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

MEMORANDUM DATE: March 15, 2006

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS & BORDER PROTECTION
MIAMI, FLORIDA

Respondent

and Case No. AT-CA-03-0565

NATIONAL TREASURY EMPLOYEES UNION

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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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DEPARTMENT OF HOMELAND SECURITY BUREAU OF CUSTOMS & BORDER PROTECTION MIAMI, FLORIDA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. AT-CA-03-0565

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 **APRIL 17, 2006**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
1400 K Street, NW, 2nd Floor
Washington, DC 20005

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RICHARD A. PEARSON
Administrative Law Judge

Dated: March 15, 2006
Washington, DC

OALJ 06-08

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF HOMELAND SECURITY BUREAU OF CUSTOMS & BORDER PROTECTION MIAMI, FLORIDA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. AT-CA-03-0565

Ruth Pippin Dow, Esquire
For the General Counsel

Rebecca A. Laws, Esquire
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For the Respondent

Steven P. Flig, Esquire
William Harness, Esquire
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423 (2005).

On September 23, 2003, the Regional Director of the Atlanta Region of the Authority issued an unfair labor practice complaint, alleging that the Department of Homeland Security, Bureau of Customs & Border Protection, Miami, Florida (the Respondent or Agency) violated section 7116(a)(1) of the Federal Service Labor-Management Relations Statute (the Statute) by threatening and harassing an employee for engaging in activity protected under the Statute. The Respondent answered the complaint on October 17, 2003 and denied committing an unfair labor practice.

A hearing was held on this matter in Miami, Florida, at which all parties were present and afforded the opportunity to be heard, to introduce evidence and to examine and cross-examine witnesses. Subsequent to the hearing, the parties submitted a Stipulation concerning certain matters raised at the hearing. The Respondent, the General Counsel and the Charging Party subsequently filed post-hearing briefs, which I have fully considered. Based on the entire record,[1] including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

At all times relevant to this case, the National Treasury Employees Union (the Charging Party or Union) has been the exclusive collective bargaining representative for a unit of employees who formerly worked for the United States Customs Service, and who became part of the newly-created Department of Homeland Security, Bureau of Customs & Border Protection in March 2003. The specific employees involved in this case work in the Agency's Canine Enforcement Unit at the Miami International Airport, as well as at other airports and seaports in southern Florida. The Agency employs two types of Canine Enforcement Officers (CEOs) at its facilities: handlers for passive-response and aggressive-response canines. In May of 2003, Robert Rivera was the supervisor of a passive-response canine team and Kenneth Brett was an employee on that team. Brett was also a Union steward who had previously worked as a CEO and Union steward at the Fort Lauderdale airport and seaport. Dwight Raleigh was the Chief of the Canine Enforcement Branch in Miami, the second-line supervisor of all the passive- and aggressive-response CEOs (approximately 60 employees in all) in Miami.

Each CEO is responsible for training and handling a particular dog and patrolling areas of the airport. CEOs begin and end their work day when they pick up and drop off their dogs at an off-site kennel. An essential daily part

[1] Union Exhibit 1, which was offered into evidence and rejected (Tr. 324, 327), should have been incorporated into the record as a rejected exhibit, but the Reporter neglected to do so. Union Exhibit 2 was accepted into evidence, but for unexplained reasons it was not made a named exhibit; a copy of the document, however, is contained as an attachment to the Respondent's Motion for Summary Judgment or, in the Alternative, for an Order Limiting the Issues, which in turn is contained, along with the Stipulation, with the General Counsel's Exhibits in the Exhibit File.

of their duties is to utilize "training aids" to simulate real-life situations with their dogs.[2] Tr. 58-60. The CEOs (sometimes with the assistance of other CEOs or supervisors, but mostly on their own) prepare luggage or clothing that may (or may not) contain simulated drugs for the dog to detect. Each CEO is required to perform at least three such training exercises per day, and at least another four hours per week is allotted for training. Tr. 258-59, 268.

