfair Labor Practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter[.]

### **F. Lowry Engaged In Protected Activity**

The GC of the FLRA contends that Lowry was engaged in activity protected by the Statute when he talked to Vansandt and Payne, and those communications were therefore confidential. The GC argues that FCI Forrest City violated section 7116(a) (1) of the Statute when it compelled Lowry to divulge the substance of the conversations he had with Vansandt and Payne.

FCI Forrest City contends that Lowry's communications with Vansandt and Payne were not privileged or protected. In effect, it contends that Lowry was a witness to misconduct, and compelling him to testify as to what he



heard, was not a violation of the Statute.

Section 7101 of the Statute provides that the right of employees to organize, bargain collectively, and participate through labor organizations safeguards the public interest and contributes to the effective conduct of public business. Labor organizations and collective bargaining in the civil service are in the public interest. Unions serve that public interest on a daily basis by negotiating and enforcing contracts, filing grievances, and participating in partnership. Unions also serve the public interest in less formal ways.

Unions advise employees about their rights and counsel employees about their obligations and responsibilities. Unions listen to employees vent about work problems and mediate problems between an employee and the employees' supervisor or between two employees.

If employees are not allowed to speak freely and make full and frank disclosures to their union representatives, the public interest and the effective conduct of public business will be undermined. When a union tries to resolve a dispute between two employees, especially when one is a union official, it is in the nature of internal union communications. As such, the union must be able to treat these communications as privileged. This is so, even if the dispute between the employees might also constitute a violation of the Standards of Conduct.

The Authority has recognized communications between a unit employee and a union official occurring in the course of protected activity are confidential. *U.S. Department of Veterans Affairs*, 56 FLRA No. 117 (2000) (*Veterans Affairs*); *Long Beach Naval Shipyard, Long Beach, California*, 44 FLRA 1021 (1992) (*Long Beach Naval Shipyard*). See also *Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado*, 53 FLRA 1500, 1509 (1998) (*FCI, Littleton*). The Statute "clearly assures the right and duty of a union to represent employees in disciplinary proceedings, and the correlative right of each employee to be represented. Therefore, it follows, as found by the Judge that such rights and duties demand that the employee be free to make full and frank disclosure to his or her representative in order that the employee have adequate advice and a proper defense." *U.S. Department of the Treasury, Customs Service, Washington, DC*, 38 FLRA 1300, 1308 (1991) (*Customs Service*). Accordingly, union representatives have the statutory right to maintain the confidentiality of their conversations with employees they are representing and any interference with that right violates section 7116(a)(1) of the Statute, unless the right has been waived or an extraordinary need for the information has been established. *Customs Service*, 38 FLRA at 1300 (Respondent violated section 7116(a)(1) by threatening an employee who was a Union representative with

disciplinary action if he did not provide information regarding the conduct of another employee which the representative had acquired while engaged in protected activity). See also *Long Beach Naval Shipyard*, 44 FLRA at 1037-41.

Consistent with Article 6, Section a and b, of the parties Master Agreement, employee Vansandt sought the Union's assistance with respect to an incident with a co-worker, who is the Union's Vice President. It is undisputed that Vansandt sought Lowry's assistance with this problem in Lowry's capacity as Union President. This was a situation where the Union was enlisted to mediate a dispute between two bargaining unit employees, one a Union official. Thus, this conversation, as well as the follow up conversation with Payne, constituted protected activity and were entitled to confidentiality. *Long Beach Naval Shipyard*, 44 FLRA at 1038; *Customs Service*, 38 FLRA at 1308-09. See also *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1039-40 (1992) (assertion of a contractual right is protected activity under section 7102 of the Statute).

FCI Forrest City argues that Lowry was not representing Vansandt or Payne and as such, his conversations with them did not constitute protected activity. It is undisputed that Vansandt contacted Lowry in his capacity as Union President. Whether he was calling to seek assistance, to vent about workplace injustice, or to complain about a Union official, it is clear that a bargaining unit employee was contacting his Union representative to discuss conditions of employment. The argument that this conversation did not constitute protected activity is rejected. In this regard, the only reason why Vansandt contacted Lowry was because he was the Union's President, and Vansandt was enlisting the Union President's help, in his capacity as Union President, in mediating a dispute with a fellow employee, who is also a Union official.

