

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

.....
DEPARTMENT OF THE AIR FORCE, .
3245th AIR BASE GROUP, .
HANSCOM AIR FORCE BASE, .
BEDFORD, MASSACHUSETTS .
Respondent .
and .
RICHARD D. MARTINO, .
An Individual .
Charging Party .
.....

Case No. 1-CA-90275

John G. Abizaid, Esq.
For the Respondent

Richard D. Martino
Pro Se

Peter F. Dow, Esq. and
Daniel F. Sutton, Esq.
For the General Counsel

Before: SALVATORE J. ARRIGO
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 U.S. Code, 5 U.S.C. § 7101, et seq. (herein the Statute).

Upon an unfair labor practice charge having been filed by the captioned Charging Party against the captioned Respondent, the General Counsel of the Federal Labor Relations Authority (herein the Authority), by the Regional Director for Region I, issued a Complaint and Notice of Hearing alleging Respondent violated the Statute when its

Foreman, Michael Champagne: refused to rehire applicant Richard Martino because he had engaged in union activity while previously employed by Respondent; told an employee Martino would not be rehired as a painter because of his prior union activity; and told Martino and another job applicant that Martino was not rehired because of his union activity.

A hearing on the Complaint was conducted at Hanscom Air Force Base, Bedford, Massachusetts, at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. Briefs were filed by Respondent and the General Counsel and have been carefully considered.

Upon the entire record in this case, my observation of the witnesses and their demeanor and from my evaluation of the evidence, I make the following:

Findings of Fact

Background.

At all times material the National Association of Government Employees, Local R1-8 (herein the Union) has been the exclusive collective bargaining representative of various of Respondent's employees including Civil Engineering Paint Shop employees.

Richard Martino began his employment with Respondent in 1978 and worked as a painter in the Civil Engineering section until he resigned on August 24, 1987. Martino was a member of the Union throughout his employment. He became a Union Steward in March 1985 and sometime thereafter served as Union Vice President until he was appointed Trustee President of the Union in early October 1986.^{1/} He resigned the Trustee President position on June 26, 1987. The record reveals that while an official with the Union, Martino did not file any grievances under the parties' negotiated grievance procedure but followed the practice of attempting to resolve disputes on an informal basis with supervision and management.

During his employment Martino was counselled by his Foreman for taking extended breaks on December 26, 1984. He

^{1/} The date of appointment as Trustee President was ascertained by reference to "Supervisor's Record of Employee," Respondent Exhibit No. 2.

was also counselled by his second line Supervisor, Structural Section Superintendent Master Sergeant Raymond Salvas, on February 4, 1985 for being at a location he was not supposed to be at the time and for leaving a job site without permission to speak to the Union. On April 18, 1986 Salvas issued a letter of reprimand to Martino and four other painters for "loafing on the job" on March 27, 1986 at a time when Martino was a Crew Leader.^{2/} Notwithstanding the above, Martino was rated "Excellent" by his Foreman and Superintendent on his last four annual performance appraisals, the final appraisal prior to his resignation covering the period February 1, 1986 to January 31, 1987.^{3/}

Sometime early in 1986 Martino, while representing the Union, met with Superintendent Salvas and Foreman Lemoyne to discuss retaining a temporary employee. Martino took the position that the employee should be retained and Salvas was of the opinion that there was not enough work to warrant his continued employment. Martino told Salvas he felt Salvas was not doing his job and more work could be found. Salvas responded by jumping to his feet, coming to within a few inches of Martino's face and telling Martino he would not be talked to like that, daring Martino to repeat the statement. Martino suggested Salvas sit down and attempt to resolve the problem in a normal fashion. The parties did not reach agreement on the matter.

After becoming Union Trustee President in October 1986, Martino began to use almost 50 percent of his workday on Union business, which created some concern for management. Thus, Foreman Lemoyne felt Martino was not spending enough time on painting and Civil Engineering General Foreman Richard Ornellas, who was in charge of the entire Civil Engineering section, was desirous of having Martino report to him on the use and scheduling of official time for Union business. Accordingly, sometime in December 1986 Martino met with various members of management including Foreman Lemoyne and Acting Superintendent Gary Robidoux.^{4/} The

^{2/} The incident was observed by Salvas and Michael Champagne, another painter who was Acting Foreman since the regular Foreman, Gerard Lemoyne, was away from the job that day.

^{3/} Martino's final appraisal was given by Acting Superintendent Gary Robidoux, infra, and Foreman Lemoyne.

^{4/} Superintendent Salvas left the base on a military assignment in June or July 1986.

parties, in addition to resolving questions concerning Union office space and parking, agreed that Martino would be authorized to use 50 percent of his workweek for Union business and if more was required, Martino could request additional time from management. Thereafter, Martino regularly used 50 percent of his worktime for Union business, and occasionally more.

In January 1987 Foreman Lemoyne left employment at the Air Base and Martino was given a temporary detail as Acting Foreman for a 90 day period effective February 1. At the end of this period (May 1) Martino reverted to his prior status as painter and painter Michael Champagne was given a 90 day temporary detail as Acting Foreman after which Champagne was made Temporary Foreman.

