

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,
KENTUCKY STATE OFFICE LOUISVILLE, KENTUCKY Respondent

and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL
3980, AFL-CIO Charging Party

Case No.

CH-CA-00196

Kenneth Woodberry, Esquire Peter A. Sutton, Esquire For the General Counsel Jeffrey J. Burns, Esquire For
the Respondent Before: RICHARD A. PEARSON Administrative Law Judge

DECISION

On September 28, 2000, the General Counsel of the Federal Labor Relations Authority, by the Regional Director of its Chicago Region, issued an unfair labor practice complaint, alleging that the Department of Housing and Urban Development, Kentucky State Office, Louisville, Kentucky (the Respondent or the Agency) violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by making a coercive statement to an employee. The Respondent filed its Answer on October 20, 2000, denying that it made any coercive statement or that it otherwise committed an unfair labor practice. A hearing in this case was held in Louisville, Kentucky, on March 13, 2001, at which all parties were present and afforded the opportunity to be heard, to introduce evidence, and to examine and cross-examine witnesses. The General Counsel and the Respondent subsequently filed post-hearing briefs, which I have fully considered.

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 focus of this case is a July 13, 1999 conversation between Deborah Knight, a GS-12 Associate Community Builder in HUD's Kentucky State Office located in Louisville, and John Milchick, Jr., her supervisor and the State Coordinator for the Community Builder program. The conversation, initiated by Ms. Knight, concerned her interest in a promotion to a GS-13 position. In the course of discussing Mr. Milchick's hope to obtain Agency approval to create a higher-graded position in the office, he allegedly told Ms. Knight that he was "not interested in putting anyone affiliated with the union" in that position. Milchick denies making such a comment or saying anything else to suggest that members or supporters of the union would not be selected for such a position.

The specific events of July 13, 1999, occurred in the context of at least two years of administrative reorganization within HUD. In 1997, the Agency had initiated a reform program known as HUD 2020, in which new positions such as Community Builders were created and many job functions were moved to different offices. Many employees applied for other positions, sometimes to obtain promotions to new positions and sometimes in fear of losing jobs that might be moved out of their own offices. This process adversely affected so many employees that by the latter part of 1998, the Agency decided to implement a HUD 2020 Make Whole Initiative to correct the many individual injustices that had occurred.

Prior to HUD 2020, Ms. Knight had been a GS-12 in the Louisville office. During the reorganization in 1997, the incumbent Single Family Branch Chief in Louisville took another job, because the functions of that position were being transferred to a regional center in Atlanta. A vacancy announcement for the vacant Branch Chief position was posted as a temporary position in the Louisville office at the GS-12/13 level, and Ms. Knight was selected for it. She served as Branch Chief for approximately a year, part of which she served as a GS-12 and the latter part (from November 1997 to March 1998) she served as a GS-13. This temporary position was phased out of the Louisville office in March 1998, at which time Knight was reassigned as a GS-12 Community Builder. She began looking for other promotional opportunities and discussed her career aspirations with Mr. Milchick, who came to the Louisville office in July 1998. When she heard about the HUD 2020 Make Whole Initiative, Ms. Knight wrote Milchick and other officials a memo in November 1998, in which she asked to be considered for an upgrade to GS-13 based on her prior work as a Branch Chief. In April 1999, Knight was placed on a list of employees being considered for "make whole" relief, and in a letter dated June 24, 1999, she was told that she was being made a GS-13 Community Builder. Two weeks later, however, in a letter dated July 7, 1999, a HUD official in Washington rescinded the earlier notice, stating that she was ineligible for make whole relief because her earlier work as a GS-13 was in a temporary position.

In the Louisville office, which services the entire state of Kentucky, the highest career ladder potential for an Associate Community Builder is GS-12. For several years, the office had several Community Builder Fellows, who were hired as term employees with two-year limited appointments at the GS-13 through GS-15 levels, but the Louisville office was one of the few in the country that had not been allocated any permanent Community Builder positions. This was a significant problem in Mr. Milchick's eyes when he was assigned to Louisville in 1998, and he let his employees know on several occasions that he wanted to obtain Agency approval for one or more permanent Community Builder positions at the GS-13 through GS-15 levels.

The American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive representative of a nationwide unit of HUD employees for collective bargaining. AFGE Local 3980 (the Charging Party or the Union) is an agent of AFGE for the purpose of representing employees in the bargaining unit. On July 6, 1999, Union President Victoria Brown notified Agency management that Ms. Knight had been appointed as Union Steward for the Louisville office. This was the first time Knight had served as a Union representative.

