

UNITED STATES AIR FORCE SAN ANTONIO AIR LOGISTICS CENTER KELLY AIR FORCE BASE SAN ANTONIO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, AFL-CIO Charging Party	Case No. DA-CA-21315

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 his 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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **DECEMBER 19, 1994**, and addressed to:

Federal Labor Relations Authority
 Office of Case Control
 607 14th Street, NW, 4th Floor
 Washington, DC 20424-0001

ELI NASH, JR.
 Administrative Law Judge

Dated: November 17, 1994

Washington, DC

MEMORANDUM

DATE: November 17, 1994

TO: The Federal Labor Relations Authority

FROM: ELI NASH, JR.
Administrative Law Judge

SUBJECT: UNITED STATES AIR FORCE
SAN ANTONIO AIR LOGISTICS CENTER
KELLY AIR FORCE BASE
SAN ANTONIO, TEXAS

Respondent

and

Case No. DA-CA-21315

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1617, AFL-CIO

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

UNITED STATES AIR FORCE SAN ANTONIO AIR LOGISTICS CENTER KELLY AIR FORCE BASE SAN ANTONIO, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1617, AFL-CIO Charging Party	Case No. DA-CA-21315

Brian T. Corrigan, Esq.
For the Respondent

Joseph T. Merli, Esq.
For the General Counsel

Kim C. Roe
For the Charging Party

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

On December 29, 1992, the Regional Director of the Dallas Region of the Federal Labor Relations Authority (herein called the FLRA), issued a Complaint and Notice of Hearing which was duly served by certified mail upon the named the United States Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, San Antonio, Texas (herein called Respondent) violated section 7116(a)(1) and (8) of the Statute by failing to comply with section 7114(a)(2)(B) when one of its supervisors denied the requests of a bargaining unit employee during an examination which the employee believed could result in disciplinary action against her.

Findings of Fact

1. At all times material herein, American Federation of Government Employees, Local 1617, AFL-CIO (herein called the Union) was the exclusive representative of certain bargaining unit employees of Respondent.

2. Employee Hope Long, at all times material herein worked in Respondent's machine shop in building 303 and is part of the bargaining unit represented by the Union. Long's first line supervisor was Frank Mora and her second line supervisor was Sammie Frazier.

3. Sometime around August 17, 1992, Long called the Kelly Air Force Base Security Police to report that a co-worker, Omar Shannon, made threats of bodily harm against her. In response to her call, the Security Police sent a unit to her work site. The officers asked Long to come to the police station and make out a report, which she did. The officers also escorted Shannon to the police station. Long then returned to her work site. Unfortunately, Long called the Security Police without first discussing the incident with her supervisor thereby creating, it seems a problem with supervision.

4. Subsequent to the above incident, Mora approached Long and informed her that he was going to give her a written counselling because she called the Security Police without checking with him first. According to Mora, Long failed to follow the chain of command. The counselling record stated, "August 17, 1992 counselling was given to Ms. Hope Long on how to follow chain of command on reporting any incident of concern. Ms. Long has violated this procedure."

5. After the counselling, Long mentioned to her union steward, Jesse Sanchez, that she had been given counselling. Sanchez told her to call union officer Kim Roe. After work on August 17, 1992, Long telephoned Roe at the Union office and told him what had occurred. Roe informed her that she could file a grievance over the counselling Mora had given her. Roe's recollection of what he told Long is as follows:

At any rate, no matter what happens, that if they called her in to question her or discuss her grievance with her without her union representative being present, to notify me, because that would be a bypass, and if they further questioned her about the incident, she should request a union representative be present, because it could probably lead into more serious disciplinary actions.

6. The following morning, Mora informed Long that Frazier, her second line supervisor, wanted to speak to her in his office. Frazier was on vacation when the incident occurred. Long proceeded, as ordered, to Frazier's office. Upon arriving, she found Frazier alone and seemingly upset. Frazier demanded that Long give him a report on the events of the previous day. Long responded by asking Frazier if he was conducting an investigation because in that case she wanted a union representative present. Long testified that she felt she was going to be reprimanded because of the questions Frazier was asking her.

7. During their meeting, Frazier told Long that he was aware that she had been counselled by Mora. Frazier, however, told her that she could not have a union representative present because they were just going to be talking and she didn't need a union representative. Frazier then persisted in his examination of Long. He told Long to tell him exactly what had happened the day before. She repeated her request for a union representative. Frazier continued to ignore Long's requests. Long testified as follows:

Specifically, what I remember was that he asked me that I should give him a step-by-step report or tell him exactly, step by step, as to what had happened during that incident, exactly what did I tell the police. I told him it was in the police report. He said, I already asked for it; I am going to get it, but I want you to tell me right now; I want you to tell me exactly what you said; you have to tell me; I need to defend you against all these people that are going to file against you.

