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

DEPARTMENT OF THE AIR FORCE, SCOTT AIR FORCE BASE, ILLINOIS Respondent and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R7-23, SEIU, AFL-CIO Charging Party	Case No. 5-CA-70308

Susan S. Matlin, Esq., and
Sharon Bauer, Esq.
For the General Counsel

Major Steven E. Sherwood, Esq.
For the Respondent

Donna Dann, Esq.
For the Charging Party

Before: JESSE ETELSON
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., (the Statute).

Upon an unfair labor practice charge filed by the National Association of Government Employees, Local R7-23, SEIU, AFL-CIO, (the Union) against the Department of the Air Force, Scott Air Force Base, Illinois, (the Respondent), the

General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director for Region V, issued a Complaint and Notice of Hearing on February 29, 1988. The Complaint alleges that the Respondent violated Section 7116(a)(1) of the Statute by telling an employee (a) that he was not selected for a particular position because of concern that if he had been selected, he or the Union's president would enforce a particular provision of the parties' collective-bargaining agreement; (b) that the Respondent would not fill a position as long as the employee had a priority referral; and (c) that he probably would have been selected for a particular position if he had been referred on the Merit Promotion roster instead of a priority referral and that "politics between management and labor" were a reason for his non-selection. The Respondent's answer denied that the alleged statements were made and denied the commission of any unfair labor practices.

A hearing was held on May 10, 1988, in St. Louis, Missouri. All parties were permitted to present their positions, to call, examine, and cross-examine witnesses, and to introduce evidence bearing on the issues presented. The General Counsel and the Respondent submitted post-hearing briefs.

On the basis of the entire record, the briefs, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following findings of fact, conclusions and recommendations:

Findings of Fact; Credibility Resolutions

John Cissell is an employee in the heat plant at Scott Air Force Base. Since 1986 he has been the executive vice-president of the Union, which represents a unit of employees in which Cissell works. As a result of a grievance filed on behalf of Cissell and another employee, both employees were given priority consideration for promotion to certain positions carrying a classification level designated as WG-10. When a WG-10 "boiler plant operator" position became available in April 1987, General Foreman Charles Affolter interviewed Cissell and the other employee, Rakers, for the job. Affolter selected Rakers. Cissell retained his priority status temporarily, and had it extended by informal agreement. His priority status was withdrawn in June 1987 because the Union's filing of an

unfair labor practice charge over Cissell's non-selection to fill the April opening violated the informal agreement.1/

This case involves three conversations which Cissell testified he had with Affolter between mid-April and early May 1987, the period immediately following his non-selection for the WG-10 boiler plant operator position. Affolter was Cissell's supervisor as well as the selecting official and was therefore readily accessible to Cissell for such informal conversations as are alleged here.

First, I recount Cissell's testimony. On either April 10 or 17, Cissell asked Affolter, who happened to be standing nearby, whether Affolter had checked with another management official as to how to phrase a question at their recent job interview. The question he was referring to was whether Cissell, as the job applicant, realized that the position applied for involved rotating shifts. A provision in the applicable collective-bargaining agreement (Article 7, Section 8) gave union officers the right to be assigned to the day shift. Affolter referred to that provision in the course of responding to Cissell's inquiry about the phrasing of the interview question. Thus, Cissell testified:

> He went on to say that whomever he selected, he wanted to make sure that they were going to work shift work and that was the reason that he had not hired me. Because he was afraid that I might want to enforce Article 7, Section 8 of the contract.

Cissell, on hearing this, told Affolter that he (Cissell) thought he had made it clear at the interview that he would not invoke that provision. But Affolter responded that he was afraid that even if Cissell didn't invoke it, the Union's president might insist on having Cissell, the executive vice-president, on the day shift. Cissell then told Affolter that he could have stayed on rotating shifts until a similar day shift position, officially occupied at the time by an employee who was expected to be on extended sick leave, had to be filled. Cissell suggested himself to

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1/ No unfair labor practice charge was filed over the termination of Cissell's priority status. No complaint was issued on the Union's charge that the April non-selection was discriminatory.

fill that position, when available, adding that a new hire could take Cissell's rotating shift position. The conversation ended when Affolter said it was a shame they didn't have the same conversation during the interview.

The second conversation is alleged to have occurred on about April 29, 1987. It concerned the fact that Cissell still had priority referral status despite having been turned down for a WG-10 boiler mechanic job in a different part of the facility. Affolter told Cissell that he would not request authority to fill any WG-10 positions in his shop as long as Cissell had priority status, so that he would never have to hire Cissell in a WG-10 position. Affolter then told Cissell that, of the last six people he had hired, three of them were people he wouldn't have wanted to hire, but that management made him take them. That was why, Affolter stated, he would not "put any fill action in as long as [Cissell had] a priority referral."