Martino's resignation.

Sometime in June 1987 Martino decided to relocate and start a business in Florida. Martino testified he met with Acting Foreman Champagne and Superintendent Robidoux in late June and requested a leave of absence for this purpose. Robidoux denied the request and Martino asked higher management for a leave of absence while he was attempting to start up a business. That request was also denied. Martino related this denial to Champagne and Robidoux and, according to Martino, Champagne suggested Martino use up all his leave and he'd "carry (him) on the books for his leave," indicating that when his leave ran out, he would carry Martino on the books as being on "leave without pay" (LWOP).^{5/} Although present, Robidoux made no comment.

According to Martino, in early July he called Champagne and requested he be put on sick leave since he was under a doctor's care and was required to take an iodine radiation tablet.^{6/} Thereafter, Martino left for Florida and had no further contact with Respondent until his return around August 24.

Champagne did not specifically deny the arrangement for leave as testified by Martino, above, and admitted he

^{5/} I credit Martino's version of this arrangement.

^{6/} Respondent's records indicate Martino was placed on sick leave for July 6-10, 1987.

approved whatever sick leave and annual leave Martino requested.^{7/} Indeed, Martino's "Time and Attendance Card" maintained by Respondent reveals Champagne, as Foreman, certified as correct annual leave taken by Martino for the entire weeks of July 13, July 20 and July 27.^{8/} However, for the following weeks up until August 24, Respondent's records indicate Martino was placed on AWOL (absence without leave) with Raymond Salvas as the certifying supervisor for those notations even though Champagne continued to be Martino's nominal foreman.^{9/} Champagne testified that at some unspecified time "it seemed like (Martino) wasn't going to come back and just abandoned the job." Champagne testified he called Martino's home "a couple of times" and left word that he wanted to know "what was going on" but never heard from Martino. Thus, I construe Champagne's testimony to essentially deny an arrangement to keep Martino on LWOP for an indeterminate period after his annual and sick leave was used.

By August 24, 1987 Martino had returned to Massachusetts. Martino testified on that date he was advised during a phone conversation with Wayne Keith, from Respondent's Labor Relations Office, that "they" wanted Martino to resign and Salvas had the paperwork prepared for his signature.^{10/} Keith also told Martino that he was being carried as AWOL and they wanted him out of the squadron and to resign so they could fill the position. Martino then went to the Air Base and met with Salvas in his office. Martino testified as follows:

^{7/} Robidoux was not called to testify and I find Champagne was less than fully candid when testifying about this arrangement.

^{8/} The "Time and Attendance Report," apparently maintained by Respondent's Civil Engineering section, indicates that Martino was on annual leave during the entire weeks of July 13 and July 20 but only the first day and a half of the week of July 27. Respondent made no attempt to reconcile this disparity.

^{9/} Sergeant Salvas returned to his former position at the Base during this period. Salvas was not called to testify in this proceeding.

^{10/} Keith was not called to testified in this proceeding.

A I went in and he said hello. We sat down and he asked me if I was going to resign my position or if I was going to stay on or what I was going to do.

And, I told him that I hadn't made a decision at that point. That I still had some time still on the books. And, I asked him why it wasn't approved. And, he said that I had two days of sick leave. And, that he was not going to give it to me unless I brought in a doctor's certificate.

And, he wanted me to resign right then and there from my position.

Q What did you tell him?

A I told him I needed to talk it over with my wife and see what decision I was going to come up with. And, we started to get into a little heated discussion -- like it always did -- and I got up and walked out.

And, he came behind me saying -- yelling -- to me to sign the paper work and resign. And, I ignored him and left the building.

Martino returned home and telephoned the Labor Relations Office and talked with Keith. Martino indicated he would resign but didn't wish to go back to the Base and meet up with Salvas again. Martino and Keith also briefly discussed Martino's insurance and Martino related that he was supposed to be on LWOP and not AWOL after his leave had been used up. Keith offered to go to Martino's home to pick up his resignation and Martino agreed. Later that day Keith went to Martino's residence and Keith explained how Martino's insurance would terminate and told Martino that any AWOL in the records would be charged to LWOP. With that assurance Martino signed the resignation statement Keith brought with him.

Martino seeks reemployment.

Martino went back to Florida on August 25, 1987 and returned back from Florida to his home in New Hampshire

in May of 1988. Martino testified that in September or early October 1988 he went to Hanscom Air Force Base and happened to meet Superintendent Salvas at a worksite. Martino asked Salvas if there were any vacancies in the Paint Shop and Salvas said yes. Martino asked Salvas what he thought about his applying and getting his job back. Salvas replied sarcastically, "go ahead and put in for it." Although Martino assumed from the manner of Salvas' reply that he wouldn't have a chance at getting the job, he nevertheless went to the personnel office and submitted his application.^{11/}

James Moore was a co-worker with Martino in the Paint Shop for a number of years prior to Martino's resignation. Accordingly to Moore's testimony, around September 1988 he met Martino in the Paint Shop parking lot and during a conversation Moore asked Martino what he was doing at the Base and Martino said, "he just came back for employment."^{12/} Later that day, according to Moore, he had the following conversation with Paint Shop Foreman Champagne:

A And, I was asking Mike, I said, hey, Richie's coming back and he said yes, he's trying to get back. I said, so, what are you going to do, are you going to hire him back or what? He said yes, you know, I'll hire him back.