On July 12 or 13, Ms. Knight received the letter rescinding her elevation to GS-13 under the make whole initiative, and she immediately telephoned Dallas Fowler, a Human Resources representative in the Agency's Washington headquarters, to explore ways in which she could advance her career. Mr. Fowler suggested that despite her ineligibility for the make whole initiative, the reassignment of some Community Builder functions to her Associate Community Builder position might constitute an "accretion of duties" that would justify a reclassification of her position as a GS-13. Ms. Knight then approached Mr. Milchick, her supervisor, on July 13 with this idea.

Milchick and Knight were the only participants in this July 13 conversation, and they were also the only witnesses at the unfair labor practice hearing. Their testimony was in agreement as to some aspects of their conversation. Both witnesses testified, for instance, that Knight initiated the meeting by entering her supervisor's office and by citing her conversation with Mr. Fowler about a promotion by "accretion of duties." Both witnesses agreed that Milchick had previously encouraged Knight's promotional aspirations and had told her she was highly qualified for a permanent Community Builder position, should such a position be created; they further agreed, however, that on July 13 Milchick was not supportive of her receiving an "accretion of duties" promotion to GS-13. He indicated his view that her position was properly classified at GS-12. In both versions of the conversation, Milchick then referred to the permanent Community Builder positions that he was trying to create.⁽¹⁾ At this point, their testimonies crucially diverge.

Ms. Knight testified as follows (Transcript (Tr.) at 33):

And then he went on to say that he was not interested in putting anyone affiliated with the union in a permanent GS-13 through 15 Community Builder position.

Q Did you say anything?

A No. I was shocked.

Q Did the meeting end at that point?

A Yes. I just said okay, and the meeting ended.

For his part, Mr. Milchick described the conversation in this manner (Tr. at 108):

Q How did you describe this Senior Staff Level position to her during that meeting?

A Well, because I had described it many times before, I didn't feel the need to have much detail about it. But during that conversation, after I brought that up, it was Ms. Knight who asked me, you mean the position that is going to be exempt. And I said, well, yes, that is, you know, what my plan is . . . that was pretty much the end of the discussion there . . .

Milchick further testified that he didn't discuss Ms. Knight's Union affiliation with her at all on July 13, or tell her that he would not be interested in putting someone with Union affiliation in any job, or say anything at all about the Union or Union affiliation (Tr. at 108-109).

Ms. Knight testified, as noted above, that she was shocked by Milchick's comments, because he had previously agreed that she deserved a GS-13 position. Although she was too shocked to follow up on July 13 concerning Milchick's statement about not hiring Union affiliates for a senior position, she testified that she did so about a week later. She entered Milchick's office and asked him to clarify his earlier statement that he wouldn't put anyone affiliated with the Union in a permanent Community Builder position. According to Knight (Tr. at 37-38):

He got a stern look on his face and just kind of looked at me with this stern look for about ten or twenty seconds, and then he said that - you know, that he intended for that position to be non-bargaining unit, to be like a quasi managerial position, and that anyone could apply for it.

Milchick denied that any second or follow-up conversation on this subject occurred. He testified that the only such conversation occurred on July 13.

On December 27, 1999, Ms. Knight prepared and signed an unfair labor practice charge against the Respondent, which was filed by the FLRA on December 30, alleging that Mr. Milchick "has engaged in ongoing union animus retaliatory practices" in violation of section 7116(a)(1), (2), (5), (7) and (8). The charge details a series of incidents between Knight and Milchick between July and October of 1999, starting with the July 13 meeting concerning Knight's desired promotion, and alleges that Milchick had repeatedly discriminated against her because of her position as a Union steward.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The issues in this case are straightforward: did the Respondent, through Mr. Milchick, make the statement attributed to him on July 13, 1999, by Ms. Knight? And if so, did that statement "interfere with, restrain, or coerce" Knight in the exercise of her rights under the Statute?

The General Counsel asserts that the evidence in its entirety supports the credibility of Knight's story and requires a finding that Milchick did tell Knight that he would not consider anyone affiliated with the Union for his hoped-for permanent Community Builder positions. The Agency denies that Milchick used the language attributed to him by Knight or language to that effect; it asserts instead that Milchick simply indicated, in response to Knight's question, that the higher-level Community Builder position would be "exempt," or outside the bargaining unit.

