

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

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ARMY AND AIR FORCE EXCHANGE  
SERVICE, FORT DRUM EXCHANGE  
FORT DRUM, NEW YORK  
Respondent  
and  
AMERICAN FEDERATION OF  
GOVERNMENT EMPLOYEES, AFL-CIO  
Charging Party  
.....

Case No. 1-CA-00086

Marie Amie Malouf  
Counsel for the Respondent

Derrick Thomas  
Representative of Charging Party

Gerard M. Greene  
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER  
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent, by Claudette Hembree, violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by ordering bargaining unit employee Raymond Fernandez to remove a union button with the inscription "AFGE UNITY IS POWER" from his clothing.<sup>1/</sup>

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<sup>1/</sup> The complaint was amended during the hearing to reflect a settlement agreement between the parties with respect to Case No. 1-CA-00089.

Respondent admitted the jurisdictional allegations as to Respondent, the Charging Party, and the charge, but denied any violation of the Statute.

For the reasons discussed below, I find that a preponderance of the evidence demonstrates that Respondent engaged in the unfair labor practice as alleged.

A hearing was held in Fort Drum, New York.<sup>2/</sup> The Respondent, the Charging Party and General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs, and the proposed findings have been adopted where found supported by the record as a whole.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

#### Findings of Fact

The Charging Party (Union or AFGE) was certified in October, 1988 as the exclusive representative of the Respondent's full-time, regular part-time and intermittent employees, and certain temporary employees as part of a national consolidated bargaining unit.

Respondent, a non-appropriated fund instrumentality, operates, among other food services facilities, a snack bar and a mobile vending truck on Fort Drum, New York.

Raymond Fernandez began working for the Respondent in May 1988, and joined the Union in the fall of that year. Fernandez was a shop steward and later became president of the Union's local. In November 1989, while president, Fernandez wore a button with the inscription "AFGE UNITY IS

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<sup>2/</sup> The unopposed motions of the General Counsel and the Respondent to correct the transcript are granted; the transcript is corrected as set forth therein. By agreement of the parties at the hearing, Respondent's Exhibit 3a, portions of a food service regulation, submitted by Respondent after the hearing, is received.

POWER" during his working hours.<sup>3/</sup> At that period of time, Fernandez was employed by the Respondent as a "mobile sales associate," selling food from the vending truck.

Fernandez wore a uniform on the job, consisting of a white, pullover short sleeve shirt, blue pants, and an AAFES name tag. The uniform was provided by Respondent. Respondent did not prescribe shoes, sweater, or jacket. The letters "AAFES" were stitched in white on the left sleeve of the shirt. There were no insignia on the pants.

Fernandez wore the AAFES name tag on the left-hand side of his chest, attached to the pullover shirt.<sup>4/</sup> He wore the Union button on the right-hand side of his chest, also attached to the pullover shirt.

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<sup>3/</sup> The button is a square measuring 1 1/2" x 1 1/2" with black lettering on white and red bars on each side of the word "AFGE." Except for color, the appearance is as follows:



■ AFGE ■  
UNITY IS  
POWER

<sup>4/</sup> The AAFES name tag is 1 5/8" x 2 7/8" x 3/32". The employee's name appears under the word, "welcome." Except for color, the appearance is as follows:



**welcome**

As a mobile sales associate, Fernandez sold food only on the premises of Fort Drum, making about thirty stops every morning and returning to the same stops in the afternoon. He served about five hundred customers daily from the vending truck, the majority of them being civilian personnel, the balance comprised of military enlisted and National Guard personnel. Fernandez did not sell to the Respondent's employees, except for its personnel staff whose office was on his route. None of Fernandez' customers complained to him about the button, and there was no decline in his business in the period of time he wore the button.

Although he worked the vending route alone, Fernandez came into contact with bargaining unit employees daily while wearing the union button. He loaded the truck twice a day and got cash at Bonnie's Snack Bar, one of the Respondent's facilities, where his supervisor and about fifteen bargaining unit employees worked. He also obtained gas and services for the truck at another of the Respondent's facilities where unit employees worked.

