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

OALJ 14-19

DEPARTMENT OF THE ARMY, FORT POLK
FORT POLK, LOUISIANA

RESPONDENT

AND

NATIONAL ASSOCIATION OF INDEPENDENT LABOR, LOCAL 10

CHARGING PARTY

Case No. DA-CA-10-0017

Nora E. Hinojosa
For the General Counsel

Bernadine Lenahan
For the Respondent

George L. Reaves, Jr.
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the revised Rules and Regulations of the Federal Labor Relations Authority (Authority), Part 2423.

Based upon an unfair labor practice charge filed by the National Association of Independent Labor, Local 10 (Union), a Complaint and Notice of Hearing was issued by the Regional Director of the Dallas Regional Office. The complaint alleges that the United States Army, Fort Polk, Fort Polk, Louisiana (Respondent) violated § 7116(a)(1) and (2) of the Statute when it removed three mirrors and a television from the Energy Plant/Building 289,

the work site for bargaining unit employee Dwayne Martin, in retaliation for his activity protected under § 7106(a)(1) of the Statute. (G.C. Ex. 1(c)). The Respondent timely filed an Answer denying the allegations of the complaint. (G.C. Ex. 1(d)).[1]

A hearing was held at Fort Polk, Louisiana on May 18 and 19, 2011, at which time the parties were afforded a full opportunity to be represented, be heard, examine and cross-examine witnesses, introduce evidence and make oral argument. The General Counsel and the Respondent filed timely post-hearing briefs that have been fully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions, and recommendations.

FINDINGS OF FACT

Fort Polk has three separate entities: the Joint Readiness Training Center and Fort Polk, the U.S. Army Installation Management Command and the U.S. Army Contracting Agency. (Tr. 22). The hospital is also called MEDDAC and is part of the Joint Readiness Training Center. (Tr. 22). One collective bargaining agreement (CBA) covers all three components. There are approximately 900 bargaining unit employees, with the hospital having the largest number of about 400.

Bargaining unit employees are represented by the National Association of Independent Labor, Local 10. Dwayne Martin has worked in the facilities maintenance branch for about 14 years as a WG-10 maintenance mechanic. He has been a member of the Union since 1999 and a steward since 2000. He became the Chief Steward for the Union in July 2009. (Tr. 105).

This case involves the maintenance mechanics in the Logistics Facilities Maintenance Branch of the Bayne-Jones Army Community Hospital, located at Fort Polk, Louisiana. At all times material to this case, Col. Barbara Taylor (initially Major Taylor) was the Chief of Logistics; James Rutherford was the Chief of Facilities Maintenance Branch and Paul Eaves was the Maintenance Supervisor. The employees in the Maintenance Branch worked two shifts: a day shift with two general schedules (7 a.m. to 3:30 p.m. five days a week and 7 a.m. to 5:30 p.m. 4 days a week) and a second or night shift from 1:30 p.m. to midnight (4 days a week). (Tr. 32). Both shifts perform basic building maintenance. (Tr. 33).

Duties as maintenance workers and/or mechanics include plumbing, electrical, carpentry, maintenance systems, and basic building maintenance issues. (Tr. 24). Certain employees also had specific work assignments: Martin was responsible for maintaining the boilers in the energy plant or Building 289. The boilers supply steam to the hospital for hot water, the kitchen, and humidity control. There is a separate steam system for sterilization

[1] The General Counsel filed a motion to amend the complaint to correct the case number, which was granted. See G.C. Ex. 1(j).

purposes. (Tr. 24). The boilers are located in the energy plant, which is separate from the main hospital. Maintenance workers all have the same job description; Martin's job description is identical to other WG-10s and does not specifically designated him as responsible for the boilers, but he has been the primary person dealing with the boilers for a number of years. (Tr. 88). Martin works four days a week; when he is not present, no other individual is responsible for checking the boilers. According to Martin, when he is not present, daily checks are not required and the boilers run independently. (Tr. 88-89). The boilers are tied to an alarm located in the main hospital, which would sound in the event of any problems. (Tr. 89).

As stated above, Martin was responsible for maintaining the boilers for the facility. These duties took approximately two hours a day; during the remainder of his shift, Martin was responsible for completing any assigned work orders. Martin had an office in the energy plant, where he ran certain tests on a daily basis. For a number of years, there were three mirrors located in the energy plant, as well as a television. Two of the mirrors were large concave mirrors that had been placed above the boilers for several years. There was also a small mirror which was placed in the energy plant office and had been there for an even longer period of time. (Tr. 40, 44).

