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

BUREAU OF THE CENSUS Respondent and EDWARD HANLON Charging Party	Case No. 3-CA-80102

Saul Y. Schwartz and
Peter A Sutton, Esqs.
For the General Counsel

Hugh J. Beins
For the Charging Party

Myrrel C. Hendricks, Jr.
and Erica F. Cooper, Esqs.
For the Respondent

Before: ELI NASH, JR.
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. section 7101, et seq. (herein called the Statute). It was instituted by the Regional Director of Region 3 based upon an unfair labor practice charge filed on November 27, 1987 and first Amended Charge filed on December 16, 1987 by Edward Hanlon (herein called the Charging Party or Hanlon) against the Bureau of Census (herein called Respondent). The Complaint alleges that the Respondent issued a record of infraction and a later letter of proposed removal to the Charging Party in which its cites as one of its bases for action that he was filing grievances and unfair labor practice charges in violation of section 7116(a)(1) of the Statute.

A hearing was held before the undersigned in Washington, D.C., at which time all parties were represented by counsel and afforded full opportunity to adduce evidence and to call, examine, and cross-examine witnesses and argue orally. Timely briefs were filed and have been duly considered.

Upon consideration of the entire record in this case,1/ including my evaluation of the testimony and evidence presented at the hearing, and from my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommended order.

Findings of Fact

1. Respondent is an agency within the meaning of section 7103(a)(3) of the Statute.

2. The Charging Party was, at all times material, an employee of Respondent within the meaning of section 7103(a)(2) of the Statute. The Charging Party was employed by Respondent from May 31, 1978 to January 8, 1988. He was employed as a statistician/demographer in Respondent's Population Division.

3. Paula J. Schneider, served as Chief of the Population Division, and was at all times material herein, the Charging Party's third line supervisor.

4. The American Federation of Government Employees, Local 2782 (herein called AFGE, Local 2782) was at all times material herein, the exclusive representative of Respondent's employees. Hanlon was a member of the AFGE, Local 2782 bargaining unit at all times material herein.

5. Beginning in April 1985 to November 1987, Hanlon was actively engaged in union organizational and representational activities at Respondent's Suitland, Maryland location. These union activities included solicitation of union membership and distribution of union literature by Hanlon which acts were known by Respondent.

6. In his individual capacity, Hanlon filed unfair labor practice charges against Respondent with the Federal Labor Relations Authority during 1985 through 1987. In this same

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1/ The General Counsel's uncontested motion to correct transcript is granted.

time frame, 1985 through 1987, Hanlon filed grievances under the AFGE, Local 2782 collective bargaining agreement with Respondent. Several of these unfair labor practice charges resulted in Authority decisions such as 26 FLRA 311 (1987), 26 FLRA 719 (1987) and at least one Administrative Law Judge's decision in Case 3-CA-60041.

7. On or about November 23, 1987, Respondent, by its agent and representative Paula J. Schneider, issued the Charging Party a written record of infraction. This record of infraction lists as one of its bases, Hanlon's filing of grievances and unfair labor practice charges. Specifically, the record of infraction alleges that Hanlon misused administrative/judicial procedures between 1985 and the present (i.e., November 23, 1987) by filing numerous unfair labor practice charges and grievances.

8. A record of infraction is not a disciplinary action and is not a grievable matter under the AFGE, Local 2782 negotiated agreement. Rather, a record on infraction is a precursor to discipline and is used by supervisors to document and report employee violations of Respondent's regulations or standards of conduct.

9. On or about November 27, 1987, Hanlon submitted a written response to Schneider in regard to the record of infraction. Hanlon's response stated that the filing of grievances and unfair labor practice charges is a statutorily protected right and that to punish him for such filings would be unlawful.

10. Subsequently, around December 4, 1987, Respondent, by its agent and representative Schneider, issued the Charging Party a letter of proposed removal. This letter of proposed removal cites as one of its bases Hanlon's filing of grievances and unfair labor practice charges. More specifically, the letter of proposed removal considered Hanlon's removal from the Federal service for alleged misuse of administrative/judicial procedures between 1985 and the present time (i.e., December 4, 1987) due to his filing numerous unfair labor practice charges and grievances. In the letter of proposed removal, Schneider cites the number of unfair labor practice charges filed against Respondent during 1985 through 1987, as well as the disposition of certain unfair labor practice charges (i.e., ULP cases settled and ULP cases successfully litigated against Respondent by the General Counsel) and grievances filed under the negotiated agreement.

11. On or about December 22, 1987, a meeting was held to discuss the letter of proposed removal with Hanlon. At this meeting, Hanlon, once again, advised Respondent that he had a statutory right to file grievances and unfair labor practice charges and that it was improper to use these activities against him. Nonetheless, Respondent's agents represented that Respondent was not prepared to drop any of the reasons specified in the letter of proposed removal.

12. No grievance was filed by Hanlon over the letter of proposed removal.

Conclusions

Respondent's argument that the Authority lacks jurisdiction by virtue of its subsequent removal of Hanlon, since he is no longer an employee within the meaning of section 7103(a)(2) of the Statute, is no defense. With respect to this contention, the record is crystal clear that Hanlon was an employee at the time the alleged coercive statements were written and given to him. See Federal Election Commission, 6 FLRA 327, 336-337 (1981).

Respondent contends alternatively that section 7116(d)2/ is a statutory bar to this matter and that the issues raised in the complaint are properly raised only before the Merit Systems Protection Board or an Arbitrator. These defenses are based on Respondent's assumption that the complaint covers the removal action. Neither the General Counsel nor the Charging Party take such a view. If the removal action itself was involved, Respondent's analysis would be correct. Since it is not, however, both defenses are rejected.

The record indicates that no grievance could be filed over the record of infraction and that no grievance was filed over the letter of proposed removal, Respondent cannot rely on the second sentence of section 7116(d); i.e., the previously filed grievance bar. Similarly, if Respondent

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2/ Counsel for the Charging Party, on the other hand, complains that the scope of the proceedings is too narrow. Apparently, the Charging Party would not separate the alleged violative statements made to Hanlon from the removal action. Under the broader theory, the Authority might, as Respondent contends, lack jurisdiction. An offer of proof made in the Charging Party's behalf by his counsel was rejected.

seeks to avoid liability for the alleged section 7116(a)(1) conduct based on the first sentence of section 7116(d); i.e., the statutory appeals bar, such a defense is completely misplaced. Furthermore, Respondent's argument that the section 7116(d) statutory appeals bar comes into play because of its subsequent removal of Hanlon is without basis. Although true that a removal action ordinarily falls within the statutory appeals bar of section 7116(d), the complaint, as already noted, does not pertain to Hanlon's removal. Rather, it concerns as already discussed above, the alleged section 7116(a)(1) statements which, besides occurring prior to Hanlon's removal, are totally independent of the removal issue.

With regard to whether the matter should be before the Merit Systems Protection Board or an Arbitrator again, it must be pointed out that the complaint concerns only certain statements contained in the record of infraction and letter of proposed removal. It is well settled that the Authority has jurisdiction over unfair labor practice charges concerning statements made by an agency which are alleged, as is the case here, to be violative of section 7116(a)(1) of the Statute. Moreover, neither the record of infraction nor the proposed removal letter constitute adverse actions with the jurisdiction of the Merit Systems Protection Board under 5 U.S.C. §4303 or §§ 7511-7514 and 5 C.F.R. § 432.101-432.207 or §§ 752.401-752.406. Since neither action is appealable to the Merit Systems Protection Board, the statutory appeals bar of section 7116(d) appear to be inapplicable.

