

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

.....
DEPARTMENT OF THE AIR FORCE, .
GRIFFISS AIR FORCE BASE, .
ROME, NEW YORK .

Respondent .

and .

Case No. 1-CA-80219 .

AMERICAN FEDERATION OF .
GOVERNMENT EMPLOYEES, .
LOCAL 2612, AFL-CIO .

Charging Party .

.....
Major Michael W. Johnston and
Major Phillip G. Tidmore
For the Respondent

Gerard M. Greene, 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 (herein the Union) 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
by attempting to force two bargaining unit employees who
were also Union representatives to answer questions
concerning another unfair labor practice case that was
scheduled for hearing.

A hearing on the Complaint was conducted in Rome, New York 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

At all times material the Union has been the exclusive collective bargaining representative of various of Respondent's employees. In the Fall of 1987 the Union's office at Griffiss Air Force Base was relocated and the move gave rise to a unfair labor practice charge filed by the Union against Respondent. A complaint issued in the matter alleging Respondent moved the Union office without providing the Union with reasonable notice and opportunity to bargain on the matter. The case was set for hearing to commence during the last week of March 1988. Major Steven Sherwood, counsel for Respondent in that case, arrived at the Air Base during the week prior to the scheduled hearing to prepare for litigation. Major Sherwood decided it would be helpful to his preparation if he interviewed Chief Steward Thomas Merrick regarding details concerning the Union office relocation.^{1/} Although Sherwood did not know who the Union's witnesses would be, he testified it was a reasonable likelihood that Merrick would be called on as a Union witness in that proceeding. Merrick had been interviewed that week at the Air Base by an Authority lawyer with Respondent's knowledge and consent. On Friday March 25 Base Labor Relations Officer William DeSantis telephoned Merrick and informed him that he and Major Sherwood would like to meet with Merrick to discuss the Union office relocation on the following Monday. DeSantis told Merrick he could bring Union President Joseph Sallustio with him as his Union representative if he wished. Merrick agreed to attend the meeting which was set for Monday at 7:30 a.m. in the Personnel Office conference room.

Around 7:30 a.m. on Monday March 28, 1988 Chief Steward Merrick's supervisor, Mr. Frasca, asked Merrick why he

^{1/} Merrick had been Chief Steward since June 1987.

wasn't at the scheduled meeting.^{2/} Merrick told Frasca he changed his mind about attending the meeting and shortly thereafter Union President Sallustio, who works in the same area as Merrick, telephoned DeSantis. Sallustio, who had been Union President since April 1987, informed DeSantis he was Merrick's representative and Merrick would not be attending the scheduled meeting or answering any questions concerning moving the Union office since the matter was not related to employment but concerned internal Union business and Union officials acting on behalf of the Union could not be required to be interviewed about this subject. DeSantis replied he wanted to hear the refusal from Merrick himself. Sallustio turned the telephone over to Merrick and Merrick told DeSantis he had changed his mind about being interviewed by Sherwood. DeSantis replied that Merrick didn't have the discretion not to come to the meeting. Merrick said if he came to the interview he wouldn't answer any questions anyway. DeSantis' response indicated that what Merrick did when he came to the conference room was another matter, but he had no choice as to whether he reported for the interview. Merrick again stated he was not going. DeSantis then contacted Merrick's supervisor Frasca, told him Sherwood wanted to interview Merrick and asked Frasca to give Merrick a direct order to report for the interview. Thereafter Frasca approached Merrick, told him he had been called and informed Merrick he had to report for the interview or face possible adverse action.^{3/} Merrick asked if Sallustio could accompany him and Frasca said yes.

Shortly thereafter Merrick and Sallustio reported to the Personnel Office conference room. Sherwood and DeSantis were already seated at a conference table and DeSantis introduced Sherwood to Merrick as counsel for the Air Base.^{4/} After Sallustio and Merrick were seated, Sallustio indicated he did not feel management had the right to call them to the interview to question them about their actions as Union officials on behalf of the Union, especially requiring their

^{2/} The following account of what occurred on March 28 is a composite of the credited testimony of those witnesses who testified regarding the events of that day.