I said, oh, yes, is that right. He said yes. Then, he grinned and he said. But, I don't know what Sal is going to say -- this is Chief Salvas, . . . (who) is the Superintendent.

^{11/} A vacancy announcement (VA 455-87) for a Painter WG-4102-9 had been posted at the facility. Martino's application for this job is dated October 27, 1988. Martino testified he also made application at the Base for a number of other jobs as well.

^{12/} Martino did not testify concerning this meeting. However, such a meeting, if it occurred, would more likely have been on or about October 27, the date of Martino's application.

So, I said well, what do you mean?
He said well, Salvas is not going to
hire him back, you know, because he's
tied up with too much of union business.
I said oh, yes, really. And, then, you
know, the conversation ended and I went
on to work and he went on his way.^{13/}

Martino testified that around mid-December 1988 he returned to the Base and had a conversation alone with Champagne in the Paint Shop. After talking briefly about local events and his return from Florida, Martino asked Champagne about the painter's position and Champagne indicated that although there was supposed to be a priority on filling the vacancy, the matter was still with Personnel and Champagne was waiting to hear from that office. According to Martino he asked Champagne if he was going to "pick him up" or not and Champagne said he was going to hire him, indicating he needed somebody to help train new employees he anticipated hiring.

Martino also testified that sometime in late December or early January he asked Raymond Thibodeau, a friend who was employed at the Base as a painter in another section, to check with Champagne on the status of Martino's job application. According to Martino, Thibodeau reported back to him in early February that he had talked to Champagne in the Paint Shop and been told Champagne was going to "pick him up" for the position as soon as he got all the paper work from Personnel.

^{13/} Moore testified that he had no personal relationship with Martino outside of Base employment contacts and this conversation was not revealed to Martino until sometime in July 1989. Martino testified Moore told him of this conversation in early May 1989. The record reveals that Moore's Foreman, Champagne, counselled Moore on at least three occasions prior to October 1988 and Moore was aware Champagne was contemplating bringing an adverse action against him while he was under Champagne's supervision based on his work performance. However, the matter was dropped after a hearing sometime in October 1988 was conducted and Moore was transferred to another department in January 1989 pursuant to an application Moore testified he submitted in September 1988.

Thibodeau testified that sometime in late 1988 or January 1989 Martino told him he was applying for his prior job as a painter at the Base and asked Thibodeau to drop by the Paint Shop and make an inquiry into the matter. Sometime thereafter Thibodeau went to the Paint Shop and asked Champagne what "the story" was on Martino coming back to work. According to Thibodeau, Champagne told him he was going to "pick up" Martino and was just waiting for a list to come from Personnel and it was just a matter of time. A week or two thereafter, according to Thibodeau, he related his conversation with Champagne to Martino.

Thibodeau also testified that about a month or so later he again talked to Martino when Martino was on the Base. During the conversation Martino said he still hadn't received any word as to his job application and again asked Thibodeau to go to the Paint Shop when he had a chance and see if he could find out anything about it. Sometime thereafter Thibodeau went to the Paint Shop and met with Champagne.^{14/} Champagne asked Thibodeau if Martino sent his "messenger boy" back again. Thibodeau said he was there to pick up some supplies and asked "what's the story on Rick . . . is he coming back or what?" According to Thibodeau, Champagne responded that neither Salvas nor he wanted Martino back because of his taking up too much time with Union business. Thibodeau then got his supplies and left.^{15/}

^{14/} Thibodeau placed the two conversations with Champagne as about two months apart, the last taking place sometime in February 1989.

^{15/} Thibodeau acknowledged he didn't "get along" with Champagne and normally avoided going to the Civil Engineering Paint Shop as much as possible. Thibodeau has known Martino for about 10 to 12 years and described Martino as a close friend. Thibodeau and Martino were at one time partners for a short period in a private painting business off Base on their own time and since the dissolution of the partnership, Thibodeau has worked privately as a painter for Martino from time to time.

The record reveals that Thibodeau was one of the four painters who received a letter of reprimand with Martino from Salvas in April of 1986 when Martino was acting as a Crew Leader, supra. Thibodeau received a second written reprimand from Salvas on that day for being away from his jobsite without permission on another occasion.

