UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424

DEPARTMENT OF THE AIR FORCE SCOTT AIR FORCE BASE, ILLINOIS Respondent	
and	Case No. 5-CA-70175
NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R7-23, SEIU, AFL-CIO Charging Party	

Lt. Colonel Lewis G. Brewer
Lt. Colonel Charles L. Wiest, Jr.
For the Respondent

Judith A. Ramey, Esquire
For the General Counsel

Mr. Carl Denton
For the Charging Party

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This matter, 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.,1/ and the Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether Respondent violated § 16(a)(1)

1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116 (a)(1) will be referred to, simply, as "§ 16(a)(1)".

of the Statute by refusing to permit the publication, in Respondent's Base newspaper, the Command Post, without editorial change, of a Union advertisement highly critical of Respondent for the asserted use of a quota system for civilian performance ratings.

This case was initiated by a charge filed on March 2, 1987, alleging violations of §§ 16(a)(1) and (5) of the Statute (G.C. Exh. 1(a)). The Complaint and Notice of Hearing (G.C. Exh. 1(c)) issued on April 24, 1987; alleged violation only of § 16(a)(1) of the Statute; and set the hearing for June 26, 1987. On motion of the Charging Party, National Association of Government Employees, Local R7-23, SEIU/AFL-CIO (hereinafter referred to as the "Union"), for good cause shown, by Order dated May 18, 1987, the hearing was rescheduled for July 14, 1987, pursuant to which a hearing was duly held on July 14, 1987, in St. Louis, Missouri, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which the General Counsel exercised. At the conclusion of the hearing, August 14, 1987, was fixed as the date for mailing post-hearing briefs. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, August 18, 1987, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. The Union represents a unit of appropriated fund, General Schedule and Wage Grade, employees at Scott Air Force Base, Illinois (hereinafter referred to as "Respondent") as more fully set forth in Paragraph IV of the Complaint (G.C. Exh. 1(c), Par. IV) and in Article I of the Agreement of the Parties (G.C. Exh. 2, Article 1).

2. There are about 2500 employees in the bargaining unit (Tr. 26) located in an estimated 100 different buildings (Tr. 19).

3. In the summer of 1986, following the June 30 performance rating cycle for General Service employees, the Union began receiving reports and complaints that performance ratings had been downgraded because of a quota system (Tr. 20-21). The Union asked Respondent if a new policy had been issued or a new practice or procedure instituted involving

the setting of quotas or goals and if there were, the Union demanded negotiations, (Tr. 24-25). Respondent denied that there had been a change in policy or practice. Nevertheless, the Union filed a grievance, pursuant to Article XXI, Section 11 of the Agreement (G.C. Exh. 2 Article XXI, Section 11), which at the time of the hearing was awaiting arbitration (Tr. 25).

4. The Union wished to notify all members of the bargaining unit that it had filed a grievance concerning an asserted unlawful quota system, to invite other employees to join the grievance, and to solicit Congressional support, and, after considering various alternatives, decided to run an advertisement in the base newspaper, the Command Post, because practically everybody gets it (Tr. 26-27) and the Union in the past had used the Command Post to communicate with members of the bargaining unit (G.C. Exhs. 6, 6(a)). Accordingly, the Union delivered a handwritten copy of an editorial advertisement (G.C. Exh. 7), concerning the asserted unlawful quota system, to Ms. Linda Polston the publisher of the O'Fallon Progress, for intended publication in the September 12, 1986, issue of the Command Post (Tr. 32-33).

5. At the same time, the Union submitted an advertisement for "Master Card" credit cards for Union members, which was published in the September 12, 1986, issue of Command Post (G.C. Exh. 9; Tr. 40-41, 6a) and an advertisement concerning flexitime (G.C. Exh. 7A), to which there was no problem (Tr. 47), but which was not published because it was intended only as a filler, if there were space, for a half-page and devoted principally to the quota system (Tr. 47).

6. O'Fallon Progress, Inc. (hereinafter referred to as "O'Fallon") is a private printing business which publishes the Command Post under a contract with Respondent and has done so far the past 18 years (Tr. 66). The Command Post is a commercial enterprise newspaper published under the authority of Air Force Regulation 190-1, Par. 2-6a. (Res. Exh. 1; Tr. 66, 78-79). The publisher obtains revenue solely from the sale of advertising (Tr. 66, 79).

7. O'Fallon regularly screens all advertising copy to reject objectionable advertisements (Tr. 67). In the last two years, O'Fallon has rejected 100 to 200 advertisements (Tr. 73). Personnel from Respondent's Public Affairs Office regularly review the advertising content of the Command Post prior to publication and from time to time reject advertising deemed objectionable (Tr. 30, 70-71, 79-82).