^{3/} Failure to obey a direct order would open Merrick to a charge of insubordination.

^{4/} Sallustio previously met Sherwood when dealing with prior unfair labor practice charges.

presence under threat of discipline. Sherwood responded that Merrick works for the Air Force and as long as they pay his salary, they had the authority to direct him to report for the interview. Sherwood then told Merrick he wished to ask him some questions about the Union office move which was pending hearing stating that any answer he wished to give would be strictly voluntary and Merrick didn't have to answer any of his questions if he didn't want to. Sherwood said he hoped Merrick would cooperate. Merrick response was that did not wish to answer Sherwood's questions. Sherwood reiterated that Merrick didn't have to answer any of his questions but if Merrick would cooperate and answer his questions it might help get the matter resolved and the hearing on the relocation of the Union office might not be necessary. Merrick again indicated he would not answer any of Sherwood's questions. After about ten seconds silence Merrick asked, "is that it"? Sherwood responded, "yes, you can go" and Merrick and Sallustio left the room. The entire meeting lasted approximately five to ten minutes. All participants remained seated during the meeting and spoke in normal conversational voices.

Around 9:00 a.m. on March 28 Major Sherwood decided he would attempt to interview Union President Sallustio about the Union office relocation and had Labor Relations Officer DeSantis telephone Sallustio.^{5/} DeSantis reached Sallustio at, Union office and told Sallustio that Sherwood wished to

^{5/} As with Merrick, Sallustio had been interviewed at the Air Base the previous week by an Authority lawyer with Respondent's knowledge and consent and Sherwood felt it was a reasonable likelihood that Sallustio would be called as a witness for the Union at the scheduled hearing. DeSantis testified that while their "hopes weren't very high that he would agree to answer questions," management had nothing to lose in asking for Sallustio's cooperation in answering questions about the Union office relocation. Sherwood testified he didn't conclude that Sallustio would not talk to him based upon Merrick's prior refusal. When Sherwood was asked on cross-examination if he didn't anticipate at that time that Sallustio would not answer his questions, Sherwood testified:

I don't anticipate anyone not answering questions until they tell me that they will not

(Footnote 5 continued)

interview him at 10:15 a.m. Sallustio indicated he was in the Union office on Union business and further stated he didn't want to be interviewed. DeSantis replied they wanted to ask Sallustio some question and Sallustio said he didn't want to answer any questions. DeSantis stated that they wanted Sallustio to come for an interview at 10:45 and Sallustio again refused. Sherwood, who remained in the conference room while DeSantis was on the telephone, then told DeSantis to call Sallustio's immediate supervisor and order Sallustio back to work so he could be ordered to the interview. DeSantis then told Sallustio, "look Joe, we can do this the easy way or the hard way." Sallustio insisted he was not going to be interviewed. The parties hung up and no further action on this matter was taken.

Sherwood testified that his purpose of seeking to interview Merrick and Sallustio was to ascertain the facts and circumstances surrounding the relocation of the Union's office which was the subject of the pending unfair labor practice hearing. Thus, when asked what kind of questions he was going to ask Merrick and Sallustio, Sherwood testified:

Different ones for each person, sir. I had some indication that Mr. Merrick was present on the scene when certain exchanges were made between management representatives during this union office move and what went on, and that he would be able to confirm some ideas that I had about what actually transpired during the initial phases of that move.

With respect to Mr. Sallustio, I had been given conflicting information from my own people as to when he was present and with whom he spoke and at what times, and I was hoping to clarify that for myself by asking him with whom he spoke

(Footnote 5 continued)

answer the questions. And that I only can really anticipate after I have given them all the assurances I can give them that it's a voluntary situation and ask them if they will let me talk to them. To answer your question, no--I don't anticipate anything.

and at what times and what was said so that I might better know what had transpired between the parties and the exchanges and, in other words, get into a better position to be able either to prepare my case or suggest to my client alternatives.