According to the testimony of Francis Golen, Martino's brother-in-law, around early January 1989 he and Martino went to Hanscom Air Force Base. Golen had worked painting for Martino at various times over the past 15 years as a second job and wished to apply for a painter's position at the Base. Martino and Golen proceeded to the Paint Shop and met with Foreman Champagne. According to Golen^{16/}, Martino introduced Golen to Champagne and ascertained that there were several openings for painters at the Base. Champagne indicated they were in "desperate need" and it was "very favorable" that they could get hired and asked if they had filled out applications. Martino asked if he would take him back and Champagne said he would. Martino asked Champagne what he thought of Golen's chances for a job and Champagne replied Golen should take care of the paper work and "we'll take it from there." Martino and Golen then went to the Personnel office and Golen filled out an employment application.

Paint Shop foreman Champagne did not specifically testify about the alleged conversations with Moore and Thibodeau, above. However, Champagne did generally deny the allegation in the Complaint of having made any statement to the effect that he would not rehire Martino because of his prior Union activities or his likelihood to get involved with the Union in the future.

Champagne also testified that he talked to Martino about his reemployment on two occasions. The first conversation, according to Champagne, occurred in late January or early February 1989 and began with a chance meeting in a parking lot on the Base.^{17/} Champagne testified that Martino was with another person and, after greeting one another, the following conversation took place:

From there he just started talking saying that he had heard that there were some positions open in the Paint Shop. And, he just started talking and he made one statement, that he realized in the past things were wrong. And, in the time he's been away from the Government that he's grown up some. And, things wouldn't be like before.

^{16/} Martino did not testify regarding this meeting.

^{17/} In view of his subsequent testimony, *infra*, it is obvious that this meeting would have to have occurred on an earlier date.

He also stated that he wouldn't get involved in the Union. Which I replied that that didn't matter anyway.

And, from there he asked me if I would consider him for the position and I told him I would. And, then, from that point, he said he was going to put in for the position."

Champagne testified Martino then invited himself to the Paint Shop office for a cup of coffee. When in the office Martino introduced the person with him as his brother-in-law. Martino told Champagne his brother-in-law was a painter and a good worker and would be interested in one of the "overhire positions" and asked if Champagne would consider him. Champagne said he would and suggested he put in the proper paper work. After a little further conversation according to Champagne, Martino said they were going to Personnel to do their paper work and they left.

Champagne testified that the second conversation he had with Martino about employment occurred by telephone in the very end of January or early February. According to Champagne, Martino called and asked if he was going to interview him for the job and Champagne's response was that he hadn't yet received the names of all the applicants. Champagne testified Martino began "arguing" with him saying he had just talked to Personnel and they told him Champagne had the names. Champagne denied he had the names^{18/} and Martino asked how it "looked" and Champagne replied, "the best qualified applicant (will) get the position," ending the conversation.^{19/}

18/ Champagne testified that at this time he, in fact, did not have the names of the applicants.

19/ Martino did not testify to having such a telephone conversation with Champagne. However, Martino did testify that sometime in January 1989 he had a telephone conversation with Brian Sullivan, a Staffing Specialist in Personnel, at which time he was told "the paper work was all done" and Martino would just have to "wait and see." According to Martino, during this conversation Sullivan said Salvas and Champagne had been to Personnel, looked over the job applications and when they got to Martino's application, "Salvas kind of snickered and put it aside." Sullivan was not called to testify.

Non-selection and thereafter.

The record reveals that a list of six applicants for the posted painter vacancy announcement, supra, was sent to Civil Engineering by the Personnel office around February 7, 1989 and on February 13, Foreman Champagne, as the selecting official, declined to select Martino for the job.^{20/} Martino received notification of his non-selection by letter from Champagne on February 15.

On February 21, 1989 Martino went to Lowell, Massachusetts and met with Randy Goguen, an aid to Congressman Chester Atkins. Martino told Ms. Goguen of having worked at Hanscom Air Force Base, resigning, attempting to get reinstated and being refused reemployment. Martino told Goguen that he had a good work record at Hanscom and he suspected the reason why he wasn't rehired was because of his Union activities. Martino informed Goguen that he had been a Union Steward and was having a problem with his supervisor, Master Sergeant Salvas, who regarded him as a trouble maker because of his Union activities, and claimed that Salvas was responsible for his not being rehired. Goguen asked Martino if anyone specifically told him the reason he wasn't being rehired was because of his Union activities and Martino indicated no one had made such a statement.

On the following day Ms. Goguen telephoned Hanscom Air Force Base and talked to Lt. Col. G. Malcolm Junkin, Commander of the Civil Engineering Squadron. Upon, inquiring, Goguen was given a number of reasons why Martino was not rehired. None of the reasons involved Martino's Union activities. Goguen requested a written response to her inquiry.

According to Francis Golen, Martino's brother-in-law, in late February 1989 he and Martino went back to the Base because "Richard was going to find out if Mike Champagne knew anything about the paperwork and (had) any interviews been scheduled . . ." According to Golen's version of the meeting, they went to the Paint Shop office and after exchanging greetings, Champagne sat on a couch and Golen went about 18 feet across the room to help himself to a cup of coffee. While getting his coffee Golen heard Martino and

^{20/} The record reveals that the individual who was selected possessed excellent qualifications for the position.

