

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: May 31, 2006

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS
TUCSON TELEPHONE CENTER
TUCSON, ARIZONA

Respondent

and

Case No. DE-CA-05-0319

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 1207

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

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

DEPARTMENT OF COMMERCE BUREAU OF THE CENSUS TUCSON TELEPHONE CENTER TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1207 Charging Party	Case No. DE-CA-05-0319

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **JULY 3, 2006**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: May 31, 2006
Washington, DC

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

DEPARTMENT OF COMMERCE BUREAU OF THE CENSUS TUCSON TELEPHONE CENTER TUCSON, ARIZONA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1207 Charging Party	Case No. DE-CA-05-0319

Michael Farley, Esquire
For the General Counsel

Jerry Cline
For the Charging Party

Rebecca Pikofsky, Esquire
For the Respondent

Before: SUSAN E. JELEN
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 United States Code, 5 U.S.C. § 7101, *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (hereinafter the Authority), 5 C.F.R. Part 2423.

On April 21, 2005, the American Federation of Government Employees, AFL-CIO, Local 1207 (Charging Party or Local 1207) filed an unfair labor practice charge in this matter against the Department of Commerce, Bureau of the Census, Tucson Telephone Center, Tucson, Arizona (Respondent or Tucson Center). (G.C. Ex. 1(a)) On August 4, 2005, the Charging Party amended the unfair labor practice charge. (G.C. Ex. 1(b)) On January 11, 2006, the Regional Director

of the Denver Region of the Authority issued a Complaint and Notice of Hearing, which alleged that, on or about March 25, 2005, the Respondent, through the actions of its supervisor, committed an unfair labor practice in violation of section 7116(a)(1) of the Statute. On February 2, 2006, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(c) and (d)).

A hearing was held in Tucson, Arizona on March 7, 2006, at which times 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 General Counsel and the Respondent 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 and recommendations.

Findings of Fact

The Department of Commerce, Bureau of the Census, Tucson Telephone Center, Tucson, Arizona is an agency under 5 U.S.C. 7103(a)(3). Evelyn Chandler is the current Branch Chief or Facility Manager. Debbie Jill Moser is the Statistician/Assistant Facility Manager; Martha Compos is the Operations Specialist and Joseph Parker is a Supervisory Statistical Assistant. (G.C. Ex. 1(c) and (d); Tr. 16-17, 56-57)

The American Federation of Government Employees is a labor organization under 5 U.S.C. 7103(a)(4). The Charging Party represents the bargaining unit employees at the Tucson Center. The Charging Party and the Tucson Center have a current Labor Management Agreement (LMA). (G.C. Ex. 2; Tr. 19-20) Moses Sterngast has worked as the Tucson Center since 1995 as a telephone interviewer. He has been President of Local 1207 since 1999. (Tr. 15-16, 21-22) Parker is his second level supervisor. (Tr. 18)

One of the primary concerns of employees at the Tucson Center has been the issue of promotions and conversions. Most employees begin work as temporary intermittent employees and are interested in becoming permanent intermittent and then permanent part time employees. The Tucson Center primarily uses part time employees, although recently

they have had a few permanent full time positions.
(Tr. 22-24, 60) Factors considered in the conversion/
promotion process include, but are not limited to, the
employee's attendance, hours worked quarterly, production,
and monitoring. (Tr. 58-59)

In January or February 2005¹, pursuant to the parties'
LMA, Sterngast attended an employee orientation session as
the Union President. Sterngast addressed the new employees
and described the Union and encouraged employees to join.
The issue of promotions and conversions arose and Sterngast
spoke to the question and explained his understanding of the
conversion process. After the orientation session,
according to Sterngast, Parker "chided" him about providing
false information regarding the conversion process. (G.C.
Ex. 2; Tr. 25-28) Parker did not recall any such discussion
with Sterngast. (Tr. 69)

On March 25, Sterngast was working the evening shift,
which was a five hour shift from 5 to 10 pm. He was
entitled to one 15 minute break during that time frame and
took his break about 8 pm. While in the break room, another
bargaining unit employee, Beverly Wright, asked him if he
knew anything about promotions and conversions. Wright was
a temporary intermittent employee and thought she had been
overlooked for promotion or conversion. Sterngast explained
the process to her. He asked her if she had spoken with her
supervisor about the issue, but Wright told him she had not
gotten any where with the supervisor. Sterngast recommended
that she speak with an administrative clerk, since they
dealt with the process all the time. Wright thanked him for
his help. (Tr. 29-31)

Sterngast and Wright returned to their work stations.
Sterngast first went to the union locker, which was 6 to 7
steps from his work station and got a memorandum from
management on the conversion/promotion issue. He dropped a
copy of the memorandum on Wright's work station and told her

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All dates are in 2005 unless otherwise noted.

