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

LONG BEACH NAVAL SHIPYARD LONG BEACH, CALIFORNIA Respondent	
and	Case No. 8-CA-90137
FEDERAL EMPLOYEES METAL TRADES COUNCIL, AFL-CIO Charging Party	

Mr. John A. Townsend
For the Respondent

Gerald M. Cole, 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 whether, as alleged in the Complaint, ". . . Respondent, [on, or about, August 27, 1988] through Keeling threatened a representative of the Union, an employee, with disciplinary action because the representative had refused to provide information regarding the conduct of another unit

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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)."

employee which the representative had acquired while engaged in Union activity." (G.C. Exh. 1(b), Par. 7). General Counsel asserts that this case is "virtually indistinguishable from," and should be governed by, my decision in United States Customs Service, Washington, D.C. and National Treasury Employees Union, Case No. 8-CA-80171, OALJ-89-88, June 20, 1988 (hereinafter referred to as "Customs Service"). For reasons fully set forth hereinafter I do not agree and conclude that Respondent did not violate § 16(a)(1).

This case was initiated by a charge filed on December 12, 1988. The Complaint and Notice of Hearing issued on March 29, 1989, and set the hearing for June 15, 1989. By Order dated June 6, 1989, pursuant to the motion of Respondent, for good cause shown, the hearing was rescheduled for July 12, 1989, pursuant to which a hearing was duly held on July 12, 1989, in Los Angeles, California, 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 and were afforded the opportunity to present oral argument which both parties waived. At the close of the hearing, by agreement of the parties, September 5, 1989, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, on timely motion of Respondent to which General Counsel did not object but which was opposed by the Charging Party, for good cause shown, to September 18, 1989. General Counsel and Respondent each timely mailed an excellent brief, received on, or before, September 21, 1989, which have been carefully considered. Upon 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 Federal Employees Metal Trades Council, AFL-CIO (hereinafter referred to as the "Union") is the recognized exclusive representative of certain of Respondent Long Beach Naval Shipyard's employees, as more fully described in Paragraph 3 of the Complaint (G.C. Exhs. 1(b), Par. 3; 1(c)).

2. Mr. Joseph Walsh is a boiler plant operator/utility dispatcher at the Shipyard and is also Chief Steward for the Union (Tr. 11-12).

3. In his capacity as Chief Steward, Mr. Walsh represented an employeee named Rene L. Garcia in a removal action before the Merit Systems Protection Board (MSPB)

(Tr. 12-13). A threshold issue in the MSPB case was whether Mr. Garcia was a probationary employeee (Tr. 36). Once the MSPB's Administrative Judge determined that he was a status employeee, i.e., he had completed his probationary period, Respondent and Mr. Garcia, on April 26, 1988, entered into a Settlement Agreement (Res. Exh. 1; Tr. 13, 36-37) whereby Respondent agreed to cancel Mr. Garcia's removal, on January 25, 1988, and reinstate him, effective April 27, 1988, with backpay in accordance with Subpart H of 5 C.F.R. § 550 (5 C.F.R. § 550.801, et seq.) (Res. Exh. 1; Tr. 13).

4. The settlement was effectuated at a meeting on April 26, 1988, at which Mr. Garcia stated, in the presence of Messrs. Fred Billetts, Shop Superintendent; Jon A. Dodd, Labor Relations Officer; Joseph Walsh, Union Chief Steward; and Ms. Jeri L. Edwards, Labor Relations Specialist, that he had been working during the time of his removal (Tr. 15, 58, 65; Res. Exhs. 3 and 5).

5. Ms. Edwards testified that during a pre-hearing conference on April 26, 1988, Mr. Walsh told her that Mr. Garcia had been employed during the period of his removal, i.e., after January 25, 1988, but that he was only making about $7.00 per hour whereas at the Shipyard he had made over $11.00 per hour (Tr. 52; Res. Exh. 3).

6. Nevertheless, when, on May 3, 1988, Mr. Garcia submitted his declaration for backpay he put down zero for the amount earned from other employment during the period January 25 through April 26, 1988 (Tr. 19, 52) (see, 5 U.S.C. § 5596(b)(A)(i); 5 C.F.R. § 550.805(e)(1)).

7. As a result, Ms. Edwards, on the basis of statements made to her by Mr. Walsh, to her by Mr. Garcia (Tr. 53), and in her presence, reported the apparent falsification to Respondent's Security Officer (Tr. 54) and an investigation of Mr. Garcia's claim by Respondent's Criminal Investigation Division (CID) followed.