Champagne's voices, but did not hear what was being said until their voices grew louder. Golen testified as follows:

Q Low voices being spoken, you don't know what they were saying?

A No.

Q Then you heard an elevated voice, Richard Martino's say, (what)?

A I didn't hear what he said when the voice elevated.

Q Okay.

A All I heard was Mike Champagne's reply to it. Saying, he won't take you back because of your bullshit with the Union.

Q And then, what did Rich say?

A He said, what and he said yes, your bullshit with the Union because you know he's -- you're a trouble maker. He said, it's out of my hands, Salvas has the last call.

Q Then, what did Mr. Martino say?

A Fran come on let's go, let's get out of here.

Q And, did you then leave?

A Yes.^{21/}

According to Golen, he and Martino then went to Personnel and saw Staffing Specialist Brian Sullivan who told them he still hadn't any schedules yet for painters positions because he was still working on other more important vacancies which were open at the Base that had higher priority. Golen testified that at this time he was not aware Martino had already received a rejection notice.

^{21/} Golen testified he heard no other specific statement made by Martino during this conversation.

According to Martino's testimony,^{22/} in late February or early March 1989, he and Golen went to the Base "to see about jobs (they) had applied for."^{23/} Martino testified he and Golen proceeded to the Paint Shop and met with Champagne who was sitting at his desk. While Golen went to get a cup of coffee, Martino asked Champagne why he wasn't selected for the painter's position since he felt he was the most qualified for the job. Champagne told Martino that the person selected had a 30 percent veteran's disability and he and Salvias had talked it over and they didn't want Martino back because he would get involved with the Union and spend more time on Union business than painting. Martino stated he just wanted his job back and was not going to get involved with the Union anymore and just wanted to get back to work. Champagne said he couldn't believe Martino and asked him to "stop." Martino testified that their voices were raising during the discussion and, he angrily told Golen "come on" and they walked out of the office.

Martino testified that during the first or second weeks of March 1989 Raymond Thibodeau told him of his last conversation with Champagne where Champagne purportedly told him that Martino wasn't wanted back because of his using too much time for Union business, supra. Martino acknowledged that he made numerous calls to Congressman Atkins aid, Ms. Goguen, in March to ask about the status of the inquiry made by the Congressman's office into his situation but never mentioned to Goguen that he now had admissions from Champagne that he was not selected because of his Union activity. When questioned why he had not so notified Goguen, Martino said it was because the Congressman's office was still awaiting a reply from the Base and Martino "didn't want to throw any more into it" and "wanted to get (his) job back without causing any more waves," so decided to "wait and see what happened . . ."

^{22/} Martino testified at the hearing after Golen and since he made an appearance as representing himself, he was excluded from the sequestration of witnesses and remained throughout the testimony of all witnesses.

^{23/} Martino testified he had applied for three other positions in addition to the painter's job. Martino further testified that he had not told Golen he had already been notified that he was not selected for the painter's job because "he didn't want everybody to know (his) business . . ."

On March 30, 1989 Lt. Colonel Junkin sent Respondent's reply to Ms. Goguen's inquiry concerning Martino. The letter stated:

This letter is to follow up on our phone conversation concerning Mr. Richard D. Martino's complaint of alleged hiring discrimination practices in our squadron. I've completed my review and feel confident that any "discrimination" involved was actually job/performance related "selectivity."

Mr. Martino's past record of work indicates he was undependable and required close supervision. He was suspected by his supervisors of abusing annual and sick leave. Of particular note is a time and attendance record reflecting the period of 11 May 1987 to 24 August 1987, spanning a total of 75 work days. Mr. Martino came to base to conduct Union business on 18 of those days. Eleven days were used for sick leave for which no doctor's certificate was produced. He also took 26.5 days of unscheduled annual leave and another 19.5 days were charged as absent without leave (AWOL). Records also reflect a string of unauthorized absences from the job site, as well as extended breaks and non-compliance with established policies and procedures. He was counseled numerous times for these violations. Mr. Martino received a letter of reprimand for loafing on the job on 24 March 1986; letter dated 18 April 1986.

If Mr. Martino had not resigned on 24 August 1987 and had remained in our employ, his next Annual Performance Appraisal would most likely have contained an unacceptable rating.

I believe this information should refute the charge of discriminatory hiring practices. If there is any further information we can provide, don't hesitate to call.

Attached to the letter were various documents including copies of Martino's disciplinary counselling and a time and the attendance report from Civil Engineering. Foreman Champagne testified that the reasons set forth in Junkin's reply were the reasons he did not select Martino for the painter's job.^{24/}

On Wednesday, May 3, 1989 Martino went to the Base and met with Lorraine Iovanni, Labor Relations Officer at Hanscom Air Force Base. Martino and Iovanni previously dealt with one another when Martino served as a Union official prior to his resignation. According to the testimony of Ms. Iovanni^{25/}, Martino was upset about some of the information contained in Lt. Col. Junkin's letter to Ms. Goguen, supra. Martino expressed his belief that he was not rehired at Hanscom because of Sergeant Salvas's "feelings towards him." Martino recounted a meeting he had with Salvas where Salvas "gestured" in some fashion which Martino interpreted as a physical threat. Martino did not go into detail concerning the situation but claimed he could come forward, if need be at a later date, and present "information along that line" if he wished to do anything formally on the matter.