8. According to Long, Frazier alternately sat and stood, banged his fists on the table, screamed and also was shaking while talking. Without question Long was intimidated by Frazier's outward appearance as well as his manner of questioning. Frazier eventually told Long that he was going to obtain and read a copy of the police report but at the present time, he wanted her to tell him everything "right now".

9. Mora stated that counselling such as Long received on August 17, 1992, is not necessarily an adverse or disciplinary action. It is the lowest form of action a supervisor can take against an employee. Therefore, when Frazier questioned Long on August 18, 1992 concerning her report to the Security Police, she had not received any disciplinary action.

10. Shannon denied that he ever threatened Long as she claimed he did in her report to the Security Police. Air Force Regulation (AFR) 40-750 prohibits employees from making false claims or accusations about fellow co-workers. If an employee violates AFR 40-750, the employee can be disciplined. The counselling which Mora gave Long on August 17, 1992 had nothing to do with AFR 40-750, but concerned only her alleged failure to follow the chain of command. In the event Frazier determined that Long did file a false claim against Shannon, he certainly could have recommended that Mora discipline Long for violating AFR 40-750.

Conclusions

This case involves what Respondent terms a "swearing match" and can be resolved only by making credibility determinations contrary to one of the parties. In this matter, the undersigned finds that the General Counsel's witnesses were more credible than those of Respondent.

Long and Mora both testified that Frazier wanted to meet with Long the morning of August 18, 1992. Frazier who was on leave the day before, wasted no time investigating what Mora had told him had happened during his absence. After Mora told Frazier what had happened, Frazier told Mora to send Long in to see him. So urgent was Frazier's desire to investigate that, according to Frazier, he met with Long at 8:00 a.m., hardly waiting a moment after his return to work. Frazier then proceeded to question Long about the events of the previous day.

According to Long, Frazier told her that he wanted to know, step by step, exactly what happened during the incident. Frazier testified that he questioned Long for the reasons that follow:

. . . so that I could get a better understanding of what had transpired while I was on vacation, so that I might be able to, after talking with Ms. Hope Long, be able to make a better understanding of what was going on, so that I might be able to know what action that I would have to take against Omar Shannon.

When asked if he had a right to question employees, Frazier testified as follows:

Yes, sir. That is my right, not only if the police are brought in my area, but any infraction that happens with the section, it is my right, if I have knowledge of it, is to find out what is going on within my section.

The key elements in dispute in the case are whether Frazier's questioning of Long was an "examination" and whether his questioning was conducted "in connection with an investigation".

Clearly, the testimony of Long and Frazier proves that Frazier examined Long while conducting an investigation. As in Lackland Air Force Base Exchange, Lackland Air Force Base, Texas, 5 FLRA 473, 485 (1981), Frazier's meeting with Long was designed to elicit a complete explanation of the events leading up to the Security Police responding to Long's complaint. Frazier's examination also was conducted to find out from Long exactly what had transpired the previous day, while he was away from work on vacation. Frazier admittedly questioned Long and stated that his intention was to "find out what is going on within [his] section". Accordingly, the evidence establishes and it is found that Frazier examined Long in connection with an investigation.

The next element in dispute is whether Long reasonably believed that the examination might result in disciplinary action against her. The test to determine reasonableness of the employee's belief is an objective one. Long testified that she felt that she could receive disciplinary action as a result of Frazier's questioning. If this were not enough, her description of Frazier's demeanor and outward appearance, that is, that he was extremely upset, yelling, and banging his fists on the table, makes her belief that Frazier would take disciplinary action against her seem even more plausible. Furthermore, Respondent's theory that because Long had already been counselled by Mora, it was unreasonable for Long to believe that Frazier might take action against her is less acceptable when viewed in light of Long's testimony of her fear of discipline as a result of the examination. She stated, "It wasn't that he was going to take it away. It was that he could add." Clearly Frazier could add for he admitted, that, "I can recommend that to Mr. Frank Mora, that punishment is not severe enough, but he doesn't have to change it".

In addition, Mora's testimony helps demonstrate the reasonableness of Long's fear that disciplinary action might result from Frazier's examination. Thus, Mora testified that counselling is not necessarily a disciplinary action, but it is the lowest form of action which can be taken. Given this testimony from Long's first line supervisor, it would be reasonable to conclude that, when she met with Frazier, Long had not yet received any disciplinary action for a failure to follow the chain of command. Consequently, it was totally appropriate for her to believe she might suffer disciplinary action as a result of Frazier's questioning.