A considerable amount of testimony was utilized to debate whose responsibility it was to provide CEOs with the materials for their training aids, but the following is essentially undisputed: 1) the Agency's policy on this, established by the Agency as an exercise of its management right to assign work, placed on each CEO the general responsibility to keep his dog properly trained, as well as the specific requirement to perform three training exercises a day (Tr. 59); 2) supervisors at times would help their CEOs to find training materials and sources for such materials, but ultimately each CEO was responsible for seeing to it that his dog performed the training exercises daily (Tr. 273); and 3) the Agency's budget did not allocate sufficient funds to provide all such materials to all CEOs (Tr. 273, 342-43). As a result, CEOs had to resort to a variety of techniques for obtaining training materials: bringing supplies of their own, talking to other employees for ideas and sources, finding outside businesses that had excess or unmarketable supplies, and even looking in trash receptacles for everything from boxes to luggage. The search for training materials has been, in the words of one supervisor, "an age-old issue." Tr. 255; *see also* Tr. 260 ("a constant battle that we have to deal with.")

The specific issues of this case involve comments that were made by and to CEO Brett at two meetings, first on May 1 and then on May 7, 2003.[3] On Thursday, May 1, Canine Enforcement Branch Chief Raleigh conducted his weekly "muster," or general meeting for the CEOs and supervisors. Supervisory CEO Rivera was on vacation that week and did not attend the muster, but CEO Brett did attend. After Raleigh

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[2] Throughout the hearing, witnesses used the terms "training aids" and "training materials." Essentially, a "training aid" is something that is constructed by a CEO to simulate a situation that will cause his dog to alert and detect contraband; the physical materials used by the CEO to construct a training aid (such as luggage, tape, boxes, purses and clothing) are "training materials." *See, e.g.*, Tr. 174.

[3] Hereafter, all dates are in 2003, unless otherwise noted.

spoke to the officers about issues he felt were of immediate importance, he opened the floor for questions, and Brett raised the issue of materials for training aids. He asked how CEOs could find the necessary materials to prepare the daily training aids necessary to train their dogs, and he also asked whether this was the responsibility of CEOs or management. Tr. 67-68, 155, 221-22, 300-01. Brett stated that when he had worked at Port Everglades (the Fort Lauderdale seaport), he had a contact with a private businessman who supplied him with materials, but this person did not have enough materials for all the CEOs working in Miami. *Id*. Brett further indicated that other CEOs in Miami had approached him about finding materials for training aids, and that this was a general problem that needed to be addressed. Tr. 68, 173, 185-86. Chief Raleigh told Brett that he should speak to his supervisor first about the problem, but Brett said that he already had done so, without any resolution. Tr. 67, 155, 223, 301. According to one attendee at the meeting, Brett also asked that his supervisor assist him in putting out training aids when he was working alone. Tr. 222. According to most attendees, the discussion between Brett and Raleigh got at least slightly heated: Raleigh began to raise his voice and told Brett that he should take the initiative to find his own materials to advance his career, and two observers described the atmosphere of the discussion as "very uncomfortable." Tr. 156, 224.

Brett's supervisor, Rivera, returned to work on Monday May 5, and early that week Raleigh told Rivera that Brett "had brought up at the muster that he was not getting training materials and was having a problem with Brett." Tr. 303. Rivera testified that even before Raleigh raised the issue with him, other officers had told him about Brett's comments at the muster, to the effect that Brett "wasn't getting training and training materials[,]" and that Brett had claimed to have raised the issue with Rivera "numerous times and I just ignored him." Tr. 226-27, 354. Rivera told Raleigh there was no problem getting training materials, but that he would "talk to Brett and take care of it." Tr. 304.

In the early afternoon of March 7, another employee told Brett that Rivera wanted to see him in the K-9 office on Terminal E of the airport. As he approached the office, which contains an outer room for all CEOs to use and an inner room that supervisors Rivera and Gernaat use as their private office, Brett saw Rivera and Rivera asked him to come inside. Tr. 70-71, 355. According to Brett, Rivera began talking to him as they walked to the office (Tr. 71); according to Rivera, he waited until they were in his office

and the door was closed before he started talking (Tr. 355). Neither man could be sure whether anyone in particular was in the outer office as they passed through, although CEO and fellow Union steward Michael Sklarsky testified that he was there and overheard the first part of their conversation. Tr. 157-58. Supervisory CEO Gernaat was already in his office when Rivera and Brett entered, and he immediately left the room at Rivera's request; he testified that he did not see Sklarsky in the outer office as he left. Tr. 228.

