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

UNITED STATES ARMY AVIATION CENTER AND FORT RUCKER FORT RUCKER, ALABAMA Respondent	
and	Case No. 4-CA-10691
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1815, AFL-CIO Charging Party	

Blaine Jackson King, Esquire
For the Respondent

Godfrey E. Goff, Jr., Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101 et seq.[1/], and the Rules and Regulations issued thereunder, 5 C.F.R., § 2423.1, et seq., concerns alleged statements by Respondent to a Local 1815 steward and action against the steward in a RIF in violation of §§ 16(a)(1), (2) and (4) of the Statute.

This case was initiated by a charge, filed on June 17, 1991 (G.C. Exh. 1(a)), which asserted violations of

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1/ For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, e.g., Section 7116(a)(1) will be referred to, simply, as "§ 16(a)(1)".

§§ 16(a)(1), (2), (4) and (8) of the Statute; a First Amended charge, filed on July 5, 1991 (G.C. Exh. 1(c)), which asserted violation only of § 16(a)(1); and a Second Amended charge, filed on September 25, 1991 (G.C. Exh. 1(e)), which alleged violation of §§ 16(a)(1), (2) and (4) of the Statute. The Complaint and Notice of Hearing issued September 26, 1991 (G.C. Exh. 1(g)), alleged violations of §§ 16(a)(1), (2), and (4) of the Statute and set the hearing for October 24, 1991, pursuant to which a hearing was duly held on October 24, 1991, in Dothan, Alabama, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, to examine and cross-examine witnesses, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, November 25, 1991, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, on motion of the General Counsel, to which the other parties did not object, for good cause shown, to December 20, 1991. Respondent and General Counsel each timely mailed a brief, received on, or before, December 26, 1991, which have been carefully considered. On the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions.

FINDINGS

1. The American Federation of Government Employees, Local 1815, AFL-CIO (hereinafter referred to as the "Union") is the exclusive representative of a unit of employees appropriate for collective bargaining at the United States Army Aviation Center and Fort Rucker (hereinafter referred to as "Respondent"). (G.C. Exh. 1(g)).

2. Ms. Stella Swearingen worked as a Budget Assistant, GS-6, in Respondent's Directorate of Planning, Training Mobilization and Security (DPT) (Tr. 15). The director of DPT was Mr. Clyde S. Tullos (Tr. 17). Ms. Swearingen has been a Union steward since 1989 and spends one-third of her time on union related activities (Tr. 19). There were about 12 other Budget Analyst positions in DPT.

3. In May, 1991[2/], 12 Budget Analyst positions in DPT were abolished in a RIF (Tr. 60). Mr. Tullos called Ms. Swearingen and Ms. Judy Black, a GS-7, to his office and

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2/ Ms. Black placed the meeting with Mr. Tullos as "sometime in July". (Tr. 58).

told them their jobs had been abolished (Tr. 18), showed them a list of job vacancies and told them to let him know if there were any positions listed to which they would like to be reassigned (Tr. 59). Ms. Black was initially offered a job as an accounting technician, GS-5 (Tr. 60); however, following further discussions with Personnel she was offered a GS-7 Budget Assistant job in DRM (Tr. 59, 61, 64). Ms. Black did not meet with supervision in connection with her reassignment to DRM (Tr. 66).

4. Following her meeting with Mr. Tullos, Ms. Swearingen asked Mr. Charles Welch, Chief, Resource Management Division, DPT, and her immediate supervisor, to tell Mr. Tullos she was interested in a GS-6 Lead Scheduling Clerk position in DPT, a position on the vacancy list which Mr. Tullos had shown her (Tr. 18). Mr. Welch did contact Mr. Tullos who told him Ms. Swearingen would have to get the approval of the supervisor to see if they would take her (Tr. 18). Ms. Swearingen refused to contract the supervisor (Tr. 92), stating to Mr. Welch that that was unfair; that she should not have to see if she was qualified or get permission to be assigned to the job (Tr. 18).

