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| U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, NORTHAMPTON, MASSACHUSETTS Respondent | |
| and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R1-107 Charging Party/Union | Case No. BN-CA-50352 |

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. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before MAY 6, 1996, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: April 4, 1996
Washington, DC

MEMORANDUM

DATE: April 4, 1996

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS
AFFAIRS MEDICAL CENTER,
NORTHAMPTON, MASSACHUSETTS

Respondent

and

Case No. BN-

CA-50352

NATIONAL ASSOCIATION OF
GOVERNMENT EMPLOYEES, SEIU,
AFL-CIO, LOCAL R1-107

Charging Party/Union

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

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| U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER, NORTHAMPTON, MASSACHUSETTS Respondent | |
| and NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, SEIU, AFL-CIO, LOCAL R1-107 Charging Party/Union | Case No. BN-CA-50352 |

Alan L. Rosenman
Counsel for the Respondent

Stephen Quigley
Representative of the Charging Party

Gary J. Lieberman
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (2), by issuing a performance counseling to employee Kevin Rule because he became a Union steward and engaged in representational activity.

Respondent's answer admitted the allegations as to the Respondent, the Union, and the charge, but denied any violation of the Statute.

A hearing was held in Northampton, Massachusetts. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The Union is the exclusive representative of a unit of nonprofessional employees appropriate for collective bargaining at Respondent, including employees in the Respondent's Dietetic Service. On January 19, 1995, Union President Steven Quigley appointed bargaining unit employee Kevin Rule as a Union steward. Rule has been employed as a Food Service Worker for five years and has been under the direct supervision of Gary R. Linscott, Food Service Supervisor, since September 1994. Rule's responsibilities as a Union steward include the handling of grievances, representing employees and ensuring compliance with the parties' contract. When requesting official time to conduct Union business, Rule submitted his requests directly to Linscott. Linscott was aware of Rule's status as a Union steward.

On February 6, 1995, Gary Linscott gave Kevin Rule a performance counseling in memorandum form. In pertinent part, the memorandum cited Mr. Rule for being "without your uniform top on" on February 5, 1995, for "not wearing your uniform top" on February 6, 1995, and for "pulling my [Mr. Linscott's] sweater and talking back" on February 6, 1995.

With certain exceptions not relevant to the incident of February 6, 1995, food service workers are required to wear a uniform at all times. The uniform, supplied by Respondent, consists of white pants, a blue uniform top, and paper hats for males and hair nets for females. Employees may wear sweaters, sweatshirts, or flannel shirts over the uniform top, as comfort dictates, provided the uniform is visible underneath. Some supervisors (who wear uniforms of a different color) also wear outer garments on top for comfort. In the past, if a supervisor discovered a food service worker without a hat or uniform top, the employee

was simply reminded by the supervisor to put on the uniform article.

There is no dispute that on February 5, 1995, Rule was not wearing his blue uniform top and was admittedly out of uniform while cleaning up the tray line in Dining Room A. Linscott informed Rule that he should put on his uniform top, and Rule promptly complied with Linscott's request in the presence of Linscott.

The following day, on February 6, 1995, Rule was working on the tray line in Dining Room A preparing the luncheon meal. Paula Mott was working next to Rule, and Willard Carpenter was working facing Rule, about 3 to 4 feet away from him. All agree that Rule was wearing an over-garment, a sweatshirt, and that Supervisor Linscott approached Rule on the line shortly after 11 a.m.

Supervisor Linscott testified that he saw no evidence that Mr. Rule was wearing a uniform top and when he inquired of Mr. Rule whether he had on his uniform top, Mr. Rule grabbed him by his sweater, twisted it, held it for about five seconds, and stated, "What about you, your uniform top?" Mr. Linscott testified that this happened in full view of several others, that he did not recall taking Mr. Rule to the adjacent space, called a cart room, or seeing any evidence that Rule was wearing the uniform top.¹ Mr. Linscott then left the area to see the Chief of the Service.