When Rivera was alone in his office with Brett, Rivera said he understood that at last week's muster, Brett had "brought up issues to my Chief about your not getting training . . . materials, that you had approached me on this several times and that I never did anything about it." Tr. 355. Brett's testimony essentially confirmed this (Tr. 72-73), but the two men's testimony diverged sharply from that point on. According to Rivera, Brett denied ever making the remarks attributed to him at the muster, saying that "they" must have misunderstood him and offering to "clarify" his remarks at the next muster. Tr. 355. Rivera told Brett he did not need to clarify anything, but that he simply wanted Brett to understand that when he has a problem in the future, he should give Rivera the opportunity as supervisor to handle it first. Tr. 355-56. According to Brett, Rivera immediately began to raise his voice and expressed his upset at Brett's having raised the training materials issue to the Chief, putting Rivera "in an unfavorable light with higher management." Tr. 72. Brett testified that he admitted raising the issue at the muster but insisted to Rivera that he had previously raised the same issue to him, without success. Tr. 72-73. At that point, according to Brett, Rivera "got up out of his chair . . . and said, 'I'm not the type of person to fuck with. You don't know who you're dealing with. You know, this badge comes right off and we can deal with this man-to-man." Tr. 73. Both men testified that shortly after this verbal exchange, they began to discuss another subject, and Brett then left to complete the remainder of his shift.

Both the General Counsel and the Respondent offered witnesses who observed brief, but inconclusive, segments of the Rivera-Brett exchange. CEO Sklarsky testified that as the two men walked through the K-9 office and into the supervisors' office, he heard Rivera ask Brett why he had brought up the training aid issue to the Chief and not to him. He said Brett replied that he had asked Rivera about it, and that Rivera said that "we could handle things here." Tr. 158. At that point, the conversation was getting heated, so Sklarsky left the room. Tr. 158-59. Later that afternoon, outside the airport, Brett saw Sklarsky and told

him that he had just gotten into an argument with Rivera, who had grabbed his badge and said that it comes off at the end of the day. Brett asked Sklarsky what he thought that meant, but Sklarsky didn't tell Brett that he'd overheard the first part of the conversation. Tr. 159-60. Supervisory CEO Gernaat testified that after leaving his office when Rivera and Brett entered, he walked to his car (parked outside the terminal concourse) and then realized he had forgotten something. Tr. 228. He went back to the office, entered without knocking, retrieved the item he needed and left immediately. Brett and Rivera were still in the office, and although Gernaat did not hear any conversation between them, he indicated that they were seated and appeared to be calm. Tr. 228-32.

After Brett had finished working on May 7, he telephoned a vice-president of the Union to discuss his confrontation with Rivera, and the next morning he talked to the Union's chief steward, Barbara Evans, about it. At Evans's urging, Brett made a complaint about the incident with the Agency's Internal Affairs office and prepared a written statement describing the events of the previous day. G.C. Ex. 2. The Union also arranged a meeting with Agency management officials later on May 8. Assistant Port Director Thomas Mattina held that meeting and listened to both Brett and Rivera give their accounts of their conversation of the day before. Mr. Mattina hoped to get the parties to resolve the issue then and there, but when it became evident that Brett had filed a complaint with Internal Affairs and the incident could not be attributed to a misunderstanding, he told Ms. Evans that the Union would have to decide whether it wanted to pursue the matter. He also spoke to Raleigh and Rivera privately to hear their account of the incident, and Rivera prepared his own written statement. Resp. Ex. 4.

DISCUSSION AND CONCLUSIONS

Issues and Positions of the Parties

The General Counsel alleges that Supervisory CEO Rivera violated section 7116(a)(1) of the Statute by harassing and threatening Brett for raising the issue of training materials to Chief Raleigh. An underlying premise of this allegation is that Brett was engaged in protected activity under the Statute when he made his comments at the May 1 muster. The Respondent denies that Rivera made the threatening comments attributed to him, but it further argues that Brett was not engaged in protected activity at all on May 1. Although Brett was a Union steward, the Respondent asserts that he was not acting in that capacity

when he spoke out at the muster; that nobody had asked Brett to raise the issue of training materials that day; that the Union institutionally had never made this an issue of labor-management debate; and that Brett was actually engaged in a strictly personal complaint against either Rivera or the Agency.

On the factual question of whether Rivera threatened Brett on May 7, the parties draw diametrically opposed inferences from the witnesses' accounts, and they make conflicting claims about the motives and actions of the primary participants. The General Counsel points first to the events of the May 1 muster, which provided the background for the Rivera-Brett meeting the following week. The GC notes the testimony of other witnesses that Chief Raleigh got upset at Brett's complaint regarding the lack of training materials, and that the atmosphere of the muster became very "uncomfortable." In the GC's view, when Rivera returned from leave the week after the muster, both Raleigh and other employees made it clear to Rivera that Brett had been complaining about him. On May 7, Rivera asked his fellow supervisor, Gernaat, to leave the office before he confronted Brett, suggesting to the GC that Rivera had a less than friendly intent in speaking to Brett. The GC also points to Sklarsky's observations from the outset of the May 7 meeting and from his conversation with Brett shortly after the confrontation. This shows, the General Counsel argues, that Rivera was already beginning to get upset at Brett even before he closed the door to his office, and that Brett was quite shaken emotionally in the wake of the meeting. Brett's prompt complaints to the Union and Internal Affairs also suggests to the GC that Brett was telling the truth.