Mr. Tullos readily admitted that he made the statement but asserted that it was his policy to let the division chiefs make the decision as to whether they wanted a particular person (Tr. 91-92). The record tends to support his assertion as to reassignments to managerial, or supervisory, positions (Tr. 84-85; 86-87); but there is no support in the record that any bargaining unit employee, except Ms. Swearingen, was told to contact, or contacted, "gaining" supervisors. To the contrary, each bargaining unit employees was automatically reassigned, whether within the same division or to a different division. Thus, Ms. Barbara King (Tr. 69), Ms. Iris Koveleski (Tr. 89); and Ms. Carole Schumaker (Tr. 73) were reassigned automatically.

5. At an EEO complaint meeting on, or about, June 5, 1991, which involved a job for which Ms. Swearingen believed she had superior qualifications than the person, Ms. Mary Pridgen, who had been chosen (Tr. 23-25), with Major Douglas M. Taylor, Union President, Raymond Dean, Adjudicator, Evan Smith, and Ms. Pridgen present (Tr. 24), the discussion between Ms. Swearingen and Major Taylor became quite heated and loud (Tr. 53). Ms. Swearingen called Major Taylor a liar (Tr. 25, 53, 110, 113); Major Taylor responded that he felt she was trying to slander him and he stated that he intended to pursue some action against her (Tr. 25, 26, 53, 113); and Major Taylor further stated "Stella", you ain't nothing but a troublemaker" (Tr. 26, 50). Major Taylor did not testify

and, although Ms. Pridgen did not mention the "troublemaker" remark, the testimony concerning the statement is wholly uncontradicted.

6. At an earlier EEO meeting in May, 1991, with Mr. John Altiari, the EEO counselor, Mr. Tullos, Ms. Swearingen, and others present, Mr. Altiari testified that Mr. Tullos made the statement that Ms. Swearingen, ". . . had caused hell in the office." (Tr. 42). Mr. Tullos admitted the statement (Tr. 97).

7. In her RIF notice, issued on August 8, 1991, Ms. Swearingen was informed that she would be reassigned to a GS-6 Steno position at Logistics Assistance, effective October 10, 1991. This job was outside the bargaining unit and General Counsel asserts that this action was in retaliation for her Union activity in violation of § 16(a)(1), (2) and (4). I have considered carefully the testimony of Ms. Bobbie Collins, Director of Civilian Personnel, which is wholly uncontradicted, and conclude that the initial "assignment" of Ms. Swearingen to a job outside the bargaining unit was unintentional and when it was discovered that all of Logistics Assistance was outside the bargaining unit, Ms. Swearingen was assigned to a GS-6 job as statistical assistant in Evaluation and Standardization, effective October 10, 1991, a position with which General Counsel states she is satisfied (General Counsel's Brief, p. 13, n.2). Thus, Ms. Collins testified that when she learned that Ms. Swearingen was proposed to be moved to Logistics Assistance Office (LAO), she checked their Servicing Agreement, dated 1985, and found that GS-8s and below were in Fort Rucker's competitive area (Tr. 79)3/. She then informed the Recruitment and Placement Office which input the data into the computer (Tr. 77). Accordingly, Ms. Swearingen was, in the first round, assigned to a job in LAO4/. Ms. Collins received a call, from a Union official she believed (Tr. 80-81), in which the caller questioned whether LAO was in the bargaining unit. Ms. Collins checked further and found that there was, indeed, a 1990 Servicing Agreement from headquarters, not the local area, and this 1990 Servicing Agreement stated that all of LAO was outside the competitive area of Fort Rucker (Tr. 78). Immediately, all of the people were brought out of the competitive area,

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3/ Presumably, as the parties so treat it, "competitive area" equates to "bargaining unit".

4/ By comparison, Ms. Black, in the first round, was assigned to a GS-5 position (Tr. 60).

i.e., the GS-8s and below, including Ms. Swearingen, were removed from RIF assignments in LAO and Ms. Swearingen was assigned to her current position.

