

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

.....
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
LOCAL 1931, AFL-CIO,
(NAVAL WEAPONS STATION
CONCORD) CONCORD, CALIFORNIA
Respondent
and
MARC S. CARPENTER
AN INDIVIDUAL
Charging Party
.....

Case No. 9-CO-70001

Kevin M. Grile, Esquire
For Respondent
R. Timothy Sheils, Esquire
For General Counsel
Mr. Marc S. Carpenter
Pro se
Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, 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

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
(b)(1) will be referred to, simply as "§ 16(b)(1)."

Final Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether the President of Respondent, American Federation of Government Employees, Local 1931, AFL-CIO (hereinafter referred to as the "Union"), caused an Assistant Fire Chief to convey a threat to a bargaining unit employee, a work leader also known as a "Captain," because of statements the Captain was asserted to have made to members of his crew and whether the Union's President caused, or attempted to cause, the Naval Weapons Station Concord (hereinafter referred as ("Concord")) to discriminate against the Captain because of the Captain's exercise of rights accorded by § 2 of the Statute.

This case was initiated by a charge filed on October 6, 1986 (G.C. Exh. 1(a)). The Complaint and Notice of Hearing (G.C. Exh. 1(b) issued on June 30, 1987, and fixed the hearing for October 6, 1987. By Order dated July 1, 1987 (G.C. Exh. 1(c), the hearing was rescheduled for September 9, 1987; on August 7, 1987, an Amendment to Complaint issued (G.C. Exh. 1(e)); and by Order dated August 14, 1987 (G.C. Exh. 1(g)) the hearing was further rescheduled for September 11, 1987, pursuant to which a hearing was duly held on September 11, 1987, in San Francisco, California, before the undersigned.

All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues presented, to examine and cross-examine witnesses, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, October 13 was fixed as the date for mailing post-hearing briefs which time was subsequently extended, upon motion of the General Counsel with which counsel for Respondent joined and to which the Charging Party did not object, for good cause shown, to November 6, 1987. Respondent and General Counsel each timely mailed an excellent brief, received on November 9, 1987, which have been carefully considered. Upon the basis of the entire record,^{2/} including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

^{2/} Respondent's Motion to Correct Transcript, to which no objection was filed, is granted except the correction on page 103, l. 23 respecting "decision" as to which no actual change was shown and no error is apparent, and the transcript is hereby corrected as set forth in the Appendix hereto.

Findings and Discussion

1. Marc S. Carpenter, the Charging Party, has been a firefighter at Concord since about 1981 (Tr. 17) and has been a lead firefighter, also known as a "Captain," since 1985 (Tr. 17; G.C. Exh. 2). Captains are members of the bargaining unit at Concord (Tr. 18, 103; G.C. Exhs. 3 and 4), and have served as Union stewards (Tr. 17-18, 104). As a Captain, Mr. Carpenter neither hires nor recommends who is to be hired (Tr. 31, 32); does not promote nor recommend for promotion (Tr. 32); does not have authority directly to discipline employees (Tr. 32); has no involvement in handling grievances (Tr. 34-35); and has no authority to grant leave (Tr. 31-32). However, as a Captain, Mr. Carpenter conducts morning muster, gives instructions and work assignments to crew members, although job assignments are routine in nature; as Captain, Mr. Carpenter gives orders to his crew and reports on performance of members of his crew to the Assistant Fire Chief (Tr. 27, 37, 62); and the Captain is the leader of the engine company (G.C. Exh. 2, Tr. 49-50) but acts pursuant to instructions of either the Fire Chief or Assistant Fire Chiefs and very rarely makes independent decisions (Tr. 31). Although Captains perform duties which would make them supervisors if they were not firefighters,^{3/} they do not devote a preponderance of their employment time to the exercise of such authority as is required by the concluding portion of § 3(a)(10) of the Statute which provides:

". . . except that, with respect to any unit which includes firefighters . . . the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority." (5 U.S.C. § 7103(a)(10)).