The Agency, however, paints an entirely different picture. To it, Brett was simply a complainer with a personal axe to grind and no motives of assisting his fellow employees or his Union. Brett had been reassigned at least temporarily from the Fort Lauderdale area to Miami, and Brett was quite unhappy at this. He seized on the issue of training materials to make his supervisor look bad and to get himself reassigned back to Fort Lauderdale. The Agency discredits Sklarsky's testimony and emphasizes Gernaat's partial observations of the May 7 encounter. It notes that Sklarsky never mentioned to anybody, until the day before the hearing, that he was in the outer K-9 office when Rivera and Brett entered, and it cites evidence suggesting that Sklarsky does not generally arrive at the airport until later in the afternoon than the incident occurred. Gernaat, however, saw the protagonists at the start and in the middle of the meeting and noticed nothing out of the ordinary; this

discredits, according the Respondent, the claim that Rivera was angry at Brett or threatened him in any way.

Thus, this case involves two issues: was Brett engaged in protected activity when he spoke out on May 1? If he wasn't, then Rivera's behavior on May 7, however, threatening it might have been, did not violate section 7116 (a)(1). If Brett was engaged in protected activity, I must then determine whether Rivera made statements to him that would tend to coerce or intimidate him from exercising his statutory rights.

Analysis

1. Brett Was Engaged in Protected Activity

Any examination of alleged interference with protected activity must begin by identifying the right that is protected. Section 7102 of the Statute gives employees the "right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal." It further provides that this includes (among other things) the right "to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials . . . ." Unlike section 7 of the National Labor Relations Act, the Statute does not protect employees engaged in concerted activity that is unrelated to membership in, or activities on behalf of, a union. *See, e.g., U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1037-38 (1992) (*DOL*); *Veterans Administration Medical Center, Bath, New York*, 4 FLRA 563, 570-71 (1980) (VA, Bath). Thus in *VA, Bath*, twelve doctors were held not to be engaged in protected activity when they sent a letter to the hospital's Medical Director protesting how the Chief of Staff treated employees. In that case, there was no negotiated grievance procedure between the newly certified union and the hospital, and the protest filed by the doctors was not under the aegis of the union. Therefore, even though the action was concerted activity and related to general working conditions, it was unprotected because it was not on behalf of a union.

While the Statute requires protected activity to be in assistance to a labor organization, the Authority construes this concept quite broadly. In *Navy Resale System Field Support Office Commissary Store Group*, 5 FLRA 311 (1981), an injured employee seeking advanced sick leave contacted his union steward and was subsequently chided by his supervisor

for going outside the chain of command. The employee was not himself a union representative, but his consultation with a union official about his employment rights was nonetheless protected activity. For more recent applications of this principle, *see United States Department of the Treasury, United States Customs Service, Miami, Florida*, 58 FLRA 712 (2003), and *DOL, supra,* 43 FLRA 1036.

In *Department of the Treasury, Internal Revenue Service, Louisville District*, 11 FLRA 290 (1983), a union steward was chided by a supervisor for consulting the Agency's personnel office about another employee's question relating to a job offered to the employee. While this clearly involved a union representative, the Agency argued, among other things, that his activity was unprotected because he was interfering in a reserved management right to determine where a position is located. This argument was rejected, however: the ALJ noted that even though the conversation occurred before a grievance had been filed, the "grievance" process (as defined in section 7103(a)(9) of the Statute) includes informal, pre-filing attempts to investigate or resolve a "matter relating to the employment of any employee". 11 FLRA at 297-98.