Martin testified that he used the two concave mirrors to monitor the indicator lights on the boilers when he was in the office. These mirrors enabled him to check the lights without getting up or having to leave the office. Martin also testified that he did not really use the small truck-like mirror because it was blocked by materials that he had placed on top of the shelves where the mirror was located. (Tr. 44).

The television had also been at the energy plant for a number of years. Martin used the television to monitor the weather conditions. This would help him determine whether he needed to bring another boiler on-line and determine the necessary steam load (in case of extreme cold). Martin made those specific decisions about how many boilers to run, which ones and when. He would need to know the temperatures for this duty. (Tr. 34). He also used the television to keep up with the weather and prepare for what might happen. Martin was particularly concerned about the possibility of hurricanes. (Tr. 35). For a number of years, the television was just plugged in, but it was eventually connected to the hospital's cable system in 2005 after Hurricane Rita. (Tr. 35). According to Martin, he specifically requested cable to be run and it was approved by Rutherford. (Tr. 36-37). Martin testified that he had a computer in the energy plant office and could also check the weather on the computer. During Hurricane Rita, the internet connection was lost, but the cable was operational. (Tr. 37). Martin would check the weather channel for the local weather forecast every ten minutes (for instance, 10:08, 10:18, 10:28, 10:38, 10:48, and 10:58). The weather channel gave him the weather in real time, with radar and everything. (Tr. 38). He's not sure if he could get that information on the internet. (Tr. 38).

On March 25, 2009, at around 9 a.m., Martin went to the facility maintenance shop break room area for the morning break. Maj. Taylor, Paul Eaves and Gary Ostroski were in the break room when he arrived. (Tr. 56). Others came in behind him – Martin Vander, Charles Wamber, Bobby Clemons, and Danny Vasquez. (Tr. 57, 139, 140). Taylor and

others first discussed the new uniform policy and then safety shoes. (Tr. 140-41). Ostroski then asked Taylor if she could explain the difference between key and essential personnel and mission-essential personnel. This was a discussion related to which employees would be necessary to work during an emergency. Taylor said that she would decide on the day of the emergency. (Tr. 57, 58, 176-77).

At this point, Martin became interested in the conversation and told Taylor that he hoped she wasn't going to do what she did at the last hurricane. [This was in reference to sending wage grade employees who had been scheduled to work home and keeping the GS supervisors to work during the fall of 2008 with Hurricane Ike]. (Tr. 57-58, 62). Taylor said she would keep whoever she liked and would rewrite job descriptions if she had to. (Tr. 62, 143-44).

Martin reminded Taylor that the employees were in a bargaining represented by a union, that they had a negotiated agreement, and there were certain ways she had to go about making changes. (Tr. 62, 143, 179). Taylor disagreed and she and Martin went back and forth for a while. At one point Taylor stated that she didn't have a copy of an agreement and that there was not one at Headquarters or Personnel. (Tr. 62, 63, 178). Martin initially offered to provide Taylor a copy of the agreement; he later told Taylor to get her own copy. (Tr. 63, 64, 179-80).

There was no more discussion between Martin and Taylor at that point. Taylor later said something to another employee and Martin attempted to speak. Taylor took a step toward Martin, held up her hand and said she didn't want to hear anything more from him. (Tr. 64, 144, 179-80, 297). Taylor was about six feet away from Martin at that time. (Tr. 8). Break was then over and Martin left the area for work. (Tr. 64). Martin denied that he was rude or disrespectful to Taylor. (Tr. 65). Martin testified that Taylor should have known that he was a Union steward; that his name was on the steward list that was furnished by the Union to the supervisors on a regular basis. Martin's name was also on a list of Union stewards on a bulletin since 2006. (Tr. 65).

Later that day, Eaves talked to Martin about the conversation and told him not to be confrontational. (Tr. 65). On Friday, Eaves asked Martin and the other employees to write a statement about what happened. Martin turned in his statement on the following Monday. (G.C. Ex. 3; Tr. 65-66).