In consultation with the Chief of Service, Mr. Linscott decided to send Mr. Rule the performance counseling noted above. Mr. Linscott testified that he prepared the memorandum because he was primarily concerned that Mr. Rule had grabbed his (Linscott's) shirt, thereby startling or threatening him. He also referred in the memorandum to two instances of Mr. Rule being out of uniform because he felt it had happened on two days in a row and Mr. Rule needed to correct himself. Mr. Linscott testified that Mr. Rule's being a Union steward did not affect this counseling action.

Rule and his two coworkers, Mott and Carpenter, testified that, at the time Mr. Linscott approached Rule, Rule was wearing the required uniform top beneath his sweatshirt with the bottom flaps and/or the collar of his blue uniform clearly visible. I credit their testimony.

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Linscott's version of the events conflicted with the testimony of Rule, Carpenter, and Mott, whom I credit.

According to Rule and Carpenter, Mr. Linscott asked Mr. Rule to go with him to the nearby cart room so they could talk. Mr. Rule then accompanied Mr. Linscott to the cart room.²

Linscott and Rule proceeded into the cart room, approximately 10 feet from the tray line. The cart room is situated so that Linscott and Rule were not visible or audible to Mott and Carpenter. While in the cart room, Linscott told Rule that he had to put a uniform top on. Despite the fact that the uniform was clearly visible with the collar protruding and the bottom of the uniform hanging out of the sweatshirt, Rule proceeded to lift his sweatshirt up to ensure that Linscott was aware that he was wearing the proper uniform underneath. Linscott did not acknowledge this, but again informed Rule that he was required to wear a uniform top. Rule lifted his sweatshirt a second time to make it clear to Linscott that he was wearing the proper uniform underneath his sweatshirt. At that point, Rule asked Linscott, who was wearing a sweater over his uniform, "[If you] can wear a sweater over [your] uniform, why can not we?" In the process of pointing out Linscott's sweater, Rule touched Linscott's sweater. Rule did not grab or pull Linscott's sweater. Rule then proceeded to take off his sweatshirt in front of Linscott while in the cart room. He returned to work on the tray line wearing his blue uniform top with a T-shirt underneath. Rule appeared to be upset.³

A letter of counseling is not considered a disciplinary action, but it remains in the employee's personnel file for six months and can be referenced. Rule has received fully successful performance ratings from his supervisors, including his last rating from Linscott.

Sandra Maynard, Rule's former supervisor, testified that when she was Rule's supervisor (sometime prior to September 1994), she once gave him a letter of counseling for disrespectful comments. Ms. Maynard also removed him from the serving line and counseled him on one occasion when he became angry and threw down some plastic ware. The

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/ Mott's testimony differs from that of Rule and Carpenter in that Mott testified that when Linscott approached Rule, Linscott said Rule was not allowed to wear a sweatshirt on the line, and the two then walked into the cart room.

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/ I credit Mr. Rule's version of the conversation and actions in the cart room. The fact that Rule emerged from the cart room wearing his uniform top was corroborated by Carpenter and Mott, who testified that Rule appeared to be upset.

latter incident was also observed by Ms. Mott. Ms. Maynard testified that, as a supervisor, she would also take some kind of action if an employee grabbed her uniform.

Discussion and Conclusions

Section 7116(a)(2) of the Statute provides that it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" Under the analytical framework set forth in Letterkenny Army Depot, 35 FLRA 113 (1990), in determining whether the Respondent violated Section 7116(a)(2) of the Statute, the General Counsel must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and that consideration of such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. Id. at 118. If the General Counsel makes this required prima facie showing, the respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the consideration of protected activity. Id.

There is no dispute that Mr. Rule was engaged in activities protected by the Statute and that Respondent was aware of those activities.

The General Counsel made a prima facie showing that consideration of such activity was a motivating factor in Respondent's issuance of the letter of counseling to Rule for being out of uniform and for pulling the sweater of his supervisor and talking back. Although other employees were observed out of uniform in the past, no other employee had ever been issued a letter of counseling for such action until Rule was counseled on February 6, 1995, just over two weeks after becoming a Union steward. Evidence of discriminatory motive may be demonstrated by suspicious timing of the questioned conduct. U.S. Customs Service, Region IV, Miami District, Miami, Florida, 36 FLRA 489, 496 (1990). Although the closeness in time between an agency's employment decision and protected union activity engaged in by an employee may support an inference of illegal anti-union motivation, it is not conclusive proof of a violation. U.S. Department of Labor, Washington, D. C., 37 FLRA 25, 37 (1990).

