



UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Washington Regional Office

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September 8, 2010

Lee Hurlock, President
AFGE, Local 2096
5280 Fourth Street c/o
Naval Network &
Space Operations, Bldg. 1700
Dahlgren, VA 22448

Re: Department of the Navy, Naval Support Activity
South Potomac and American Federation of
Government Employees, Local 2096
Case No. WA-CA-10-0314

Dear Mr. Hurlock:

The Regional Office has investigated and considered your charge filed against the Department of the Navy, Naval Support Activity South Potomac, ("Agency") alleging violations under section 7116(a)(1), (2), (4), (5) and (8) of the Federal Service Labor-Management Relations Statute ("Statute"). Based on the investigation, I have concluded that the issuance of a complaint on this charge is not warranted.

The charge alleges that the Agency violated §7116(a)(1), (2) and (4) of the Statute when it referred for criminal investigation your email correspondence in connection with the Agency's denial of your appeal of a suspension of your driving privileges..

The Regional Office's investigation disclosed as follows. You are the President of AFGE Local 2096 and an employee of the U. S. Air Force 20th Space Control Squadron (AFSPCS), Detachment I, located at Naval Support Activity South Potomac (NSASP), Dahlgren, Virginia. Bargaining unit employees of AFSPCS Detachment I are represented by AFGE Local 2096. AFGE Local 2096 also represents a bargaining unit of employees of the Naval Surface Warfare Center, Dahlgren.

The Regional Office's investigation disclosed that, beginning in or before your January 2009 correspondence with the Agency about security issues, and continuing into 2010,

the Agency had directed you to communicate with the Human Resources Office at Dahlgren on labor relations matters. During this period and continuing thereafter, you declined to follow the Agency's directives and insisted on communicating with Captain Hanft and others outside the Human Resources Office. The investigation also showed that, during this period, your correspondence to and about Captain Catherine Hanft criticized, mocked and insulted her.

On August 16, 2009, you were charged with driving while intoxicated and refusing a blood/breath test in King George County, Virginia. On September 3, 2009, the King George County Sheriff notified the Agency of the charges. On September 3, 2009, Captain Hanft preliminarily suspended your driving privileges on NSASP Dahlgren based on the King George County charges. On November 23, 2009, Captain Hanft issued a final Notice of Suspension of your driving privileges on the Dahlgren base. There is no evidence or allegation that the King George County charges or the suspension of your driving privileges had a relationship to your role and activities as President of AFGE Local 2096.

On November 30, 2009, you requested a hearing to appeal the suspension of your driving privileges and submitted your request to Captain Hanft. Command Master Chief J. M. Eller reviewed the matter and denied your appeal on December 17, 2009. That same day, Labor and Employee Relations Specialist Jacquelyn Hicks informed you by e-mail of the denial of your appeal. You responded to Ms. Hicks by e-mail. Your December 17, 2009 message to her, which you copied to Captain Hanft, made the following statements:

What an idiotic response.

I will follow-up with higher authority outside of NSASP and NDW where there may be some sensible intelligence applied. The ignorance of the personnel exercising the subject authority, of which they do not possess, is demonstrative of the ludicrous, irresponsible conduct of such individuals who are obviously not of the ability to conduct themselves professionally. I take compliment to the fact that apparently the spineless individuals within NSASP management again demonstrate that they do not have the guts to conduct business face to face. What a joke, they actually think they are somehow harming or dissuading me. Feel free to share with the idiot(s) above you that I would laugh in their face if they had the backbone to show it.

The actions of NSASP "leadership", using the term very loosely, continues to amuse me with their inadequacies of intelligent response and conduct. How little do they know, their actions actually are costing the government much more than they are costing me and such will ultimately cost them much more than they have sense to realize.

I may provide you additional official response from AFGE separately, if I feel like amusing myself further at the local level. I actually thought you might shed some light of intelligence on NSASP management in regard to labor relations. Apparently I was mistaken. I presume you are also caused to be a puppet of the ignorance at the top that is too blind to see the forest for the tree. I feel sorry for you having to deal with such an egotistical idiot being in charge of their own little world and their own ultimate demise. Given time, I will do what I am able to relieve you of the burden of such ignorant, irresponsible directive conduct along with the many others who concur with my assessment while behind the back of the offender.

The investigation established that in or about January 2010, Captain Hanft referred the December 17, 2009 message and other information about your communications with and about her to the Naval Criminal Investigative Service (NCIS). NCIS is responsible for conducting investigations of potential felony-level offenses affecting the Navy and Marine Corps, responding to and providing warnings of threats to those forces, and providing force protection support to U. S. Naval forces around the world.

On February 25, 2010, you were interviewed by NCIS agents. On August 2, 2010, NCIS closed its investigation, having determined that your conduct may have been a misdemeanor, that no felony had been committed and that no further action would be taken. No disciplinary action was proposed or has been taken against you.

These facts form the basis for the charge that the Agency's referral for the NCIS investigation constituted unlawful intimidation, coercion and discrimination in violation of section 7116(a)(1), (2), (4), (5) and (8) of the Statute.