that it might help. He then returned to his work station.
(G.C. Ex. 3; Tr. 32-33)²

Sterngast asserted that he was not late from returning to his work station from his break, even with the detour of getting the memorandum for Wright. Shortly after he returned to work, Parker came to his work station and told him he needed to speak with him. Sterngast had seen Parker pick up something on Wright's desk and asked Parker if the meeting was because of that. Parker did not respond. Sterngast then followed Parker into his office. Only the two of them were present and the door to the office was closed. Sterngast told Parker that he could not believe Parker was bringing him in to talk about the memo.
(Tr. 37-38)

Parker then responded and asked why Sterngast hadn't sent Wright over to him, if she had questions about promotions and conversion. Sterngast explained that Wright had asked if he had knowledge about promotions and conversions, that she had been employed by the Census Bureau for about two years, that others in her peer group had already been promoted and she thought she had been overlooked. (Tr. 38) Sterngast told Parker that he had explained the conversion/promotion process to Wright, as he understood it, including the various requirements.
(Tr. 38-39)

Parker then told Sterngast that it was not his responsibility to answer those questions and that Wright should have been directed personally to him. (Tr. 39) Sterngast took exception to that statement and told Parker that as Union President, he was certainly acting within his rights and his responsibilities to answer her questions

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G.C. Ex. 3 is an undated memo from Evelyn A. Funk (now Evelyn Chandler) on the subject of Work Schedule Conversions and Promotions. Chandler testified that she reissued a memo written by a former Chief of the Tucson Telephone Center. The memo sets forth the criteria used to determine when an employee's work schedule is converted from Temporary-Intermittent to Permanent-Intermittent and from Permanent-Intermittent to Part-Time. It also covers the criteria for promotions from Grade 02 to 03 to Grade 03 and 04. There was no evidence presented that indicated this memorandum did not contain the current criteria used by the Respondent for conversions and promotions. (G.C. Ex. 3; Tr. 98-99)

directly to the best of his ability and to provide information to Wright. (Tr. 39)

Parker objected and stated that it was not Sterngast's responsibility, and that in the future if any employees would address Sterngast with questions regarding promotions and conversions, he was to direct them immediately to Parker. (Tr. 39)

Sterngast stated that Parker did not say anything about delivering the memo; did not say anything about time away from the work station; did not say anything about distributing information on duty time. (Tr. 40) The meeting lasted 5-10 minutes, at the most. (Tr. 40)

Parker testified that he worked from 2 pm to 10:30 pm on March 25. At 8 pm, he was near the supervisor's station, which is elevated in order to see the production room. He observed Sterngast coming from the copier and placing a paper or papers on Wright's desk. Parker went to Wright's work station to determine what the papers were and saw the memo. He did not take the memo or talk with Wright. He then went to Sterngast and asked him to come to his office. (Tr. 60-62)

Parker asserted that he wanted to determine Sterngast's activity since Sterngast has to follow certain procedures under the parties' LMA in order to distribute literature on the production floor. Parker closed the door and asked if Sterngast was representing Wright. Sterngast said no. Parker asked about the memo and Sterngast told him it was a memo on promotions and conversions. Parker told him that he should bring this type of inquiry to the supervisor or to Parker, since he was present. Sterngast said that in the break room he had a conversation with Wright and could provide her information and could help that person. (Tr. 62-63)

Parker denied that he told Sterngast he must refer employees to supervisors. He denied that he ever gave Sterngast an order or direction and noted that the meeting was not disciplinary in nature. Parker admitted that he told Sterngast to refer the inquiring employee to the supervisor or to Parker. (Tr. 64) Parker admitted he did not question Sterngast about his break time. He further asserts that he did not read the memo in question, but only

knew that it appeared to be a memo. (Tr. 80-81) Parker states that he never told Sterngast that it was not his responsibility as a union representative to provide information to employees (Tr. 68); that he never told him that if employees had questions about conversions/promotions to direct those employees to him (Tr. 68) and never warned Sterngast about the future. (Tr. 69).

Discussion and Conclusions

Issue

Whether or not statements allegedly made by the Respondent violated section 7116(a)(1) of the Statute by interfering with, restraining or coercing an employee in the exercise of rights protected by the Statute.

Positions of the Parties

General Counsel

Counsel for the General Counsel maintains that the Respondent, through the actions of Joseph Parker, violated section 7116(a)(1) of the Statute when, during a meeting on March 25, 2005, Parker made statements to Moses Sterngast, the Union President, that would interfere with, restrain, and coerce a reasonable employee in the exercise of rights guaranteed under the Federal Service Labor Management Relations Statute, including the right of a Union representative to communicate with bargaining unit employees, and to provide representation and assistance to employees in the form of information and guidance concerning working conditions.