The Authority, in Department of the Navy, Marine Corps Base, Camp Pendleton, California, 8 FLRA 276, 277-278 (1982); and Department of the Navy, Naval Education and Training Center, Newport, Rhode Island, 3 FLRA 325, 326-327 (1980), has held that Fire Captains, whose duties were substantially identical to Captain Carpenter's, were not supervisors within the

^{3/} Indeed, Concord's 1974 Fire Division rules and regulations specifically provided that: "Fire Captains are supervisors . . ." Res. Exh. 1, SECDEPTINST 11320.1, chapter 3, Paragraph 4b, page 3-7.

meaning of the Statute. Without setting forth in complete detail all of the portions of the record, I have examined the record carefully, including those portions referenced in Respondent's Brief at pages 2-6, as well as Respondent's argument (Respondent's Brief, pp. 11-14), and find nothing in the record to distinguish the duties of Fire Captains at Concord, and specifically the duties of Mr. Carpenter, from the duties of the Fire Captains considered by the Authority in the Camp Pendleton and Newport cases, supra, and found not to be supervisors within the meaning of the Statute. Accordingly, I conclude that Captain Carpenter was not a supervisor within the meaning of the Statute.

2. On September 19, 1986, Captain Carpenter called a meeting of his crew because the discharge of an employee, Mr. Tracy Gilmour, had resulted in a morale problem (Tr. 21-22). All members of the crew were present except Mr. Ray Borgia who was not working that day (Tr. 25). What Mr. Carpenter said to Messrs. George Chandler, William Miller and Ron Evans was not shown as Mr. Carpenter, who did testify, was not asked and no other person present at the meeting testified.

3. Mr. James Wright, President of the Union (Tr. 92), testified that at a meeting he (Wright) conducted with stewards Borgia and James H. Douglas on September 23, 1986, Mr. Douglas told him that,

". . . he [Douglas] had received a complaint from at least one of the unit employees within the Fire Department that Marc Carpenter had assembled the workers together during the morning shift and informed them that the Union was not going to help Tracy Gilmour or any other employee in the Fire Department. (Tr. 96).

4. Mr. Wright further testified that he [Wright] on September 23, 1986, in the presence of Messrs. Borgia and Douglas, called Assistant Fire Chief Raymond Gilmore and told Mr. Gilmore that,

". . . I had received a complaint from one of the stewards . . . that one of the Lead Firefighters had assembled all the workers together during a morning shift and told them that the Union was not able to do anything for Tracy Gilmour and was not going to do anything

for any other employee. I informed him that I was concerned as to whether or not that was coming from Mr. Carpenter as an individual employee or whether or not that was coming from management. I explained to him that if it was coming from Mr. Carpenter that I had no problem with that because that was his individual right to do so, however, if it was coming from management I felt that that could in fact discourage Union membership." (Tr. 99).

"Q During this conversation what, if anything, was Mr. Gilmore saying?

"A Mr. Gilmore said to me that he had not made those comments himself, however if I would tell him who had made those comments that he would himself tell them to knock it off.

"A At that point I informed him that it was my understanding that Mr. Carpenter had made those comments." (Tr. 101).

5. Assistant Chief Gilmore agreed that Mr. Wright called him on September 23, 1986, and after discussing another matter first then said,

"'. . . As long as I got you on the line there's one more thing I'd like to talk to you about.' He says, 'I've got one of your Captains that are bad-mouthing the Union, talking against the Union.' He asked me if I could talk to him and he'd like it stopped. I said, 'Well yeah I can but we have six Captains on board the station and it makes it a lot easier for me if you give me the individual's name' So at that time he told me it was Marc Carpenter. Then James went on to mention that we're all working together towards the same common goals and he didn't need anybody

tearing it down and he would like it stopped. If it isn't, if it continues, he was going to start pushing papers. So I told him I would get to Captain Carpenter about it for him"
(Tr. 40-41).

On cross-examination Assistant Chief Gilmore further testified,

"Q Did he [Wright] make any expression to the effect that this type of statement he heard should not come from management?

"A No.