The third conversation took place during a lunch break on May 2, 1987. Present, in addition to Cissell and Affolter, was another supervisor, Michael Church. At a certain point, Affolter and Church expressed dissatisfaction with the work of another employee. Cissell reminded Affolter that Affolter had selected that employee over Cissell for a WG-10 position in 1986. Affolter told Cissell that Cissell probably would have been hired if he hadn't been referred as a priority referral. Cissell responded that he had also been referred on the merit promotion list but that Affolter still had not selected him. Affolter said it was nothing personal against Cissell, "but you've got to understand the politics out here between management and the Union. . . . I don't like for someone trying to tell me who I have to select. . . . You guys should have received priority referrals down at water and waste and not to the heat shop."

Affolter denied having any conversation with Cissell concerning his non-selection except that on about April 6, the day he notified Cissell that he had selected Rakers over Cissell, Cissell asked him why he wasn't selected. Affolter told him that, as a result of the interview, Rakers proved to be more qualified. Cissell asked no further questions and they never discussed his non-selection again, nor did they discuss priority status or management telling Affolter whom to hire. Church supported Affolter's denial that any conversation about Cissell's priority status, about the Union, or about dissatisfaction with the other employee, occurred during the May 2 lunch.

I credit Cissell. Cissell appeared to be intelligent and was no stranger to labor-management disputes. Had he, as the Respondent suggests, made up his story in order to exact revenge on Affolter for bypassing him for promotion, I believe he would have concocted more damning statements. He appeared to be primarily interested in reporting his recollections accurately. In this instance, my credibility resolution goes to all three conversations.

Cissell and Affolter agree that they had a short conversation in early April when Affolter informed him that he had selected Rakers. According to Affolter, this was their only conversation on the subject. From my observation of Cissell, and on reviewing his union activities, I do not believe Affolter's testimony that Cissell, having raised the issue of why he was not selected, dropped the inquiry on being told simply that Rakers was more qualified based on the interview. I believe that, whether in that conversation or in another conversation, Cissell inquired further about the interview, and that Affolter responded substantially as Cissell testified.2/

The April 29 and May 2 conversations are closely related both in time and subject. Cissell's testimony regarding Affolter's repeated complaints about management interference with his hiring was persuasive and makes it reasonable to believe that Affolter expressed an intention to resist management's interference by refusing to fill positions with "priority" applicants. Affolter denied telling Cissell

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2/ The fact that the Regional Director did not issue a complaint on the Union's charge that Cissell's non-selection was discriminatory does not militate against this finding. Whether or not there was sufficient evidence of actual discrimination to justify a complaint is a completely different issue from the one presented here. I cannot review the considerations which led the Regional Director to dismiss or the Union to withdraw the charge. Somewhat puzzling, however, in light of Cissell's testimony, is the fact that, around the same time, Affolter submitted a request for Cissell's promotion to a WG-9 position which also involved rotating shifts. However, Affolter admitted that Cissell's selection was mandatory. The Respondent intimates but does not show that Affolter could have left the WG-9 position vacant. Even if he had that option, he may have declined to exercise it in order to avoid another discrimination charge or a grievance.

anything about management interference. I find Cissell to be more credible as to Affolter's comments about management and his related hostility toward "priority" applicants in both conversations. Church's support of Affolter as to the May 2 conversation does not dissuade me. Church, who works for Affolter, was placed in an uncomfortable position in necessarily being called to testify. A non-participant in the crucial exchange between Cissell and Affolter, Church's mind may well have been on other things during that part of the conversation. More important, I find it unlikely that Cissell would have chosen a setting for a made-up story that included a witness whose loyalty could be expected to be with Affolter.3/

Legal Discussion and Conclusions

The Respondent is on firmer ground in arguing the legal implications of Affolter's statements. Viewed in the circumstances surrounding the making of each of the alleged unlawful statements, and in their cumulative tendency, I find that they do not interfere with, restrain, or coerce any employee in the exercise of the rights granted by the Statute.