The General Counsel argues that the statements made by Parker represent a violation of law because Parker was effectively prohibiting Sterngast from fully exercising his rights as a Union representative, including the right to communicate with bargaining unit employees, and to provide information, advice, and assistance concerning working conditions. Citing *Department of the Treasury, Internal Revenue Service, Louisville District*, 11 FLRA 290, 298 (1983), the General Counsel asserts that Parker's statements would reasonably force Sterngast to "think twice" before providing further information or guidance concerning

conversions and promotions in his capacity as a Union representative.

Respondent

The Respondent asserts that Sterngast's testimony is not reliable due to its contradictions as well as the suspicious timing of the filing of the unfair labor practice (ULP) charge. Rather it asserts that Parker clearly understands the right of the Union to provide information to employees and provided credible testimony that he never made the statements Sterngast attributes to him. The Respondent also asserts that the timing of the filing of the charge illustrates that Sterngast's credibility is questionable at best. The Respondent points out that Sterngast applied for a promotion in March 2005 and was interviewed for that position on March 29 or 30, by Parker and Campos. Sterngast was not selected for the promotion in March or April, when two more positions were filled, and was told at those times. Sterngast requested to meet regarding his non-selection and the meeting was held on April 20. Sterngast was dismayed and disenchanted by the non-selection and became upset during the meeting. The following day, April 21, he filed the ULP in this matter. The Respondent therefore argues that Sterngast had other motives for filing the ULP and his testimony regarding his conversation with Parker on March 25 should not be credited.

The Respondent further asserts that, even if credited, the statements attributed by Sterngast to Parker did not constitute a violation of section 7116(a)(1) of the Statute.

Parker asked Sterngast to come to his office because the distribution of any literature on the production floor during duty time violates the LMA. Parker treated Sterngast as he would treat any other employee. While Sterngast alleged that Parker gave him a direct order to discontinue providing employees with information and warned him not to do so in the future, he also admitted that he disregarded this order and continued to give information to employees. Parker denies these statements and asserts that the conversation was never disciplinary in nature.

Parker admits that he told Sterngast that inquiries about promotions and conversions should be referred to management because supervisors are in the unique position to

provide employees with accurate information about an employee's individual employment status. Parker's statements did not contain any threat of reprisal or force or promise of benefit. The statements were not made under coercive conditions and, therefore, were protected by 5 U.S.C. 7116(e). *Army and Air Force Exchange Service (AAFES), Fort Carson, Colorado*, 9 FLRA 620 (1982); *Oklahoma City Air Logistics Center (AFLC), Tinker Air Force Base, Oklahoma*, 6 FLRA 159, 160 (1981).

Finally, the Respondent asserts that even if Parker directed Sterngast to refer inquiries about promotions and conversions to supervisors or directly to Parker, nothing in that alleged direction from Parker precluded the Union from giving information as well. This clearly does not meet the objective standard required to find a violation of 5 U.S.C. 7116(a)(1). *United States Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Florence, Colorado*, 59 FLRA 165 (2003).

Analysis

Both parties correctly cited the Authority's decision in *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020 (1994), which states the objective standard for determining interference, restraint, and coercion with the pursuit of protected rights as ". . . whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. . . . While 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 on the intent of the employer." See also, *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891 at 895-96 (1990).

Section 7102 of the Statute gives employees the "right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal." It further provides that this includes (among other things) the right "to act for a labor organization in the capacity of a representative"

The evidence in this matter establishes that Sterngast was acting in his capacity as Union President when he responded to the questions of a bargaining unit employee about the issue of conversions and promotions on March 25. Therefore, he was engaged in protected activity, both in discussing the issue and in giving the employee a management memo on the subject.

While the parties are in agreement that there was a private discussion between Sterngast and Parker on March 25, there are differences in testimony which require a credibility determination. In reviewing the evidence in its entirety, I find the testimony of Sterngast more credible than that of Parker. Sterngast's testimony was consistent throughout the proceeding, containing good detail, and I find it inherently more probable in light of the surrounding circumstances.

I do not find that the Respondent's arguments against Sterngast's credibility persuasive. The main complaint concerns the timing of his filing of the ULP in this matter, following a meeting he had requested of two supervisors to discuss the failure to promote him. I find Sterngast's explanation for his delay in filing the ULP until after the promotion selections were completed understandable. Further, I do not find the motivation for filing the ULP to be relevant to the credibility determination regarding his actual testimony. The issue is not why a party decides to file an unfair labor practice charge, but whether the evidence establishes a violation of the Statute.

