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

INTERNAL REVENUE SERVICE HEADQUARTERS,[1/] AND INTERNAL REVENUE SERVICE, DETROIT DISTRICT, DETROIT, MICHIGAN Respondent and NATIONAL TREASURY EMPLOYEES UNION AND NATIONAL TREASURY EMPLOYEES UNION, CHAPTER 24 Charging Party	Case No. 5-CA-00476

James E. Rogers, Jr., Esq.
For the Respondent

John F. Gallagher, Esq.
For the General Counsel

Randi Warshall
For the Charging Party

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on August 29, 1990, by the Regional Director for Region V,

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1/ At the hearing General Counsel's Motion was granted to amend the complaint to add the Internal Revenue Service Headquarters as a Respondent. In order to meet this amendment Respondent was permitted to call any necessary witnesses at the hearing.

Federal Labor Relations Authority, a hearing was held before the undersigned on November 15, 1990 at Detroit, Michigan.

This case arises under the Federal Service Labor-Management Relations Statute, 5 U.S.C. section 7101, et seq., (herein called the Statute). It is based on an amended charge filed on July 20, 1990 by National Treasury Employees Union and National Treasury Employees Union, Chapter 24 (herein collectively called the Union) against Internal Revenue Service, Detroit District, Detroit, Michigan.2/

The Complaint alleged, in substance, that at an arbitration hearing on April 6, 1990, held pursuant to negotiated grievance/arbitration procedures, Respondent, by its agent Shirley L. Gatliff, testified that if the grievant's removal by Respondent was reversed, Respondent could pursue other avenues, including the referral of the matter to the U.S. Attorney for criminal prosecution - all in violation of section 7116(a)(1) of the Statute.

Respondent's Answer, dated September 21, 1990, denies that Shirley L. Gatliff was employed by Respondent and acted as its agent or on its behalf with respect to the conduct alleged in the Complaint. It also denied the conduct attributed to Respondent, as aforesaid, on April 6, 1990 at the arbitration hearing as well as the commission of any unfair labor practices.

All parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Thereafter, briefs were filed which have been duly considered.3/

Upon the entire record, from my observation of the witnesses and their demeanor, and from all of the testimony

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2/ In view of the amendment at the hearing, the Internal Revenue Service, Headquarter and Internal Revenue Service, Detroit District, Detroit, Michigan, are collectively called Respondent.

3/ General Counsel filed a Motion To Correct Record, dated December 17, 1990, in the following respect: "change page 56, line 24 from December 7th to December 17th". There being no objections, and the proposed correction appearing to be proper, the Motion is granted as requested.

and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the National Treasury Employees Union has been, and still is, the exclusive bargaining representative of a nationwide unit of Internal Revenue Service employees, which unit includes the employees of the Internal Revenue Service, Detroit District, Detroit, Michigan.

2. At all times material herein the Internal Revenue Service and the National Treasury Employees Union were parties to a master collective bargaining agreement which covered the unit employees of the Detroit District office. The said agreement contained a grievance/arbitration procedure upon the filing of grievances for, or on behalf of unit employees.

3. The Central Region of the Internal Revenue Service at Cincinnati, Ohio is composed of several District offices, one of which is the Detroit District, Detroit, Michigan. The Detroit District Director reports to the Regional Commissioner, and the latter reports to the Internal Revenue Service[4/] Headquarters' Commissioner.

4. IRS maintains an Internal Security Division which includes an Inspection Service. The Inspection Branch reports to the Regional Inspector who reports to the Assistant Commissioner of Inspectors.[5/] The Inspection Service ultimately reports to the IRS Headquarters' Commissioner.

5. In March 1989 Elizabeth Khamati was employed in the IRS Detroit District Office as a revenue officer. On March 13, 1989 she was notified of an intention to discharge her for falsifying an application form by stating she was a naturalized citizen. Prior to any action being taken against Khamati, the IRS assigned Shirley Gatliff, who was stationed at the Detroit District Office, to conduct an investigation of the alleged falsification. As a result of

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4/ Hereinafter referred to as IRS.