8. In the investigation of Mr. Garcia's backpay claim, CID investigators Edward Michael Dyner and Greg Baddeley sought to interview Mr. Walsh. Mr. Dyner, now employed by the Department of Agriculture, Office of the Inspector General (Tr. 68), testified that they first spoke to Mr. Walsh on May 17, 1988, and after identifying themselves and informing Mr. Walsh that they were conducting an investigation into fraud that had been committed against the Shipyard by Mr. Garcia, Mr. Dyner testified that Mr. Walsh stated,

> ". . . that he didn't have any information about Mr. Garcia working, and we told him that we had information that he did know or have knowledge of it. And at that time he became irate and didn't want to speak to us unless he had a Union representative present." (Tr. 71-72).

When Mr. Walsh requested a Union representative the interview was terminated (Tr. 72). Mr. Walsh's version is substantially different. He testified, inter alia, that the investigators said they, ". . . wanted to talk to me about Rene Garcia working off the books" (Tr. 16); that he, Walsh, asked Mr. Dyner, ". . . if he understood the Weingarten rights. . . ." (Tr. 16); that when he told them he had, ". . . no information for you until Frank Griffin, who was the Acting President of the Metal Trade Council, is present" (Tr. 16-17), that they refused to terminate the interview; and that he, Walsh, went ". . . to my supervisor and asked them to be removed from the dispatcher's office." (Tr. 17). I found Mr. Dyner a more convincing witness and, therefore, credit his version of the events of May 17, 1988.

9. CID investigators Baddeley and Dyner next met with Mr. Walsh and his representative, Acting President Frank Griffin, on May 20, 1988, at the Metal Trades Council office (Tr. 19, 72). Again, there is a sharp disagreement between the testimony of Mr. Walsh and Mr. Dyner. In essence, Mr. Walsh testified that on May 20 he and Mr. Griffin were given a copy of the Kalkines Warning (G.C. Exh. 5; Tr. 20, 21). Mr. Dyner first denied that he gave Mr. Griffin a copy of the Kalkines Warning on May 20 but immediately thereafter stated,

> "A. Excuse me. I do remember a copy of the Kalkines Warning that we had in our possession given to Mr. Griffin. I don't exactly remember what day it was." (Tr. 79).

Accordingly, I credit Mr. Walsh's version of this meeting and find that the informal meeting of May 20, 1988, was for the purpose of informing Messrs. Walsh and Griffin that they wanted to ask Mr. Walsh about Mr. Garcia and that as a federal employee he [Walsh] had to answer but if he did not action could be taken against him [Walsh] (Tr. 20).

10. The formal interview of Mr. Walsh took place on May 23, 1988, at the office of CID; both investigators Baddeley and Dyner were present; Mr. Walsh was accompanied

by Mr. Griffin; the interview was recorded and has been transcribed; and a copy of the transcript of the interview was introduced as General Counsel Exhibit 2. Two questions in particular were asked and answered as follows:

"DYNER: Did you ever speak with Ms. Edwards about Mr. Garcia working and collecting money while he was out on unemployment?

"WALSH: I cannot answer that question until Judge Vitoro makes a determination in this case.

"DYNER: You then refuse to answer that question?

"WALSH: I cannot answer the question until the Merit System Protection Board makes a determination on the case, the brief is on file.

"DYNER: Do you have knowledge of ah . . . Mr. Garcia working off the books?

"WALSH: I cannot answer that question until Judge Vitoro makes a determination." (G.C. Exh. 2, pp. 6-7).

Immediately thereafter the interview terminated (G.C. Exh. 2, p. 7).

11. On the morning of June 3, 1988, Mr. Walsh, who was working on the graveyard shift, was called to the Security Office at about 7:00 a.m. Two investigators from CID, Messrs. Murray Harper Corder and Mark Kishman were present. Mr. Corder, now a special agent with the U.S. Department of Agriculture, Forest Service (Tr. 83), told Mr. Walsh they wanted to question him about Garcia (Tr. 26, 95). Mr. Corder stated that he had in his possession copies of the affidavits of Mr. Dodd and Ms. Edwards (Res. Exhs. 3 and 5) and wanted to question Mr. Walsh about statements made in his presence or by Walsh about money earned by Garcia while he was away from the Shipyard (Tr. 86).