Although the Respondent did not cite them in its brief, its arguments here most closely resemble issues that arose in the *DOL* case, *supra*, and in *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Detroit Teleservice Center, Detroit, Michigan*, 42 FLRA 22 (1991). In the latter case, it was held that an employee's personal letter to the Commissioner of Social Security, complaining about local management's shortcomings, was not protected activity. The employee was not a union representative and was not acting in any way on behalf of the union; while she may have sent the union a copy of her letter, the agency was not shown to have known this. Thus the Authority concluded that the letter "had no connection to Union activity or asserting rights under the parties' collective bargaining agreement." 42 FLRA at 24. In the ALJ's decision in *DOL*, 43 FLRA at 1060 n.10, in the course of explaining the case law concerning a single employee's protected activity, the ALJ noted that "at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity." The ALJ cited to an NLRB decision that an employee's "purely personal griping" does not constitute concerted or protected activity. *Capital Ornamental Concrete*, 248 NLRB 851 (1980). In the case at bar, the Respondent seems, in essence, to be arguing that Brett's comments about training materials at

the May 1 muster were actually a purely personal gripe. It asserts that Brett was not "representing anyone" when he spoke at the muster (Respondent's Brief at 22); he didn't tell Chief Raleigh about any complaints from other employees, and at the hearing he was similarly evasive as to the specifics of prior complaints he had received from other CEOs; in reality, Brett was raising the issue in order to get reassigned to Fort Lauderdale.

I do not accept these arguments, either factually or legally. First of all, Brett clearly was a Union representative, and I find that in making his comments on May 1, he was "act[ing] for a labor organization in the capacity of a representative". In order to act for a labor organization, a steward does not have to announce that his comments are made in his union capacity. *See, e.g. Federal Bureau of Prisons, Office of Internal Affairs, Washington, D.C. and Federal Bureau of Prisons, Federal Correctional Institution Englewood, Littleton, Colorado*, 53 FLRA 1500, 1516-18 (1998). Moreover, it was evident to the management officials at the muster that Brett was articulating a problem that was not personal to himself, but was common to other CEOs as well. Brett had made it clear in his comments to Raleigh that his "contact" had been able to supply him with enough materials for his own needs, but he was trying to help other CEOs also obtain materials. Indeed, one outcome of the discussion at the muster was that Brett would be allowed working time to go to Fort Lauderdale to meet with his contact and to see if that contact could supply other CEOs with training materials. Tr. 155-56, 221-22, 258-59, 301, 306-07.

Furthermore, it is irrelevant whether a grievance had previously been filed on this issue, or even whether such a grievance involved one of management's reserved rights. Even if Brett had not previously obtained the authorization of other Union officials to raise this issue on May 1, and even if Brett had not previously discussed the issue with Rivera (an assumption I do not make, but I pose it here simply for argument's sake), he had the right as a Union steward to bring it to Chief Raleigh's attention. The issue of training materials related to the employment of Brett and his fellow CEOs, and it is encompassed within the term "grievance" defined in section 7103(a)(9). Brett was a Union steward, performing the duties of a steward, when he asked the Section Chief for management assistance in dealing with an "age-old issue" faced by CEOs. It is the Agency, not Brett, that has tried to personalize this incident. Indeed, that has been the crux of the problem since May 1, 2003.

2. Rivera Made Coercive Statements to Brett on May 7

Having concluded that Brett was engaged in protected activity on May 1, I must determine whether Rivera acted on May 7 to coerce Brett or to restrain him from engaging in such activity. Ultimately, this is a credibility dispute: I must either accept Brett's underlying version of the May 7 meeting or Rivera's. And while I believe that the actual conversation on that day incorporated elements of both men's testimony, I credit Brett's account far more than Rivera's. In particular, I find that Rivera told Brett (or words to this effect) that Brett's comments on May 1 had put him in an unfavorable light, and he asked Brett "keep things in-house." He further told Brett that he wasn't "the type of person to fuck with", and he offered to take his badge off and deal with the matter "man-to-man." Looking at these comments objectively, any reasonable employee would feel threatened with physical harm and restrained from raising such issues with higher management.

The May 1 conversation between Brett and Raleigh set the stage for the events of the following week. While Raleigh testified that he did not raise his voice or become combative to Brett (Tr. 329-30), both Gernaat (Tr. 223-24) and Sklarsky (Tr. 155-56) testified that he did raise his voice, and both men used the phrase "very uncomfortable" to describe the atmosphere of the exchange. Tr. 156, 224. It is also clear that Agency management, from Raleigh down, viewed Brett's comments as "complaining" and "critical of his supervisor." *See, e.g.*, paragraph 5 of Union Exhibit 2, Raleigh's affidavit, that is attached to the Respondent's Motion for Summary Judgment. While it is certainly true that Brett was expressing a complaint, it appears to me that Agency officials took it much more personally than Brett intended it. From the entire context of the May 1 muster, it appears to me that Brett was trying to raise a general problem concerning the shortage of training materials, which affected many CEOs and which required (in Brett's view at least) more supervisory assistance. Brett himself already had an outside source for his own materials, but that source would not be sufficient for 60 CEOs, and he was trying to make the Branch Chief aware of this larger issue. Raleigh, however, insisted on seeing the matter handled through the chain of command, as if this was simply a problem between Brett and Rivera. Thus, in my view, Brett's articulation of a general problem was transformed by management into an "attack" by Brett on his supervisor behind Rivera's back.