Accordingly, the record affirmatively shows that Ms. Swearingen's assignment to a position in LAO was pursuant to a 1985 Servicing Agreement for LAO which placed GS-8's and below in the bargaining unit. Employees other than Ms. Swearingen were also assigned positions in LAO. After the first round notices were issued, a Union official called Ms. Collins, Director of Personnel, and questioned whether LAO was in the bargaining unit; Ms. Collins checked further and found that Headquarters had, in fact, entered into a 1990 Servicing Agreement for LAO which removed all of LAO from the bargaining unit. Ms. Collins immediately removed all employees assigned positions in the RIF from LAO, and Ms. Swearingen in particular was assigned to her present position. Further, as the record does not show that Respondent's RIF assignments of Ms. Swearingen were in violation of 16(a)(1), (2) or (4) of the Statute, the allegations of the Complaint to that effect are hereby dismissed, i.e., specifically, all of the allegations set forth in Paragraphs 17, 18 and 19, except the allegation, included in Paragraph 16, to the effect that "Respondent failed and refused to reassign Swearingen to another position in accordance with the Respondent's practice in reassigning employees whose positions were abolished." (Complaint, G.C. Exh. 1(g), Paragraph 16), and that portion of Paragraph 19 of the Complaint which alleges that, "By the conduct described in . . ." paragraph 16, "the Respondent committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1) and (2) . . ."

CONCLUSIONS

1. Imposition of a requirement on Swearingen for reassignment not required of any other employee.

As I have found, Ms. Swearingen, following her meeting with Mr. Tullos at which he had shown her a list of vacancies and told her to let him know if there were any positions listed to which she would like to be reassigned, advised her immediate supervisor, Mr. Welch, that she was interested in a GS-6 Lead Scheduling Clerk position in DPT. Mr. Welch did contact Mr. Tullos who told him Ms. Swearingen would have to contact the supervisor to see if they would take her in DPT. Ms. Swearingen refused to contact the DPT supervisor for the reasons, as she told Mr. Welch, that such requirement was unfair; that she should not have to get permission for assignment to a job; and that it was Respondent's obligation

to determine qualifications. Mr. Tullos readily admitted that he made the statement but asserted that it was his policy to let the division chiefs make the decision as to whether they wanted a particular employee. While the record tends to support his assertion as to reassignments to managerial, or supervisory, positions, there is no support in the record that any employee, except Ms. Swearingen, was told to contact any "gaining" supervisor for RIF placement whether within or without the division in which they were employed prior to the RIF. Thus, Ms. Barbara King, Ms. Iris Koveleski and Ms. Carole Schumaker were automatically reassigned to bargaining unit jobs. Moreover, at an EEO meeting on May 24, 1991, Mr. Tullos stated that Ms. Swearingen had, "caused hell in the office" by filing numerous EEO complaints, and his keen awareness of her active participation in Union representational activity motivated his insistence that Ms. Swearingen, but not any other unit employees, must be acceptable to the "gaining" supervisor, i.e., he did not want to foist a Union activist on another supervisor. Because Respondent discriminated against Ms. Swearingen, who was actively engaged in protected activity, by imposing on her a condition to reassignment in a RIF which was not shown to have been required of any other bargaining unit employee and I find that her engagement in protected activity was a motivating factor in Respondent's treatment of her in connection with hiring, tenure, promotion, or other conditions of employment, Respondent violated § 16(a)(1) and (2) of the Statute. Letterkenny Army Depot, 35 FLRA 113, 118 (1990); Department of Transportation, Federal Aviation Administration, Boston Air Route Traffic Control Center, Nashua, New Hampshire, 11 FLRA 318 (1983); Internal Revenue Service, Boston District Office, Boston, Massachusetts and Internal Revenue Service, Andover Service Center, Andover, Massachusetts, 5 FLRA 700 (1981); United States Marine Corps, Marine Corps Logisitics Base, Barstow, California, 5 FLRA 725, 742-744 (1981). As noted, the record shows that all other bargaining unit employees reassigned as a result of RIF action were automatically reassigned,5/ so that Respondent's asserted justification was wholly lacking in merit.

5/ There was no basis for a 16(a)(4) violation in connection with Respondent's May, 1991, refusal to reassign Ms. Swearingen to the GS-6 Lead Scheduling Clerk position in DPT, inasmuch as no charge had then been filed (original charge was filed June 17, 1991) and Ms. Swearingen had filed no complaint, affidavit, or petition, nor had she then given any information or testimony under the Statute.