5/ The Inspection Division does not report to the IRS Detroit District Director.

Gatliff's investigation, which was conducted at the request of the Detroit District Office, the agency discharged employee Khamati.

6. Gatliff became an inspector about one year prior to the hearing herein and has continued to act in that capacity. As an inspector she conducts criminal and administrative investigations of IRS employees re allegations made against them. Although employed by IRS, Gatliff does not come under the supervision of the Detroit District Office. A report of an investigation prepared by Gatliff is not done for the District Director, but he is given a copy. As an inspector, Gatliff may refer cases to the Assistant U.S. Attorney under 18 USC 1001 - the false statement criminal violation statute. Usually, however, cases are handled administratively. In this instance, IRS declined to seek criminal prosecution of Khamati after the initial investigation was made concerning her conduct.

7. Subsequent to Khamati's discharge in March 1989, she filed a grievance pursuant to the negotiated grievance procedure.6/ It was denied and an appeal filed with the Merit Systems Protection Board. The matter was then submitted to arbitration and a hearing was held before an arbitrator on April 6, 1989.

8. At the arbitration hearing Gatliff was called upon to testify re the alleged misconduct by Khamati and the procedure pursued during and after an investigation thereof. She testified that initially a matter of this nature is handled administratively. If not resolved, the U.S. Attorney's office is consulted and the matter is discussed with the U.S. Attorney. Gatliff further testified that on April 5 she conferred with the U.S. Attorney to ascertain whether he would accept the case involving Khamati.

9. The relevant and material testimony given by Gatliff at the arbitration hearing was as follows:

> Q. What -- I'm trying to understand what your involvement is with this case again?
>
> A. I was called here to testify at this hearing.

6/ The Union assisted her in this regard, and it continued to represent her at subsequent proceedings.

Q. Okay. And?

A. And based on this case that was closed by me, if the cases can be handled administratively then I'm out of the picture. If there's a problem with the case then we can refer it to the U.S. Attorney, which it appears there is a problem with this case that's why we're all here today. And in the event that her removal is reversed then there's other avenues that we'll pursue and one of them was prosecution and that is why I called the U.S. Attorney to discuss it with him and see if that was, you know, a viable avenue. And he indicated that, yes, he would prosecute in this instance. (underscoring supplied).

Q. In this instance if the Grievant prevailed in her arbitration?

A. Correct. (G.C. Exhibit 2, p. 103).

Further testimony by Gatliff at the arbitration hearing reflects that when she called the U.S. Attorney to see if he would accept the case if it was not resolved administratively, she did not make a recommendation; that she just gave him all the circumstances and then asked what his accommodation would be in respect to prosecution.

10. On June 7, 1990 the arbitrator issued a decision wherein he concluded the discharge of Khamati was arbitrable.7/

11. The Union's Attorney, Michael McAuley, acted as Khamati's representative during the foregoing proceedings and the instant case. On June 11, 1990 he received a call from Gatliff notifying him that Khamati would be arrested. Thereafter, Khamati was arrested pursuant to a complaint and warrant issued by the Federal Court, Eastern District of Michigan. Gatliff had previously submitted an affidavit in support of the criminal complaint and the warrant for

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7/ In accord with the consent of the parties the arbitrator did not consider whether Khamati's discharge was justifiable.

Khamati's arrest. The allegations in her affidavit were the same allegations set forth in the original proposal to terminate the employee.

Conclusions

General Counsel contends that certain statements made by Gatliff, while testifying at the arbitration hearing involving grievant Khamati, tended to coerce and restrain said employee and other unit employees. In particular, it is urged that such coercion and restraint results from the statement by Gatliff that if the arbitrator reversed Respondent's action in removing Khamati, other avenues would be pursued by Respondent, one of which is criminal prosecution via the U.S. Attorney's office.