I found Parker's testimony troublesome in a few areas. First, Parker testified that he observed Sterngast place a memo on another bargaining unit employee's desk and was concerned because the distribution of any literature on the production floor during duty time violates the LMA. However, in the meeting with Sterngast on March 25, at no time did Parker mention the LMA or the distribution of literature on the production floor. I further find it unfathomable that Parker would not look at or read the memo that was given to the employee, particularly when he goes to Sterngast to allegedly discuss the issue. And while Parker may have been concerned that Sterngast was distributing literature after he returned from break, Parker did not ask Sterngast anything at all about his break time or attempt to determine whether Sterngast was still on break. Finally,

while Parker may have been concerned that Sterngast was giving incorrect information to employees about conversions and promotions, there was no evidence that Sterngast was not giving correct information.

Therefore, the question now becomes whether the conversation on March 25, as relayed by Sterngast, was a violation of the Statute. In that regard, the evidence shows that Sterngast had engaged in protected activity by responding to a bargaining unit employee's questions about the policy of conversions and promotions and by delivering a management memo on the subject to the employee. Sterngast was immediately approached by his second level supervisor and told to come into his office. In the office, Parker questioned Sterngast on whether he was representing the employee. After Sterngast explained what he had told the employee, Parker told Sterngast that it was not his responsibility to answer those questions and that Wright should have been directed personally to him. (Tr. 39) Sterngast took exception to that statement and told Parker that as Union President, he was certainly acting within his rights and his responsibilities to answer her questions directly to the best of his ability and to provide information to the employee. (Tr. 39) Parker objected and stated that it was not his responsibility, that in the future if any employees would address Sterngast with questions regarding promotions and conversions, he was to direct them immediately to Parker. (Tr. 39)

While the Respondent certainly is interested in assuring that its employees receive accurate information on the issue of conversions and promotions, the Union also has the right to give information to bargaining unit employees. As stated above, there is no evidence that Sterngast's information to the employee was inaccurate or incorrect or that the undated management memo given to the employee was not the current position on the matter. Further, while the Respondent would have the most accurate information regarding each individual employee, there is no evidence that Sterngast did anything other than explain the process and suggest that the employee contact her supervisor or the administrative clerks. The fact that the employee may have given Sterngast inaccurate information regarding her length of service, did not invalidate the information that he was giving her about conversions and promotions.

I therefore find that Parker's statements to Sterngast was an attempt to interfere with his rights to give information to bargaining unit employees as the Union President. This attempt to control and limit the rights and responsibilities of the Union President was therefore a violation of section 7116(a)(1) of the Statute. See *Department of Labor, Office of Workers' Compensation Programs, Branch of Special Claims*, 11 FLRA 77 (1983), in which the Authority upheld the Administrative Law Judge's decision finding a violation of 5 U.S.C. 7116(a)(1) based on a supervisor removing Union notices that had been posted on an employee bulletin board. The ALJ concluded that by removing the Union notices, management directly interfered with the Union representative's statutory right to communicate with and to represent employees in the unit, and that it also interfered with the right of unit employees to seek the assistance of their union representatives.

Further, I reject the Respondent's contention that Parker's statements were protected by section 7116(e). Parker's statements were not merely an expression of his personal opinion, but were clearly a management response to the Union President's dissemination of information regarding conversions and promotions to a bargaining unit employee. The statements were made under coercive conditions and an objective employee would have drawn a coercive inference from them.

Therefore, based on the above findings and conclusions, I conclude that the Respondent violated section 7116(a)(1) of the Statute by making statements that interfered with the Union President's statutory rights as a Union representative to communicate with bargaining unit employees and to provide information, advice, and assistance concerning working conditions, and I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Commerce, Bureau of the Census, Tucson Telephone Center, Tucson, Arizona, shall:

1. Cease and desist from:

(a) Making statements to representatives of the American Federation of Government Employees, Local 1207, to the effect that Union representatives are not to provide work-related information and assistance to employees, and that Union representatives are to direct employees with work-related questions to a management representative.

(b) In any like or related manner, interfering with, restraining, or coercing unit employees in the exercise of their 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 its Tucson, Arizona facility, where bargaining unit employees are employed, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Branch Chief, and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(b) Pursuant to section 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Denver Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, May 31, 2006

SUSAN E. JELEN
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 Commerce, Bureau of the Census, Tucson Telephone Center, Tucson, Arizona, 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 make statements to representatives of the American Federation of Government Employees, Local 1207, to the effect that Union representatives are not to provide work-related information and assistance to employees, and that Union representatives are to direct employees with work-related questions to a management representative.

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.

-
(Agency)

Dated: _____

By: _____
(Signature) (Branch Chief)

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, Denver Regional Office, whose address is: Federal Labor Relations Authority, 1244 Speer Boulevard, Suite 100, Denver, CO 80204-3581, and whose telephone number is: 303-844-5226.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DE-CA-05-0319, were sent to the following parties:

—

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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DATED: May 31, 2006
Washington, DC