It has long been settled that the filing of unfair labor practice charges is a protected right of employees under section 7102 of the Statute. American Federation of Government Employee, AFL-CIO, 29 FLRA 1359, 1363 (1987), U.S. Naval Supply Center, San Diego, California, 21 FLRA 792, 806 (1986). It is equally well established that the filing and pursuit of grievances under a negotiated grievance procedure constitutes protected activity under the Statute. U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, 3 FLRA 724, 730 (1980), Bureau of Engraving and Printing, 28 FLRA 796 (1987). I see no limit in the Statute as to how many unfair labor practice charges or grievances an employee can file. Respondent seemingly thinks it can put a limitation on such guaranteed rights and label the protected right misconduct. I do not agree.

The current standard for determining a section 7116(a)(1) violation is whether the agency's conduct, when viewed

objectively, has a reasonable tendency to interfere with or intimidate employees. Federal Mediation and Conciliation Service, 9 FLRA 199 (1982), see also U.S. Treasury Department, Bureau of Engraving and Printing, 19 FLRA 366 (1985). With respect to statements, the test is whether employees could reasonably draw a coercive inference from the statement. Department of the Treasury, U.S. Customs Service, Region IV, Miami, Florida, 19 FLRA 956 (1985), U.S. Air Force, Lowry Air Force Base, Denver, Colorado, 16 FLRA 952 (1984). A threat of penalty or discipline, whether oral or written, no matter what context it is hidden in, made to an employee for filing and pursuing unfair labor practices or grievances is such an interference with a fundamental right that it certainly constitutes prohibited conduct under section 7116(a)(1) of the Statute. In my view such a letter of infraction and letter of proposed removal would undoubtably reasonably tend to coerce or intimidate the employee involved.

Accordingly, it is found that Respondent violated section 7116(a)(1) of the Statute by directing a record of infraction and letter of proposed removal to the Charging Party citing as one of its bases for discipline his filing of grievances and unfair labor practices.

Accordingly, it is recommended that the Authority[3/] adopt the following:

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 Bureau of the Census, shall:

1. Cease and desist from:

(a) Interfering with the protected right of Edward Hanlon, or any other employee, to file and pursue unfair labor practice charges and grievances under the negotiated grievance procedure by issuing records of infraction and letters of proposed removal to any employee which references the employee's filing of unfair labor practice charges and grievances.

3/ I agree with the General Counsel that a stronger cease and desist order and broader posting of Notice To All Employees is appropriate in this matter.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of 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) Remove from the record of infraction issued to Edward Hanlon on November 23, 1987 any references to his filing of unfair labor practice charges and to his filing of grievances.

(b) Remove from the letter of proposed removal issued to Edward Hanlon on December 4, 1987 any references to his filing of unfair labor practice charges and to his filing of grievances.

(c) Notify Edward Hanlon that the Respondent has removed from the record of infraction and the letter of proposed removal any references to his filing of unfair labor practice charges and his filing of grievances and that such activity will not be used against him in any way.

(d) Post at its Suitland, Maryland 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 the Director, Bureau of the Census, 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.

(e) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Region 3, Federal Labor Relations Authority, 1111 - 18th Street, N.W., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, 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., May 18, 1989

Eli Nash Jr.

ELI NASH, JR.
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE POLICIES OF

CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT issue Edward Hanlon, or any other employee, a record of infraction or a proposed removal letter which cites as a ground the filing of unfair labor practice charges and grievances under the negotiated grievance procedure.

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 remove from the record of infraction issued to Edward Hanlon on November 23, 1987, any references to Edward Hanlon's filing of unfair labor practice charges and grievances.

WE WILL remove from the letter of proposed removal issued to Edward Hanlon on December 4, 1987, any references to Hanlon's filing of unfair labor practice charges and grievance.

WE WILL notify Edward Hanlon that we have removed from the record of infraction and letter of proposed removal any references to his filing of unfair labor practice charges and grievances and that such protected activity will not be used against him in any way.

_____
(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 3, whose address is: 1111 - 18th Street, N.W., 7th Floor, P.O. Box 33758, Washington, D.C. 20033-0758, and whose telephone number is: (202) 653-8500.