It is maintained by Respondent that, on the contrary, no threat or intimidation was implicit in Gatliff's testimony in that regard. Further, that her statement referred to the options afforded management in enforcing internal security practices. It is argued that Respondent has procedural options after an employee's removal just as options are afforded Khamati and the Union. Reference to possible criminal prosecution of Khamati by Gatliff during the latter's testimony, it is contended, was an option always available to Respondent.8/

In support of its position General Counsel cites several decisions by the Authority which concluded that statements by an agency indicating it may retaliate because an employee may file or process a grievance were violative of section 7116(a)(1). See Bureau of Engraving and Printing, 28 FLRA 796; Social Security Administration, Baltimore, Maryland, 18 FLRA 249. It is also argued that a particularly relevant

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8/ Respondent raises a collateral issue dealing with its responsibility for the actions of Gatliff whom it deems to be neither a supervisor nor a management official. It thus denies that, as an investigator for the Internal Security Division of IRS, Gatliff could bind the Respondent for her conduct. There is considerable support for concluding that Respondent had cloaked Gatliff with apparent authority to act as its agent at the arbitration hearing and thus made Respondent accountable for her statements thereat. However, I find it unnecessary to pass upon this issue in view of my ultimate conclusion herein.

case is Combined Arms Center and Fort Leavenworth, Fort Leavenworth, Kansas, OALJ 88-42, 7-CA-70281, aff'd without exception (March 22, 1988).

The cases cited by General Counsel seem quite distinguishable from the instant matter. In respect to such cases, the Authority found a violation where agency statements constituted a threat to take retaliatory action because the employee did, or may, resort to the grievance procedure. While it is insisted that the Combined Arms Center case, supra, is particularly relevant, I disagree. That case involved agency statements which notified an employee she would be charged with illegal entry if she continued to process a grievance. As stated therein by the Administrative Law Judge, "any threat imparted to an employee for resorting to, or pursuing, the filing of such a grievance constitutes interference, restraint or coercion under section 7116(a)(1) of the Statute." (underscoring supplied).

Turning to the case herein, the statements made by Gatliff at the arbitration hearing while testifying thereat do not, in my opinion, take on the character of either direct or implied threats based on Khamati's filing or pursuing her grievance. The thrust of any interference, or coercive conduct, by an agency in making statements is an attempt to threaten an employee for engaging in protected activity, i.e. the filing of a grievance. Statements which may be construed as retaliatory in nature on the part of the employer, due to pursuing rights as a grievant, would clearly be violative of the Statute.

It is true, of course, that the test is an objective one in determining whether remarks by an agency tended to coerce or intimidate employees. Whether an employee could reasonably have drawn a coercive inference therefrom is the determinative factor. U.S. Department of the Air Force, Nellis Air Force Base, Nevada, 38 FLRA 39. However, I do not believe that a reasonable inference can be drawn that Gatliff's testimony at the arbitration hearing tended to coerce employees. Her statement concerning the pursuit of other avenues by Respondent if the arbitrator reversed the agency's discharge of Khamati, including the referral of the matter to the U.S. Attorney for criminal prosecution, reflected steps which were affordable to the agency for the alleged falsifications by Khamati. It is akin to statements which the grievant or her representative might make regarding other appeals they might pursue if the arbitrator sustained the agency's conduct. I do not view Gatliff's testimony as

an attempt to interfere with the protected rights afforded Khamati or other employees under section 7102 of the Statute. Her statements do not carry with them, express or implied, a threat to prosecute Khamati because she filed a grievance or pursued it to arbitration. Neither do they suggest that an employee who engages in protected activity will suffer reprisals. Her remarks, as Gatliff testified at the arbitration hearing, seem clearly referable to justifiable action which the agency could pursue if the arbitrator did not conclude that Khamati's discharge was proper under the circumstances. As such, they do not constitute interference, restraint or coercion under section 7116(a)(1) of the Statute. It is, therefore, recommended that the Authority adopt the following Order:

ORDER

The Complaint in Case No. 5-CA-00476 is dismissed.

Issued, Washington, D.C., January 15, 1991.

William Naimark

WILLIAM NAIMARK
Administrative Law Judge