On April 15, Taylor and Rutherford toured the energy plant where Martin performs his duties as boiler plant operator. (Tr. 68). Martin was in the energy plant office completing a report on the computer, when he noticed Taylor and Rutherford looking and pointing at the mirror over the feed water tank. (Tr. 68). They then proceeded to the second concave mirror and then came into the office. (Tr. 69). Bobby Clemons had just finished his environmental inspections of the energy plant and sat down in the office to wait for the scheduled break time of 2 p.m., which was two minutes away. (Tr. 70). Rutherford told Clemons to leave and he did. (Tr. 70). Taylor then looked at the little truck mirror to see what could be seen from it. (Tr. 70). Taylor and Rutherford then left without addressing Martin. (Tr. 70).

On April 16, Ostroski came into the energy plant with a work order signed by Rutherford to take down the mirrors and the television. Martin helped him do that and the equipment was stored upstairs in the plant. (Tr. 71-72).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel (GC) contends that the Respondent violated section 7116(a)(1) and (5) of the Statute when it removed the three mirrors and television from the energy plant in retaliation for Dwayne Martin's protected activity. The GC asserts that Martin, a Union steward, engaged his third-level supervisor, Maj. Taylor, in a discussion regarding the CBA in the break room on March 25. During this conversation regarding which employees were considered essential in emergency situations, Martin raised the issue that the maintenance employees were in a bargaining unit represented by an exclusive representative and that they were covered by the CBA.

The GC asserts that there is no question that Martin's actions, by challenging and disagreeing with what Taylor said during that discussion, antagonized Taylor. Taylor denied the existence of a CBA which covered the unit employees, but was instructed by Martin that a contract did cover the unit. Taylor stated that she would draw up her own procedures and name the essential personnel, to which Martin responded by stating that the employees belonged to a bargaining unit, that they were covered by a contract, and certain procedures needed to be followed in accordance with the contract. When Taylor told Martin to give her a copy of the contract, Martin told her to get her own copy. Such actions are not atypical of a union steward toward speaking to a management official on behalf of the bargaining unit. However, such actions are not typical of an employee speaking to their third-level supervisor, especially in the presence of other bargaining unit employees and the first-level supervisor. Taylor first sought to have Evans, the first-level supervisor, give Martin a letter of reprimand but Evans refused to do so. In removing the mirrors and television, Taylor demonstrated her motivation to take some kind of action against Martin, if not a reprimand, because of his protected activity. Thus, the evidence establishes a prima facie case of discrimination: Martin engaged in protected activity on March 25, for which protected activity Taylor removed the mirrors and television from his work space.

The GC also argues that the Respondent failed to establish that it had a legitimate justification for removing the three mirrors and television from the work place of the Union steward and that it would not have taken the same action absent Martin engaging in protected activities. The GC argues that Martin used the mirrors and the television in the performance of his duties and that Respondent's argument that the mirrors and the television were used for the purpose of watching out for supervisors and congregating with other employees should be rejected. The GC argues that the Respondent failed to provide any evidence that Martin was slacking off in the performance of his duties and that he used the mirrors to watch out for

incoming supervisors to prevent his being caught watching television or congregating with his coworkers. Martin has never been counseled about such activity or received any disciplinary action for such conduct. Martin has consistently received excellent performance appraisals in which he is lauded as a productive and effective employee who uses his time wisely.

The GC rejects the Respondent's argument that Rutherford, rather than Taylor, ordered the removal of the mirrors and television. Both Taylor and Rutherford visited the energy plant on April 15, and the mirrors and television were removed the next day. The GC argues that Rutherford was the one who gave Martin permission to obtain cable reception for the television soon after Hurricane Katrina in 2005. Having permitted use of cable reception on the television and approving a newer television for the energy plant, it is unlikely that Rutherford would determine that the television should be removed. It was only after the March 25, discussion between Martin and Taylor that the mirrors and television were removed. The employee assigned the task to remove the mirrors and television testified that Rutherford told him that he had been ordered by Taylor to have them removed. The only rational conclusion that can be drawn is that Taylor had the items removed and the removal was after, and in reaction to Martin challenging Taylor's authority to determine emergency procedures and personnel, and the related discussion about the CBA and the Union.

The GC further argues that the Respondent's argument that it was attempting to fix problems of unequal work distribution and unfinished work assignments should be rejected. Respondent provided no evidence to establish that there was unequal distribution of work or that work assignments were not being completed. Further, there was no evidence of a correlation between the alleged unequal distribution of work or incomplete assignments and the television and mirrors.

