

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: September 17, 2003

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
LOW SECURITY FEDERAL
CORRECTIONAL INSTITUTION
BEAUMONT, TEXAS

Respondent

and

Case No. DA-CA-03-0029

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
LOCAL 1010

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS LOW SECURITY FEDERAL CORRECTIONAL INSTITUTION BEAUMONT, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1010 Charging Party	Case No. DA-CA-03-0029

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 20, 2003**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, Suite 201
Washington, DC 20424-0001

PAUL B. LANG
Administrative Law Judge

Dated: September 17, 2003
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS LOW SECURITY FEDERAL CORRECTIONAL INSTITUTION BEAUMONT, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1010 Charging Party	Case No. DA-CA-03-0029

Michael A. Quintanilla, Esq.
Melissa McIntosh, Esq.
For the General Counsel

Steve Simon, Esq
For the Respondent

Kenzaburo Guzman
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice (ULP) charge which was filed on October 10, 2002, by the American Federation of Government Employees, Local 1010 (Union) against the U.S. Department of Justice, Federal Bureau of Prisons, Low Security Federal Correctional Institution, Beaumont, Texas (Respondent). On March 20, 2003, the Regional Director, Dallas Region of the Federal Labor Relations Authority (Authority) issued a Complaint and

Notice of Hearing in which it was alleged that the Respondent committed unfair labor practices in violation of § 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (Statute) through the actions of John Tombone, Warden, who purportedly told Kenzaburo Guzman, a member of the bargaining unit and the Executive Vice President of the Union, that he had authorized his lieutenants to give the Union a "hard time" because Guzman had filed two unfair labor practice charges against the Respondent as well as a charge against the Respondent with the Occupational Safety and Health Administration (OSHA). According to the Complaint, Tombone also informed Guzman that he would not receive an Outstanding rating on his annual performance evaluation because of the filing of the unfair labor practice charges and the OSHA charge. Instead, Guzman received an overall rating of Exceeds.

The General Counsel subsequently filed a motion to amend the complaint, an addendum to the motion to amend the complaint and a second motion to amend the complaint. Each of the motions was unopposed and was granted. The substantive effect of the amendments was to eliminate all allegations of unfair labor practices other than that the Respondent violated § 7116(a)(1) of the Statute by virtue of Tombone's statements to Guzman.

A hearing was held in Houston, Texas on July 9, 2003. The parties were present with their respective counsel and were afforded the opportunity to present evidence and to cross examine witnesses.¹ This decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel

The General Counsel states that, on October 15, 2001, Guzman, on behalf of the Union, filed two unfair labor practice charges against the Respondent; both charges led to issuance of complaints and both were eventually settled. During the course of discussions about the underlying issues Tombone told Guzman that he (Guzman) was making a "big deal" about nothing.

The General Counsel further states that, on October 19, 2001, Guzman, again on behalf of the Union,

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After the General Counsel had closed his case the Respondent made a motion to dismiss. The motion was denied.

filed a charge against the Respondent with OSHA. On November 5, 2001, Guzman was summoned to Tombone's office where he observed Tombone raising his voice and otherwise displaying anger during a conversation with a person whom Guzman later learned was an OSHA investigator. The investigator had come to the facility in response to the charge which Guzman had filed on behalf of the Union. Tombone identified the OSHA investigator to Guzman after which Guzman, accompanied by representatives of the Respondent, was allowed to show the investigator the location of the alleged safety violation.

According to the General Counsel, Guzman made an appointment to see Tombone on April 9, 2002, in order to discuss various labor relations issues including the proposed discipline of a bargaining unit employee. Tombone allegedly asked Guzman why the Union was involving itself in disciplinary matters. Guzman stated that the employee needed representation, at which point Tombone stated that things were going to change because various lieutenants² had told Tombone that he was siding with the Union on too many issues. Tombone also told Guzman that, because of his lieutenants' dissatisfaction as well as the OSHA and ULP charges and grievances, he was going to stop siding with the Union in disputes with the lieutenants. Tombone allegedly also stated that he had instructed the incoming Associate Warden to give the Union and Guzman a hard time.

The General Counsel maintains that Guzman again met with Tombone on April 12, 2002. Guzman's motives were twofold: as a representative of the Union he wanted to avoid an adversarial relationship with Tombone and, as an individual, he wanted Tombone to review his performance appraisal because he thought that he deserved an Outstanding rating. Tombone told Guzman that, while he understood his argument, he would not change his performance rating. According to the General Counsel, Tombone stated that he would not give Guzman an Outstanding rating because he wanted to show the lieutenants that he was going to support them rather than the Union. Tombone allegedly also referred to his remarks to Guzman on April 9.

The General Counsel argues that Tombone's denial of inappropriate statements to Guzman is not credible in view of his stated inability to remember significant events.