The unfair labor practice charge concerning the Union office relocation was settled thereby precluding a hearing in that case.

Ultimate Findings, Discussion and Conclusions

Counsel for the General Counsel contends in his brief that Respondent engaged in unlawful coercion and intimidation in violation of Section 7116(a)(1) of the Statute by attempting to force Merrick and Sallustio to answer questions when the Respondent knew at the time that neither employee wanted to participate in the interview. As explained at the hearing, counsel for the General Counsel alleges Respondent violated the Statute on March 28, 1988: by the telephone conversation between DeSantis and Merrick requiring his attendance at the interview with Sherwood; by Respondent's conduct at the meeting; and by DeSantis' telephone conversation with Sallustio attempting to require him to be interviewed by Sherwood.

Respondent denies any violations of the Statute occurred herein contending the interview with Merrick was not coercive but was permissible under the Authority's holdings in Internal Revenue Service and Brookhaven Service Center, 9 FLRA 930 (1982) and Department of the Air Force, F.E. Warren Air Force Base, Cheyenne, Wyoming, 31 FLRA 541 (1988).

Brookhaven dealt with management interviewing employees in preparation for an unfair labor practice hearing and an arbitration proceeding. In that case the Authority, in finding no violation occurred when employees were interviewed, held such interviews were permissible if certain safeguards were met. Thus the Authority held, inter alia:

. . . while management may ascertain facts in preparing its case for third-party proceedings . . . the unit employees have the protected right under section 7102 of the Statute to "form, join, or assist any labor organization, or to refrain from such activity, freely and without fear of penalty or reprisal[.]

Accordingly, where management exercises its right to interview unit employees in preparation for third-party proceedings, but does not take necessary precautions to preserve employees' protected rights, and instead acts in a manner which "interferes with, restrains, or coerces" the employees, it violates section 7116(a)(1) of the Statute. To protect employees' rights under section 7102 while management attempts to ascertain necessary facts, the Authority concludes that (1) management must inform the employee who is to be questioned of the purpose of the questioning, assure the employee that no reprisal will take place if he or she refuses, and obtain the employee's participation on a voluntary basis; (2) the questioning must occur in a context which is not coercive in nature; and (3) the questions must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's statutory rights. In this manner, the necessary balance between the rights of management and the rights of employees and their exclusive representatives will best be preserved.

The Authority's stated safeguards were based upon private sector law under the National Labor Relations Act. The Authority reviewed the background of the approach set forth in Brookhaven in the F.E. Warren case, relied on by Respondent herein. In F.E. Warren the Authority stated:

The Authority's requirements can be traced directly to private sector law. Since 1964, the National Labor Relations Board (the Board) has required employers seeking to interrogate employees for legitimate purposes--such as preparing a defense in an unfair labor practice trial--to communicate the purpose of the questioning, assure that no reprisal would take place, and obtain participation on a voluntary basis. Johnnie's Poultry Co., 146 NLRB 770, 775 (1964), enforcement denied on other grounds sub nom. NLRB v. Johnnie's Poultry Co., 344 F.2d 617 (8th Cir. 1965). The Board recognized that "despite the inherent danger of coercion" in an employer's interrogation of employees concerning matters involving protected rights, where there is a legitimate purpose and necessity, such as preparation for a third party proceeding, such

safeguards could "minimize the coercive impact of such employer interrogation." Johnnie's Poultry, 146 NLRB at 774-75.

In F.E. Warren the Authority reflected on the application of the Johnnie's Poultry approach by the National Labor Relations Board and the courts wherein an attempt is made to strike a balance between management's legitimate need to prepare adequately its defense to pending unfair labor practice charges and the inherently coercive nature of employer interrogation of its employees. The Authority, in F.E. Warren, further held it would not require the assurances set forth in Brookhaven routinely be given in every instance where an employer interrogates employees in preparation for a hearing but rather, the Authority will examine the circumstances in which interviews occur in determining whether the interview is coercive and therefore violative of the Statute.