2. Remarks by Ms. Swearingen and by Major Taylor in response constituted robust debate

It is undisputed that at an EEO complaint meeting on, or about, June 5, 1991, the discussion between Ms. Swearingen and Major Taylor became loud and heated and Ms. Swearingen called Major Taylor a liar and Major Taylor responded by stating, "Stella, you ain't nothing but a troublemaker". It is commonplace that debate between adversaries in labor-management proceedings becomes acrimonious, as it did on June 5. Having been called a liar, Major Taylor's retort that you are nothing but a troublemaker was, under the circumstances, a mild comment. The Supreme Court, with regard to Executive Order 11491, held that,

> ". . . the same federal polices favoring uninhibited, robust, and wide-open debate in labor disputes are applicable . . ." (Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin, 418 U.S. 264, 273 (1974)).

In Old Dominion Branch, et al., supra, the Union published a "List of Scabs", gave a pejorative definition of "scab" and called scabs, inter alia "traitors". The Statute essentially adopted, in § 2, the provisions of Section 1 of Executive Order 11491 and throughout follows the union-management rights and duties of the Executive Order. There can be no doubt that under the Statute federal law continues to favor uninhibited, robust, and wide-open debate in labor disputes. I find nothing in the respective remarks of Ms. Swearingen and Major Taylor that exceeds the bounds of uninhibited, robust and wide-open debate and find no violation of 16(a)(1) in Major Taylor's retort to Ms. Swearingen. cf., Linn v. United Plant Guard Workers of America, Local 114, et al., 383 U.S. 53, 60 (1966). Accordingly, the allegations of paragraphs 15 and 20 of the Complaint that Respondent violated § 16(a)(1) of the Statute by Major Taylor telling Ms. Swearingen she was a troublemaker are hereby dismissed.

As noted above, Mr. Tullos, on May 24, 1991, did say that Ms. Swearingen had "created hell in the office". I have found that Mr. Tullos' statement clearly showed that his motive in imposing a condition on her reassignment was her engagement in protected activity and that his discriminatory action violated §§ 16(a)(1) and (2) of the Statute; but I do not find that his statement independently, as alleged in paragraphs 4 and 20 of the complaint, violated § 16(a)(1) of the Statute. Accordingly, the allegation of paragraphs 14 and 20 of the complaint to that effect are hereby dismissed.

3. Major Taylor's Threat to Sue

During the June 5, 1991, meeting when Ms. Swearingen called him a liar, Major Taylor said, that now that he had her statement on tape, ". . . I can sue you for slander" (Tr. 26); ". . . you called me a liar, and I can prosecute you" (Tr. 53); ". . . he said that he felt like she was trying to slander him and that he was going to pursue some action against her" (Tr. 113).

Filing an action for libel does not violate § 16(a)(1) of the Statute, Consumer Product Safety Commission, 4 FLRA 803, 804, 842-845 (1980); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983); but the National Labor Relations Board has held that the threat to sue, as distinguished from actually suing, is a violation of Section 8(a)(1) of the NLRA[6/], which is substantially like § 16(a)(1) of the Statute.

In Department of Treasury, Internal Revenue Service, Louisville District, 20 FLRA 660 (1985)(hereinafter referred to as "IRS, Louisville District"), review denied, 801 F.2d 1436 (D.C. Cir. 1986), Judge Arrigo, at 675-681, set forth a strong and persuasive basis for his finding a violation of 16(a)(1) for the threat to sue for libel; however, the Authority disagreed, sustained exceptions to Judge Arrigo's decision and dismissed the complaint. The Authority stated, in part, as follows:

> "Noting the absence of specific Authority precedent as to whether it may be an unfair labor practice to threaten a lawsuit, the Judge relied on a 25-year old decision of the National Labor Relations Board in Clyde Taylor Company, 127 NLRB 103 (1960), in reaching his decision. In the Authority's view, Clyde Taylor is clearly distinguishable from the instant case both on its facts and with regard to applicable Federal sector law. First, in contrast to Clyde Taylor, where there was a threat to sue if an unfair labor

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6/ Section 8(a)(1) provides:

> "(a) It shall be an unfair labor practice for an employer -
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;"

practice charge were not withdrawn, Klein did not 'threaten' to sue because of the grievance or unless Eads withdrew her grievance. . . " (20 FLRA at 664).