With respect to the alleged violation of section 7116(a)(1), the Authority considers whether, under the circumstances, the Agency's statement or conduct alleged as a violation tended to coerce or intimidate an employee in the exercise of rights protected under the Statute. *Dept. of Agriculture, U. S. Forest Service, Frenchburg Job corps, Mariba, KY, 49 FLRA 1020 (1994)*. I assume for purposes of this analysis that referral to NCIS could reasonably tend to coerce or intimidate an employee in the exercise of his rights under the Statute.

However, a threshold question is whether you were exercising rights protected under the Statute. While your insistence on communicating directly with Captain Hanft, despite Agency directives to communicate with the Human Resources Office and Labor Relations Specialist Hicks, may have been protected activity, the investigation revealed that it was your December 17, 2009 e-mail message that precipitated Captain Hanft's referral to NCIS. Your December 17 message stated that you "may" ask the Union to respond separately to the Agency's denial of your appeal of the suspension of your driving privileges, if you felt like "amusing [your]self at the local level," a statement that suggests that you sent the e-mail in your personal capacity, not as Local Union President.

Even assuming the December 17 message was sent in your Union capacity, however, I conclude that the message was not protected. The message states that the Agency's denial of your appeal "will cost them more than they have sense to realize," and that "given time," you will do "what [you] are able to relieve [Ms. Hicks, the addressee of your message] of the burden of such ignorant, irresponsible directive conduct..." These statements, standing alone and viewed in the context of the message as a whole, were, under the circumstances, threatening and insubordinate. The Authority has found that remarks or conduct "of an outrageous or insubordinate nature" lose the protection they would otherwise have under the Statute. *Grissom Air Force Base, Ind.* 51 FLRA 7 (1995); *U. S. Air Force Logistics Command, Tinker AFB, Okla. City, OK.*, 34 FLRA 385 (1990). For this reason, I am declining to issue complaint on the section 7116(a)(1) allegation.

In order to make a *prima facie* showing of discrimination in violation of §7116(a)(2) and (a)(4) of the Statute, the General Counsel has the burden of establishing by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of him in connection with his hiring, tenure, promotion, or other conditions of employment. See *Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 113 (2001); *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990). Once the General Counsel makes the required showing, the agency may seek to establish the affirmative defense that (1) there was a legitimate justification for the action; and (2) the same action would have been taken in the absence of the protected activity. See *id.*

Where a charge alleges an agency discriminated by disciplining an employee for conduct occurring when he was acting in his capacity as a union representative, the agency may, as a defense, demonstrate that the employee's conduct constituted flagrant misconduct. *Federal Bureau of Prisons Office of Internal Affairs*, 53 FLRA 1500 (1998). In deciding whether an employee has engaged in flagrant misconduct, the Authority balances the employee's right to engage in protected activity which "permits leeway for impulsive behavior..... against the employer's right to maintain order and respect for its supervisory staff on the jobsite." See, *Oak Ridge*, 57 FLRA No. 69 (57 FLRA 343) citing *Grissom*, 51 FLRA at 11-12. If flagrant misconduct is established, the employee's conduct loses its protection under the Statute and can be the basis for discipline. See *OIA*, 53 FLRA 1500.

Here, the alleged discrimination, i.e. the referral to NCIS, concerned, at least potentially, discipline for your conduct with respect to Captain Hanft in connection with her decisions to suspend your driving privileges and refer you to NCIS. This conduct occurred while you were serving as, but was unrelated to your activities in your capacity as, Local Union President. Nevertheless, I assume for purposes of analyzing whether unlawful discrimination has occurred that the conduct alleged to be discriminatory (the referral to NCIS) occurred when you were acting as Union President.

Even assuming, however, that you were otherwise engaged in protected activity as a Local Union President on December 17, 2009, when you sent the threatening and insubordinate e-mail message, the message itself constituted flagrant misconduct and was therefore not protected. Furthermore, there is no evidence that the Agency referred you to NCIS or took other action against you because of your representational activities during this period. Notably, the Agency ultimately took no action against you at all with respect to your conditions of employment. While the evidence supports a finding that the Agency had legitimate reasons for the referral to NCIS, I need not reach that prong of the analysis, because the General Counsel could not meet the requirements of a prima facie case under *Letterkenny*. Even if the December 17 message were not flagrant misconduct, the investigation established that the Agency had legitimate reasons for its response to the message and that it would have responded as it did in any event.

Finally, the investigation yielded no evidence of violations of section 7116(a)(5) or (a)(8).

For these reasons, I have decided to dismiss your charge.

You may obtain review of my determination not to issue a complaint in this matter by filing an appeal with the General Counsel at the address below. The appeal should include the Case Number and be addressed to the:


Federal Labor Relations Authority
Office of the General Counsel (Attn: Appeals)
1400 K Street, NW, Second Floor
Washington, DC 20424-0001
Fax No. 202-482-6608

To be timely, an appeal must be filed no later than October 8, 2010. This means that an appeal that is mailed must be postmarked, or an appeal must be hand delivered or faxed, no later than October 8, 2010. Please send a copy of the appeal to this office.

If more time is needed to prepare the appeal, a request for an extension of time may be filed. Mail, fax or hand-deliver the request for an extension of time to the Office of the General Counsel at the address listed above. A request for an extension of time in these cases must be received at the above address no later than October 1, 2010.

Mr. Lee Hurlock
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The grounds for granting an appeal are set forth in 2423.11 (e) of the Authority's Regulations which are available on the Authority's website: www.flra.gov.

Sincerely,

Barbara Kraft
Regional Director

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