8. Publisher Linda Polston, on her own initiative, as she had on other occasions (70, 71, 81-82), sent the Union's proposed advertisement on the asserted quota system to Respondent's Public Affairs Office for review (the Flexitime "filler", G.C. Exh. 7A, was part of the same handwritten copy and was also sent to Respondent).

9. By letter dated September 16, 1986, the Base Commander, Colonel Edward A. Glowatski, informed Mr. Denton, President of the Union, that,

> "1. The attached advertisement is returned to you and can not be published in the Command Post newspaper in its current form. It appears to be misleading and does not fall within the bounds of advertising propriety.
>
> "2. You are free to discuss this advertisement with Capt Faber . . . if you wish." (G.C. Exh. 8).

10. Subsequently, Mr. Denton and V.P. Carolyn Byrd met with Captain Faber, Chief of Public Affairs, and Mr. Offelberger, Labor Relations Specialist (Tr. 42, 82-83). Mr. Denton testified that,

> "A. They suggested, management suggested that if we made certain changes to the ad, that they would consider running it then, and one thing they suggested was that we change the headline to read, 'Was the Quota System Implemented at Scott Air Force Base?' and another suggestion was that we add verbiage that says that it's the union's opinion that such and such was done by the base." (Tr. 44).2/

The Union decided, however,

> ". . . that we would not go along with management in any way, shape or form" (Tr. 45),

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2/ Captain Faber testified that,

> "A. The final decision was made that we would not run the ad as it was. If changes were made to it, we would. I also offered to run the flexitime ad, but they, it was all or none." (Tr. 83).

and, accordingly, the advertisement was never published in the Command Post (Tr. 45, 83). As noted previously, although there was no objection to the Union's flexitime advertisement (G.C. Exh. 7-A) (Tr. 47, 55, 83), the Union did not run the flexitime advertisement because,

> ". . . the purpose of running an ad in the first place was to get the information to the bargaining unit about the quota system. The flexitime was just something extra . . . if there was space available . . . It could be characterized as fill-in." (Tr. 55).

11. Article XXIII, Section 16, of the parties' Agreement, provides, in part, that:

> "The Employer agrees that the Union may use the Towncrier section of the base newspaper and the Notices Section of the Base Bulletin to announce general membership meetings and events: such as, picnics, retirements, or Christmas parties . . . ." (G.C. Exh. 2, Article XXIII, Section 16).

12. Article XXIII, Section 13, of the parties' Agreement provides, in part, that:

> ". . . The Union agrees that literature posted or distributed 3/ must not violate any law, the security of the base, or contain scurrilous or libelous material.

3/ Article VI, Section 13, provides, in part, as follows:

> "The Employer shall permit the Union to distribute informational literature, including union newspapers . . . in designated locations, where unit employees are assigned, within the buildings throughout Scott Air Force Base. The Union agrees that it shall not distribute any libelous or scurrilous material or violate any law, applicable regulations or other provisions of this Agreement in exercising any right under this section . . . ." (G.C. Exh. 2, Article VI, Section 13).

> In addition, the posting or distribution of . . . material which reflects unfairly upon the integrity or motives of any individual, another employee organization or upon the Federal Government will not be permitted . . . ." (G.C. Exh. 2, Article XXIII, Section 13) (Emphasis supplied.

Although Article XXIII, Section 13 by its terms deals with reserved space on official bulletin boards (Tr. 46), Mr. Raymond Rush, since 1985 Chief of the Personnel Management Section and from 1978 until his promotion to his present position the Labor Relations Officer and management's spokesman at the negotiation of General Counsel Exhibit 2, (Tr. 84-85) testified that the words "or distributed", in particular, had been added in a management counterproposal specifically to restrict distribution of unfavorable Union publications (Tr. 88-90). Mr. Rush made it clear that at the time the publications in question were the Union's own newspaper, i.e., either a local publication or a national newspaper, and ". . . We were concerned about their making distribution through our means . . . ." (Tr. 89-90).

12. Article II, Section 1, of the parties Agreement provides, in pertinent part, as follows:

> "In the administration of all matters covered by this Agreement, it is agreed that officials and employees are governed by existing or future laws and regulations . . . ." (G.C. Exh. 2, Article II, Section 1).

