UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

NEW YORK STATE UNITED TEACHERS (NYSUT)

and Case 03–CA–116945

PROFESSIONAL STAFF ASSOCIATION

John Grunert, Esq., for the General Counsel
Ira Paul Rubtchinsky, *Esq*., of Albany, New York,
for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Albany, New York on April 21, 2014. The Professional Staff Association (the Union or PSA) filed the charge on November 14, 2013,[1] and the General Counsel issued the complaint on January 28, 2014. The complaint alleges that a supervisor of the New York State United Teachers (NYSUT) (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act)[2] by telling an employee that his union and/or protected concerted activities were incompatible with his employment. The Respondent timely denied the allegations and contends that the supervisor's statements appropriately expressed disappointment that he chose to refer her request for performance-related documentation to the Union rather than promptly comply with the request.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

[1] All dates are in 2013 unless otherwise indicated.
[2] 29 U.S.C. §§ 151–169.
[3] The General Counsel's motion to correct the transcript, dated May 30, 2014, which the Respondent concurred with by email, dated June 3, 2014, is granted and received in evidence as GC Exh. 6.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a labor organization, has been a not-for-profit corporation with a place of business in Latham, New York, where it represents employees in bargaining with employers. Annually, Respondent derives from such operations gross revenues in excess of $250,000 and purchases and receives at its Latham headquarters and regional offices throughout New York State, goods and services valued in excess of $50,000 directly from points located outside of New York. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is also a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Parties

The Respondent, an unincorporated membership association, has approximately 480 employees operating out of a headquarters and 16 regional offices. Approximately 270 of those employees, as defined at Article 1 of the 2012–2015 collective bargaining agreement (the CBA), are represented by the PSA.[4] The bargaining unit includes approximately 135 labor relations specialists (LRS), who service over 1300 affiliated union locals and 600,000 members.[5] Thomas Anapolis is executive director; Mark Chaykin is director of regional services; and Anna Geronimo is the regional staff director of the southwestern regional office in Jamestown, New York (the Jamestown Office).[6] Derrick Lewis is the PSA's president.

As a regional staff director, Geronimo is responsible for the supervision of labor relations specialists located in the Jamestown Office. Other responsibilities include: direct involvement and supervision of LRS staff in organizing new bargaining units, member engagement; assisting, advising and supervising labor relations specialists in contract administration, disciplinary matters, and proceedings at the State level and before the National Labor Relations Board.[7]

Paul Csont and Shirley Bissell are labor relations specialists in the Jamestown Office. Bissell also serves as the local shop steward. Labor relations specialists are responsible for a myriad of duties: service the Respondent's local affiliates; advocate on their behalf; support their growth; represent the Respondent in the activities of local affiliates, including collective bargaining, contract administration and organizing; support the organizing of unrepresented and unaffiliated workers; assist local affiliates in maximizing member engagement and meeting the needs of their members; engage in political action; participate in events and programs; develop

[4] GC Exh. 2 at 1.

[5] R. Exh. 2–3.

[6] The Respondent admitted that these individuals were supervisors and/or agents of the Respondent within the meaning of Sec. 2(11) and (13) of the Act.

[7] R. Exh. 1.

relationships with local affiliates; and work with local affiliates as a consultant in the resolution of local issues. A notable responsibility requires labor relations specialists to be "[a]ccountable to the [Respondent] through the regional staff director."[8]

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B. The Collective-Bargaining Agreement

The Respondent and the Union are parties to a CBA which runs from September 1, 2012 to August 31, 2015. Under the CBA, the Respondent recognized the Union as the exclusive and sole collective-bargaining representative for employees in the following unit:

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> [A]ll professional personnel employed by NYSUT, including regular part-time employees and retirees for the sole purpose of enforcement of rights contained in Article XIV – J, but excluding confidential, supervisory, managerial and casual personnel, and the Assistant to the President, Assistant to the Executive Vice President, Assistant Director, and Legislative Representative.[9]

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The CBA contains provisions setting forth a grievance and arbitration procedure, and the disciplinary process for cases involving suspension and discharge. There is no provision, however, in the CBA with respect to a personnel performance evaluation process.