At the meeting with Ms. Iovanni, Martino also alleged Salvas was responsible for not approving his LWOP and his being placed on AWOL. Martino suggested he had a witness that management had approved his LWOP. Martino further alleged that Junkin's letter to Goguen indicated hostility toward him because of his Union activity. Thus, Martino pointed to the section in the letter which referred to Martino conducting Union business on 18 days in a 75 day period and said he was permitted to take time for Union business because he was the Union's Trustee President. Iovanni disagreed that the reference in the letter indicated Union animus but she told Martino she would inquire into the matter. Martino indicated that if she couldn't work out the matter in a few days and get him his job back, he would file an unfair labor practice charge with the Federal Labor Relations Authority. Thereafter Iovanni made inquiry into the matter and, having satisfied herself that Martino was

^{24/} Champagne testified he did not write the letter but provided the information used in the letter.

^{25/} Martino did not testify regarding this meeting.

not refused reemployment because of his Union activities, telephoned Martino on the following day and told him he would not be reemployed for the reasons stated in Junkin's letter. Martino then stated he would file an unfair labor practice charge and on May 8, 1989 Martino filed with the Authority's Region I the unfair labor practice charge giving rise to these proceedings, alleging Respondent's refusal to rehire him was based upon his Union activities.^{26/}

Ultimate Findings, Discussion and Conclusions

The Complaint, as amended, alleges:

In or about December 1988 or January 1989 or February 1989 the Respondent, by its agent and representative Michael Champagne, on one occasion, the specific date of which is unknown, told an employee that Richard D. Martino would not be hired by the Respondent as a Painter because Martino would be spending more time on Union business than working.

In or around late February, or early March, 1989, the Respondent, by its agent and representative Michael Champagne, told job applicant Richard D. Martino and another job applicant, that Martino was not rehired by the Respondent as a Painter, because of his Union activity.

In or around February, 1989, the Respondent refused to rehire Richard D. Martino for the position of Painter, WG-4102-9 because Martino had engaged in activity on behalf of the Union when he was formerly employed by the Respondent.

Counsel for the General Counsel urges that a discriminatory refusal to rehire Martino has been proven since the record establishes Martino, while employed, had been engaged in protected activity, Respondent had knowledge of that activity, Respondent was concerned with that activity as shown by the December 1986 meeting with Martino when he

^{26/} Martino filed an amended charge on July 21, 1989 which included allegations concerning statements made by Foreman Champagne to "an employee" and to "Martino and another person," concerning the alleged reason for not rehiring Martino. The Complaint issued July 27.

was given permission to spend 50 percent of his work day on Union activity and by the statements of Champagne to Moore, Thibodeau, and Martino in the presence of Golen. Counsel for the General Counsel also suggests Respondent's reasons for not rehiring Martino are pretextual since they are not supported by the record, particularly noting Champagne had approved as LWOP Martino's absence in late July and August 1987, which leave was later changed to AWOL.

Respondent contends the General Counsel has not met its burden of proving that Martino's Union activity played a substantial part or was a motivating factor in its failure to rehire Martino, raising various arguments as to why the testimony of Moore, Thibodeau, Golen and Martino should not be credited. Respondent also contends that even if the General Counsel met its burden of proof, Respondent has met its burden of proving by a preponderance of the credible evidence that it would not, in any event, have rehired Martino even absent his protected activity, citing Internal Revenue Service, 6 FLRA 96 (1981) and Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

Essentially this case turns in large measure on the credibility of the witnesses involved.^{27/} Thus, if Moore, Thibodeau, Golen and Martino, or indeed any one of them, are credited regarding Champagne's alleged statements regarding Martino's failure to be rehired, the evidence will establish a prima facie case that Martino was not rehired because of fear he would engage in Union activity as he had in the past. If evidence of such motivation is not established from such testimony then, at best, a violation could be found only by ascertaining whether illegal motivation could be inferred from the other facts herein.

^{27/} In making my credibility determination herein I have noted the possible bias and partiality of the witnesses giving testimony. Moore had been given numerous disciplinary counsellings by Champagne and was the subject of an adverse action proceeding instituted by Champagne; Thibodeau was a close friend of Martino, worked off-duty hours with Martino, had been reprimanded twice by Salvas and admittedly didn't get along with Champagne; Golen was Martino's brother-in-law and worked for Martino; Martino, of course, had most to gain by establishing illegal motivation for his non-selection; and Champagne as the accused agent of Respondent obviously did not wish to be found to have violated the Statute.