The General Counsel further argues that Milchick's statement of July 13, as quoted by Knight, was indeed coercive. In the General Counsel's view, the remark, viewed objectively, would tend to intimidate an employee from asserting her right to affiliate with a union, because the remark indicates that Union supporters will not get promoted.

While the Respondent rests most of its case on Milchick's contention that he did not use the words attributed to him by Knight, it also asserts that the comment attributed to him by Knight was "ambiguous." Moreover, since Knight concedes that Milchick "clarified" his statement a week later to explicitly assure Knight that there would be no discrimination, the Respondent argues that this removed any ambiguity in the July 13 comment and negated any potentially coercive implication.

Analysis

I.

Initially, I would like to dispose of the two legal issues discussed above, before I tackle the underlying factual, or credibility, dispute that constitutes the crux of this case.

I do not accept either the Agency's contention that Milchick's comments (as attributed to him by Knight) were ambiguous or that the coercive impact of those comments was negated by his "clarification" a week later. In my opinion, the words attributed to Milchick by Knight on July 13 are overtly coercive and intimidating; if he truly said those words on July 13, Milchick and the Agency violated section 7116(a)(1) of the Statute, and his clarification (or really retraction) a week later would not wipe the slate clean.

Both parties have appropriately cited the legal standard for interpreting comments by agency officials under section 7116(a)(1). As the Authority stated in *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 895-96 (1990):

The standard for determining whether management's statement or conduct violates section 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. . . . In order to find a violation of section 7116(a)(1), it is not necessary to find other unfair labor practices or to demonstrate union animus. . . . While the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or on the intent of the employer.

(Citations omitted). This standard was reiterated in *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994).

If, indeed, Mr. Milchick told Ms. Knight, "I am not interested in placing anyone affiliated with the union in a permanent GS-13 through 15 Community Builder position," the only reasonable inference is that Union supporters would not get that position. Even if the comment was made in the context of referring to a non-bargaining unit, "quasi-managerial" position, it would still be unlawful to refuse to consider Union supporters for the job, and that is the direct import of the statement attributed to Milchick. Milchick's alleged comment is distinguishable from *Department of the Navy, Portsmouth Naval Shipyard*, 6 FLRA 491 (1981), where the supervisor allegedly told a union steward at the end of a grievance meeting that he was "more adamant [in his position] after you coming over here today." The latter statement can reasonably be interpreted as having either a lawful meaning or a retaliatory meaning; the alleged statement by Milchick, however, is not similarly susceptible to a lawful interpretation. If "anyone affiliated with the union" is excluded from consideration for a position (even a position outside the bargaining unit), then employees are clearly left with the message that union activity is detrimental to their careers. While the threat may not be explicit, it is far from ambiguous. It is comparable to the statement found unlawful in *Department of the Treasury, United States Customs Service, Region IV, Miami, Florida*, 19 FLRA 956, 968-69 (1985), in which a union official was told he would not be assigned to a desirable detail because of his union position.

Similarly, the alleged conversation between Milchick and Knight a week later does not retroactively cast an innocent light on the July 13 comments (as quoted by Knight). If indeed the statement attributed to Milchick on the 13th was ambiguous, I would agree with the Agency that Milchick would be entitled to an opportunity to "clarify" the remark and to demonstrate that the lawful inference was the appropriate inference to draw from his original statement. However, as already explained, the alleged statement was clearly coercive. If Milchick on July 13 made the statement attributed to him by Knight, he committed an unfair labor practice, and any later retraction by Milchick would not undo that conclusion. While a later retraction might minimize the coercive effects of his earlier statement, it would not negate them.

II.

All of the discussion above, however, begs the ultimate question: did Milchick make the statement attributed to him by Knight, or use words to that effect? This is unavoidably a credibility question requiring me to believe either Knight or Milchick. The dispute involves a conversation to which there were no other witnesses, and neither party can offer any documents or other type of evidence to directly corroborate their versions of the conversation. The question reduces itself to whose testimony is more believable, although the ultimate burden of persuasion is on the General Counsel.⁽²⁾

The Authority has noted that credibility determinations may be based on a number of considerations, including (but not limited to): the witness' opportunity and capacity to observe the event in question; the witness' character as it relates to honesty; prior inconsistent statements by the witness; the witness' bias or lack thereof; the consistency of the witness' testimony with the other record evidence; the inherent improbability of the witness' testimony; and the witness' demeanor. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1204 (2000), citing *Hillen v. Department of the Army*, 35 MSPR 453, 458 (1987). Some of these considerations are either inapplicable to the facts of this case or weigh equally toward both witnesses; those factors which are applicable will be included in my overall discussion below.