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C. The August 14–15 Emails

Csont started working for the Union in September 2012. As a probationary employee, he was evaluated after 6 months (March) and again 3 months later (June) by his previous supervisor, former Regional Staff Director Wally Raupp. Raupp was replaced 1 month later in July by Geronimo, a former LRS. After assuming her position, Geronimo met separately with each of the labor relations specialists assigned to her, including Csont and Bissell. On August 5, Geronimo met with Csont to discuss the work he was doing for his assigned labor organizations. She told him that she was preparing to do his 12-month evaluation and needed certain documents to complete it. Csont agreed to provide the information.[10] On August 14, Geronimo followed-up by reminding Csont that she needed the information:

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> As a follow-up to our meeting on your locals and your work, there's a few things I'm interested in, if you could provide them to me.
>
> If you have written a brief in your year here, I'd like to see it. Barring that, I'd like to see any paperwork you've done for PERB or an arbitration (IP or arb filings, etc.)
>
> I'd like . . . the paperwork for the trainings you mentioned, agenda, any handouts, power point, etc.

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[8] R. Exh. 2.

[9] GC Exh. 2 at 1.

[10] Aside from Csont's response to a leading question that the meeting transpired during the week of August 5, neither he nor Geronimo referred to the actual date. (Tr. 22–23, 75–76.)

> I'd like a list of your locals with contract status indicated (only that)—so (Name of Local) —in bargaining, contract expires (or expired) in (date). Also the number of bargaining sessions you've had thus far if they are in bargaining, and of course whether or not you are at the table.
>
> I'd like a complete list of the trainings you have done for your locals in your year here. Thanks.[11]

Csont did not reply. Instead, shortly thereafter, he spoke with Bissell about the request. Bissell, in turn, advised Csont to forward Geronimo's request to Lewis. Csont did so with an added comment that Bissell "said that you know the background and she can explain it further to you, or you can call me if you'd like."[12]

On August 15 at 10:39 a.m., Bissell emailed Geronimo, with a copy to Csont, informing her that Csont sent her Geronimo's August 14 email. Bissell also asked Geronimo to let her know "when you are available to discuss this request."[13]

On August 15 at 2:54 p.m., Geronimo followed-up on her August 14 email request to Csont by asking why he had not yet responded to her request for further information and if he intended to respond. Instead of replying, Csont immediately forwarded Geronimo's email to Bissell and Lewis.[14] Coincidentally, at 2:57 p.m., Geronimo sent Bissell an email asking "why do you want to meet on this request? This is a rather routine request for information."[15] Bissell disputed that assertion in her response at 3:02 p.m.:

> On the contrary, I don't consider this a routine request. This, in essence, is requesting him to put together a portfolio of his work—apparently for evaluation purposes. I would like to discuss this in person, rather than through email.[16]

Simultaneously, Csont replied to Geronimo by stating that her "email request for information did not specify when you needed it are you now asking for it by a certain date?"[17] She responded at 4:17 p.m.:

> I was asking why you hadn't responded and if you intend to. I kind of expected a reply of "okay, I'll gather that for you," or something of that nature. I assume it's a matter of printing out or forwarding me some things so how about next Friday.[18]

At 4:27 p.m., prior to a further response from Csont, Geronimo noted her displeasure with his actions up to that point:

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[11] GC Exh. 3 at 1.
[12] GC Exh. 4.
[13] GC Exh. 3 at 2.
[14] GC Exh. 4 at 2.
[15] GC Exh. 3 at 4.
[16] GC Exh. 3 at 6.
[17] GC Exh. 3 at 5.
[18] GC Exh. 3 at 7.

> Paul, I'm sorry to be responding to you via email as I feel in person is better, but I had three meetings in Buffalo today and I'm working out of my car. I just want to ask you, regarding your last response to me, if you are certain this is how you want to deal with my request, because it is sending me a big red flag on your willingness to provide the requested information and your overall attitude towards working with me.[19]

Csont responded at 4:34 p.m. by explaining that he did not realize that he needed to respond to Geronimo's request until he had all of the information:

> Sorry that you thought that I was being difficult to work with it was not my intent. I didn't realize that there was a need to respond ok I just figured that the response would come when all of the information was gathered and I had a strategic planning meeting with the fredonia ta and had not gathered anything as yet.[20]

Geronimo replied at 4:50 p.m., expressing her concern that Csont chose to forward her information request to his union representative rather than provide the information:

> Paul, let's not be disingenuous. Your first instinct was to forward my request to the PSA rep rather than come to me and ask my any questions you might have, such as when would I like this material. That is sending me a very clear message about your view on working with me. I will be in all day tomorrow if you have questions or concerns on this request.[21]

A few minutes later, Csont forwarded Geronoimo's response to Bissell and Lewis, stating that "[s]he actually said it, doesn't like me going to the union."[22]

A few hours later, Bissell concluded the exchange with an assessment as to the consequences of her statements to Csont and reiterating the need for union representation to be present when Geronimo met with Csont:

> Anna, I need to repeat my request to meet with you regarding your request to Paul – and now the follow-up emails you have sent him. I am sure you didn't intend your messages to Paul to sound like the basis for an interference charge, but that's the problem with email communication. However, based on those emails, I have advised Paul not to discuss this issue with you without PSA representation. Please let me know when you are available to meet to discuss this in person. As I mentioned in response to your request for a meeting date to discuss my locals, I am available any time during the day on the 27th.

No grievance was ever filed as a result of Geronimo's emailed remarks to Csont and he supplied the requested information on August 16.[23]

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[19] GC Exh. 5 at 2.
[20] GC Exh. 3 at 9.
[21] GC Exh. 5 at 2.
[22] GC Exh. 5 at 1.
[23] Aside from the ramifications of her remarks, there was no evidence of labor discord between the Respondent, Csont and/or the PSA. (Tr. 78–80.)

Legal Analysis

The General Counsel alleges that the Respondent violated Section 8(a)(1) of the Act when Geronimo, a supervisor, conveyed unlawful statements to a probationary employee through two emails. More specifically, these emails allegedly suggested that the employee's union and/or protected concerted activities were incompatible with his employment. The Respondent denies the material allegations, insisting that the statements in question do not violate the Act because they were not made during a period of labor unrest, and there was no use of clear antiunion language. Moreover, the Respondent contends that the statements in question are stray remarks and, thus, protected by the First Amendment.

It is an 8(a)(1) violation for an employer to engage in conduct which tends to interfere with, threaten, or coerce employees in the exercise of their Section 7 rights. *Alliance Steel Products,*, 340 NLRB 495, 495 (2003); *Phillips Petroleum Co.*, 339 NLRB 916, 923 (2003); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969*); Almet, Inc.*, 305 NLRB 626 (1991); and *American Freightways Co.*, 124 NLRB 146, 147 (1959). Section 7 of the Act gives employees "the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." 29 U.S.C. § 157. In determining whether a violation is present, the Board applies an objective standard as to whether the statement reasonably tends to coerce the employee. *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004). As such, the employer's motive, or success or failure of the coercion, is irrelevant. *American Tissue Corp.*, 336 NLRB 435, 441 (2001); *American Freightways Co.*, supra at 147.

Geronimo's request to Csont for performance-related documentation was entirely appropriate. Having been recently appointed as the supervisor for the Jamestown office's LRS staff, she met with Csont in preparation for his upcoming annual performance review. She asked him for documentation during that meeting and he agreed to provide it. Apparently, he had a change of heart and delayed in providing the documentation. Geronimo followed-up her request, which she was entitled to do. At that point, Csont engaged in protected concerted activity by reaching out to his union representative regarding his concerns in providing the documentation. *Tracer Protection Services*, 328 NLRB 734, 741 (1999) (communication from one employee to another in an attempt to protect the employment of one of them constitutes protected concerted activity). Having found that Csont engaged in protected activity, the issue becomes whether Geronimo violated the Act by retaliating for such conduct. *Alliance Steel Products*, 340, NLRB at 495.

Even though several emails were exchanged between Geronimo and Csont, the General Counsel focused on two specific emails sent on August 15. In both emails, Geronimo directly addressed Csont's actions following her request for personnel-related information. In the first email, Geronimo wrote, in pertinent part;

> [R]egarding your last response to me, if you are certain this is how you want to deal with my request, because it is sending me a big red flag on your willingness to provide the requested information and your overall attitude towards working with me.