I generally credit the testimony of Moore, Thibodeau, Golen and Martino regarding the conversation they had with Champagne. While the recollections of dates when such conversations occurred are obviously best estimates and perhaps wide of the mark,^{28/} these witnesses testified in a forthright, open manner and I was impressed by their demeanor. However, I found Champagne's testimony to be inordinately limited and constrained and had the feeling throughout his testimony that he was withholding relevant information. Indeed, Champagne was not asked specifically whether he had conversations with Moore or Thibodeau about Martino's reemployment and accordingly, the only testimony on these conversations is that presented by Moore and Thibodeau themselves, except of course, for Champagne's general denial of having made any statement indicating Martino was not rehired because of his Union activity.

Moore, Thibodeau, Golen and Martino all testified that Champagne was favorably inclined to rehire Martino, but Superintendent Salvas was opposed to Martino's return because of his Union activity. Although Champagne essentially denied making any statement that Martino's Union activity was the reason why he was not rehired, Superintendent Salvas was not called as a witness to support Champagne's testimony. Thus the record contains no evidence that Champagne did not have conversations with Moore and Thibodeau wherein he indicated Martino's chances for being rehired were good and no testimony by Respondent regarding Salvas' part in Martino's non-selection to rebut the testimony calling into question such active participation by Salvas.

I find from the credited testimony therefore that Champagne, the selecting official, was originally inclined to rehire Martino and expressed such feelings to Moore Thibodeau and Martino in Golen's presence. Champagne also, early on to Moore, expressed his reservations regarding his supervisor Salvas' attitude regarding Martino's acceptability because of Martino's prior Union activity. However, as the day for the selection grew close, it appears from the credited testimony of Thibodeau, Martino and Golen that Champagne was influenced by Salvas' hostility towards Martino and, presumably rather than incurring his supervisor's ill will, decided to reject Martino for reemployment and so

^{28/} Champagne's testimony as to when he had conversations with Martino concerning reemployment was also questionable.

informed Thibodeau and Martino in Golen's presence that Martino was not being rehired because of his Union activity.^{29/}

Further, a review of Respondent's March 30, 1989 letter to Congressional Aid Goguen gives rise to a suspicion of illegal motivation in Martino's non-selection for rehire. The letter states Martino's past work record "indicates he was undependable and required close supervision." This statement is difficult to square with Martino's four prior "Excellent" performance appraisals and his having been selected for a three month tour as Acting Foreman, which tour terminated just four months prior to his resignation. The reference in the March 30 letter to Martino's being suspected by his supervisors of abusing annual and sick leave and the reference to his time and attendance record are matters which, according to the record, approval had been granted by Martino's supervisor and little evidence revealing any concern about these matters by management appears to have existed prior to the writing of this letter except for Salvas' refusal to permit Martino to use his remaining two days sick leave without a doctor's certificate on August 24, 1987, above. The prior use of 11 days sick leave without a doctor's certificate is misleading without revealing that no doctor's certificate was requested by supervision and the "Union business" referred to in Respondent's March 30 letter was clearly authorized. Thus, it appears that Respondent's letter was less than completely candid about Martino and sought to create a misleading impression of him which could mask an ulterior reason for his non-selection for rehire.

Certainly doubts existed and questions remain unresolved regarding why Martino did not mention to Congressional Aid Goguen that, after his initial meeting with her, he obtained evidence that he was not being rehired because of his Union activity and why Martino did not clearly indicate he had such evidence when he talked to Labor Relations Officer Iovanni in May 1989. Perhaps Martino was, as he indicated regarding his contacts with Goguen, trying to negotiate his reemployment and did not wish to exacerbate the situation with allegations of evidence of Union hostility. A review of the record evidence also discloses other questions in the testimony of events which create doubts, many of which can

^{29/} The testimony of Thibodeau, Martino and Golen clearly indicates that Salvas had some part to play in Champagne's decision to not select Martino for reemployment.

be resolved if one assumes that the testimony regarding specific dates and the sequence of events are simply in error due to poor recollection due to the effect of the passage of time on the memory. Nevertheless from my evaluation of the witnesses and the record as a whole I credit the above testimony of Moore, Thibodeau, Martino and Golen which establishes that Champagne failed to rehire Martino because of his Union activity. This is not to say that legitimate reasons may not have existed for Respondent to not select Martino.^{30/} However, I find and conclude that Champagne was originally inclined to rehire Martino but, based upon Champagne's admission to Thibodeau and Martino as witnessed by Golen, Champagne, at Salvas' urging, concluded he would not select Martino because of Martino's prior Union activity or fear that such activity would continue if Martino was reemployed.

Counsel for Respondent contends that Respondent would have not rehired Martino regardless of whether he engaged in protected activity. The Authority has long held that after the General Counsel makes a prima facie showing that an employee had engaged in protected activity and this conduct was a motivating factor in management's decision to take an action against the employee, as has occurred herein, the agency may then show by a preponderance of the evidence that it would have reached the same conclusion even in the absence of the protected conduct. Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981); Equal Employment Opportunity Commission, 24 FLRA 851 (1986); and United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874 (1987).