First, the meeting of July 13 must be placed within its proper context. The period of 1997-1999 was a time of considerable administrative upheaval throughout HUD nationwide, and this upheaval particularly affected the Louisville office, as well as Milchick and Knight. No sooner had the dust settled on the personnel changes caused by the HUD 2020 initiative, than the Agency agreed to further changes through a "make whole" initiative. Ms. Knight had benefited from the staff changes triggered by HUD 2020 in earning a temporary

promotion to GS-13; when she was returned to GS-12, she was naturally interested in using her experience to earn a permanent promotion to a higher career ladder. She had applied for a promotion through the make whole initiative, and in late June of 1999 she was told by the Agency's national office that she would be placed in a GS-13 position, only to be told two weeks later that the promotion had been rescinded. It is, therefore, wholly understandable that Knight would then have been looking for another way of getting a promotion, and it was for this purpose that she approached Milchick on July 13.

Unlike most state offices in the country, the Agency's Louisville office in 1999 had been operating without any permanent Community Builders. Although the office had several Community Builder Fellow positions, these people were temporary employees who could not be counted on for any long-term stability or continuity. Mr. Milchick had taken over as manager of the Louisville program in mid-1998, and the testimony of Knight and Milchick reflects that he had expended considerable effort since then to correct this problem by seeking Agency authorization for one or more permanent Community Builders, who would have career ladders from GS-13 through 15. If these permanent positions were created, Ms. Knight was a logical candidate for one of them, and indeed Milchick had previously told her that she appeared to be well qualified for them. In this context, Milchick's plan to create one or more such positions was clearly a subject of great interest to both Milchick and Knight, in which they would have shared a common goal.

The timing of this meeting is potentially significant in other respects. Milchick first became aware on June 28, 1999, that Knight had volunteered to replace the outgoing Union steward, and the Union confirmed Knight's appointment to the position on July 6. The July 13 meeting occurred a week later. Despite the allegedly threatening statement made by Milchick on July 13, Knight did not file her unfair labor practice charge until December 27, five and a half months later, at which time she accused Milchick of many discriminatory actions against her, in addition to the threatening statement.

Both Milchick and Knight describe the initial portion of the July 13 conversation in similar terms: Knight sought to enlist Milchick's support for the idea (suggested by an official from Agency headquarters) of a promotion by accretion of duties, and Milchick disagreed with that idea. Instead, Milchick referred her to the permanent Community Builder positions he hoped to create. It is at this point that their stories diverge: she testified that Milchick then said he would not be interested in putting anyone affiliated in the Union in such a position, while he testified that he simply assented when she referred to the position as "exempt."

Although there is no way of conclusively determining who said what at the July 13 meeting, I do not find Ms. Knight's version of the conversation credible. In a variety of respects, it simply does not ring true to me and is inherently less probable than Milchick's version. In Knight's version of the conversation, Milchick's threat is contrary to Knight's own description of his prior attitude toward her, as well her description of Milchick's demeanor during the conversation. Knight testified that Milchick had heretofore been very supportive of her aspirations for a permanent Community Builder job and that on the 13th he spoke to her in a "calm and professional, matter of fact" manner (Tr. at 34). The disputed words she attributes to Milchick, however, are at odds with that, and they do not fit within the logical context of the meeting. Knight was looking for a promotion-by-accretion; Milchick did not agree with that idea. In light of their disagreement on that specific idea, it makes perfect sense that Milchick would seek to soothe her disappointment by assuring her that there would be other, better ways of getting promoted in the future: namely, the permanent Community Builder positions, which would have a career ladder to GS-15. But once Milchick had raised the prospect of her getting one of these positions, it did not make sense for him to immediately dash her hopes by telling her that she had no chance of getting it because of her Union affiliation. Moreover, it would hardly have been "professional" or "matter of fact" for Milchick to tell her he was "not interested in putting anyone affiliated with the union in a permanent GS-13 through 15 Community Builder position." It is also the type of direct threat of Union-related discrimination that an experienced manager is trained not to make. If Milchick had

made such a coercive statement to her, I believe he would have not done so casually or in a calm and professional tone, but rather he would have emphasized his point to Knight to make sure she understood him. The alleged threat that Knight attributes to Milchick appears to come "out of left field" and simply doesn't fit within the logical context of Knight's other testimony. I can understand why Ms. Knight would testify that she was shocked by the statement, but I cannot accept that she was so shocked that she let the conversation end abruptly without any protest or further questioning on her part (at least until the following week). If Milchick used the words she attributes to him, I think she would have stopped him immediately and asked him precisely what he meant, or told him that a refusal to consider Union supporters for a particular job was illegal. If she indeed questioned Milchick about his comments a week later, I believe she waited a week because his earlier comments were simply ambiguous and required clarification (such as a reference to the Community Builder position being exempt or quasi-managerial, as Milchick described).