Affolter told Cissell that he was not selected for the rotating shift position because the contractual provision entitling him to switch to the day shift might be invoked. This statement arguably discouraged invocation of the provision and service as a union official on whose behalf the provision could be invoked. However, not every attempted

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3/ The Respondent argues that Affolter's alleged April statement about refusing to fill WG-10 vacancies as long as Cissell had a priority status is inconsistent with his requesting referrals for such positions some time between October and December, when, as he testified, he thought Cissell still had priority status. But Cissell had lost his priority status in June, and I am somewhat reluctant to believe that Affolter did not learn of it. Second, in the words of Maxwell Anderson, "it's a long, long time from May to December." Or, as Justice Douglas wrote in a different context, Affolter was "free to refrain in November from the actions he endorsed in May." NLRB v. Granite State Jt. Bd., Textile Workers Union, Local 1029, 409 U.S. 213, 217-218 (1972). In any event, that Affolter failed to follow through on his words does not dim my impression that he uttered them.

limitation of employees' protected activity violates the Statute. The question is whether the attempt should reasonably be understood as a denial or disparagement of the employee right, on the one hand, or, on the other hand, seeking of an accommodation between the employee right and the agency's right to manage efficiently and effectively. Veterans Administration Medical Center, Leavenworth, Kansas, 31 FLRA 1161, 1169-70 (1988); Department of the Air Force, Scott Air Force Base, Illinois, 20 FLRA 761, 764 (1985).4/

The entire conversation, as Cissell related it, shows that Affolter's expressed concern was that the person selected for the position continue to be available for rotating shift work. While Cissell's subjective reaction is not dispositive, it is instructive that his response strongly suggests that he recognized Affolter's statement as seeking an accommodation. Thus, he assured Affolter that he had no intention of invoking the privilege and suggested a way to avoid the problem: by assigning Cissell to the day shift and filling the rotating shift position with a new hire. Affolter's closing response, stating that he wished they had had this conversation earlier, should have reinforced the idea that he was primarily interested in having the position covered. That Cissell understood this is reflected in his testimony that if he had exercised the right to be assigned to a straight day shift, Affolter would not be filling the position that he was trying to fill.

The Respondent argues persuasively that no employee would reasonably fear adverse consequences attached to the exercise of protected activity, or reasonably be tempted to turn away from collective activity, as a result of this conversation. To find a violation, I would have to be persuaded to the contrary. I am not. See, e.g., Department of Health and Human Resources, Social Security Administration, 23 FLRA 648, 657 (1986).

4/ Although the cited cases involved the Section 7131 right to use official time, I believe the principle set forth was intended to be applicable to employee rights generally.

Counsel for the General Counsel is to be commended for citing the Veterans Administration case in her brief. Although she was unsuccessful, in my view, in distinguishing it on factual grounds, her willingness to call it to my attention represents a style of advocacy that should be encouraged.

The focus of the April 29 and May 2 conversations was, as the Respondent notes, Affolter's dissatisfaction and frustration with employee selection restrictions placed on him by higher levels of management. Affolter reacted to these restrictions by forming, or at least expressing, a bias against priority referrals -- applicants who were not competing strictly according to merit. Thus, as he told Cissell, he doesn't "like . . . someone trying to tell [him whom he has] to select." Affolter did not say that he would block Cissell's promotion because Cissell's priority status arose from a grievance proceeding. Nor, viewed objectively, did his comments convey that impression. The only reference to the Union was his implied disparagement of "politics . . . between management and the Union" that was impinging on his autonomy. His words convey no animosity toward the Union or toward Cissell for using the grievance procedure, but, rather, that Cissell was, like Affolter (in his own view), a pawn in a higher-level power game. Affolter expressly acknowledged the validity of Cissell's priority status by stating that it should have been applicable to the water and waste section.

This analysis of Affolter's remarks at these two meetings is not to deny that they could possibly be taken as a threat of loss of promotional opportunities for engaging in and benefitting from protected activities. That, however, would be a strained interpretation. Taken in their entirety and in their context, which did not include unfair labor practices or expressions of anti-union animus, Affolter's remarks could not reasonably be taken to imply such a threat or any other coercion. Therefore, they did not interfere with, restrain, or coerce any employee within the meaning of Section 7116(a)(1). Federal Mediation and Conciliation Service, 9 FLRA 201, 208 (1982); Department of the Army Headquarters, Washington, D.C. and U.S. Army Field Artillery Center and Fort Sill, Fort Sill, Oklahoma, 29 FLRA 110, 1124-25 (1987). Accordingly, I recommend that the Authority adopt the following Order:

ORDER

The Complaint in this proceeding is dismissed.

JESSE ETELSON
Administrative Law Judge

Dated: July 14, 1988
Washington, D.C.