Counsel for Respondent contends that Martino would not have been rehired, relying on Foreman Champagne's testimony that he would have given Martino an "unsatisfactory" rating on his next Annual Performance Appraisal. Counsel for Respondent also relies on Champagne's testimony that some of the reasons Martino was not rehired^{31/} included his loafing

^{30/} Thus, Salvas probably harbored hostility towards Martino for his hesitancy in tendering his resignation in August of 1987. Perhaps Superintendent Salvas' return to the Base around that time caused Foreman Champagne to doubt the wisdom of having allowed Martino to depart from the Base under such a loose arrangement as LWOP after annual and sick leave were used.

^{31/} The reasons set forth in Respondent's March 30 letter to Congressional Aid Goguen have been treated above and I find these supplemental reasons unpersuasive.

on the job (for which Martino was counselled in 1986) and "on a few different occasions" Champagne testified he observed (approximately five years ago); Martino's reprimands and counsellings (which occurred in 1985 and 1986 during which time and after which Martino received "Excellent" performance appraisals and was designated by management to serve as Acting Foreman for 90 days); and Martino's abandonment of the job during the last weeks of his previous employment with Respondent (under circumstances wherein Champagne participated in the arrangement to put Martino in an arguably indefinite LWOP status, later withdrawn).

I have found Martino had engaged in protected activity and Respondent refused to rehire him because of this activity. Essentially I conclude the reasons offered by Respondent for its refusal to rehire Martino are a pretext to mask the unlawful reason found herein. Thus, notwithstanding Martino's prior employment history with Respondent, after Martino applied for reemployment, Champagne, the selecting officer, was disposed to rehire Martino and I conclude would have rehired him but for Martino's prior Union activity which decision, Champagne admitted to Thibodeau and Martino, was fostered and provoked by Superintendent Salvas. In these circumstances I conclude Respondent has not shown by a preponderance of the credible evidence that it would not have rehired Martino in the absence of Martino's Union activity. Accordingly, I conclude Respondent has violated section 7116(a)(1) and (2) of the Statute by refusing to rehire job applicant Martino because he engaged in Union activity and violated section 7116(a)(1) of the Statute when Foreman Champagne informed employee Thibodeau and job applicant Martino that Martino was not rehired because of his Union activity and recommend the Authority issue the following:^{32/}

^{32/} As I have found that Respondent failed and refused to rehire Martino because of his Union activity and indeed Martino would have been rehired but for his Union activity, I shall recommend as part of the remedy herein that Martino be offered employment as a Painter, WG-4102-9 and he receive back pay, with interest thereon, from the date the job under Vacancy Announcement VA 455-87 was filled until his reinstatement and with all attendant benefits and privileges of employment.

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 the Department of the Air Force, 3245th Air Base Group, Hanscom Air Force Base, Bedford, Massachusetts, shall:

1. Cease and desist from:

(a) Refusing to employ Richard D. Martino, or any other applicant for employment, because the applicant has previously engaged in or might, if employed, engage in activity protected by the Statute.

(b) Making statements to employees or applicants for employment that employment will be denied to a person who has engaged in or, if employed, might engage in activity protected by the Statute.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured them by the Statute.

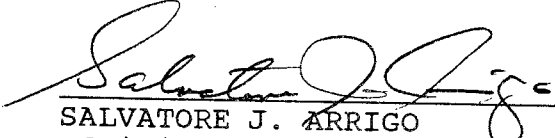
2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Offer Richard D. Martino immediate and full employment to the position of Painter, WG-4102-9 as referred to in vacancy announcement 455-87, or a substantially equivalent position, and make him whole for the losses he incurred as a result of the refusal to reemploy him by paying him backpay from February 13, 1989 until such time as he is reemployed in compliance with this Order, with interest [See Defense Logistics Agency, 31 FLRA 754 (1988)], and with all benefits and privileges retroactive to February 13, 1989, consistent with applicable law and regulations.

(b) Post at the Department of the Air Force, 3245th Air Base Group, Hanscom Air Force Base, Bedford, Massachusetts, 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 Base Commander 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region I, 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, D.C., March 19, 1990


SALVATORE J. ARRIGO
Administrative Law Judge

NOTICE TO ALL 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 EMPLOYEES THAT:

WE WILL NOT refuse to employ Richard D. Martino, or any other applicant for employment, because the applicant has previously engaged in or might, if employed, engage in activity protected by the Statute.

WE WILL NOT make statements to employees or applicants for employment that employment will be denied to a person who has engaged in or, if employed, might engage in activity protected by the Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights assured them by the Statute.

WE WILL offer Richard D. Martino immediate and full employment to the position of Painter, WG-4102-9 as referred to in vacancy announcement 455-87, or a substantially equivalent portion, and make him whole for the losses he incurred as a result of the refusal to reemploy him by paying him backpay from February 13, 1989 until such time as he is reemployed, and with all benefits and privileges retroactive to February 13, 1989, consistent with applicable law and regulations.

(Activity)

Dated: _____ 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, Region I, whose address is: 10 Causeway Street, Room 1017, Boston, MA 02222-1046, and whose telephone number is: (617) 565-7280.