The apparent logic for Milchick's otherwise inexplicable comment, according to Knight and the General Counsel, is that Milchick had only recently learned of Knight's appointment as Union steward. Although a supervisor can violate section 7116(a)(1) without harboring any anti-union animus, it makes no sense in the facts of this case. Milchick had supported Knight's hopes for a promotion for the past year, and both witnesses testified that in the July 13 conversation he raised the subject of the planned creation of permanent Community Builder positions. For him to then state that anyone affiliated with the Union won't be considered for those positions, it must be believed that he was advising her to abandon her Union stewardship in order to advance her career ambitions. But there is no credible evidence in the record to support such a finding. I find instead that Milchick did not use the words attributed to him by Knight; that he did not tell her (explicitly or implicitly) that "he was not interested in putting anyone affiliated with the union" in those positions.

Another factor weighing against the accuracy of Knight's recollection of the July 13 conversation is the timing of her unfair labor practice charge: Knight did not make her accusation against Milchick until nearly six months had passed. While she was legally entitled to wait up to six months to file a charge, it reduces my confidence that she could still remember Milchick's exact words, as she contends. The full contents of her unfair labor practice charge also suggest to me that she was more concerned with getting promoted to GS-13 than with remembering Milchick's exact words in their July 13 conversation. Her charge is a rambling account of six months of alleged discrimination by Milchick, and the July 13 conversation comprises only a tiny fraction of that account. Although I do not draw any adverse inference from the fact that the General Counsel chose not to issue complaint against most of the behavior alleged by Knight, I do infer that Knight's pursuit of a promotion has robbed her of an unbiased perspective of the events in dispute. Her willingness to criticize the work of other employees in the office in order to promote herself (as exhibited in her November 30, 1998 memo to Milchick, attached to her charge, General Counsel Exhibit 1(a)) also makes me question her credibility.

In general, I was more impressed by Milchick's demeanor than Knight's. He struck me as a knowledgeable, professional career manager with no particular axes to grind. In order to defend himself against Knight's accusation, he did not resort to taking personal shots at her, and he readily admitted that she was a highly qualified employee. While he could not recall his or Knight's exact words from July 13, that does not strike me as unusual, since Knight did not raise the issue of that conversation until many months later. Moreover, while the Agency suggested in its post-hearing brief that the threat attributed to Milchick by Knight was "ambiguous," Milchick himself seemed to fully understand in his testimony that those words were coercive and unlawful, and he disavowed using such words (Tr. at 109). His explanation of the July 13 conversation was simply more plausible, more consistent with the other evidence, and his testimony was more credible than Knight's.

For all of these reasons, I conclude that the General Counsel has failed to prove, by a preponderance of the evidence, that Milchick made any statement on July 13, 1999 that interfered with, restrained or coerced Ms. Knight or any other employee in the exercise of any protected right. Therefore, I do not find that the

Respondent committed an unfair labor practice by the conduct alleged in the complaint.

Based on the foregoing, I recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, March 14, 2002

RICHARD PEARSON

Administrative Law Judge

1. Knight testified that Milchick told her that the reclassification of her current job from GS-12 to 13 by accretion of duties would jeopardize his plan to obtain permanent positions at GS-13 through 15. Milchick testified that since he couldn't support her suggestion for a promotion by accretion, he didn't want her to go away totally discouraged; therefore, he reminded her that he was trying to create other promotion opportunities for her, particularly through the creation of permanent Community Builder slots.
2. In this respect, the General Counsel must demonstrate, by a preponderance of the evidence, that Milchick either said the precise words attributed to him by Knight ("he was not interested in putting anyone affiliated with the union in a permanent GS-13 through 15 Community Builder position") or similar words which conveyed the point that anyone affiliated with the Union would not be placed in the permanent Community Builder position Milchick was hoping to create.