With regard to remedy, the parties agreed in a Joint Stipulation that, in the event a violation of the Statute is found, that an appropriate Notice to employees would be disseminated electronically and posted on Respondent's bulletin boards. The GC further requests that the three mirrors and television be returned to the energy plant.

Respondent

The Respondent denies that it violated the Statute by removing the mirrors and television from the energy plant. It argues that even if Martin's inappropriate response to Taylor on March 25, was protected activity, the GC cannot show that the interaction between Taylor and Martin on that date was a motivating factor in removing the mirrors and the television. The GC bases its entire argument on an incident that occurred less than 30 days before the mirrors and television were removed. There is no direct evidence that the removal of the items was related to the March 25, incident.

The Respondent asserts that it had a legitimate justification for removing the mirrors and television and would have done so even in the absence of the incident. Both Rutherford and Taylor testified that there were serious issues with the maintenance department, primarily related to concerns regarding uneven work distribution and that the night crew was doing the majority of the heavy work. Further, work orders originally assigned to the day crew were redistributed to the night crew. There were also concerns that the day crew were gathering in the energy plant and walking the halls of the hospital, drinking coffee, and talking. As a result of their concerns, Taylor and Rutherford initiated several things in an attempt to even out the work and require all members of the maintenance department to be productive. The men were assigned to teams, break hours were set, Eaves was no longer allowed to distribute work orders, and the mirrors and television from the energy plant were removed. Neither Taylor nor Rutherford believed that there was a legitimate work related reason for the mirrors and television to be in the energy plant and were never informed otherwise. Rutherford determined that the main purpose of the mirrors was to monitor the comings and goings of supervisors into the energy plant. He also determined that it was unreasonable to allow the employees to have a television set in a duty office. Rutherford testified that it was his decision to remove the mirrors and television and he issued the work order to do so.

The Respondent further argues that the evidence fails to establish that the mirrors and television were needed for Martin's work as a boiler operator. The items clearly were not necessary for that work and were used for improper, non-work related activities.

ANALYSIS AND CONCLUSIONS

In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the Authority established the analytical framework for reviewing allegations of discrimination under § 7116(a)(2) of the Statute. Under that framework, the General Counsel has the burden to establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* at 118. Whether the GC has established a prima facie case is determined by considering the evidence on the record as a whole, not just the evidence presented by the GC. *Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201, 1205 (2000). The timing of a management action is a significant factor in determining whether the GC has established a prima facie case of discrimination. *U.S. Dep't of VA Med. Ctr., Leavenworth, Kan.*, 60 FLRA 315, 319 (2004); *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567, 568 (1990); *Dep't of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 35 FLRA 891, 900 (1990).

Once the GC makes the required prima facie showing, a respondent may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the protected activity. If the respondent establishes an affirmative defense, then the Authority will conclude that the GC has not established a violation of the Statute. *U.S. Dep't of Transp., FAA, Wash., D.C.*, 64 FLRA 410 (2010).

The first question in this matter is whether or not Martin was engaged in protected activity. The evidence reflects that Martin has been a steward since 2000. There is no specific evidence relating to his activities as a steward, except for the conversation at issue in this matter. On March 25, Martin joined other bargaining unit employees of the maintenance department in taking a break in the department's break room. Also present were the first-level supervisor Eaves and the third-level supervisor Taylor. When Martin arrived, Taylor and other employees were discussing the new uniform policy. One of the employees asked about the difference between key and essential personnel during a crisis, such as a hurricane. Taylor attempted to explain the difference, but eventually just stated that she would be making any such decision as needed. At that point, Martin joined in the conversation and told Taylor that there was a bargaining unit and a CBA that would need to be followed. This conversation went back and forth between Taylor and Martin, in front of the others. After denying the existence of a CBA, Taylor asked Martin several times to get her one and Martin told her to get her own copy. At that point Taylor and Martin quit talking to each other and Taylor continued to talk to other employees. Towards the end of the break period, Taylor said something and Martin attempted to respond. Taylor held her hand up and told him that she didn't want to hear anything else he had to say. The break then ended and everyone left. There is no evidence that Taylor physically threatened Martin by holding up her hand and the evidence reflects that there was some distance and probably a table between them.

