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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, JACKSON AREA OFFICE, JACKSON, MISSISSIPPI Respondent	
and	Case No. 4-CA-80134
NATIONAL COUNCIL OF EEOC LOCALS NO. 216, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3599 Charging Party	

Carole L. Jordan-Bryson
For Respondent

Kenneth D. Battle, Esq.
For General Counsel of FLRA

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. § 7101 et seq., 92 Stat. 1191, (hereinafter referred to as the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2410 et seq.

A charge against Equal Employment Opportunity Commission, Jackson Area Office, Jackson, Mississippi, (hereinafter called Respondent and Jackson Area Office), was filed by National Council of EEOC Locals No. 216, American Federation of Government Employees, Local 3599, (hereinafter called the

Union and AFGE Local 3599), on November 5, 1987 and amended on February 29, 1988. Based upon the foregoing the General Counsel of the FLRA, by the Regional Director of Region IV of the FLRA, issued a Complaint and Notice of Hearing alleging that Respondent violated Section 7116(a)(1) of the Statute by making a statement mentioning an employee's union activity in the performance appraisal of that employee. Respondent filed an Answer admitting all of the factual allegations in the Complaint but denying it had violated the Statute.

General Counsel of the FLRA filed a Motion for Summary Judgment with attachments and a Supporting Memorandum. The Regional Director issued an Order Referring Counsel for the General Counsel's Motion for Summary Judgment to the Chief Administrative Law Judge.

The Chief Administrative Law Judge issued an Order granting the parties an opportunity to file Responses. Respondent filed Respondent's Opposition to the Acting General Counsel's Motion for Summary Judgment and Cross Motion for Summary Judgment with a supporting memorandum and attachments. This matter has be referred to the undersigned for disposition.

I conclude that, in the absence of any dispute as to facts, summary judgment is an appropriate procedure for disposing of this case. Accordingly, based upon the pleadings, the Motion and Cross-Motion for Summary Judgment, the memoranda in support thereof, and the various attachments thereto, I make the following:

Findings of Fact

At all times material herein, the Union has been, and is now a labor organization within the meaning of Section 7103(a)(4) of the Statute.

At all times material herein, the Equal Employment Opportunity Commission, herein called EEOC, has been and is now an agency within the meaning of Section 7103(a)(3) of the Statute. At all times material herein, the Jackson Area Office, has been and is now an activity of the EEOC within the meaning of Section 2421.4 of the Authority's Rules and Regulations, as amended.

At all times material herein, the following named persons occupied the positions set out opposite their names and as such have been and are now supervisors, and/or management officials within the meaning of Section 7103(a)(10) and (11) of the Statute, and/or are agents of Jackson Area Office.

Henrene Matthews . . . . . Area Director
Jane D. Sample . . . . . Supervisor

At all times material herein, Flonzie B. Goodloe, Equal Opportunity Specialist GS-11, has been and is now an employee of Respondent. At all times material herein, Goodloe has been a representative and/or an official of the Union and has engaged in and is engaging in activities protected under the Statute.

On or about October 5, 1987, Sample, as appraising official, and Matthews, as reviewing official, caused the following statements to appear in the performance appraisal of Goodloe:

> Any evaluation of this Investigator must be tempered by the fact that she is the Union President and has spent less than 400 hours in compliance during FY 87.
>
> Most of the work in this job element is at least fully satisfactory. It is not possible to give an in depth critique since Ms. Goodloe is fully involved with Union problems at all levels and is frequently away from her duty station.

Discussion and Conclusions

Section 7116(a)(1) of the Statute provides that it is an unfair labor practice for an agency "to interfere with, restrain or coerce any employee in the exercise by the employee of any right under this chapter." Goodloe's activity on behalf of AFGE Local 3599 was activity protected by Section 7102 of the Statute and therefore was protected from Agency interference by Section 7116(a)(1) of the Statute.

General Counsel of the FLRA contends that the mention in the performance appraisal of Goodloe's activity on behalf of AFGE Local 3599 violated Section 7116(a)(1) of the Statute. The General Counsel of the FLRA urges that protected activity cannot be considered or referenced, even non-judgmentally, in connection with performance discussions on appraisals. He urges a per se approach.

The FLRA has held the evaluation of employer conduct is objective and that where an employer's conduct may reasonably tend to coerce or intimidate an employee, such conduct would violate the Statute Department of the Treasury, Internal Revenue Service, 11 FLRA 290 (1983). The FLRA did not set

down a per se rule, but rather set up an objective standards test for determining if employer conduct or statements violate Section 7116(a)(1) of the Statute.

The General Counsel of the FLRA relies on two FLRA cases and on A/SLMR case to support its contention that any reference, even non-jugdmentally, to protected activity in performance discussions or appraisals. Department of Health and Human Services, Social Security Administration, 22 FLRA 91 (1986) and Department of Health and Human Services, Social Security Administration, 12 FLRA 667 (1983), both involve the mentioning of union activity in circumstances wherein negative or unfavorable inference could be drawn. In Naval Facilities Engineering Command, 3 A/SLMR 209 (1973) a negative inference and hence a coercive effect was inferred from a purely gratuitous reference to the employee's union activity in a performance appraisal. The reference to the protected activity could serve no purpose other then inform others that the employee was active for the union. It was quite properly concluded that such a gratuitous reference to union activity in an employee's performance appraisal would tend to interfere with an employee's exercise of protected activity.

The test to be applied, however, is whether the mention of an employee's union activity would reasonably and foreseeably have the effect of interfering with the employee's exercise of his protected activity. See Veterans Administration Medical Center, Leavenworth, Kansas, 31 FLRA 1161 (1988), (hereinafter called the VA Case). In the VA Case, supra, a supervisor's comments about the employee's union activity was merely an attempt by the supervisor to reach an accommodation between the employee's right to engage in union activity on official time and the supervisor's interest in insuring that all his firefighters shared in performing routine checks. Such a reference to the employee's union activities, in these circumstances, was held not to interfere with the employee's protected rights and thus not to violate the Statute.

In the subject case the reference to Goodloe's union activity in his job appraisal was in the context of explaining why he had spent less then 400 hours performing compliance work and why no "in depth critique" could be made of this aspect of Goodloe's work, although it was noted that most of Goodloe's work in this job element was "at least fully satisfactory." I conclude such a reference to union activity, in this context, would not tend to interfere with an employee's exercise of his protected rights. Rather, the reference was merely to explain why the employee had spent less than 400 hours on the compliance work and no in depth analysis could be done of this work.

Such a comment would not discourage an employee from exercising his protected rights. The comment provided a reason that employee had spent the limited time on compliance work, rather than just stating the employee had spent limited time on compliance work, with no explanation. Lack of an explanation for the limited time spent on the compliance work could have been much more harmful and unfavorable to the employee.

I conclude that the bare reference to Goodloe's union activity in his job appraisal, in the context of explaining why no in depth critique could be made of an aspect of his work, did not constitute a violation of Section 7116(a)(1) of the Statute. c.f. VA Case, supra.

Having concluded that Respondent did not violate Section 7116(a)(1) of the Statute, I recommend the Authority issue the following Order:

ORDER

The Complaint in Case No. 4-CA-80134 be, and hereby is, dismissed.

Issued, Washington, D.C., September 26, 1988

Samuel A. Chaitovitz

SAMUEL A. CHAITOVITZ
Administrative Law Judge