By the time Rivera returned to work a few days later, the section was rife with talk about the Raleigh-Brett exchange, and Rivera quickly heard about it from many

sources. Even taking Rivera's testimony at face value, he clearly perceived that Brett had complained "about him not getting training. That he had approached me several times and I hadn't done anything about it." Tr. 353. This is, as I noted above, a twisting of Brett's initial presentation to Raleigh of a question affecting all CEOs, not just himself. Rivera personalized the issue just as Raleigh had, which is understandable since Raleigh told him about the May 1 meeting and ordered him to take care of it. According to Rivera, he told Brett, "What I want to do is, I want to make sure that what you said to the Chief, you've never approached me on this." Tr. 355. Rivera and Brett immediately got into a dispute as to whether Brett had discussed this issue with him previously, but this is also understandable, since the "issue" in Brett's mind was different than the issue in Raleigh's and Rivera's minds. Given this background, it was inevitable that the Rivera-Brett meeting would become an argument.

I also find it suspicious that Rivera asked Gernaat to leave him alone with Brett at the start of their meeting. Tr. 227. While this fact, in isolation, could have a perfectly innocent or acceptable explanation, in the context of this case it suggests to me that Rivera intended to chew Brett out for speaking out at the muster. Supervisors sometimes make a point of having another supervisor sit in on a counseling session, so that they will have a witness; but Rivera's request that Gernaat leave them alone suggests that he wanted to deal with Brett "man-to-man."

In light of these facts, Brett's account of the meeting is much more credible to me than Rivera's. I believe that Rivera was already harboring hostile feelings about Brett's May 1 comments before the meeting started, and Brett's insistence that they had previously discussed the training materials issue would likely have angered him further. Rivera is probably correct when he testified that Brett tried to attribute what Rivera had heard to a "misunderstanding" (Tr. 355), because Rivera had indeed presented the "issue" as Brett complaining about Rivera's inadequate training, whereas Brett viewed his comments to Raleigh as raising a generalized problem facing all CEOs. Brett may well have offered to "clarify" his comments at the next muster, but this was not really what Rivera wanted: Rivera wanted Brett to keep quiet entirely about the lack of materials (at least publicly) and to deal with it strictly one-to-one. I believe Brett's testimony that he told Rivera that the problem of the inadequate supply of training materials was persisting and needed to be addressed by management (Tr. 73), and that this further angered Rivera to the point of threatening Brett. Specifically, Rivera told

Brett, "I'm not the type of person to fuck with", and he offered to remove his badge and deal with Brett "man-to-man." The clear meaning of these statements was to threaten Brett with physical harm after work, if he insisted on complaining to Raleigh.

Rivera's, and the Agency's, version of the events simply does not meet close scrutiny and seems inherently implausible to me. First of all, accepting Rivera's account would require me to believe that Brett fabricated the entire incident of May 7 out of whole cloth. According to everyone involved, Rivera and Brett went into Rivera's closed office for the purpose of reviewing Brett's comments at the May 1 muster. Then, according to Rivera, Brett agreed with Rivera that there was no problem concerning training materials, yet turned around minutes later and complained to fellow steward Sklarsky about Rivera's threat, and repeated that allegation to other Union officials and to Internal Affairs later that day and the next morning. If indeed (as Rivera insists) Brett had retracted his May 1 comments when speaking privately to Rivera on May 7 and had assured Rivera that he would keep his concerns about training materials "in-house," I don't think he would have turned around minutes later and accused Rivera of threatening him. Sklarsky testified that when he saw Brett later that afternoon, Brett told him about Rivera's threat and that Brett appeared "flustered and shaken". Tr. 160. While Brett's repetition of Rivera's comments to Sklarsky was hearsay, the comments have probative value because they are indicative of Brett's excited state of mind, and his immediate reporting of the threat is further indication that Brett did indeed feel threatened. If Rivera's comments to Brett on May 7 had been as innocuous as he described them, it is incredible to me that Brett would have walked out and made such serious accusations against a supervisor to several Union officials and to the Agency's Internal Affairs office.