Fernandez wore the Union button for about two weeks until he was ordered to remove it. Initially, his supervisor, Rose Ann (Bonnie) Weir, told him several times to take off the button because "it was not part of the uniform." Fernandez insisted that as a Union representative he had a right to wear the Union button and asked to speak to someone with higher authority. Weir made an appointment for Fernandez to see Claudette Hembree, the Respondent's people resources manager, about the button.

Fernandez met alone with Hembree at her office on November 20, 1989. Hembree told Fernandez he was not allowed to wear the button because it was not part of the uniform and constituted the solicitation of Union membership. Fernandez retorted, "I don't solicit Union members. I don't go out and sell Union when I'm working." Hembree reiterated, "that pin says you're soliciting, and you're soliciting." Hembree told Fernandez that he could wear the button on his lunch periods and breaks.<sup>5/</sup> Hembree ordered Fernandez to remove the button, and he complied.

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<sup>5/</sup> Fernandez testified that Hembree did not tell him he could wear the Union button on his lunch time or break time. I credit Hembree's testimony on this point; however, it is

(footnote continued)

At the time Hembree ordered Fernandez to remove the button, she had no information that, apart from consideration of the button, he had actually engaged in Union solicitation. Hembree was well aware, however, that his wearing of the button coincided with a Union membership drive in mid-November as she had sat in the breakroom of the main store while AFGE representatives met with unit employees over a three-day period. She noticed Fernandez and others wearing the "AFGE UNITY IS POWER" button at that time.

Hembree said nothing to Fernandez about customer complaints when she ordered him to remove the button. His supervisor Weir testified that she had not received any complaints about the "AFGE UNITY IS POWER" button from customers or from the employees at Bonnie's Snack Bar. Hembree testified that she heard of one customer complaint ". . . off the record, and I didn't pay much attention to that." Hembree did not receive any complaints from employees. She did not look to see whether the button was having any effect on Fernandez' sales figures.

The Army and Air Force Exchange Service (AAFES) and AFGE are parties to a collective bargaining agreement (Master Agreement) approved April 22, 1987. (AAFES No. 1). Article 6, Section 2 of the Master Agreement provides:

The Employer and the Union agree that it is mutually beneficial to periodically remind employees that solicitation of membership or dues and other internal business of the Union will not be conducted during the working hours of the employees concerned.

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5/ (footnote continued)

also understandable that Fernandez would not recall this advice. It had no particular significance to him since he did not take breaks or have lunch in order to make the most income. He testified, "For me to make money with that truck, I take no breaks and I take no lunch . . . that truck is always in gear. It's always working." (Tr. 70). Bonnie Weir also did not mention anything about breaks or lunch when she told Fernandez he could not wear the union button (Tr. 40), but the charge and the complaint only address Hembree's later order.

Article 32 of the Master Agreement addresses in general terms the provision of uniforms for food service employees and the display of the AAFES name tag as follows:

Section 2. If the Employer establishes a means of performing work which includes additional dress requirements for certain customer contact areas, the Employer will, at its discretion, furnish such clothing or reimburse employees affected for the actual cost of buying and maintaining the clothing required.

Section 3. The Employer will provide employees who are required to wear uniforms in the performance of their duties properly fitted attire appropriate for the work performed in accordance with applicable regulation in effect on the effective date of this Master Agreement.

Section 4. Food Service employees are authorized and will be provided a sufficient number of uniforms to perform the duties and responsibilities of the position, with part-time employees being furnished a minimum of 2 uniforms and full-time employees being furnished a minimum of 5 uniforms. Uniforms of like color and style will worn within the same food facility.

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Section 6. All customer-contact personnel must wear an official AAFES name tag while on duty. The name tag will be furnished by the Employer. AAFES name tags should be worn on the left side of the employee's garment at chest level provided no damage will result to the garment. If there is a potential for damage, the name tag may be worn on any front portion of the garment from the waist up.