Conclusions

A commercial enterprise newspaper, such as the Command Post, beyond question is an arm of the Base inasmuch as the content, other than advertisements, is prepared, provided and edited by Respondent's Public Affairs Office and the advertisements are screened and edited by Respondent's Public Affairs Office which rejects any advertisement deemed objectionable.4/

4/ The publisher also screens all advertisements and rejects advertisements it deems objectionable. The publisher makes the great majority of rejections; nevertheless, Respondent has the final authority.

So far as I am aware, only one other case touched upon access to publication of advertisements in a Base newspaper. This case was: Local 3254, American Federation of Government Employees, AFL-CIO and Department of the Air Force, Grissom Air Force Base, Peru, Indiana, A/SLMR No. 852, 7 A/SLMR 486 (1977), set aside, FLRC No. 77A-77, 6 FLRC 406 (1978), Complaint dismissed, A/SLMR No. 1057, 8 A/SLMR 640 (1978) (hereinafter referred to as "Grissom"). There, no violation by Local 3254, American Federation of Government Employees, AFL-CIO, had been found and the Complaint against Local 3254 had been dismissed; the Administrative Law Judge and the Assistant Secretary had found a violation of §§ 19(a)(3) and (1) of Executive Order 11491 by the Activity (Grissom Air Force Base) in permitting publication in its Base newspaper, the Grissom Contact, of an advertisement by the AFGE for the reason that in permitting the publication of the advertisement the Activity's conduct constituted the furnishing of services and facilities to a labor organization, the AFGE, which was not in equivalent status with the exclusively recognized representative of the Activity's employees, Local 1434, National Federation of Federal Employees. There, the Activity (Grissom AFB) exercised control over the Grissom Contact which was, in effect, an instrumentality of the Activity. As noted, the finding was set aside by the Federal Labor Relations Council for the reason that,

> ". . . a finding of a 19(a)(3) violation based merely on the failure to prevent the publication of the subject advertisement by AFGE is inconsistent with the purpose of the Order.10/

> "10/ Similarly, such conduct plainly does not constitute interference with, restraint or coercion of an employee in the exercise of the rights assured by the Order in violation of section 19(a)(1)." (6 FLRC 412-413).

It is somewhat ironic that in Grissom, supra, the Activity was charged with an unfair labor practice because it did not exercise its right to exclude a union advertisement and that here, Respondent, Scott AFB, is charged with an unfair labor practice because it did. As Grissom, supra, turned on labor "organizations having equivalent status" (E.O. 11491, §19(3); see, substantially like language of

§ 16(a)(3) of the Statute), the decisions therein are not really in point since there is no dispute, and the record clearly shows, that Respondent exercised control over the Command Post which was, in effect, an instrumentality of Respondent.

Except for Grissom, supra, the other cases have involved some form of penalty for having communicated something. For example, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264 (1974) (hereinafter, "Letter Carriers") (publication of a "List of Scabs" in union's newsletter with a pejorative definition of "scab"; held, state libel award did not comport with recognized protection for freedom of speech in labor disputes); and United States Forces Korea/Eighth United States Army, 17 FLRA 718 (1985) (hereinafter, "U.S. Forces Korea") (letter to the editor of the Korea Herald (which was never published); held, letter of reprimand did not violate § 16(a)(1) or (2) of the Statute because, although the Statute accords unions the right to publicize labor relations problems and seek outside support and assistance, embarassment to senior U.S. Military representative in Korea exceeded bounds of protected activity.)

While libel may lie for publication, obviously, it will not lie because publication is not permitted. Denial of the means to communicate may interfere with the freedom of speech as surely as penalty for the exercise of the right, but the standards and remedies are not the same. If a person communicates (speaks, writes, publishes, etc.) and is penalized it is clear without more that his freedom of speech has been interfered with unlawfully, Letter Carriers, supra, in the absence of circumstances, such as knowledge of their falsity or reckless disregard of the truth, Linn v. Plant Guard Workers, 383 U.S. 53 (1966), or other considerations exceeding the bounds of protected activity, U.S. Forces Korea, supra. However, the denial of the right to communicate does not automatically constitute interference. At the outset, there must be a general right to communicate through the means sought to be used. Proprietary rights include exclusionary rights. The fact that a newspaper is published does not mean that anyone can write an article or story and demand that it be printed. Quite the contrary, the publishers, or proprietor, is under no obligation to accept any story or article for publication. Indeed, here, Respondent prepares the entire content of the Command Post, except advertisements, and unless the Public Affairs Office includes any story or article, or even covers a given subject, it does not attain publication in the Command Post and there is no assertion that Respondent does not have the absolute right to determine the editorial content of the Command Post.

However, once the public is invited to advertise, General Counsel argues that the Union's advertisements ". . . should have been accorded no closer scrutiny than any other advertiser." (General Counsel's Brief, p. 8). The Union must not be discriminated against because it is a union.