"Q Did he make any, engage in any discussion about management's responsibility to insure that employees were not coerced regarding union affiliation or non-affiliation?

"A No that wasn't the subject of the conversation at all.

"Q He mentioned, did he mention the term 'pushing paper?'

"A I believe that was the terminology he used. If not, it was, generate paperwork, I believe it was 'pushing paper.' At least the way it came across to me was that he was going to start a legal action against Marc Carpenter, be it a lawsuit, grievance, whatever. I don't know how the Union handles their internal things.

"Q And he would not, it was your understanding that he was not going to push any paper against management?

"A No he didn't insinuate that at all." (Tr. 47-48).

In general, I credit the testimony of Assistant Chief Gilmore as more credible than Mr. Wright's; however, I specifically find, as Mr. Wright testified, that Mr. Wright told Mr. Gilmore that a Lead Firefighter [Captain], later identified as Captain Carpenter," had assembled all the workers together" and made the statements about the Union which Mr. Gilmore termed "bad-mouthing the Union, talking against the Union." Further, I specifically find, as Mr. Gilmore testified on direct examination that Mr. Wright said only that "If it isn't, if it continues, he was going to start pushing papers;" I specifically do not find that Mr. Wright made any reference whatever as to whom, or as to what, he referred in his "pushing papers" comment, and to this extent I do not credit the contrary inferences of fact in Mr. Gilmore's cross-examination, notwithstanding that Mr. Gilmore may have made such assumption from what I have found Mr. Wright said, which could, with equal ease, support an inference that Concord was the object of Mr. Wright's comment, or that both Concord and Captain Carpenter were the objects of Mr. Wright's comment, etc. In short, I find that Mr. Wright said that if the "bad-mouthing" of the Union continued, he was going to start pushing papers.

I credit, in general, Mr. Gilmore's testimony in part because I find wholly unconvincing that Mr. Wright would have made such a conditional protest. I am firmly convinced that Mr. Wright was understandably angered to learn that a Fire Captain had called a meeting at which he "bad-mouthed" the Union and that he called Assistant Chief Gilmore, inter alia, to demand that this be stopped. I credit, in general, Mr. Gilmore's testimony in part for the reasons set forth by General Counsel in his Brief (G.C. Brief, pp. 2-3) including: a) Gilmore testified that Wright used the words "bad mouthing the Union." Wright denied that he used such term; but Borgia corroborated Gilmore (Tr. 52, 53-54). b) Wright denied making the "pushing papers" statement and, indeed, denied that he ever used the term (Tr. 102); but Borgia admitted that he had heard Wright use the phrase "pushing paper" in the past (Tr. 123-124). c) Gilmore's testimony was consistent with what he told Captain Carpenter on the same day, September 23, namely that Wright had said that if he, Carpenter, didn't stop bad-mouthing the Union he was going to start pushing paper (Tr. 22).4/

4/ I have considered G.C. Exh. 6 but give it no weight for the reason that it was not a contemporaneous written report of Mr. Wright's conversation, but was not written until October 8, 1986, following the filing of the charge [dated October 3] on October 6, 1986 (G.C. Exh. 1(a)).

6. Assistant Chief Gilmore called Captain Carpenter to his Office on September 23 and told Carpenter that if he [Carpenter] didn't stop bad-mouthing the Union, Wright was going to start pushing papers (Tr. 22, 42).

7. Captain Carpenter signed the charge herein on October 3, 1986, and it was filed with the Authority on October 6, 1986, (G.C. Exh. 1(a)).