In the case herein Chief Steward Merrick was first invited by Labor Relations Office DeSantis on Friday March 25 to discuss the Union office relocation with Major Sherwood on the following Monday. Merrick knew of the scheduled unfair labor practice hearing and issues involved therein. DeSantis told Merrick he could bring a Union representative with him to the meeting and Merrick agreed to attend the meeting. On Monday the 28th, Merrick, having decided not to meet with Sherwood, related his decision to management not to attend the meeting and was informed that what he did when he got to the meeting was another matter, but he had no discretion in reporting for the interview. Merrick was then ordered to attend the meeting under penalty of discipline. Nothing in the conversation with DeSantis suggests Merrick would not be free to decline answering questions during the interview. Further, when Merrick attended the meeting on March 28 with his union representative Sallustio, nothing was said or done by management's representatives to compel Merrick to answer any questions. Indeed, no questions were asked.

As to the subsequent telephone request that Sallustio be interviewed, DeSantis' comment that they could proceed either the "easy way or the hard way" clearly conveyed an attempt to coerce Sallustio to attend the interview, the "hard way" obviously following the method used to compel Merrick's attendance, a direct order by a supervisor under the threat of discipline. However, Sallustio never attended the interview and accordingly no questions were asked him by management.

Respondent's attempt to interview Merrick and Sallustio was for the purpose of satisfying its legitimate need to adequately prepare for the pending unfair labor practice hearing. Thus Major Sherwood, Respondent's counsel for the scheduled hearing, wished to prepare for the hearing by personally questioning two Union representatives whom he reasonably expected would have particular knowledge concerning the alleged unfair labor practice of management's failure and refusal to give the Union adequate notice and an opportunity to bargain on the relocation of the Union's office. Through the recognized exercise of management authority Respondent forced or attempted to force employees Merrick and Sallustio to meet with Sherwood.^{6/} Sherwood wished to have the opportunity to personally explain to the employees why he wished to have the interview and why cooperation might be beneficial to all involved. When it became evident that Merrick and Sallustio would not participate in an interview, no interview occurred, no questions were asked and there is no evidence by words or conduct to convey coercion of Merrick or Sallustio to participate in an interview.^{7/}

Accordingly, in view of the entire foregoing and balancing Respondent's right to interview employees in preparation for the pending unfair labor practice hearing with the employees' rights to be free from coercive interrogations, I conclude the General Counsel has failed to prove by a preponderance of the evidence that Respondent's requiring Chief Steward Merrick to attend the meeting with Major Sherwood on March 28, 1988 under the penalty of discipline, the conduct of the meeting on that same date described above, or the telephone conversation between DeSantis and Sallustio on March 28, either separately or

6/ Cf. Veterans Administration, West Los Angeles Medical Center, Los Angeles, California, 23 FLRA 278 (1986) at 280; Congressional Research Employees Association and Library of Congress, Congressional Research Service, 25 FLRA 306 (1987) at 331; and Department of the Navy, Norfolk Naval Base, Norfolk, Virginia, 14 FLRA 731 (1984) at 748-749.

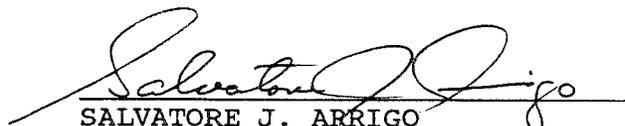
7/ I reject counsel for the General Counsel's suggestion in his brief that the "cool reception given Merrick and Sallustio in the conference room", as well as "Sherwood's lecture" and the "silence in which Merrick and Sallustio were allowed to linger at the end" of the meeting "reinforced" the impression of intimidation.

when taken as a whole in all the circumstances herein violated section 7116(a)(1) of the Statute. Therefore I recommend the Authority issue the following:

ORDER

IT IS HEREBY ORDERED that the Complaint in Case No. 1-CA-80219 be, and hereby is, dismissed.

Issued, Washington, D.C., November 9, 1989.


SALVATORE J. ARRIGO
Administrative Law Judge