. . .

"Furthermore, it appears that reliance on Clyde Taylor, which is factually distinguishable, is also misplaced based on an objective application of the Federal sector test, i.e., whether an agency's conduct reasonably tends to interfere with, restrain or coerce any employee in the exercise of his or her protected rights under the Statute. Rather, the Clyde Taylor test appears to be based on the perception of hypothetical employees who are easily intimidated and fearful of exercising their rights under the law. Although not necessary to the outcome of this decision, the Authority finds it difficult in these days and times to believe that the objective considerations present in this case would indicate any tendency to coerce, or in any other way to chill, the exercise of an employee's protected rights. Indeed, it is noted in this regard that, after the letters were sent, third and fourth step meetings were held regarding Eads' grievance, and that the grievance was subsequently submitted to arbitration. Thus, it is clear in the present case that Eads was not so coerced nor felt so chilled as to be restrained in the exercise of rights under the contract and the Statute." (20 FLRA at 665).

Here, as the Authority found in IRS, Louisville District, supra, there was no threat to sue unless some charge was withdrawn. To the contrary, when Ms. Swearingen called Major Taylor a liar, he responded, in effect, "you are trying to slander me by calling me a liar and I intend to sue you for slander." Nor was Ms. Swearingen intimidated in the slightest as she proceeded with the EEO complaint to another day when it was resolved (Tr. 26). Accordingly, since Major Taylor simply stated that he intended to sue for the perceived slander, Respondent did not violate § 16(a)(1), IRS, Louisville District, supra, and those provisions of paragraphs 15 and 20 alleging a violation of § 16(a)(1) because Major Taylor told Ms. Swearingen that, "he intended to bring an action against her" are hereby dismissed.

Having concluded that Respondent violated §§ 16(a)(1) and (2) of the Statute by its imposition of a discriminatory condition to Ms. Swearingen's reassignment in a RIF, which

condition was not required of any other bargaining unit employee, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29 of the Rules and Regulations, 5 C.F.R. § 2423.29, and § 18 of the Statute, 5 U.S.C. § 7118, the Authority hereby orders that the United States Army Aviation Center and Fort Rucker, Fort Rucker, Alabama, shall:

1. Cease and desist from:

(a) Encouraging or discouraging membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

(b) From imposing on Ms. Stella Swearingen, or any other bargaining unit employee, any discriminatory condition to her, or their, reassignment in a RIF, including a requirement that she, or any other bargaining unit employee, be acceptable to any "gaining" supervisor; provided, however, that Respondent shall determine the qualification of employees for available jobs in a RIF.

(c) In any like or related manner intefering with, restraining, or coercing their employees in the exercise of their rights under the Statute.

2. Take the following affirmative action7/ in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities at its Aviation Center, Fort Rucker, Alabama, 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 Commanding Officer of the Aviation Center and shall be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily

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7/ No remedy has been granted concerning Ms. Swearingen's reassignment because General Counsel stated,

> "General Counsel does not seek a remedy concerning Swearingen's reassignment as she is satisfied with her current assignment." (General Counsel's Brief, p. 13, n. 2).

posted, and shall be maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(b) Pursuant to § 2423.30 of the Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director, Atlanta Regional Office, Federal Labor Relations Authority, Suite 122, 1371 Peachtree Street, NE, Atlanta, GA 30367, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Date: August 12, 1992
Washington, DC

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 encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

WE WILL NOT impose on Ms. Stella Swearingen, or any other bargaining unit employee, any discriminatory condition to her, or their, reassignment in a RIF, including a requirement that she, or any other bargaining unit employee, be acceptable to any "gaining" supervisor; provided however that Respondent shall determine the qualification of employees for available jobs in a RIF.

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.

_____
(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, Atlanta Region, whose address is: Suite 122, 1371 Peachtree Street, NE, Atlanta, GA 30367, and whose telephone number is: (404) 347-2324.