Conclusions

Here, the Union went to management to protest what it considered improper disparagement of the Union by a Fire Captain and the threat, "to push papers" if such conduct was not stopped, was made to management, not to the captain; but management agreed to talk to the Captain and conveyed the Union's message to the Captain. General Counsel cites and relies on Overseas Education Association, 11 FLRA 377 (1983), in which the Authority found that the OEA violated §§ 16(b)(1) and (2) of the Statute by requesting that the school principal discipline an employees for having distributed an "open letter" to the faculty publicizing OEA's refusal to assist him and urging that the OEA representative be "recalled" from her position as president of the Local. The Authority stated, in part, as follows:

" . . . the Authority concludes, in agreement with the Judge, that the employee was once again 5/ exercising rights protected by section 7102 of the Statute and that OEA's attempt to cause DODDS to

5. The Authority earlier in its decision had found that the employee exercised § 2 rights in filing a grievance and indicating that he did not seek or desire OEA to act as his representative and that OEA violated § 16(b)(1) of the Statute when it, on the basis of the employee's non-membership, denied his request for assistance in ascertaining why there had been a delay in management's response to his grievance. The Authority stating,

" . . . Such conduct interfered with the employee's protected rights under section 7102 of the Statute (footnote omitted) and therefore constituted a violation of section 7116(b)(1)"
(11 FLRA at 378).

discriminate against the employee for having exercised such rights constituted a violation of section 7116(b)(2) and, additionally, interference with, restraint and coercion of the employee with regard to the exercise of protected rights in violation of section 7116(b)(1). (footnote omitted)." 11 FLRA at 378-379).

General Counsel asserts that the Union, through James Wright, ". . . tried to prevent Carpenter from the future exercise of his statutorily protected right to express his opinions about the Union." (G.C. Brief, pp. 9-10). Under certain circumstances employees have a protected § 2 right to engage in anti-union activity, Sheet Metal Workers International Association, Local 97, 7 FLRA 799, 813 (1982), although I have reservations about engagement in anti-union activity by any person who has supervisory authority being a protected right under § 2; nevertheless, I am aware of § 16(e) of the Statute which, outside of a representational context, ". . . protects the expression of personal views, arguments or opinions by management, employees, or union representatives as long as such expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions." Oklahoma City Air Logistics Center (AFLC) Tinker Air Force Base, Oklahoma, 6 FLRA 159, 161 (1981).

Because he does not devote a preponderance of his employment time to the exercise of supervisory authority, Captain Carpenter, as a lead firefighter, is not a supervisor within the meaning of the Statute; however, from time to time he does engage in supervisory activity. He exercised supervisory authority when he called the meeting of his crew on September 19, 1986; he exercised supervisory authority when he addressed his crew; and, when he "bad-mouthed" the Union at the meeting, he did so while acting in his supervisory capacity. Nothing in the record indicates that Captain Carpenter expressed a personal view, argument or opinion in his comments about the Union 6/ and the expression of anti-union views, to his assembled crew while acting in a supervisory capacity, were made under coercive conditions. Even though Captain Carpenter made no

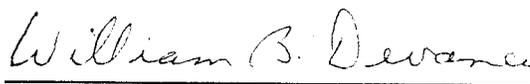
6/ Captain Carpenter testified that, ". . . I just had a talk with them to try to give them something to think about." (Tr. 22).

threat or promise of benefit, the "bad-mouthing" of the Union by a person acting in a supervisory capacity at a called meeting interfered with the employees' protected rights, inter alia, to form, join, or assist any labor organization freely and without fear of penalty or reprisal. Two of the employees went to Mr. James H. Douglas, a steward, and complained about Captain Carpenter's comments (Tr. 83, 84, 89), and Mr. Douglas told Mr. Wright who called Assistant Chief Gilmore. Captain Carpenter had no protected right to make anti-union comments while discharging a supervisory function and his statements, because made under coercive conditions and not as statements of personal views, were not protected by § 16(e). Accordingly, Mr. Wright having made it clear to Assistant Chief Gilmore that a lead firefighter had "bad-mouthed" the Union during a meeting, his demand that such conduct be stopped interfered with no right protected under the Statute and did not violate either § 16(b)(1) or (2) of the Statute.

Having found that the Union did not violate either § 16(b)(1) or (2) of the Statute as alleged, it is recommended that the Authority adopt the following:

ORDER

The Complaint in Case No. 9-CO-70001 be, and same is hereby, dismissed.



WILLIAM B. DEVANEY
Administrative Law Judge

Dated: June 30, 1988
Washington, D.C.