Mr. Walsh was shown a form (G.C. Exh. 6) and as Mr. Corder was reading the Kalkines warning[2/] (Tr. 87), Mr. Walsh handed Mr. Corder a handwritten statement (Tr. 87, 93) which stated,

> "I have reason to believe that this examination may result in disciplinary action against me or another employeee. I request Union representation during this meeting." (G.C. Exh. 7(a)).

The meeting ceased until Mr. Roger Swanson, a Union Steward, arrived shortly before 8:00 a.m. (Tr. 25). After Mr. Swanson arrived, Mr. Corder explained that Mr. Walsh would be required to sign the Administrative Warning (G.C. Exh. 6; Tr. 25) and Mr. Swanson would be required to sign as a witness (Tr. 26). Mr. Walsh refused to sign the form (Tr. 25; G.C. Exh. 6); Mr. Swanson said he thought the form was unconstitutional (Tr. 25); and Mr. Swanson refused to sign as a witness (G.C. Exh. 6, Tr. 88).

Mr. Walsh testified that Mr. Corder stated that if he [Walsh] refused to sign the form he was uncooperative and that he [Corder] was terminating the meeting (Tr. 26). Mr. Walsh stated the meeting lasted only about three minutes (Tr. 26). Mr. Corder testified that Mr. Walsh stated that he did not wish to answer any questions and that he, Corder, then asked, "Are you refusing to answer questions about Mr. Garcia?" (Tr. 88). Mr. Corder further stated that he read the Administrative (Kalkines) warning to Messrs. Walsh and Swanson, after giving them a copy to follow, and that he had explained that he ". . . was asking him to answer questions for me about what he [Walsh] knew about Mr. Garcia." (Tr. 95). Mr. Walsh gave Messrs. Corder and Kishman a second handwritten statement (Tr. 93) which stated, in part,

> ". . . I believe you are attempting to coerce and or interfere with my representational responsibilities. . . ." (G.C. Exh. 7(b)).

2/ General Counsel Exhibits 5 and 6 are identical except that the heading on G.C. Exh. 5, "Employees Acknowledgement and Kalkines Warning" does not appear on G.C. Exh. 6 and instead, there is "Civilian Employeees Administrative Warning."

Mr. Walsh asserted, in effect, that the did not refuse to answer any questions because, after he refused to sign the Administrative Warning form, the meeting was terminated. I do not credit his testimony and, instead, credit the testimony of Mr. Corder for several reasons. First, I found Mr. Corder to be a wholly credible witness. Second, Mr. Walsh's later testimony that in August 1988, he had offered to sign the form as instructed and "answer his questions" (Tr. 28), confirms that on June 3, 1988, he had refused to answer any questions and corroborates Mr. Corder's testimony. Third, Mr. Walsh's written statement (G.C. Exh. 7(b)) by strong inference implies that questions were asked, i.e., ". . . interfere with my representational responsibilities. . . ." (G.C. Exh. 7(b)). Accordingly, I find that, as Mr. Corder credibly testified, Mr. Walsh on June 3, 1988, refused to answer any questions about Mr. Garcia.

12. A formal investigative discussion (FID), a pre-disciplinary investigative discussion required by the collective bargaining agreement before the Activity may institute discipline (Tr. 26), was conducted on August 22, 1988. The FID was conducted by Mr. Ron Keeling, Superintendent of Shop 03 and Mr. Walsh's third level supervisor (Tr. 27, 35). Mr. Walsh was present and was represented by Mr. Dick Barrett, International Representative for IBEW (Tr. 27). Mr. Walsh stated that,

> ". . . Mr. Keeling said he only had two questions. The first question he asked me was did I refuse to sign the form, and I said, yes. Then, the second question he asked me, 'Did you refuse to testify in an administrative investigation?' And I said, no." (Tr. 27).

13. Mr. Walsh further testified that,

> ". . . Under our contract, the hearing officer of the FID [i.e., Keeling] is required to orally tell the employeee what the proposed penalty will be, within five work days. I had a phone conversation with Mr. Keeling. . . ." (Tr. 28-29).

Mr. Walsh called Mr. Keeling around August 27, 1988, and asked Mr. Keeling, ". . . what the recommendation of the penalty would be." (Tr. 29) and, as required by the

contract, Mr. Keeling told him that he [Keeling] was recommending Walsh's removal (Tr. 34) or "They are going to remove you from federal service." (Tr. 30).