The Respondent's Manual on personal appearance and uniforms, applicable since prior to 1987, is slightly more specific, prohibiting "[e]xposed jewelry other than wedding and engagement rings . . . . Religious medals may be worn under garments." (Respondent's Ex. 3 and 3A). The rule is based primarily on concerns for food sanitation and employees' safety, but it also promotes uniformity in the employees' appearance.

Fernandez' supervisor, Bonnie Weir, did not consider his button to be "jewelry" but it was not part of the uniform in Weir's view. Hembree considered a pin to be "jewelry."

The practice in the food activity is that employees are not permitted to wear any jewelry or additional ornaments on their uniforms.. Weir has directed employees who forget the rule and wear rings to take them off. Only supervisors are permitted to wear watches. The record does not reflect any previous incidents concerning unauthorized buttons or badges.

After meeting with Hembree, Fernandez stopped wearing the Union button. The charge was then filed by the Union.

#### Discussion and Conclusions of Law

The Authority has held that the right of employees under section 7102 of the Statute "to form, join, or assist any labor organization" encompasses an employee's right, in the absence of special circumstances, to wear union insignia at the work place. United States Army Support Command, Fort Shafter, Hawaii, 3 FLRA 796 (1980) (Fort Shafter). Where, as in this case, the Agency requires bargaining unit employees to wear a uniform as an exercise of the Agency's right under section 7106(b)(1) to determine the means of performing the Agency's work, it is necessary to determine whether the wearing of union insignia directly interferes with the mission-related purpose for which the agency requires the uniform to be worn. United States Immigration and Naturalization Service, Port of Entry, San Ysidro, California, 25 FLRA 447 (1987), enforcement denied sub nom. Immigration and Naturalization Service v. FLRA, 855 F.2d 1454 (9th Cir. 1988) (INS I).

Respondent requires a standard uniform without outside adornment, except for the AAFES name tag, for safety and sanitation reasons and to promote uniformity in the employee's appearance to the public. Fernandez was specifically told, in part, that his Union button was "not part of the uniform."

There has been no showing that the wearing of the Union button directly interfered with the purpose for which the agency requires the uniform to be worn. There is no evidence that the Union button, attached to the chest part of the pullover shirt, opposite from the agency name tag, posed any safety or sanitation threat. Unlike the union name tag in Fort Shafter, which was the same size as the hotel's name tag, the Union button here presented no cause for customer confusion as to Fernandez' employer. Fernandez was clearly identifiable as an AAFES employee. The inscription and neat appearance of the Union button, featuring primary black letters on white, was not one that would detract from the uniform or harm the image of the AAFES or its goods and services. United States Department of Justice, Immigration and Naturalization Service, Port of Entry, San Ysidro, California, 25 FLRA 490, 503 (1987) enforcement denied sub nom. Immigration and Naturalization Service v. FLRA, 855 F.2d 1454 (9th Cir. 1988) (INS II). There is, therefore, no conflict with the Agency's right under section 7106(b)(1) to determine the means of performing the Agency's work. INS I, 25 FLRA at 451; INS II, 25 FLRA 503-504.<sup>6/</sup>

The Authority in determining whether there may be present the kind of special circumstances so as to negate the employee's right under section 7102 to wear union insignia at the work place examines all the circumstances, including the size and nature of the insignia and whether it could reasonably be interpreted as promoting disruptive or illegal activity. Fort Shafter, 3 FLRA at 796; Federal Aviation Administration, Spokane Tower/Approach Control, 15 FLRA 668 (1984); INS I, 25 FLRA at 450-51; INS II, 25 FLRA at 502-03.

