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

DEPARTMENT OF HEALTH AND HUMAN SERVICES, SOCIAL SECURITY ADMINISTRATION, BALTIMORE, MARYLAND Respondent	
and	Case No. 8-CA-00110
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	

Lisa C. Lerner, Esquire
For the General Counsel

Mr. Wilson G. Schuerholz
For the Respondent

Ms. Barbara J. Lawson
For the Charging Party

Before: JESSE ETELSON
Administrative Law Judge

DECISION

This case concerns the Respondent's refusal to permit the Charging Party (the Union) to distribute to employees in work areas, during duty hours, a memorandum regarding a labor relations matter. The unfair labor practice complaint alleges that this prohibition was discriminatory, therefore constituting interference, restraint, and coercion within the meaning of section 7116(a)(1) of the Federal Service Labor-Management Relations Statute, 5 U.S.C. Chapter 71 (the Statute). A hearing was held in Riverside, California, on

August 20, 1990. The General Counsel and the Respondent filed post-hearing briefs.1/

Findings of Fact 2/

The Union represents employees in the Respondent's Riverside District Office in Riverside, California. Keith Wooten is a bargaining unit employee and the Union's representative in that office. Wooten received an oral warning in June 1989 for dropping documents concerning labor relations on the desks of employees during duty hours. He was told that he had failed to abide by Article 12, Section 2, of the national collective bargaining agreement between the Respondent (SSA) and the Union. That section says:

> Official publications of the Union may be distributed on SSA property by union representatives during the non-duty time of the union representatives who are distributing and the employees receiving the materials. Distribution shall not disrupt operations. All such materials shall be properly identified as official union issuances. Materials distributed will not malign the character of any Federal employee.

Wooten filed a grievance over the oral warning on July 14, 1989. On the same day, he sent a memorandum, on the Union's letterhead, to District Manager Lorraine Brannen, concerning a separate matter--a contention that management had violated something called the T16 CR Rotation. At the end of the T16 memorandum, Wooten asked Brannen for an immediate ruling on the applicability of Article 12, Section 2, to that very memorandum:

1/ Counsel for the General Counsel also filed a Motion to Correct Transcript. There was no opposition. The proposed corrections appear to be proper. Only one need be specially noted to protect the reader from confusion: on p. 88 l. 17, change "does" to "doesn't." The motion is granted.

2/ The findings of fact are abbreviated and tailored to reflect my opinion that the controlling issue is whether the Respondent acted in accordance with a plausible interpretation of the parties' collective bargaining agreement.

> Please let me know in writing by 2:40 pm today, as to whether you consider this memo to be an internal union publication. If you don't let me know exactly by 2:40 pm, then this will serve as proof that you don't consider this to be an internal publication, and thus I will pass it out on the floor.

Brannen did respond immediately, on July 14, in a memorandum which first suggested a time to discuss the T16 "grievance," and then gave the following answer to Wooten's query about distribution:

> You are not authorized to distribute your union memoranda [sic] except as specified in Article 12 Section 2 of the National Agreement. You are not allowed to copy and distribute the subject memorandum on your duty time or that of the employees receiving the material. This section of the contract is quite clear.

Discussion and Conclusions

The gravamen of the General Counsel's case is that the Union should have been permitted to distribute materials to employees at their desks during duty hours, because there was a practice of permitting employees to drop other kinds of materials on each other's desks. I do not reach the question of whether there was disparate or discriminatory treatment because under Authority precedent the Union is precluded from pursuing this claim in an unfair labor practice proceeding.

In the Authority's view, even an employer agency's denial of employees' statutory rights is a matter for grievance and arbitration procedures rather than unfair labor practice procedures, if that denial is based on a plausible interpretation of a collective bargaining agreement. United States Marine Corps, Washington, D.C., 33 FLRA 105, 114 (1988); 22nd Combat Support Group (SAC), March Air Force Base, California, 30 FLRA 331 (1987). Without exploring here the outer contours of this apparently broad doctrine, I see this case as being one in which the parties' dispute is essentially a dispute about contract interpretation, and therefore well within the central core area in which the doctrine is applicable.

The dispute itself was framed by the oral warning Wooten received for allegedly violating Article 12, Section 2, and by Wooten's July 14 request, which, in essence, asked Brannen if she thought that section applied to the T16 memorandum and consequently restricted its distribution to nonduty hours. The unfair labor practice allegation is limited to Brannen's July 14 memorandum responding to that request. (The earlier oral warning is not alleged as an unfair labor practice but is the subject of a grievance.)

When Wooten asked for Brannen's interpretation of the contract, and demanded it by 2:40 pm the same day, he necessarily focused Brannen's attention on the contract. Brannen's response seems at first to state more than her interpretation of the contract: "You are not authorized to distribute your union memoranda except as specified in [the contract]." The context, however, and her memorandum's literal bottom line ("This section of the contract is quite clear.") suggest that Brannen did not purport to do any more than what Wooten requested.

Wooten himself set the issue up as being whether Article 12, Section 2, prohibited him from distributing his memorandum during duty hours. Brannen gave him her opinion that it did. Neither of them evidenced an understanding that an issue of statutory rights was involved, much less that a statutory right to distribute during duty hours may have arisen because other distributions were permitted.

Statements will be held to violate section 7116(a)(1) of the Statute if they tend to coerce or intimidate, or if employees could reasonably have drawn a coercive inference from the statement. Department of the Air Force, Scott Air Force Base, Illinois, 34 FLRA 956, 962 (1990). Therefore one might argue that, if Brannen's memorandum implicitly denies the existence of a statutory right to distribute during duty hours, it had the necessary coercive tendency, assuming that the basis for a statutory right was proved. However, the preliminary question is whether it is permissible to reach the unfair labor practice allegation on the merits.

As explained above, the attention of the parties was focused exclusively on the applicability and effect of Article 12, Section 2, of the contract. Not only did the dispute giving rise to this case involve an interpretation of the contract; it involved nothing but an interpretation of the contract. Brannen's interpretation--that that section did apply and did restrict Wooten's proposed

distribution to nonduty hours--is a plausible interpretation. Thus, even a narrow reading of the Marine Corps-22nd Combat, supra, line of cases suggests that this case is not one that is appropriate for resolution under unfair labor practice procedures.[3/] I therefore recommend that the Authority issue the following order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, February 7, 1991

JESSE ETELSON
Administrative Law Judge

3/ Although I am bound by that line of cases, I would prefer to dismiss this complaint on a different ground. Wooten, not Brannen, created the situation in which the alleged interference with employee rights occurred. While the Authority does not distinguish between cases where a management representative initiates the communication that culminates in alleged unlawful statement and one where the statement is a response to an employee inquiry (see, e.g., Scott Air Force Base, supra), it does not follow that every employee-initiated course of communication must be viewed in the same light as one that is initiated by management. Ordinarily an ambiguous statement may properly be construed against the interests of the party which is its source. Here, however, since the employee sought the manager's interpretation of the contract, any ambiguity in the response should be resolved in accordance with the subject of the inquiry. Under this approach, Brannen's response would be read narrowly, as a statement that distribution during duty time is not authorized by the contract. Ultimately, of course, the tension between this approach and the traditional "tendency to coerce" test must be resolved. It need not be here, if the Marine Corps-22nd Combat line of cases remains controlling.