14. The decision of the Public Works Group Superintendent, Mr. C. Bell, issued on December 13, 1988, and proposed Mr. Walsh's removal (G.C. Exh. 3). On review, Captain H. D. Dean, Public Works Officer, modified the proposed removal to a suspension for 30 calendar days (G.C. Exh. 4). The suspension was appealed to MSPB (Tr. 31).

Conclusions

1. Respondent, through Keeling, did not threaten Joseph Walsh, on, or about, August 27, 1988.

Paragraph 7 of the Complaint alleges that,

> "On or about August 27, 1988, Respondent through Keeling, threatened a representative of the Union . . . with disciplinary action because the representative had refused to provide information regarding the conduct of another unit employee which the representative had acquired while engaged in Union activity." (G.C. Exh. 1(b), Par. 7).

Mr. Walsh testified that a formal investigative discussion (FID) had been conducted on him on August 22, 1988; that the FID, required by the parties' collective bargaining agreement before discipline may be instituted, was conducted by Mr. Ron Keeling; that the collective bargaining agreement requires the ". . . hearing officer of the FID . . . orally tell the employeee what the proposed penalty will be within five work days. . . ." (Tr. 28-29); that he, Walsh, asked Mr. Keeling what the recommended penalty would be; and Mr. Keeling, as required by the parties' collective bargaining agreement, told him that he, Keeling, was recommending removal.3/

3/ Mr. Walsh placed the date as "around the 27th" (Tr. 29); but was positive it was on a Monday, ". . . about five days after the FID." (Tr. 29). The fifth regular work day after August 22, the date of the FID, would have been August 29, a Monday. As Mr. Walsh was positive he called on a Monday, I find that the call was made on August 29, 1988, not August 27, a Saturday.

Mr. Walsh called Mr. Keeling August 29, 1988, and asked what the recommended penalty would be, and Mr. Keeling, as required by the collective bargaining agreement, told him. There was no threat made; nor did Mr. Keeling's response to Mr. Walsh's inquiry interfere with, restrain, or coerce Mr. Walsh in the exercise by Mr. Walsh of any right under the Statute. Indeed, Mr. Keeling had not on August 22, when he conducted the FID, sought information from Mr. Walsh regarding the conduct of another employee. To the contrary, Mr. Walsh made it clear that Mr. Keeling asked him only two questions, namely, ". . . did I refuse to sign the form. . . ." and "Did . . . [I] refuse to testify in an administrative investigation?" Moreover, Mr. Walsh stated that Mr. Keeling had expressly declined to ask any further questions (Tr. 28).

There is no allegation in the Complaint of interrogation of Mr. Walsh other than by Mr. Keeling; no allegation that there had been a FID conducted on him because he had refused to provide information; or that the FID, because he refused to provide information, violated § 16(a)(1); etc. The sole allegation is that Respondent, through Keeling, threatened Mr. Walsh on, or about August 27, 1988. For reasons set forth above, there is no support in the record for this allegation.

2. Interrogation of Joseph Walsh was not unlawful.

Interrogation of a union steward about an employee being represented by the steward is not violative of the Statute unless the union steward is accorded a privilege or immunity. In Customs Service, supra, I held that statements by an employee to his or her, designated union representative are privileged and that the Agency violated § 16(a)(1) by compelling disclosure by the union representative. The Authority may agree, in whole or in part, or may disagree, in whole or in part. Nevertheless, in the meantime, I adhere fully to my decision in Customs Service, supra.

I did not hold in Customs Service, supra, that the privilege was without limitation. To the contrary, in denying the broader order sought by the General Counsel, I stated,

> ". . . Nor am I persuaded that all information acquired by Union officials while engaged in protected activity should be protected from disclosure. See, for example, United States Department of Justice, Bureau of Prisons,

Terminal Island, California, supra, [Case No. 8-CA-50155, Administrative Law Judge Dec. Rep. No. 55, December 6, 1985] Customs Service, supra, n. 9.

The Bureau of Prisons case, cited above, involved an occurrence during an investigation. The union representative was present representing the employee. Subsequently, the union representative was ordered, on pain of discipline, to give a statement as to what he had observed and heard. Judge Arrigo held that the Activity did not violate § 16(a)(1). However, Judge Arrigo indicated that absent "egregious" conduct by the employee he would have found that the union representative was immune from examination because an employee "might reasonably expect the existence of a supportive association with a union representative." Nevertheless, because a privilege has the effect of withholding relevant information from the factfinder, Fisher v. United States, 425 U.S. 391 (1976) (referring to the attorney-client privilege), I would protect only those statements and disclosures made by the employee to his, or her, representative, because as stated in Customs Service, supra,

> "The right and duty of a Union to represent employees in disciplinary proceedings, and the correlative right of each employee to be represented, demand that the employee be free to make full and frank disclosures to his, or her, representative in order that the employee have adequate advice and a proper defense. . . . The subjection of an employee's representative to interrogation concerning statements made by the employee to the representative violates § 16(a)(1). . . ." (Customs Service, supra, slip opinion, p. 11).