In order to credit Rivera's account, I would also have to believe that Sklarsky, in addition to Brett, perjured himself and invented his account of having seen Rivera and Brett walk into Rivera's office. Tr. 158-59. The Respondent went to great lengths at the hearing to try to discredit Sklarsky, but these efforts were mostly unsuccessful. For instance, while the Respondent offered witnesses testifying that Sklarsky could not have been at the airport early enough to have seen Rivera and Brett enter Rivera's office, I found the record to be quite unclear as to precisely when the meeting actually occurred and as to when Sklarsky arrived at the airport that day. Both Brett and Rivera changed their estimates of the time of the meeting from their affidavits (G.C. Ex. 2 and Resp. Ex. 4)

to their testimony, and all of the evidence regarding the time of the meeting was extremely approximate in nature. Moreover, the testimony about Sklarsky's time of arrival was equally approximate. Tr. 170. There is a period of time around 1:30 p.m., give or take an indefinite margin of error, that the Rivera-Brett meeting could have occurred and Sklarsky could have been present as well.

The Respondent also argued that Sklarsky's testimony describing the start of the Rivera-Brett meeting is suspect, because Sklarsky did not tell Brett or the Union about it until shortly before the hearing. I do not think that such an inference is warranted. In its Prehearing Disclosure filed on December 23, 2003, the General Counsel notified the Respondent that Sklarsky would be a witness and would testify about his conversation with Brett after the Brett-Rivera meeting. The General Counsel filed a Supplemental Prehearing Disclosure on January 7, 2004, the day before the start of the hearing, adding that Sklarsky would also testify about the May 1 muster and about hearing part of the Brett-Rivera conversation on May 7. I agree with Respondent that this late submission made it more difficult for it to refute Sklarsky's proposed testimony about the Brett-Rivera conversation of May 7, and for that reason I have given it little or no actual weight in my consideration of the evidence in the case.[4] In evaluating the record and deciding what Rivera said to Brett on May 7, I have looked to the testimony of the participants in that meeting and the other circumstances surrounding the meeting and the protagonists' accounts, without either crediting or discrediting Sklarsky's description of the meeting. On the other hand, I expressly reject the argument that Sklarsky was lying to help his Union confederate. In my estimation of the demeanor and overall credibility of the witnesses, I believe that Sklarsky was a reluctant witness for the General Counsel. Whatever he heard Rivera say to Brett in the early afternoon of May 7, he initially hoped to keep it to himself and to avoid any entanglement in a dispute between Rivera and Brett. It was only on the eve of trial that Sklarsky realized that he was being called as a witness and he could not stay out of the fray. His long silence may not make him a Union hero, but I do not believe it makes his testimony unreliable; on the contrary, having stayed out of

[4] On the other hand, the Respondent was fully aware that Sklarsky would be testifying about what he heard from Brett later on May 7, and I give that evidence full weight, as already discussed. Additionally, the Respondent was not prejudiced in any way by the late disclosure that Sklarsky would testify about the May 1 muster, as that was already an issue the Respondent fully understood was in dispute.

the Rivera-Brett dispute for so long, Sklarsky appears to me to be less likely to turn around at the eleventh hour and perjure himself against Rivera and the Agency. Thus, in determining what was said by Rivera to Brett on May 7, I have ignored Sklarsky's account of what he heard Rivera say, but I have not discredited Sklarsky's underlying truthfulness or his account of what Brett told him later on May 7.

The Respondent further cites Gernaat's testimony to buttress Rivera's. Gernaat testified that on May 7, he left his office when Rivera and Brett came in, but he then returned a few minutes later to retrieve some keys he had forgotten. Brett and Rivera seemed to be talking calmly, and nothing seemed amiss to him. I fully accept Gernaat's testimony, but I don't think it proves anything. The actual "argument" between Rivera and Brett did not take more than a couple of minutes, and it easily should have ended before Gernaat returned. I think that when Gernaat first left the office to allow Rivera to talk to Brett, Rivera got to the point very quickly. Based on my impressions of Brett and Rivera, I doubt that Rivera would have tolerated a long discussion about the training materials, and I doubt that Brett would have protested at length. By the time Gernaat returned to the office, Rivera had made his threatening statements and Brett likely tried to change the subject by asking Rivera a question about his overtime pay. The fact that Gernaat observed nothing out of the ordinary simply shows that the confrontation between Rivera and Brett was brief, but it does not show that a confrontation did not occur or that a threat was not made.

I also reject the Respondent's claim that Brett manufactured the accusation against Rivera in order to get himself reassigned to Fort Lauderdale; it is simply unsupported in the record. While Brett may have "whined" about preferring his old location better than Miami (Tr. 399), that does not mean that he would fabricate a charge against a supervisor and perjure himself. First, Brett would have had no reason to believe that accusing his supervisor of threatening him would result in his being reassigned to Fort Lauderdale, rather than simply being assigned to another Miami supervisor or transferred somewhere else in the geographic area. The record also reflects that management had begun rotating the CEOs every several weeks to different locations throughout the Miami-Fort Lauderdale area. Tr. 411-14. Given such a system, Brett would have rotated out of the Miami airport anyway, regardless of his complaint against Rivera. More significantly, Brett never made a request for reassignment after the May 7 incident. *See, e.g.*, Tr. 237. If he had

such an agenda, it is logical to expect that he would have proposed it to Gernaat or another management official.

Considering all the evidence leading up to and surrounding the Rivera-Brett meeting on May 7, as well as the demeanor of the witnesses,[5] I believe that Rivera made the statements attributed to him by Brett, and I find that those statements could only be interpreted as threatening.

The legal standard used by the Authority in evaluating whether an agency official has violated section 7116(a)(1) is well established. As articulated in *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 895 (1990):

> The standard . . . 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.

Furthermore, the standard is not based on the subjective perceptions of the employee or on the intent of the agency official. *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994). This does not leave room for doubt, in the circumstances of this case, that the only objective interpretation of Rivera's statements that he was "not the type of person to fuck with" and that "this badge comes right off and we can deal with this man-to-man" is that Rivera was threatening to fight Brett and beat him up. Coming in the context of Rivera's objection to Brett for having complained about the lack of training materials to Raleigh, it clearly interfered with, restrained and coerced Brett in the exercise of his statutory rights, in violation of section 7116(a)(1).

In its post-hearing brief, the General Counsel seems to be arguing that the Respondent committed two independent violations of section 7116(a)(1), first by physically threatening Brett and second by prohibiting him from freely raising employee concerns with management. This was not alleged separately in the complaint itself, and I don't believe that the evidence warrants separate violations.

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[5] I have not considered, however, any insinuations made by witnesses or by counsel that Raleigh had a reputation for intimidation, or that management accused Brett on May 8 of neglecting his dog in retaliation for his complaint against Rivera. Tr. 26-33, 85-86, 94-96, 323-27.

Rivera's statements to Brett were all made for the same purpose, to inhibit Brett from raising issues of concern to employees to management; the physical threat was directly related to Brett's exercise of his protected right to act in his capacity as a Union steward. It is not necessary to find two violations of the Statute in order to declare such threats to be unlawful.

The appropriate remedy for the Respondent's unfair labor practice is that it cease and desist its unlawful conduct and post a notice to employees to advise them of that fact. The notice should be signed by an official of the Respondent who is responsible for the activities of the Canine Enforcement Units in Miami, Florida.

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Federal Labor Relations Authority (the Authority) and § 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Department of Homeland Security, Bureau of Customs & Border Protection, Miami, Florida (the Respondent), shall:

1. Cease and desist from:

(a) Threatening any employee with physical harm or using abusive language to any employee for acting on behalf of the National Treasury Employees Union (the Union) or for presenting the Union's views to officials of the Respondent.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights assured them by the Statute.

2. Take the following affirmative action:

(a) Post at its facilities in Miami, Florida, where bargaining unit employees represented by the Union are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the management official responsible for the activities of the Canine Enforcement Units in Miami, Florida, 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 Atlanta Regional Office, 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, March 15, 2006.

_____

RICHARD A. PEARSON
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 Homeland Security, Bureau of Customs & Border Protection, Miami, Florida (the Respondent), has violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT threaten any employee with physical harm or use abusive language to any employee for acting on behalf of the National Treasury Employees Union (the Union) or for presenting the Union's views to officials of the Respondent.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute.

_____
(Agency)

Dated: _____ By: _____
(Signature) (Title)

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, Atlanta Regional Office, whose address is: Federal Labor Relations Authority, Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270, and whose telephone number is: 404-331-5300.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION, issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. AT-CA-03-0565, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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Dated: March 15, 2006
Washington, DC