The Respondent

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Apparently the lieutenants are not members of the bargaining unit.

The Respondent maintains that the fact that Tombone mentioned protected activity during his discussions with Guzman does not, in itself, show that an unfair labor practice occurred. The test of whether a statement is a violation of § 7116(a)(1) of the Statute is whether it could, when judged objectively, reasonably tend to coerce or intimidate the employee to whom it was directed. Under that standard Tombone's statement of support for his lieutenants over the Union was not an unfair labor practice.

The Respondent further maintains that Guzman's evaluation was justified. In requesting that his evaluation be upgraded to Outstanding, Guzman was, in effect, asking for preferential treatment. Tombone's refusal to grant Guzman's request was a proper exercise of his management prerogative. Guzman's overall evaluation was "Exceeds" which is a favorable rating. That fact, plus the justification for the rating, corroborates the proposition that Tombone's statement to Guzman was not objectively coercive or intimidating. Furthermore, the Respondent's refusal to upgrade Guzman's evaluation for "political reasons" is a valid exercise of management rights.

The Respondent also argues that, since the filing of the unfair labor practice and OSHA charges occurred about six months before Guzman's conversation with Tombone about his evaluation, it cannot reasonably be assumed that Tombone's statement to Guzman was in any way connected with the protected activity.

Finally, the Respondent states that Tombone's testimony should be accepted rather than the self-serving testimony of Guzman.

Findings and Conclusions

The Respondent does not dispute the fact that Guzman, on behalf of the Union, filed two unfair labor practice charges (GC Ex. 3 and 4) and an OSHA charge (GC Ex. 2) against the Respondent and that Tombone was named as the agency representative in each of the charges.³ Nor does the Respondent contest the proposition that, as a matter of law, the filing of the charges was protected activity within the meaning of § 7102 of the Statute. However, there is a significant factual dispute as to the nature of the statements that Tombone made to Guzman and a legal dispute as to the significance of those statements.

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Although Guzman signed both of the ULP charges, Isaac Ortiz, the Executive President of the Union, was named as the contact person.

As to the factual dispute, I have concluded that, while Guzman's testimony is to some extent self-serving, he is a more reliable witness than Tombone. Tombone equivocated regarding each of the critical elements of the General Counsel's case. He did not testify at all about the meeting of April 9, 2002, during which Guzman raised the issue of the disciplinary action against a bargaining unit employee. When asked whether he was aware that Guzman had filed "union complaints" his answer was, "Not that I recall, but probably, yes." (Tr. 86) That statement was an obvious attempt to minimize the significance of his knowledge without an outright denial. It is simply not credible that Tombone would not have been aware of three charges in which he was named as the agency representative.

Tombone's equivocation was even more obvious when he testified about his meeting with the OSHA investigator on November 5, 2001. Tombone stated that the visit of an OSHA inspector was an unusual occurrence; in fact he had never before encountered one. Yet, when asked about his meeting with the inspector, he stated that, while he recalled the visit, he did not recall the "specific meeting" (Tr. 87). However, he testified that he was sure that he called the regional safety administrator to advise him or her of the visit.⁴ Tombone's purported lack of recollection of the meeting is totally inconsistent with his ability to remember the call to the regional safety administrator, especially in view of his testimony that the visit by the OSHA investigator was not a common occurrence.

Although, Tombone unequivocally testified that Guzman's filing of the ULP and OSHA charges played no part in his decision not to upgrade his evaluation, that denial is, at best, marginally relevant to the issue of whether he expressed hostility toward Guzman because of the charges. While Guzman clearly had a personal interest in having his evaluation upgraded, his testimony was clear and consistent. Tombone's was not. Therefore, I find as a fact that, on April 9 and 12, 2002, Tombone made statements to the effect that his future conduct toward the Union would be adversely

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Tombone also stated, contrary to Guzman's testimony, that he did not meet with the OSHA inspector for 45 minutes because his meetings with visitors never lasted more than 10 or 15 minutes. However, he acknowledged that the entire process of sending the inspector out of his office, calling the regional safety administrator to advise him of the inspection, consulting with the administrator and then calling the inspector back in "Could have. Could have not taken that long" (Tr. 91).

affected by the filing of the ULP and OSHA charges. Furthermore, I find that, on April 12, 2002, Tombone led Guzman to reasonably believe that he would not review Guzman's evaluation because of his protected activity. Even if Tombone had only stated that he was backing his lieutenants rather than the Union, there was a clear implication that this statement was a reaction to Guzman's protected activity. It makes no difference whether Tombone acted out of his own resentment toward the Union or whether he endorsed the resentment of his subordinates. In either case, his conduct is attributable to the Respondent.