What the representative saw or heard at an investigation were not disclosures made by the employee to the representative in order that the employee have adequate advice or a proper defense and I would not protect them because I would not extend the privilege beyond those disclosures made by the employee to the representative, which disclosures are necessary to obtain informed advice and a proper representation.

Information which was privileged loses its immunity upon public disclosure. For example, in this case, when Mr. Walsh

told Ms. Edwards that Mr. Garcia had been working during the time of his removal, the information disclosed ceased to be privileged and if Mr. Walsh were questioned about his statement to Ms. Edwards, such questioning would not violate § 16(a)(1) as interrogation concerning statements made by an employee to a representative. In short, the proper line of questioning is not what Garcia told Walsh but, rather, what Walsh told Ms. Edwards.

Of course, as a limited privilege it may be claimed only as to those disclosures made by the employee to the representative. Both the Activity and the Union must understand that a proper evaluation demands that specific questions be asked. Thus, by way of example, Mr. Dyner's question, "Do you wish to answer any and all questions concerning the commission of a felony." (G.C. Exh. 2, p. 5), afforded no basis whatever for evaluation of the privilege. By like token, Mr. Walsh's refusal on June 3 to answer any questions because, ". . . I believe you are attempting to coerce and or interfere with my representational responsibilities. . . ." (G.C. Exh. 7(b)) was a wholly improper invocation of the privilege. Because not in response to specific questions it is not possible to separate proper areas of inquiry from the privileged.

Mr. Walsh was questioned on May 23, 1988, and Mr. Dyner, at Mr. Baddeley's insistence, eventually asked specific questions. The first pertinent question was:

> "Did you ever speak with Ms. Edwards about Mr. Garcia working and collecting money while he was out on unemployment?"

Mr. Walsh refused to answer. His reason did not invoke the privilege (the only justification for refusing to answer apparent to me); but assuming it did, any statement Mr. Walsh may have made to Ms. Edwards was not privileged.

The second pertinent question was:

> "Do you have knowledge of ah . . . Mr. Garcia working off the books?"

Mr. Walsh again refused to answer, and again, his reason did not invoke the privilege; but assuming that he did properly assert the privilege, Mr. Walsh's knowledge based on any disclosure by Mr. Garcia was privileged.

Mr. Walsh was questioned again on June 3, 1988, and: (a) refused to sign the Administrative (Kalkines) Warning

(G.C. Exh. 6); and (b) refused to answer any questions because, as noted above, "I believe you are attempting to coerce and or interfere with my representational responsibilities," which as already stated was an improper invocation of the privilege.

Questioning a union steward is not, per se, improper. Accordingly, Mr. Walsh's interrogation on May 23 and June 3, 1988, was not improper; the question asked on May 23 concerning Mr. Walsh's statement to Ms. Edwards was not privileged, but the question concerning Mr. Walsh's "knowledge" was, at least as asked, privileged; and on June 3, 1988, by refusing to sign a statement that he had been advised of his rights and by refusing to answer any questions, Mr. Walsh was not acting in accordance with the privilege I would accord a Union steward. Accordingly, the questions asked Mr. Walsh were proper, although Mr. Walsh quite properly could have asserted the privilege as to the question asked on May 23, 1988, concerning his (Walsh's) knowledge of Mr. Garcia working off the books. Mr. Walsh's refusal to answer was not otherwise shown to have been protected from inquiry, and, if not privileged, the threat of disciplinary action for refusing to answer did not violate § 16(a)(1). Indeed, the allegation of Paragraph 7 of the Complaint of information "acquired while engaged in Union activity" (G.C. Exh. 1(b)) improperly asserts the privilege accorded by Customs Service, and is broader than any privilege I would accord.

Having found that Respondent did not violate § 16(a)(1) in questioning Mr. Walsh. I recommend that the Authority adopt the following:

ORDER

The Complaint in Case No. 8-CA-90137 be, and the same is hereby, DISMISSED.

William B. Devaney

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: July 20, 1990
Washington, D.C.