Geronimo's reference to "a big red flag," on its face, does not necessarily refer to Csont contacting Bissell. She mentions Csont's "last response" to her, which was an email in which he asked for a specific timeline for complying with Geronimo's request. Even though Geronimo made no mention of Csont's protected activity in the first email, it is not enough to consider it in isolation, as the test of whether a statement would reasonably tend to coerce requires an assessment of the surrounding circumstances in which the statement is made. *Flying Food Group, Inc.*, 345 NLRB 101, 106 (2005); *Electrical Workers,IBEW Local 6(San Francisco Electrical Contractors)*, 318 NLRB 109, 109 (1995); *Rossmore House*, 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th. Cir. 1985). In such instances, the Board has looked to the context of statements "as a whole" in order to supply meaning to otherwise ambiguous or misleading expressions. See *Homer D. Bronson Co.*, 349 NLRB 512, 513 (2007); *see also*, *Debbie Reynolds Hotel*, 332 NLRB 466, 475 (2000) (citing *Action Mining*, 318 NLRB 652, 654 (1995)).

Context for the ambiguity of the first email is clarified by the second email. In the latter, Geronimo explained, in pertinent part: "your first instinct was to forward my request to the PSA rep rather than to come and ask me . . . That is sending me a very clear message about your [Csont's] view on working with me [Geronimo]." At this point, Geronimo was clearly referring to Csont's consultation with Bissell, his union representative.

Given the context of information being gathered for a future performance evaluation, a reasonable employee would find that Geronimo's second email conveyed the message that Csont's communication with his union representative could possibly negatively affect his evaluation and, ultimately, his employment. From Csont's standpoint as a probationary employee – that he would be evaluated based on the requested information – and the temporal proximity of his recent evaluation, Geronimo's remark clearly disparaged his protected concerted activity and conveyed an implicit threat to his job security. See *NLRB v. Family Fare, Inc.*, 205 Fed. App'x 403, 404 (6th Cir. 2006) (establishing that evaluations of hourly employees effect terms and conditions of continued employment); *see also*, *Rossmore House*, 269 NLRB at 1184 (showing that a poor employee evaluations may affect whether an employee is terminated).

The Respondent's reliance on the absence of labor unrest and anti-union language, in addition to its exercise of free speech under Section 8(c), is unavailing. Unlike 8(a)(3) violations, an employer's anti-union animus, including instances permeated by labor unrest, is not a required element of Section 8(a)(1). See *Standard-Coosa-Thatcher Carpet Yarn Division, v. NLRB*, 691 F.2d 1133, 1138 (4th Cir. 1982). With respect to the right of free speech, Section 8(c) does provide that "the expressing of views, argument, or opinion" are not unlawful if "such expression contains no threat of reprisal or force or promise of benefit." However, Geronimo's statements in the second email were not merely the expression of personal opinion, but rather, threatening remarks regarding Csont's future protected activity, and suggested that such activity was incompatible with their working relationship. *Wal-Mart Stores, Inc.,* 350 NLRB 879, 880 (2007) (suggesting that even though disparaging remarks alone may be insufficient to establish an 8(a)(1) violation, implying that protected activity is incompatible with continued employment would be unlawful).

In conclusion, Geronimo's statements in her August 15 email communications to Csont violated Section 8(a)(1) of the Act by implying that his protected concerted activity in contacting

his union representative about work-related concerns was incompatible with their working relationship.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Professional Staff Association is a labor organization within the meaning of Section 2(5) of the Act.

3. By telling an employee that his union and/or protected concerted activity was incompatible with his employment, the Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

4. The aforementioned labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, the New York State United Teachers (NYSUT), Latham, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suggesting to employees that seeking representation from the Professional Staff Association, a labor organization, will be held against them and/or that such conduct is incompatible with their employment.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days after service by the Region, post at its facility in Jamestown, New York copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 15, 2013.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn statement of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. June 10, 2014

Michael A. Rosas
Administrative Law Judge

[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT do anything which interferes with, restrains, or coerces you with respect to these rights.

WE WILL NOT suggest to employees that seeking representation from the Professional Staff Association, a labor organization, will be held against them and that such conduct is incompatible with their employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

_____
New York State United Teachers (NYSUT)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Niagara Center Building., 130 S. Elmwood Avenue, Suite 630, Buffalo, NY 14202-2387
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/03-CA-116945 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

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. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.