In addition to the timing, the credible testimony of Rule, supported by his coworkers, Carpenter and Mott,

revealed that Rule was in fact wearing his uniform on February 6, 1995. Moreover, the reliable testimony of Rule revealed that he never grabbed, pulled, or twisted Linscott's sweater. A motivating factor of union animus for the issuance of the letter of counseling can be inferred from the untenable version of events offered by Linscott.

Respondent points out that improper conduct by a union official does not insulate him for agency disciplinary action and, in this instance, management, in the person of Mr. Linscott, made a measured response to the action of Kevin Rule, which was done irrespective of Rule's status or activities as a Union steward. Respondent notes that there was no evidence presented that Mr. Rule's performance as a Union steward has been impeded and also no evidence that Mr. Rule performed any significant Union duties prior to issuance of the letter of counseling which would have prompted retaliation.

As counsel for the General Counsel points out, there are several reasons why Linscott's version of the events on February 6, 1995, can not withstand scrutiny. First, Rule and two other employees, Mott and Carpenter, working within a few feet of Rule, testified that Rule was wearing the proper uniform underneath his sweatshirt, a permitted practice. The collar and the bottom of Rule's blue uniform were visible underneath his sweatshirt. Nevertheless, Linscott singled Rule out in front of all the employees and led him into the cart room to inform him that he was required to have on the proper uniform. Rule and witnesses Mott and Carpenter all testified that the discussion between Rule and Linscott ensued in the cart room, not on the tray line in front of other employees, as Linscott contends. I credit Rule's testimony that, while in the cart room, Rule lifted his sweatshirt up twice, just to make it clear to Linscott that he was in the proper uniform. Linscott does not recall that happening. Finally, I also credit Rule's testimony that the alleged grabbing or pulling of Linscott's sweatshirt by Rule while in the cart room also did not occur.

In evaluating Mr. Rule's credibility concerning his version of the events in the cart room, I carefully considered Respondent's argument that Mr. Rule previously received a prior counseling for inappropriate remarks to another super-visor and had one instance of a fit of temper, but I did not find it conclusive, given the disparity in testimony between Mr. Linscott and the other witnesses concerning the circumstances leading up to the incident in the cart room.

It is concluded that Respondent has not demonstrated, by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the consideration of protected activity. Accordingly, a preponderance of the evidence establishes that Respondent has engaged in an unfair labor practice within the meaning of section 7116(1) and (2) of the Statute by issuing a performance counseling to bargaining unit employee Kevin Rule because he engaged in protected activity under the Statute, as alleged.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts shall:

1. Cease and desist from:

(a) Discriminating against Kevin Rule by issuing him a letter of counseling, or performance counseling, because of his protected representational activity on behalf of the National Association of Government Employees, SEIU, AFL-CIO, Local R1-107, the exclusive representative of certain of its employees.

(b) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind the letter of counseling, or performance counseling, issued to Kevin Rule on February 6, 1995, expunge all record of it from his personnel records, and advise Mr. Rule and the Union in writing of such action and that the counseling will not be used against him in any way.

(b) Post at its facilities in Northampton, Massachusetts copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Boston Region, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, April 4, 1996

GARVIN LEE OLIVER
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 U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT discriminate against Kevin Rule, or any other employee, by issuing a letter of counseling, or performance counseling, because of protected representational activity on behalf of the National Association of Government Employees, SEIU, AFL-CIO, Local R1-107, the exclusive representative of certain of our employees.

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 Federal Service Labor-Management Relations Statute.

WE WILL rescind the letter of counseling, or performance counseling, issued to Kevin Rule on February 6, 1995, expunge all record of it from his personnel records, and advise Mr. Rule and the Union in writing of such action and that the counseling will not be used against him in any way.

(Activity)

Date:

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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor

Relations Authority, Boston Region, Federal Labor Relations
Authority, 99 Summer Street, Suite 1500, Boston, MA
02110-1200 and whose telephone number is: (617) 424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. BN-CA-50352, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: April 4, 1996
Washington, DC