I agree with General Counsel that the Command Post is not a bulletin board; nevertheless, there are similarities. With respect to neither does a union, or an employee, have a statutory right of use. Like access to bulletin boards, Federal Election Commission, 20 FLRA 20 (1985); Department of Defense, Department of the Air Force, 31st Combat Support Group, Homestead AFB, Florida, 13 FLRA 239 (1983), permission to advertise in the Base newspaper has been addressed by the parties in their Agreement: Thus, Article II, Section 1 incorporates by reference AFR 190-1 which, inter alia, in 2-15 n. provides, "Coordinate advertisements about union activities with the installation civilian personnel labor relations office and the staff judge advocate for propriety. Advertisement must not be worded or give the impression that the Air Force endorses or sponsors their content in any way . . . ."; and 2-15 y provides, in part, ". . . Each commander determines whether particular advertisements to be placed by the publisher in a CE newspaper serving the command or installation interfere with successful mission performance . . . ." and further that "(1) Advertisements that appears to be editorials . . . must be clearly labeled 'advertisement' in a type size equal to newsbody type, or larger . . . ." (Res. Exh. 1).

The parties made reference to the Base newspaper (Command Post) in Article XXIII, Section 16; but the granting of contractual entitlement to the Union to use the "Towncrier" section for announcements sheds no light on the placing of advertising. The record shows that Article XXIII, Section 13, by its use of "distributed" and "distribution", was intended, specifically, to restrict distribution of unfavorable union publications. Article XXIII, Section 13, especially in conjunction with AFR-190-1, Sections 2-15 n and y, could apply to advertisements in the Command Post even though there is nothing in the record to show that this was the intent of the counterproposal which became the present version of Article XIII, Section 13. In like manner, an advertisement in the Command Post is, certainly, a form of distribution although, again, the record does not show that either the Command Post, or advertisements therein, was considered by the parties during negotiations when discussing "distribution through our means" (Tr. 89-90).

I conclude that the Union was accorded no special right or privilege to advertise in the Command Post and that the Agreement, which incorporated by reference AFR 190-1, in effect, provided that Union advertisements in the Command Post: must meet Respondent's standard for propriety; must not give the impression of Air Force endorsement or sponsorship; and must not interfere with mission performance. Moreover, President Denton was well aware that,

> ". . . the base has the right to and does, indeed, edit the contents of the Command Post both editorially and the advertisements that appear." (Tr. 30).

Nothing in the record shows that Respondent discriminated in denying publication without change, of the Union's "Quota System" advertisement. To the contrary, the Union's credit card advertisement was published; the Union's flexitime advertisement was approved for publication; and the Union's "Quota System" advertisement was not rejected as such but, rather, Respondent suggested certain changes.5/ However, the Union was adament that it, ". . . would not go along with management in any way, shape or form" (Tr. 45) and, accordingly, the advertisement was never published because the Union refused to permit Respondent to exercise its conceded right to edit the content of advertisements that appear in the Command Post.

Of course, contrary to the position of General Counsel, there is, and necessarily must be, some degree of interference if the requirements of AFR 190-1 are carried out. Sometimes, depending on the nature of the advertisement, review may, indeed, involve pictures and/or language

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5/ Mr. Denton testified that,

> ". . . one thing they suggested was that we change the headline to read, 'Was the Quota System Implemented at Scott Air Force Base?' and another suggestion was that we add verbiage that says that it's the Union's opinion that such and such was done by the base." (Tr. 44).

Such changes would be consistent with the specific mandate of AFR 190-1 for propriety and/or avoidance of impression of Air Force endorsement or sponsorship.

of a risque nature; or statements of a libelous nature; or that are deceptive; or that are racially discriminatory; but editorial intervention to maintain propriety of a union advertisement, to prevent attribution to or sponsorship by the Air Force, etc., while resulting in some interference, is not only equally proper, but the Agreement of the parties provides for compliance with AFR 190-1 which mandates that Union advertisements comply with its provisions.

I express no opinion as to how far Respondent may go in the name of propriety, etc., to reject union advertisements it finds distasteful. I conclude only that on the basis of the record in this case General Counsel has shown no ". . . interference with the right of the employee representative to communicate concerning conditions of employment, and interference with protected communication itself" (General Counsel's Brief, p. 11), in violation of § 16(a)(1) of the Statute, and, accordingly, recommend that the Authority adopt the following:

ORDER

The Complaint in Case No. 5-CA-70175 be, and the same is hereby dismissed.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: December 7, 1988
Washington, D.C.