FCI Forrest City further argues that it would be a conflict of interest for Lowry to represent both Vansandt and Payne because one is the victim and the other is the perpetrator. This argument is also rejected because Lowry was acting, as Union President, as a mediator trying to resolve the dispute. The fact that it was not some formal legal proceeding with Lowry representing one side or the other, does not make this attempt at mediation not a protected activity. Lowry represented both employees and attempted to resolve the dispute. Union officials are routinely involved in resolving disputes on an informal basis every day. Lowry does not lose his statutorily protected status as a Union representative because the interest of one employee may conflict with another. The Union is charged with representing the interest of all employees in the bargaining unit. This is not a conflict of interest and there was none in Lowry's attempting to resolve this dispute.<sup>(2)</sup>

#### **G. Compelling Lowry to Reveal His Conversations Violated Section**

**7116(a) (1) of the Statute**

FCI Forrest City interfered with protected activity by directing Lowry on March 13, March 20, and March 23, 2000 to answer questions and provide an affidavit concerning his conversations with Vansandt and Payne. On March 23, under threat of discipline and adverse action, Lowry submitted to an interrogation by SIS, Lieutenant Byrne. Management put Lowry in the position of "being an informer" betraying statements made in confidence to him as a Union representative.

The questioning of Lowry undoubtedly had a chilling effect on Lowry as well as on any other employee seeking to consult a Union official or wishing Union help. Employees facing a problem at work would certainly think twice about seeking Union assistance if management could force the Union to reveal to management information employees conveyed to the Union in confidence. Further, interrogations into run-of-the-mill Union representational activity would also reasonably tend to discourage employees from acting as Union representatives.

To hold otherwise would subject communications between union members and union officials, concerning attempts by the union to resolve differences between union members to agency surveillance. It would interfere with a union's attempts to resolve internal union disputes and it would discourage employees from seeking union help in resolving employees' disputes, if they felt the agency could find out what the employees told union officials.

Consistent with *Veterans Affairs* and *Customs Service*, interference with protected activity as noted above, violates section 7116(a)(1) of the Statute unless FCI Forrest City can demonstrate an extraordinary need for the information or that the right to maintain the confidentiality of the conversations had been waived. *Veterans Affairs*, 56 FLRA No. 117, slip op. at 5. FCI Forrest City has not shown an extraordinary need for the confidential information in this case. Nor has FCI Forrest City demonstrated or argued that the right of confidentiality was clearly and unmistakably waived. *U.S. Department of Justice, Federal Bureau of Prisons, Office of Internal Affairs, Washington, DC*, 55 FLRA 388, 405 (1999). Lowry participated in the sworn interview only under threat of disciplinary action and expressly protested having to reveal confidential union communications.

Therefore, I conclude that FCI Forrest City interfered with, restrained, and coerced employees in their exercise of protected activity in violation of section 7116(a)(1) of the Statute when it interrogated Lowry about the substance of conversations he had with Vansandt and Payne concerning the October 22, 1999 workplace incident.

-

FCI Forrest City argues that it had an extraordinary need to interrogate Lowry because an employee had threatened another employee in violation of its Standards of Conduct for employees. FCI Forrest City cites *Pension Benefit Guaranty Corporation*, 52 FLRA 1390 (1997) and *FCI, Littleton*, to support its argument of an extraordinary need. However, both cases are distinguishable from the facts of this case. In the former, the Authority found that a union official must cooperate in an investigation when the official is directly involved in acts of alleged misconduct. Lowry was not directly involved and did not witness the October 22 incident between Vansandt and Payne. Similarly *FCI, Littleton* is not on point. In that case, the Authority found it permissible to interview employee witnesses who observed a union official allegedly threatening a bargaining unit employee with physical violence. However, the Authority specifically found that the employees were witnesses, and did not represent any employee involved in the case. The union president was the one accused of the wrongdoing. These cases are clearly distinguishable and do not justify FCI Forrest City's conduct in the subject case.<sup>(3)</sup> Furthermore, the timing of Lowry's interrogation contradicts any serious claim by FCI Forrest City that there was an extraordinary need for the information in this matter. Vansandt had complained to three management officials and filed a written complaint on October 22, 1999. Lowry was not questioned until March 23, 2000. FCI Forrest City was in no rush to investigate this incident. Thus, I conclude that if FCI Forrest City really believed that Payne posed a serious threat to Vansandt or anyone else, it would not have delayed the investigation for five months.

