FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 13-27

DEPARTMENT OF VETERANS AFFAIRS
VA MEDICAL CENTER
RICHMOND, VA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2145, AFL-CIO

CHARGING PARTY

Case No. WA-CA-13-0319

Ellen D. Berndtson
For the General Counsel

Timothy M. O'Boyle
For the Respondent

Jennifer Marshall
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTION FOR SUMMARY JUDGMENT

The General Counsel filed a motion for summary judgment and the Respondent filed an opposition in this matter. As I find that there is no genuine issue as to any material fact, resolution of this case upon summary judgment is appropriate. Based upon the facts as alleged in the complaint and admitted in the Respondent's answer, I find that the Respondent violated § 7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute), when a supervisor told a bargaining unit employee that he could not consult with a Union representative prior to preparation and submission of a report as part of an investigation being conducted by that supervisor. As a result of the violation, the Respondent is ordered to cease and desist from interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute, and to post a notice of the violation.

STANDARDS FOR SUMMARY JUDGMENT

In considering motions for summary judgment submitted pursuant to § 2423.27 of the Federal Labor Relations Authority's (Authority/FLRA) regulations, the standards to be applied are those used by United States District Courts under Rule 56 of the Federal Rules of Civil Procedure, *Nat'l Labor Relations Bd., Wash., D.C.*, 65 FLRA 312, 315 (2010). Upon review of the General Counsel's motion and the Respondent's opposition, I find that there is no genuine issue of material fact in dispute and have determined that summary judgment is appropriate in this matter.

On August 2, 2013, the Regional Director of the Washington Region of the FLRA issued a complaint and notice of hearing alleging that the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia (Respondent), violated § 7116(a)(1) of the Statute, when a supervisor told a bargaining unit employee that he could not consult with a Union representative prior to preparing and submitting a report as part of an investigation being conducted by that supervisor. The case was then transferred to the Boston Regional Office of the FLRA on August 6, 2013.

The Respondent filed an answer on August 14, 2013, which, other than setting forth some administrative corrections, admitted the factual allegations in the complaint, but denied that it had violated the Statute as alleged in paragraph 13 of the complaint. Included in its answer was an admission to paragraph 12 of the complaint which reads as follows:

> 12. The e-mail on March 26, 2013, at 11:40 a.m. EST from Marjorie Lyne to Walter Backlund contained the following text:
>
> "I am investigating an event that occurred on Friday in which you were involved. This is a direct work instruction for you to prepare for me today a Report of Contact regarding that event on Friday. You do not have permission to consult with AFGE in preparing this Report of Contact as this is simply your report. You may have 2 hours in which to complete it. Failure to provide this will constitute failure to complete a direct work instruction and may result in disciplinary action. Please bring it to the Primary Care Administration suite today and place it in my mailbox in the suite. Thank you for your prompt attention to this assignment."

On September 17, 2013, the General Counsel filed a motion for summary judgment alleging that there was no genuine issue of material fact in dispute and that the Respondent's answer admitted all the essential allegations of the complaint. On September 23, 2013, the Respondent filed an opposition in which it asserted that issues of material fact remained in dispute. As the record demonstrates that the Respondent admitted the essential facts alleged in the complaint, there is no genuine issue of material fact in dispute, and the decision as to whether those facts constitute a violation of § 7116(a)(1) of the Statute is a question of law. Thus, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

1. The unfair labor practice complaint and notice of hearing was issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.

2. The Department of Veterans Affairs, VA Medical Center, Richmond, VA (Respondent), is an agency within the meaning of 5 U.S.C. § 7103(a)(3).

3. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under 5 U.S.C. § 7103(a)(4) and is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

4. The American Federation of Government Employees, Local 2145 (Charging Party) is an agent of AFGE for the purpose of representing employees at the Respondent.

5. The charge in Case No. WA-CA-13-0319 was filed by the Charging Party with the Washington Regional Director on April 1, 2013.

6. A copy of the charge was served on the Respondent and received on April 23, 2013.

7. During the time period covered by this complaint, the person listed below occupied the position opposite her name at the Respondent and was an agent of the Respondent acting on its behalf:

Marjorie Lyne Nursing Service

8. At all material times, the person named in paragraph 7 was a supervisor and/or management official within the meaning of 5 U.S.C. § 7103(a)(10) and (11) at the Respondent.

9. At all material times, Walter Backlund, RN, was an employee under 5 U.S.C. § 7103(a)(2).

10. The Respondent and the Charging Party are parties to a collective bargaining agreement covering employees in the bargaining unit.

11. On March 26, 2013, at 11:40 a.m. EST, Marjorie Lyne emailed Walter Backlund.

12. The email sent on March 26, 2013, at 11:40 a.m. EST from Marjorie Lyne to Walter Backlund contained the following text:

> "I am investigating an event that occurred on Friday in which you were involved. This is a direct work instruction for you to prepare for me today a Report of Contact regarding that event on Friday. You do not have permission to consult with AFGE in preparing this Report of Contact as this is

simply your report. You may have 2 hours in which to complete it. Failure to provide this will constitute failure to complete a direct work instruction and may result in disciplinary action. Please bring it to the Primary Care Administration suite today and place it in my mailbox in the suite. Thank you for your prompt attention to this assignment."

DISCUSSION

The material facts in this case are neither complex nor are they in dispute. On March 26, 2013, the Respondent, through agent Majorie Lyne advised a lower level subordinate and bargaining unit member, that she was conducting an investigation over an incident in which that employee was involved a few days prior. In her written communication to the employee, Lyne forbade the employee from consulting with a Union representative prior to submitting his statement about the incident under her investigation. Also, she gave him notice that a failure to submit his report under the conditions she set forth could subject him to disciplinary action. Lyne communicated this information to the employee in an email that was also sent to his immediate supervisor as well as personnel in the Human Relations (HR) office of the Respondent.

It is an unfair labor practice (ULP) for an agency to interfere with, restrain, or coerce any employee in the exercise of any right protected by the Statute. 5 U.S.C. § 7116(a)(1). Authority precedent has consistently held that the standard for a violation of this section is whether under the circumstances, the statement or conduct in question tends to coerce or intimidate an employee, or whether the employee could have reasonably drawn a coercive inference from the statement. *Dep't of Justice, Fed. BOP, FCI, Elkton, Ohio*, 62 FLRA 199, 200 (2007). This standard is objective and requires consideration of the surrounding circumstances. *Id.*

In the case at hand, the material facts not in dispute by virtue of the Respondent's admissions are that a senior manager contacted a subordinate employee and told him that she was conducting an investigation of an incident in which he was involved. In other words, this is not a situation where a first-line supervisor merely asked his employee what happened. This is a case where the boss of his boss got involved and demanded the employee to present his version of the events in writing as part of her investigation. Suffice it to say, the involvement of a second-line supervisor alone was enough to signal that this was not a normal, run of the mill office interaction, and by calling her involvement an investigation, the supervisor clearly intended to get the attention of the employee she was addressing. Any reasonable employee who received such a communication from his boss's boss couched in the terms of an investigation would be intimidated by that event alone, even if the communication did not attempt to coerce him into not contacting his union representative or discuss the possibility of discipline. But in the case, the senior supervisor nailed the trifecta by not only calling her involvement an investigation, but directing the employee to not

consult with his Union representative and warning him that disciplinary action could be taken. Absent any evidence to the contrary, the only reasonable interpretation that could be drawn from such facts is that the Respondent not only intimidated and coerced this employee over the exercise of his rights provided by the Statute, but did so with intention, and thereby violated § 7116(a)(1).

While the Respondent presents several arguments for why such a conclusion is inappropriate, none of them are persuasive. With respect to the Respondent's contention that the evidence of the party opposing a motion for summary judgment is entitled to be believed and all reasonable inferences are to be drawn in its favor, such precedent is inapplicable in a case where the only evidence submitted by the Respondent is a version of the email chain containing the intimidating and coercive language that is different in appearance and order, but not in textual content. The only difference between the version submitted by the General Counsel and that submitted by the Respondent is that the Respondent's version includes additional messages, none of which change the reasonable interpretation of the email message at the heart of the violation. If anything, the additional email message dated March 31, 2013, between Lyne and Jeanne Billings, her HR representative, indicates that Lyne did not know if the comments she made in her email to Backlund were improper as they were made in reliance upon guidance from Billings. (Resp. Ex. 1 p.1).

As to the Respondent's argument that the General Counsel fails to provide evidence of the context and surrounding circumstances of the offending email that must be considered, the context and surrounding circumstances are quite clear. One would be hard pressed to interpret this string of emails as anything but a situation where managers are frustrated with the actions of an employee who is more than willing to avail himself of the Union's representation, and the Union representative aggressively challenges management actions. Rather than working together to achieve labor and management harmony, all the participants choose to taunt, challenge and prod each other like a group of bickering children, and use every incident that arises to incite, rather than calm tensions. This is not the way to extend efficient and effective service to well deserving veterans and it is high time for all involved at this facility to begin behaving like the adult in the room.

If there were evidence that this incident involved something other than what it facially appears, it was the Respondent who needed to provide the context and surrounding circumstances demonstrating that the reasonable interpretation of the facts presented by the General Counsel was belied by other facts not within the General Counsel's evidence. Instead, the Respondent presented little more than a second copy of the email chain and admitted that the action alleged in the complaint was committed by its agent with no context or circumstances other than those presented by the General Counsel's allegations.

To the extent the Respondent asserts that the General Counsel relies only upon one sentence in a lengthy email chain, that assertion is simply wrong. It fails to recognize that the entirety of the messages paints a very clear picture of the relationship existing between the parties, and more importantly, it fails to acknowledge that the agent's statements indicating

that an investigation was being conducted and that disciplinary action could occur are equally important to determining the Respondent's ability to intimidate and coerce a bargaining unit employee in the exercise of his rights.

The Respondent also argues that the employee's disregard of the prohibition upon contacting his Union representative evidences a lack of intimidation or coercion. However, this argument also fails. The test of an agency's actions is objective and not subjective. An objective standard is used to protect an agency in a situation where an employee is hyper sensitive to intimidation and coercion, and it would be unfair to allow an agency to avail itself of a subjective standard when it inures to their benefit. This is especially true when an agency's attempt at intimidation and coercive fails, not because they did not have such an intention, but because the employee is fully cognizant of his rights and the Respondent's limitations as a result of prior experience, education, or training.

The test is whether the agency's action tended to intimidate or coerce, or could be reasonably interpreted as so doing. In this case, there is no evidence that contradicts the entirely reasonable conclusion that the intent of the email message sent by Lyne to Backlund was to intimidate and coerce the employee from including his Union representative when involved in a situation being investigated by a senior manager. That the General Counsel submit an affidavit from Backlund professing his intimidation and coercion was not required, nor is its absence fatal to the allegation that the Respondent engaged in behavior that tended to intimidate and coerce, or could reasonably be interpreted as doing so. Furthermore, there is no evidence in the record that Backlund was not intimidated or coerced. The fact that he involved his Union representative despite the directive to not do so does not prove that he was not intimidated or coerced, it only proves that he overcame the Respondent's efforts to intimate or coerce. In fact, given the clear nature of the supervisor's statements, the only reasonable conclusion to be drawn is that the employee did not allow the Respondent's efforts to dissuade him, and the fact that he was not disciplined says more about the validity of the supervisor's directives than it does the impact they had upon the employee.

It is important to note that the Respondent's violation was not in assigning the work of completing a Report of Contact, nor was this a case where the employer refused an employee's request for official time to meet with a union representative as a result of immediate workload constraints. This case involves a complete and total denial of Union representation as part of a process the supervisor declared to be an investigation. Had the Respondent been charged with a violation of § 7114, the Authority has previously found a violation under similar facts, *U.S. Immigration & Naturalization Serv., U.S. Border Patrol, Del Rio, Tex.*, 46 FLRA 363 (1992), which also constituted a violation of § 7116(a)(1).

As a remedy for the Respondent's violation of § 7116(a) (1) of the Statute, the General Counsel submitted a proposed order that would require the Respondent to post a notice of violation and to distribute said notice by electronic mail to all bargaining unit employees represented by the Charging Party. For the reasons outlined below, the request for an electronic distribution of the notice of violation is granted.

The Authority has determined that the electronic posting of a notice is a nontraditional remedy. *U.S. Dep't of Justice, Fed. BOP, FCI, Florence, Colo.*, 59 FLRA 165 (2003). If there are no legal or public policy objections to a proposed nontraditional remedy, it must be reasonably necessary and effective to recreating the conditions and relationships with which the unfair labor practice interfered, as well as to effectuate the purposes and policies of the Statute, including the deterrence of future violations. *F.E. Warren AFB, Cheyenne, Wyo.*, 52 FLRA 149, 161 (1996) (*Warren AFB*).

The General Counsel submitted an unchallenged affidavit that established the Respondent's regular use of email to communicate with its employees, and argues that an electronic distribution is reasonably necessary in this case because employees are located in various buildings at multiple campus locations and official postings are only made upon six bulletin boards, all of which are in the main building of the Richmond campus. The General Counsel also cites the Authority's holding in *U.S. Dep't of Homeland Security, U.S. Customs & Border Prot., El Paso, Tex.*, 67 FLRA 46, 50 n.4 (2012) (*Homeland Security*), which found that a ULP involving the use of email was sufficient to meet the requirements of *Warren AFB* and justified electronic distribution of the notice of violation to bargaining unit members using email. As the Respondent's opposition did not contest any of the facts asserted in the affidavit or the applicability of the *Homeland Security* precedent, the request for electronic dissemination by email to bargaining unit employees is granted.

CONCLUSION

For the reasons set forth in this decision, I recommend that the Authority grant the General Counsel's motion for summary judgment and issue the following Order:

ORDER

Pursuant to § 2423.41(c) of the Authority's rules and regulations and § 7118(a)(7) of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, VA Medical Center, Richmond, Virginia, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured by the Statute, including their right to seek assistance from the America Federation of Government Employees, Local 2145, AFL-CIO (Local 2145).

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities where bargaining unit employees represented by Local 2145 are located, copies of the attached Notice on forms to be provided by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director of the VA Medical Center, Richmond, VA, and shall be posted and maintained for sixty (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) Using the Respondent's email system, a copy of the signed Notice must be disseminated to all Local 2145 bargaining unit employees.

(c) Pursuant to § 2423.41(e) of the Authority's rules and regulations and within thirty 30 days from the date of this Order, notify in writing, the Regional Director, Boston Region, Federal Labor Relations Authority, of the steps taken to comply.

Issued, Washington, D.C., September 30, 2013

CHARLES R. CENTER
Chief 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 Veterans Affairs, VA Medical Center, Richmond, Virginia, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT in any like or related manner, make statements or comments that interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute, including their right to seek assistance from the American Federation of Government Employees, Local 2145, AFL-CIO.

_____
VA Medical Center, Richmond, VA

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 any of its provisions, they may communicate directly with the Regional Director, Boston Regional Office, Federal Labor Relations Authority, 10 Causeway Street, Suite 472, Boston, MA, 02222, and whose telephone number is: (617) 565-5100.