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<sup>6/</sup> A majority of the panel in the Ninth Circuit, upon review of the Authority's decisions in INS I and II, held that management's right under section 7106(b)(1), to determine the means of performing work by prescribing a uniform for public contact employees, encompasses the right to require unadorned uniforms. 855 F.2d at 1464. The Authority to date has not adopted the Ninth Circuit's interpretation. However, United States Department of Justice, United States Immigration and Naturalization Service, United States Border Patrol, El Paso, Texas, Case No. 6-CA-70732 (Judge Naimark, October 24, 1988), exceptions filed, is pending as of this date before the Authority and involves an identical pin to that considered in INS I and II.

While the Union button is neat and non-provocative, it is not inconspicuous. However, it is only 1 1/2 inches square, half the size of the AAFES name tag, and much smaller than the union pocket penholder which a majority of the Authority in INS II would have permitted a uniformed law-enforcement officer to wear. 25 FLRA at 498.

Respondent contends that Fernandez' wearing of the button during his working time constituted solicitation of membership and thus was a violation of section 7131(b) and of the contract. Respondent claims that "the buttons purpose is to tell employees that without a union there is no power. Thus, it invites membership."

Section 7131(b) requires that "[a]ny activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership . . .) shall be performed during the time the employee is in a nonduty status." The distinction between activity soliciting on behalf of a labor organization during working hours and merely wearing a union button has long been recognized. Republic Aviation Corporation v. NLRB, 324 U.S. 793 (1945); Department of Transportation, Federal Aviation Administration, Aeronautical Center, 1 FLRA 247, 253-254 (1973). The wearing of union insignia during working hours does not result in the loss of working time and is recognized as nondisruptive, silent communication and a reasonable and legitimate form of union activity. Republic Aviation Corporation v. NLRB, 324 U.S. at 802 n.7; Albertsons, Inc., 289 NLRB No. 39, 128 LRRM 1205 (1988).

The inscription on the button "AFGE UNITY IS POWER" silently and unobtrusively promotes unity and solidarity among members. It does invite membership, but this is consistent with the Statutory right of employees "to organize" and "to form, join, or assist any labor organization[.]" 5 U.S.C. § 7101, 7102. See INS I, 25 FLRA at 451. The very personal act of merely wearing such a union button presents no reasonable potential for employee coercion or adverse impact on Respondent's operation so as to permit the agency to restrict such a right as "solicitation." Cf. Department of Transportation, supra.

Finally, nothing in the parties' agreement or Respondent's manual allowed the Respondent to prohibit the Union button in issue. The collective bargaining representative cannot waive rights guaranteed to employees under section 7102 of the Statute. INS I, 25 FLRA at 451-52.

Based on the foregoing findings and the Authority precedent to date, it is concluded that Respondent violated section 7116(a)(1) of the Statute by prohibiting bargaining unit employee Raymond Fernandez from wearing a union button with the inscription "AFGE UNITY IS POWER" on his uniform during duty hours.

Based on the foregoing findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, it is hereby ordered that the Army and Air Force Exchange Service, Fort Drum Exchange, Fort Drum, New York, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees by prohibiting mobile sales associates or similarly situated employees from wearing the American Federation of Government Employees, AFL-CIO union button "AFGE UNITY IS POWER" or similar union insignia while on duty.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Permit mobile sales associates and similarly situated employees to wear the American Federation of Government Employees, AFL-CIO, union button "AFGE UNITY IS POWER" or similar union insignia while on duty.

(b) Post at its facilities, 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 Respondent's chief executive 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 insure 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, 10 Causeway Street, Room 1017, Boston, MA 02222-1046, 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., December 5, 1990

  
GARVIN LEE OLIVER  
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 interfere with, restrain, or coerce our employees by prohibiting mobile sales associates or similarly situated employees from wearing the American Federation of Government Employees, AFL-CIO union button "AFGE UNITY IS POWER" or similar union insignia while on duty.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL permit mobile sales associates and similarly situated employees to wear the American Federation of Government Employees, AFL-CIO, union button "AFGE UNITY IS POWER" or similar union insignia while on duty.

\_\_\_\_\_  
(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.