Finally, the record reveals that as a result of Frazier's questioning, it would have been reasonable for Long to believe that she might be disciplined for a violation of AFR 40-750, that is, making false accusations, an offense completely unrelated to, and not covered by, Mora's counselling entry. In this regard, it would have been entirely reasonable for Long to believe that Frazier could decide that since Long could not actually prove that it was Shannon who had made telephone calls to her over the weekend, she had violated AFR 40-750 when she mentioned this contention to her supervisors and to the police. The fact that Frazier was Long's second line supervisor does nothing to detract from the reasonableness of such a belief. Frazier's testimony makes it certain that he can recommend to the employees' first line supervisor that disciplinary action be taken. In all these circumstances, it is found that Long could reasonably believe that this examination might lead to disciplinary action against her.

The remaining consideration is whether Long made a request for a union representative during her meeting with Frazier. As stated in Norfolk Naval Shipyard, Portsmouth, Virginia, 35 FLRA 1069, 1077 (1990), the right to representation attaches only when the affected employee makes a valid request. Frazier denies that Long made such a request. However, Long's testimony is consistent with the advice given to her by Roe the day before her interview. Roe confirmed that he advised and reminded Long about her right to a union representative during their conversation on the day before her meeting with Frazier. Roe in his words, specifically told her, "if they further questioned her about the incident, she should request a union representative be present." It is more than likely, given this warning on the day before her meeting with Frazier, Long asked for a union representative when Frazier began questioning her.

On the other hand, Frazier's testimony is not as persuasive. While Frazier was not untruthful, it is my belief that he did embellish his view of what did occur at this examination to the extent that some of what he says simply does not fit. Thus, Frazier testified that if Long had asked for a Union representative he would have stopped the "conversation" and allowed her to obtain one because his practice is as follows:

Well, I always allow, you know, union representation, you know, just to be on the safe side, because whether they are allowed union representation, you know, or not, I always do it just to be on the safe side, so that I won't get accused of an unfair labor practice or a violation

of the master labor agree- ment, which I am being charged with today, you know, and I deny that, you know, so that is one of the reasons why I do it.

Irregardless of whatever situation, I always do that. I just stop, until they there is a union representative, if they request it.

Frazier's testimony that on every occasion he had stopped meetings specifically to allow the employee to obtain a union representative, even when the employee is not entitled to one, "just to be on the safe side", raises some doubt. This statement is one of several made by Frazier which prevents the undersigned from fully crediting him. Accordingly, I conclude that Long's credited testimony establishes that she requested union representation during her meeting with Frazier.

Based on all of the foregoing, it is found that Respondent's denial of union representation to bargaining unit employee Hope Long constituted a failure to comply with section 7114(a) (2) (B) of the Statute. Accordingly, it is found that Respondent committed a violation of section 7116(a) (1) and (8) of the Statute.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that United States Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, San Antonio, Texas, shall:

1. Cease and desist from:

(a) Denying the request of a bargaining unit employee represented by the American Federation of Government Employees, AFL-CIO, Local 1617, the exclusive representative of its employees, for a union representative to be present in connection with an investigatory interview which the employee reasonably believed could result in disciplinary action being taken against her.

(b) In any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured them 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 facilities at the United States Air Force, San Antonio Air Logistics Center, Kelly Air Force Base, San Antonio, Texas, where bargaining unit members represented by the American Federation of Government Employees, Local 1617, AFL-CIO, 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 Commanding Officer 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 insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Dallas Region, Federal Office Building, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, November 17, 1994

ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL MEMBERS AND OTHER EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR MEMBERS AND OTHER EMPLOYEES THAT:

WE WILL NOT deny the request of a bargaining unit employee represented by the American Federation of Government Employees, AFL-CIO, Local 1617, the exclusive representative of our employees, for a union representative to be present in connection with an investigatory interview which the employee reasonably believed could result in disciplinary action being taken against her.

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

WE WILL grant the request of a bargaining unit employee represented by the American Federation of Government Employees, AFL-CIO, Local 1617, for a union representative to be present in connection with an investigatory interview which the employee reasonably believes could result in disciplinary action being taken against them.

(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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Dallas Region, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, and whose telephone number is: (214) 767-4996.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by ELI NASH, JR., Administrative Law Judge, in Case No. DA-CA-21315, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Brian T. Corrigan, Esq.
Office of the Staff Judge Advocate
SA-ALC/JA
Kelly AFB, TX 78241

Joseph T. Merli, Esq.
Federal Labor Relations Authority
525 Griffin Street, Suite 926, LB 107
Dallas, TX 75202-1906

Kim C. Roe, Steward
American Federation of Government
Employees, Local 1617
3311 Roselawn
San Antonio, TX

Lourdes Rodriguez, President
American Federation of Government
Employees, Local 1617
3311 Roselawn
San Antonio, TX 78226

REGULAR MAIL:

Colonel D. Gagnon
SA-AMC/TI Directorate Chief
Kelly AFB, TX 78241-5000

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: November 17, 1994
Washington, DC