The Respondent has correctly stated that the standard for determining whether a statement violates § 7116(a)(1) of the Statute is an objective one. The test is whether, regardless of the motives of the person who made the statement, the statement could reasonably tend to coerce or intimidate the person to whom it was directed, *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994). Having credited Guzman's testimony as to the events of April 9 and 12, 2002, I find that Guzman could reasonably have been intimidated by Tombone's statements. Therefore, in view of Tombone's position as the senior management representative at the facility, each of his statements to Guzman constituted an unfair labor practice.

The Respondent's position is not improved by its reference to cases such as *Equal Employment Opportunity Commission, Jackson Area Office, Jackson, Mississippi*, 34 FLRA 928, 932 (1990). While it is true that the Statute does not impose a blanket prohibition on references to protected activity, the credible evidence shows that Tombone's remarks were far more than neutral references. Tombone stated, in effect, that his attitude toward the Union and his treatment of Guzman would change because of the filing of the ULP and OSHA charges. Such statements are well within the scope of actions prohibited by § 7116(a)(1) of the Statute.

The Respondent presented the testimony of four lieutenants who prepared the performance log entries which were the basis of Guzman's evaluation and the testimony of the captain who assigned grade levels to each entry. The thrust of their unchallenged testimony was that Guzman received the evaluation that he deserved and that the evaluation itself was considered to be favorable. Although that may well be so, it is also beside the point. In amending the Complaint, the General Counsel abandoned the allegation that Guzman was the victim of discrimination in violation of § 7116(a)(2) and (4) of the Statute. The

justification for Guzman's evaluation is not a factor in the determination of whether, by virtue of Tombone's statements on April 9 and 12, 2002, the Respondent violated § 7116(a) (1). As set forth above, the only pertinent issue is the reasonably foreseeable effect of the statements.⁵ Since Tombone's statements were unambiguously related to Guzman's protected activity, it makes no difference that they occurred approximately six months after the protected activity. The amount of time between protected activity and challenged agency action is a factor which is mainly relevant to charges arising out of alleged discrimination or retaliation, *U.S. Department of Interior, Office of the Secretary, U.S. Govt. Comptroller for the Virgin Islands*, 11 FLRA 521, 532 (1983).

For the reasons set forth above I conclude that the Respondent committed unfair labor practices in violation of § 7116(a)(1) of the Statute by virtue of Tombone's coercive and intimidating statements to Guzman on April 9 and 12, 2002. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute it is hereby ordered that the Department of Justice, Federal Bureau of Prisons, Low Security Federal Correctional Institution, Beaumont, Texas shall:

1. Cease and desist from:

(a) Making statements to its employees which could reasonably be expected to interfere with, restrain or coerce such employees in the exercise of their rights to assist or to act on behalf of any labor organization, including the American Federation of Government Employees, Local 1010, AFL-CIO, or the members of any collective bargaining unit represented by such labor organization.

(b) Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action:

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In view of the withdrawal of the allegations of violations of § 7116(a)(2) and (4) it is not necessary to address the Respondent's contention that its refusal to upgrade Guzman's evaluation was a valid exercise of management rights.

(a) Post at all of its facilities in the Central Region copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Warden and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

(b) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the Dallas Region, Federal Labor Relations Authority, in writing, within 30 days of the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, September 17, 2003

PAUL B. LANG
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF

THE FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Justice, Federal Bureau of Prisons, Low Security Federal Correctional Institution, Beaumont, Texas violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT make statements to our employees which could reasonably be expected to interfere with, restrain or coerce such employees in the exercise of their rights to assist or to act on behalf of any labor organization, including the American Federation of Government Employees, Local 1010, AFL-CIO, or the members of any collective bargaining unit represented by such labor organization.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

- (Agency)

Dated: _____

By: _____ (Signature) (Warden)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with its provisions, they may communicate directly with the Regional Director, Dallas Regional Office, whose address is: Federal Labor Relations Authority, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, and whose telephone number is: 214-767-6266.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. DA-CA-03-0029, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Michael A. Quintanilla, Esq. Melissa McIntosh, Esq. Federal Labor Relations Authority 525 Griffin St., Suite 926, LB 107 Dallas, Texas 75202-1906	7000 1670 0000 1175 2461
Steve Simon, Esq. Labor Law Branch, West Federal Bureau of Prisons 522 North Central Ave., Room 247 Phoenix, AZ 85004-2168	7000 1670 0000 1175 2478
Isaac Ortiz Executive President AFGE, Local 1010 P.O. Box 22634 Beaumont, TX 77720-2634	7000 1670 0000 1175 2485
Kenzaburo Guzman Executive Vice President AFGE, Local 1010 P.O. Box 22634 Beaumont, TX 77720-2634	7000 1670 0000 1175 2492

Dated: September 17, 2003
Washington, DC