-

Finally, not only has FCI Forrest City shown no extraordinary need for the information, it has shown no real need at all. In *Veterans Affairs*, 56 FLRA No. 117, slip op. at 8, the Authority found, "[t]he Respondent also does not assert, and the record does not support a conclusion, that the Respondent would have been unable to investigate the complaint without interrogating the steward[.]" FCI Forrest City had an affidavit from Vansandt on February 29, 2000 and Payne on March 2, 2000. It could have completed its investigation without interrogating Lowry, who was not a witness to the conversation between Payne and Vansandt. Ultimately, the SIS found that this was a case of something said between two staff members. The evidence provided by Lowry was inconclusive and was pure hearsay.<sup>(4)</sup>

FCI Forrest City violated section 7116(a)(1) of the Statute when it insisted on interrogating a Union official about privileged communications.

Having concluded that FCI Forrest City violated section 7116(a)(1) of the Statute, it is recommended that the Authority issue the following Order:

### **ORDER**

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, shall:

1. Cease and desist from:

(a) Requiring an employee who is a representative of the American Federation of Government Employees, Local 922, AFL-CIO, to disclose, under threat of disciplinary action, the content or substance of statements made by bargaining unit employees to the Union representative, when such statements are privileged from disclosure.

(b) Interfering with, coercing, or discouraging any employee from exercising their rights accorded by the Statute to act for a labor organization in the capacity of a union representative freely and without fear of penalty or reprisal.

(c) In any like or related manner, interfering with, restraining, or coercing our 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) Post at its facility where bargaining unit employees represented by the American Federation of Government Employees, Local 922, 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 Warden, and they 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 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Chicago 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 herewith.

Issued, Washington, DC, January 8, 2001.

---

SAMUEL A. CHAITOVITZ

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 U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT require an employee who is a representative of the American Federation of Government Employees, Local 922, AFL-CIO, to disclose, under threat of disciplinary action, the content or substance of any statements made by unit employees to the Union representative, when such statements are privileged from disclosure.

WE WILL NOT interfere with, coerce, or discourage any employee from exercising their rights accorded them by the Statute to act for a labor organization in the capacity of a union representative freely and without fear of penalty or reprisal.

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.

\_\_\_\_\_  
Respondent/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 its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 55 W. Monroe, Suite 1150, Chicago, IL 60603, and whose telephone number is: (312)353-6306.

1. Although, for the purposes of this decision, I need not decide whether this alleged statement by Payne constituted a threat, if that issue was presented, I would conclude that the clear language of the statement, according to Vansandt, does not constitute a threat by Payne. To the contrary, Payne is clearly stating, in reply to Vansandt's question, that Payne was not threatening Vansandt. *CF., I de S et ux v. W de S, Y.B. Lib. Ass.* F99, Pl. 60 (1348).
2. Finally, FCI Forrest City may also assert that Lowry was not representing Vansandt or Payne because there were no section 7114(a)(2)(B) investigative interviews involved. This argument suggests a fundamental misunderstanding of the issue and the law involved in this case. It is irrelevant that there was no interview pursuant to section 7114(a)(2)(B) of the Statute. There is a privilege of confidentiality with respect to the content or substance of statements made to a Union representative in the entire course of representing an employee not merely with respect to section 7114(a)(2)(B) interviews. *Veterans Affairs*. This argument is rejected.
3. Moreover in *FCI, Littleton*, 53 FLRA at 1508-10, the Authority found that there was an extraordinary need for the information because of serious security concerns and threats of physical violence. This case presents no such concerns. Payne denies threatening Vansandt. However, assuming the language reported by Vansandt is accurate, there was no threat. Payne's remarks to Vansandt on October 22 were the opposite of a threat.
4. The two ALJ Decisions cited by FCI Forrest City are non-precedential and are inapposite. In *United States Department of Justice, Bureau of Prisons, Terminal Island, California*, Case No. 8-CA-50155, OALJ 86-04, ALJD Report No. 55 (1985), involves the questioning of a union representative about an incident he witnessed. *Federal Correctional Institution, Safford, Arizona*, Case No. SF-CA-30498, OALJ 95-29, ALJD Report No. 119 (1995), did not involve a union representative attempting to mediate a dispute between two union members.