In agreement with the GC, I find that Martin was engaged in protected activity during this conversation with Taylor. Whether she knew he was a steward was irrelevant, because the Respondent clearly had notice that Martin was a steward and had been one for a number of years. During this meeting, Martin made clear to Taylor that the maintenance employees were members of a bargaining unit and there was a CBA that should be consulted with regard to the specific issues related to who should be considered essential during a weather crisis such as a hurricane. Martin, as the Union steward, was explaining fundamental rights for bargaining unit employees and his conduct was therefore protected by the Statute.

I do not find, however, that the GC has met its burden of establishing that Martin's protected activity was a motivating factor in the removal of the mirrors and the television from the energy plant. The GC primarily relies on timing in establishing such motivation, asserting that Martin's protected activity on March 25, was directly related to the removal of the mirrors and television on April 15, three weeks later. But any such connection between those two actions is too tenuous to establish a violation in this matter. While the evidence does reflect that Taylor requested the employees submit statements regarding what happened

on March 25, and considered possible discipline for Martin, no such discipline occurred. Eaves refused to discipline Martin, although he did counsel Martin on March 25, telling him not to be confrontational. The possibility of disciplinary action continued throughout March and April, and it is not until April 21, after the mirrors and television were removed, that Martin was told that Taylor had initially planned to give him a letter of reprimand, but had decided not to do so after consulting with Eaves and Rutherford. (Tr. 152, 343, 336). There was no discussion of the mirrors and television during this meeting and the evidence shows no connection between the consideration of discipline and the removal of the equipment. Under these circumstances, I do not find the timing of the removal of the mirrors and television to be connected with the March 25, protected activity. *Cf. U.S. Dep't of Def., U.S. Air Force, 325th Fighter Wing, Tyndall AFB, Fla.*, 66 FLRA 256 (2011).

The GC placed great store that Martin received excellent performance appraisals, with the highest rating possible for the years 2008 through 2011. (G.C. Exs. 4, 5, 6 & 7). Both Eaves and Rutherford testified that he was an excellent mechanic and very knowledgeable in his boiler plant duties. I have no reasons to doubt Martin's capability as a mechanic, but I do not find his excellent performance appraisals to be relevant in this particular situation. And I particularly note that Eaves gave all of his employees excellent performance appraisals, which lessens their evidentiary value in this matter. While I generally found Martin to be a credible witness, his testimony regarding the necessity of the mirrors and the television was overblown and unreliable. Martin was only supposed to be in the energy building two hours each of his scheduled four days of work. When he was not present, no one else was tasked with monitoring the boilers and Martin admitted that they essentially ran on their own.

The GC rejects the Respondent's defense that there were concerns regarding unfair work assignments, but I find this too narrow of a focus. The evidence was clear that there was unrest in the department. The night shift employees consistently complained about the unfair work distribution. Whether there was evidence to actually establish problems with work distribution, the perception of such unfairness was rampant for the night shift employees. As a result of such concerns, the evidence reflects that Taylor and Rutherford had begun making changes within the maintenance department. There was a new uniform policy, with employees no longer being able to wear jeans and there was a concern about wearing safety shoes. Other changes included the temporary removal of Eaves as responsible for making work assignments. There was even evidence that two of the day shift mechanics, Ostroski and Vasquez, were removed from offices they used within the hospital. In view of all this disruption within the maintenance department, the removal of the mirrors and the television from the energy plant (which was used by more employees than just Martin) is not an isolated action but part of an overall revamping of the maintenance department.

Considering the evidence as a whole, I find that any connection between the March 25, protected activity and the later removal of the mirrors and the television is too speculative and the GC has failed to make a prima facie case in this matter.

Further, even if I was to find a prima facie case, I would find that the Respondent has established that it would have made the same decision, i.e. removal of the mirrors and the television, even in the absence of the protected activity. In that regard, the evidence reflects a widespread concern among the night shift employees and management regarding the distribution of work orders and the completion of work. The atmosphere between the two shifts was becoming toxic and the first line supervisor was more interested in peace than in supervising. As a result, the Respondent, through Taylor and Rutherford, made numerous changes within the maintenance department, as noted above, and the removal of the mirrors and the television from the energy plant was just part of their overall attempts at improving the department, with no connection to Martin's protected activity.

Therefore, I find that the General Counsel failed to establish a violation of the Statute as alleged and recommend that the complaint in this matter be dismissed.

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., August 11, 2014

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge