

GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:)

American Federation of)
Government Employees, Local 872,)

Complainant,)

v.)

District of Columbia)
Department of Public Works,)

Respondent.)

PERB Case No. 89-U-11
Opinion No. 265

DECISION AND ORDER

The history and issues in this case are set out by the Hearing Officer in her Report and Recommendations, a copy of which is attached hereto.

The Union has excepted to the Hearing Examiner's findings and conclusions, both as to the asserted supervisory status of Ms. Washington and the facts as found concerning the events in controversy. On the latter, these exceptions merely disagree with the weight and credibility that the Examiner gave certain evidence and ask us to find unlawful certain statements that, we agree with the Hearing Examiner, are not sufficient to constitute violations of D.C. Code Section 1-618.4(a)(1) or (2).

On the issue of supervisory status, there is again no basis to reject the Hearing Examiner's conclusion. The Union complains that it was surprised by the issue at the hearing, but concedes it asked permission to submit "supporting documentation" on this issue "and in fact did so" (Union's Exception, p.6).

We accept the Hearing Examiner's recommendation and hereby dismiss the complaint.

ORDER

IT IS HEREBY ORDERED THAT:

The Complaint is dismissed.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

December 19, 1990

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BEFORE THE
PUBLIC EMPLOYEE RELATIONS BOARD



In the matter of *
 ●
 AMERICAN FEDERATION OF GOVERNMENT *
 EMPLOYEES, LOCAL 872 *
 *
 Complainants * PERB Case No.: 89-U-11
 *
 and *
 *
 DISTRICT OF COLUMBIA DEPARTMENT ●
 OF PUBLIC WORKS *
 ●
 Respondent *

REPORT AND RECOMMENDATION

Appearances

For the Respondent
 Howard Abrahams, Esq.
 District of Columbia Office of
 Labor Relations and Collective Bargaining

For the Petitioner
 Beverly Crawford, Business Agent
 AFGE, Local 872

I. Introduction

On June 14, 1989, the American Federation of Government Employees, Local 872 ("Petitioner" or "Union" herein) filed a complaint with the District of Columbia Public Employee Relations Board (PERB) alleging that the District of Columbia Department of Public Works ("Respondent" or "Agency" herein) had committed unfair labor practices and seeking an order requiring the Respondent to cease and desist from interfering with the administration and decisions of the Petitioner and refraining from intimidating and discriminating against its bargaining unit members in the exercise of their rights. Respondent filed an answer on July 14, 1989. A

hearing was held before the undersigned on June 12, 1990.* After the transcript of the proceeding became available to the parties, closing arguments were submitted and the record was closed on July 12, 1990.

II. Summary of the Proceedings and Positions of the Parties

The controversy centers on alleged actions and statements of Agency supervisors related to the Union's distribution of ten tickets to the Mayor's Prayer Breakfast ("Breakfast" herein) which was held on May 12, 1989. Harvey Roach, Sr., President of AFGE Local 872 and Jocelynn Johnson, Acting Executive Vice President, distributed the tickets to bargaining unit members employed at the billing and collection division of the Agency. The parties agree that employees attending the Breakfast received administrative leave and that employees other than those who received tickets from the Union could attend the breakfast on the same leave status provided they purchased their own tickets. The evidence is also uncontested that those attending the Breakfast would be away from their duty stations approximately two or three hours that morning. The Union contends that John Florence and Betty Schaefer, acting branch chiefs in the division, and Phillis Washington, alleged to be a supervisory employee in Mr. Florence's branch, "provoked, caused and created unnecessary confusion, suspicion and unrest among the bargaining unit members ...and ... created feelings of animosity toward [the Union] leadership" in violation of the law and that the Agency's conduct "interfered with the internal Union business, attempted to restrain and coerce its officers in the conduct of

*The Hearing Examiner notes that the date on the transcript is June 12, 1989 and directs that the transcript be corrected to reflect the correct hearing date as June 12, 1990.

internal Union business; exercised domination over the local Union's administration and discriminated in the terms and conditions of employment of certain employees, causing discouragement of continued membership in the Local". (Transcript at 14) The Agency did this, according to the Union, by, among other things, questioning members about the method employed to determine the distribution and by criticizing the Union for its selection of distributees.

The Agency maintains that its conduct and comments were in exercise of the right of free speech and within its authority as an employer since the distribution left one of the branches understaffed. The Agency contends that Phillis Washington was not a supervisory employee but rather was expressing her opinions as a member of the bargaining unit. Finally, the Agency contends that its statements and actions were nonthreatening and did not have a negative effect on the Union.

In the Complaint, the Union charges that John Florence questioned several Union members about the method used to determine who received tickets, that Phillis Washington "loudly confronted" Harvey Roach, that Betty Schaefer "individually" questioned Union members about the distribution and commented that she felt Ms. Johnson had acted unfairly by not distributing tickets within her branch.** Ms. Johnson testified the

**There were allegations in the Complaint regarding comments by James Dennis and Castina Kennedy, but the Complaint does not allege that those individuals engaged in unfair labor practices and no evidence was presented at the hearing to that effect. The Union also charged that Barbara Session, a customer service program specialist, stated "that the Union was wrong in their selection process of participants to attend the Mayor Prayer's Breakfast". However, the Complaint does not allege an unfair labor practice and there was no evidence that Ms. Session was a supervisor. For these reasons, and the reasons contained in the Discussion section of this Report, the Hearing Examiner finds that these individuals did not engage in unfair labor practices.

incident affected her "negatively because the members were...angry with the distribution of the tickets, with the process by which the Executive Board used to do it." (Transcript at p. 40) Ms. Johnson stated that Ms. Schaefer had not threatened her in any way, and to her knowledge had not threatened or made promises to the employees she had questioned. (Transcript at p. 44) Mr. Roach testified he went to see Mr. Florence in response to a telephone call from him but Mr. Florence indicated there was no need to meet. However, while he was there, Mr. Roach stated he was confronted by Ms. Washington who questioned him about why she was not selected to receive a ticket. (Transcript at pp. 51-52) Mr. Roach stated Ms. Washington raised this issue again at a subsequent Union meeting (Transcript at p. 58). Mr. Roach said the incident affected morale and that "people felt that they wouldn't attend any meetings". (Transcript at p. 59)

Tawana Schooler, a bargaining unit member in Ms. Schaefer's branch, testified that Ms. Schaefer and another individual commented that they thought she would have gotten a ticket to the Breakfast because of her relationship with Ms. Johnson. Ms. Schooler stated she was "disturbed" because the comments had nothing to do with her work. (Transcript at p. 71) Ms. Schooler stated that the Union already had a "bad name" in the office and that she found the incident was "belittling" but not "threatening". (Transcript at pp. 73-75) Vera Sprigg, another bargaining unit member supervised by Ms. Schaefer, testified that Ms. Schaefer's questioning of her had no effect on her. (Transcript at p. 80). Vicki Davis, Diana Brown, and Catherine Storke, bargaining unit members employed in Mr. Florence's branch, testified that the conduct and comments of Mr. Florence and Ms. Washington created a "kind of hostile" office

atmosphere, but that "there was a lot going on in [the] office" unrelated to the incident. (Transcript at p. 95)

Mr. Florence testified that he had first learned on May 11, 1989 that three members of his staff would be attending the event on the following morning and that in order to staff his office he had to detail employees from another building without sufficient notice. Mr. Florence stated he made no comments directly to employees but rather contacted his supervisor, Castina Kennedy, Chief of the Billing and Collection Division, to see if he could close his office. Mr. Florence stated he had initiated a telephone call to Harvey Roach, but that once advised by Castina Kennedy not to make any comments about the Union activity, he declined to meet with Mr. Roach or make any statements regarding the matter to him. (Transcript at p. 115) Ms. Kennedy testified she directed her supervisors, including Mr. Florence, not to make any comments about the matter as a precautionary measure following a complaint by Ms. Johnson to Gwen Allen, Special Assistant for the Labor Relations Office. Ms. Schaefer testified that she was acting branch chief in the section in which Ms. Johnson was employed and she had inquired about the distribution because no one in her branch had been offered tickets and she felt that Ms. Johnson, who was friendly with some of her co-workers, should have offered them tickets. Ms. Schaefer stated she was just "curious" and did not intend to "undercut the Union". (Transcript at p. 157)

Ms. Washington testified that she made her comments about her dissatisfaction with the distribution of tickets as a bargaining unit member. She stated that at the time of the incident she was a lead water billing assistant, without any supervisory duties and the only difference

between her and her co-workers was her seniority . (Transcript at pp. 138-139, 147) She testified that she was disturbed that she was going to be the only employee in the branch that was working while her co-workers were at the Breakfast and expressed her dissatisfaction to Harvey Roach. (Transcript at pp. 148-149) Ms. Washington's assertions that she was not a supervisor were supported by Ms. Kennedy and Mr. Florence. Mr. Roach agreed with her statement that she was a bargaining unit member at the time of the incident. (Transcript at p. 64)

III. Issue

1. Did the Agency engage in unfair labor practices by the conduct and statements of its supervisory employees related to the distribution of tickets to the Mayor's Prayer Breakfast in May 1989?

2. Was Phillis Washington a supervisory employee at the time of the charged misconduct?

IV. Applicable District of Columbia Code (1981 edition) Provisions

Section 1-618.4. Unfair labor practices.

(a) The District, its agents and representatives are prohibited from:

(1) Interfering, restraining or coercing any employee in the exercise of the rights guaranteed by this subchapter;

(2) Dominating, interfering or assisting in the formation, existence or administration of any labor organization, or contributing financial or other support to it, except that the District may permit employees to negotiate or confer with it during working hours without loss of time or pay;

(3) Discriminating in regard to hiring or tenure of employment or any term or condition of employment or discourage membership in any labor organization, except as otherwise provided in this subchapter;

Public Employee Relations Board Interim Rules

103. Unfair Labor Practice Proceedings

103.9 The purpose of hearings under Chapter 103 is to develop a full and factual record upon which the Board may make a decision. Provided however That the party asserting a violation of the order shall have the burden of proving the allegations of the complaint by a

preponderance of the evidence. The principles of relevancy and materiality are paramount. The technical rules of evidence do not apply. The procedures of Chapter 109 of these rules shall apply to the hearing.

V. Findings of Fact

1. The Union, through its president and acting executive vice president, selected ten bargaining unit members to receive tickets to the Mayor's Prayer Breakfast held on May 12, 1989.

2. Three of the tickets were distributed to employees within the branch supervised by John Florence, who first learned of the distribution to all three individuals on May 11, 1989. Mr. Florence was concerned because the absence of the three employees would significantly deplete the office of necessary staff. Mr. Florence telephoned Mr. Roach on May 11, 1989. Mr. Florence obtained sufficient staff coverage by utilizing staff from another office.

3. At the request of Gwen Allen, who had received a complaint from Jocelynn Johnson about the actions and/or comments of Agency supervisors regarding ticket distribution, Castina Kennedy advised supervisory staff, including Mr. Florence, on May 11, 1989, to desist from making any comments to bargaining unit members concerning this Union activity. After that direction, Mr. Florence made no additional comments and declined to meet with Mr. Roach who came to see him following the call.

4. On May 11, 1989, when Mr. Roach visited Mr. Florence, he was confronted by Phillis Washington. Ms. Washington was serving in an acting position as lead water billing assistant and was a member of the bargaining unit. Ms. Washington expressed her displeasure over the method used to select unit members who were to receive tickets and her displeasure that she was not one of the members chosen.

5. Ms. Schaefer questioned several of the employees in her branch regarding the method of ticket distribution, expressing her concern that members of her branch had not been selected. She expressed her opinion on this matter directly to Ms. Johnson.

VI. Analysis and Discussion

The Union has the burden of proving by a preponderance of the evidence that the Agency engaged in unfair labor practices in violation of D.C. Code Section 1-618.4(a). After considering the evidence presented in this case, both testimonial and documentary, the Hearing Examiner finds that the Union did not meet its burden of proof. Although the Union charged that the conduct of the Agency's supervisors was an intentional effort to cause "confusion, suspicion and unrest" among bargaining unit members and to create "feelings of animosity" toward the Union (Transcript at p. 14), there was insufficient evidence to support these allegations.

It is well established that employers do not "restrain, coerce or interfere" with protected rights of employees when discussions by employers do not contain threats or promises, NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) or suggest an element of coercion or interference, Midwest Stock Exchange v. NLRB, 635 F.2d 1255, 1267 (7th Cir. 1980). In Gissel, 395 U.S. at 617, the Supreme Court cautioned that the "employer's free speech right to communicate his views to his employees cannot be infringed by a union or the Board." Courts have recognized that supervisors and those they supervise work closely together and in

the normal course of events may discuss a wide range of topics, including union activities. In Graham Architectural Products v. NLRB, 697 F.2d 534, 641 (3rd Cir. 1983), the court concluded that "[t]o hold that any instance of casual questioning concerning union sympathies violates the Act ignores the realities of the workplace". Petitioner has not established that the comments by either Mr. Florence or Ms. Schaefer were intimidating, coercive or otherwise prohibited. The testimony of bargaining unit members that the conduct resulted in anti-Union animus were accompanied by statements that the comments did not cause intimidation or fear and were not viewed as threats or promises. The Union did not establish that this or any other conduct by the Agency constituted unfair labor practices.***

With regard to Ms. Washington, the Hearing Examiner finds that Ms. Washington was a member of the bargaining unit and that her conduct and statements were made in that capacity and thus cannot be attributable to the Agency. The evidence, both testimonial and documentary, support the conclusion that Ms. Washington was not a supervisory employee regardless of the use of the word "supervisor" in Agency internal memoranda referring to Ms. Washington. In considering an employee's status as a

***Unfair labor practices have been found where, for example, an employer threatened to fire employees who discussed wages, Brookshire Grocery Co. d/b/a Super One Foods, 131 LRRM 1773, (1989), an employer threatened an employee with discharge because of his activities as a union steward, Advance Window Corp., 130 LRRM 1080, (1988), an employer questioned employees about their union sympathies and threatened to lease out part of the operation of the business unless employees ceased union activities, Lee Hotel Corp. d/b/a Airport Park Hotel, 132 LRRM 1352 (1989) and where an employer implicitly warned employees incurred risks merely by attending Union meetings, S&S Screw Machine Co., 130 LRRM 1221 (1988).

supervisor, the actual job title is in fact irrelevant. See NLRB v. Chicago Metallic Corp., 794 F.2d 527, 531 (9th Cir. 1986). The testimony established that Ms. Washington was a member of the bargaining unit during this period and that the only difference between Ms. Washington and her co-workers was her seniority in the position. She was not able to propose discipline, evaluate employees, approve leave, assign employees to duties or any of the other responsibilities associated with supervising employees. It is uncontested that she remained in the bargaining unit and continued to pay dues to the Union during this period.

VII. Conclusion and Recommendation

For the reasons discussed in this Report, the Hearing Examiner concludes that the Petitioner has not met its burden of proof that the Agency committed any unfair labor practice in this instance and the Examiner therefore recommends that the Board dismiss the complaint.

Respectfully submitted,

Lois Hochhauser

Lois Hochhauser
Hearing Examiner

August 3, 1990