



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

OALJ 15-34

DEPARTMENT OF VETERANS AFFAIRS  
VETERANS AFFAIRS MEDICAL CENTER  
MARTINSBURG, WEST VIRGINIA

RESPONDENT

Case No. WA-CA-13-0527

AND

NATIONAL ASSOCIATION OF GOVERNMENT  
EMPLOYEES, LOCAL R4-78

CHARGING PARTY

Douglas J. Guerrin  
For the General Counsel

Brenda Byrd-Pelaez  
For the Respondent

Susan Anderson  
For the Charging Party

Before: CHARLES R. CENTER  
Chief 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 rules and regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On February 10, 2014, the Regional Director of the Washington Region of the FLRA issued a Complaint and Notice of Hearing in the above case alleging that the Department of Veterans Affairs, Veterans Affairs Medical Center, Martinsburg, West Virginia (Respondent/VA) violated § 7116(a)(1) of the Statute by committing an unfair labor practice when it filed a police report with the Veterans Affairs Police (VAP), alleging that a

representative of the National Association of Government Employees, Local R4-78 (Charging Party/Union) had threatened a bargaining unit employee. The Complaint alleged that reporting the incident interfered with the Union representative's right to communicate with bargaining unit employees about an ongoing grievance. The Respondent filed its Answer to the Complaint on March 10, 2014, denying that it had interfered with the Union representative's rights.

A hearing in the matter was held on April 15, 2014, in Martinsburg, West Virginia. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent did not commit an unfair labor practice when it reported an incident in which the Union representative threatened a bargaining unit employee. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

#### FINDINGS OF FACT

The Respondent is an agency within the meaning of § 7103(a)(4) of the Statute. GC Ex. 1(c) & 1(d). The Union is a labor organization within the meaning of § 7103(a)(4) of the Statute and is the exclusive representative of a unit of Respondent's employees appropriate for collective bargaining.

Five electricians work in the Respondent's electrical shop. Tr. 38, 94. According to the Union contract, overtime is to be fairly and equitably distributed within the shop. Tr. 34, 35. However, some workers decline overtime when it is offered. Tr. 36. Robert Prevallet, an electrician and bargaining unit employee, would almost always accept any overtime that was offered to him. Tr. 38. Prevallet has worked as an electrician for the Respondent for nearly ten years and is supervised by Jason Benjamin. Tr. 38-39. Benjamin became a supervisor for the Respondent in June or July 2012. Tr. 14-15, 94.

In February 2013, Benjamin approached Prevallet in the electrical shop to ask him about performing overtime. Tr. 56. During the conversation, Union Steward Mark Gordon, intervened. Tr. 24, 56-57. Gordon told Benjamin that overtime was not being allocated properly and that he would file a grievance. *Id.* On February 27, 2013, Union Steward Thomas Ash filed a grievance against Benjamin over the distribution of overtime work. Tr. 17. Ash submitted the grievance after consulting with Gordon. *Id.* The grievance accused Benjamin of improperly distributing overtime to Prevallet, in violation of the terms set forth in the collective bargaining agreement (CBA). Tr. 16, 18. At that point, Prevallet was receiving most of the overtime that was offered to shop employees. Tr. 18.

A month later, Gordon and Prevallet were working alone in the shop. Tr. 20, 53. Gordon spoke with Prevallet about the amount of overtime Prevallet had worked relative to other bargaining unit employees. Tr. 24-25. Gordon knew that Prevallet volunteered for overtime anytime it was offered. Tr. 18-19, 25, 29. Gordon informed Prevallet that the grievance against Benjamin was over the amount of overtime assigned to Prevallet. Tr. 19. Prevallet appeared scared and his voice quivered during the conversation. Tr. 19-20. During this conversation, Gordon told Prevallet that Management had thrown Prevallet under the bus. Tr. 50, 58. As a result, Prevallet was concerned that he would get into trouble because of the overtime grievance. Tr. 41, 47-48. He also felt defensive, believing that Gordon had asked him to make sure Management properly allocated overtime. Tr. 59, 64.

During a separate meeting, concerning the distribution of overtime, Gordon warned Prevallet to "be careful" because what he had done had come out. Tr. 24, 33. On other occasions, Gordon questioned Prevallet about working on a project after hours, inquiring into who had authorized the work. Tr. 25.

The VA's Medical Center Memorandum (MCM) for its Workplace Violence Prevention Program is intended to prevent, manage, and address workplace violence at the Respondent's facility. Tr. 68; R. Ex. 1 at 1. According to the MCM, "All staff will promptly report any incident of threatening behavior or acts of violence to the proper authority." R. Ex. 1. Respondent's staff are expected to "[r]eport harassment, bullying . . . or any other behavior or event that would create fear of violence in a reasonable person . . . by notifying VA Police [VAP] using the Violent Incident Reporting System, notifying a supervisor or other management official or co-worker . . ." R. Ex. 1 at 4. When an employee informs his supervisor of what he perceives to have been a threat, the MCM requires the supervisor to report the threat to the VAP. Tr. 69, 85, 91, 95.

Section V, of the MCM entitled Procedures, states in pertinent part:

- A. Upon an incident, event, act, or other allegation of workplace violence:
  1. The staff member will report the allegation of workplace violence.
  2. VA Police will respond and conduct an investigation . . . .
  3. Conduct follow up investigative efforts as appropriate.
  4. Following release of information guidelines, VA Police will provide incident information to the TAT, as appropriate.

R. Ex. 1 at 6. The Threat Assessment Team (TAT) reviews information on workplace violence allegations only after receiving the report of the initial investigation by the VAP. *Id.*

The MCM defines threats and violence as "any verbal or nonverbal behavior that can reasonably be perceived as threatening or intimidating, and/or any physical act that is damaging or potentially damaging to a person or to any personal or government property while on Veterans Affairs (VA) owned or leased property . . ." R. Ex. 1 at 1. The MCM specifically defines a threat as "any behavior that is reasonably perceived by the receiving

individual as a suggestion that the other individual intends to harm him or her, either physically or psychologically.” Tr. 69; R. Ex. 1 at 2. Included in the definition of violence are specific references to behavior to compel or deter an action by coercion, extortion or duress; a pattern of behavior designed or intended to harass, intimidate, menace, or frighten another person; or repeated, intentional mistreatment of an individual that is driven by a desire to control, impede or interfere with an individual, e.g., bullying. Thus, under the MCM, bullying can be considered violence and bullying is considered workplace violence when committed in the workplace against coworkers. Tr. 85; R. Ex. 1. Once the VAP becomes aware of an allegation of workplace violence, it conducts an investigation to determine whether the conduct meets a criminal threshold. Tr. 71, 85. If the VAP determines that a criminal threshold is not met, they pass their investigation onto Management and the TAT for further review. Tr. 72, 81; R. Ex. 1 at 6, 7.

However, the MCM is not the only source of duties and obligations imposed upon Management and bargaining unit employees with respect to workplace violence. The parties must also comply with the NAGE Master Agreement which requires that management “make reasonable efforts to protect employees from abusive and threatening occurrences and will take reasonable precautions to ensure such protections.” R. Ex. 2 at 153. The CBA also requires Management to “provide appropriate assistance[]” when an employee faces a physically threatening situation. *Id.*

Over the course of a month-and-a-half, Prevallet came to Benjamin’s office four times regarding what he considered to be Gordon’s threatening behavior. Tr. 96. After Prevallet’s third visit to Benjamin on March 15, Benjamin sent Prevallet an email describing how Prevallet could file a report if he felt threatened. Tr. 101; Jt. Ex. 1. After the fourth visit, Benjamin contacted his supervisor, Phil Kaiser, to inform him of what was happening. Tr. 96. Kaiser agreed with Benjamin that Gordon had threatened Prevallet. *Id.* Consequently, Benjamin reported the incident to the VAP, telling them that Prevallet was being threatened. *Id.* Officer Smith was immediately dispatched to investigate and arrived at Benjamin’s office within fifteen minutes. Tr. 97.

Benjamin briefly described to Officer Smith why he had contacted the VAP. Tr. 97. Officer Smith then interviewed Prevallet and took his statement. *Id.* Prevallet provided Officer Smith with a voluntary witness statement and talked with him about the investigation. Tr. 44, 92. Smith asked Prevallet if there were any issues in the shop and what Prevallet’s relationship with Gordon was like. Tr. 45. Prevallet told Officer Smith that he felt that Gordon was trying to bully him. Tr. 92; Jt. Ex. 1. Prevallet said Gordon had “given him a hard time on several other occasions about overtime,” and “one time called him on his phone while he was working . . . to tell him to go home.” Jt. Ex. 1 at 8.

Prevallet’s written police statement went into detail about Gordon calling him about overtime and later confronting him. Jt. Ex. 1. Gordon told Prevallet that the overtime complaint backfired on Prevallet and that Management had thrown Prevallet under the bus. *Id.*; Tr. 50. According to Officer Smith’s investigation, “Mr. Prevallet feels that Mr. Gordon is misusing his position in the Union as a Union Steward to bully him, and the rest of the staff in the Electric Shop.” Jt. Ex. 1 at 3.

As part of the investigation, Gordon, Benjamin, and Phil Kaiser met with Officer William Blednick. On April 8, Gordon met with Officer Blednick to provide a statement. Jt. Ex. 1. Blednick asked Gordon if he had threatened or harassed Prevallet. Tr. 21. Gordon acknowledged that his conversations with Prevallet were sometimes "difficult and tense," but denied making any threats. Tr. 70; Jt. Ex. 1. When Officer Blednick met with Benjamin, Benjamin told Officer Blednick that Prevallet had repeatedly told him about ongoing issues he had with Gordon. Tr. 74. Kaiser told Officer Blednick that Prevallet had approached him, saying that Gordon had been bullying him about his employment. Tr. 76; Jt. Ex. 1. Kaiser informed Blednick that in June 2012, Prevallet came to Kaiser and reported that Gordon had bullied him on the job, yelled at him, berated him, and threw things at him. Jt. Ex. 1.

Based on the statements taken by Officers Smith and Blednick, it was determined that no criminal conduct had occurred. Tr. 78. However, based on the investigation, Officer Blednick believed that some of the conduct may have violated the workplace violence policy. Tr. 79. During the hearing, Officer Blednick specifically referred to the parts of the statement where Prevallet stated that the overtime records had backfired on him, and Prevallet's impression that "the other people might be against him." Tr. 79. After the VAP determined that there was no criminal conduct, it submitted its report to the Threat Assessment Team (TAT) for further review. Tr. 22.

## **POSITIONS OF THE PARTIES**

### **General Counsel**

The General Counsel (GC) contends that the Respondent violated § 7116(a)(1) of the Statute when it reported an incident arising from a conversation between Union chief steward Gordon and a bargaining unit employee to the VAP. According to the GC, reporting the incident interfered with the Union steward's right as a Union representative to communicate with bargaining unit employees about an ongoing Union grievance.

The GC posits that the question to be asked is whether under the circumstances, Respondent's conduct tended to coerce or intimidate the Union official, or whether the official could reasonably have drawn a coercive inference from the conduct. According to the GC, the Union steward was engaged in protected activity, making any interference by the Respondent a violation of the Statute.

The GC asserts that there has been tension within the Respondent's electrical shop since Benjamin became supervisor. As evidence, the GC points to a Union led Occupational Health and Safety Administration (OSHA) investigation and a grievance the Union previously filed against Benjamin regarding overtime. The GC argues that Prevallet never complained about Gordon to Benjamin and never told Benjamin that Gordon had threatened Prevallet. The GC describes Prevallet's conversations with Gordon as informative, during which Gordon talked with Prevallet about overtime distribution and the related grievance.

According to the GC, the VAP and TAT are tasked with investigating separate categories of allegations: the VAP investigates allegations of criminal conduct and the TAT reviews allegations of non-criminal conduct. The GC contends that because staff members are required to report incidents to "the proper authority," the Respondent was not required to involve the VAP. Instead, the Respondent could have handled the issue at a lower level through the TAT. The GC maintains that Benjamin called the VAP not out of concern for Prevallet's safety, but because he was the subject of the Union's overtime grievance. As a remedy, the GC asks that a notice, signed by the Director of the VA Medical Center, Martinsburg, West Virginia, be physically posted and sent electronically to all bargaining unit members.

### **Respondent**

The Respondent asserts that it never restrained or interfered with Gordon's right to act as a Union representative or communicate with bargaining unit employees about ongoing grievances.

Respondent argues that its actions are covered by the MCM, and the NAGE Master Agreement. Respondent cites the standards set out in *Metz v. Dep't of the Treasury*, 780 F.2d 1001 (Fed. Cir. 1986) (*Metz*) as part of its argument that it followed the *Metz*-compliant policies and reasonably responded to a threat. According to *Metz*, to determine whether a threat has been made, the Agency must consider: (1) the listener's reactions; (2) the listener's apprehension of harm; (3) the speaker's intent; (4) any conditional nature of the statements; and (5) the attendant circumstances. Respondent asserts that the MCM is based on the *Metz* standards.

The Respondent notes that the MCM specifically identifies bullying as a threatening behavior. Respondent asserts that Prevallet felt threatened by Gordon's behavior. Respondent states that the MCM requires that the VAP be contacted to conduct investigations into any allegation of threatening behavior. Accordingly, Respondent argues that it was required to contact the VAP after Prevallet told his supervisor about Gordon's behavior.

The Respondent acknowledges that Prevallet's testimony at the hearing contradicts the statement he gave Officer Blednick by asserting at the hearing that he did not feel threatened by Gordon. However, to rebut Prevallet's contradiction the Respondent points to: (1) Gordon's testimony that Prevallet's voice quivered during their conversation; (2) Prevallet's testimony that he felt trouble was coming; and (3) the testimony and reports Officers Blednick and Smith prepared close in time as part of their investigation, particularly Officer Smith's testimony that Prevallet told him that Gordon was being a bully.

Finally, the Respondent contends that no evidence was entered into the record that shows that the Respondent attempted to restrain, intimidate, or prohibit Gordon from performing his representational responsibilities. As evidence, the Respondent offers Gordon's testimony that he continues to freely discuss Union issues and grievances. Tr. 22. As a result, the Respondent requests that the complaint be dismissed.

## DISCUSSION

Under § 7102 of the Statute, an employee has a right to form, join, or assist any labor organization freely without fear of penalty or reprisal. Any interference with this right violates § 7116(a)(1). Based on the facts present in this case, I find that the GC did not meet its burden of proving by a preponderance of the evidence that supervisor Benjamin reported Gordon's conduct to the VAP in response to his Union representational activity as steward or to chill future representation.

The GC confuses a lack of "any threatening behavior or violence" with the absence of workplace bullying. *See* Tr. 12. Bullying does not always involve overt threats. Webster's Dictionary defines bullying as: "[t]o treat abusively or to affect by means of force or coercion." While Benjamin may not have distributed overtime in an equitable manner, rather than dealing with that through the grievance process, Gordon tried to solve the problem by intimidating the bargaining unit employee who was receiving extra overtime into refusing overtime when offered to enforce the supervisor's compliance with the CBA.

The GC argues that when Gordon told Prevallet that he would be in trouble, Gordon was not threatening him. But the GC ignores a related conversation between the two, during which Gordon told Prevallet to "be careful" because of what he had done. Tr. 24. Gordon also told Prevallet that Management had thrown Prevallet under the bus. Tr. 59. Gordon engaged in these conversations while Prevallet was alone and isolated, with no other employees nearby to see or hear them. Tr. 20, 53, 54, 58. Based upon his reaction, Prevallet was intimidated by Gordon's conduct. Gordon and Prevallet testified that Prevallet appeared nervous, his voice trembled and cracked, and he felt concerned about his job during and after Gordon's conversations with him. Tr. 34, 59. Prevallet felt that trouble was coming his way. Tr. 48. In describing it to Officer Smith at the time, he characterized Gordon's conduct as bullying. Tr. 92.

The MCM covers psychological threats/torment and the parties' CBA mandates that supervisors take reasonable steps when such incidents occur. R. Ex. 1. Contrary to the GC's assertion, the record indicates that Prevallet informed Benjamin about Gordon's behavior towards him on more than one occasion. In his email to Officer Blednick, Prevallet wrote that he believed he had been called to see Officer Smith in order to file a report "to document the events about Mark [Gordon] bugging me about an overtime grievance that was filed by Mark." Jt. Ex. 1 at 17a. Despite Prevallet's attempt to minimize Gordon's conduct at the hearing, it is clear from the police reports that he made more of the incidents at the time, even referring to them as bullying. Jt. Ex. 1 at 3, 17a. Furthermore, officers Smith and Blednick opined that the Respondent's report of the incident to the VAP was reasonable under the circumstances revealed by their investigation. Tr. 93.

The GC has not shown by preponderance that Respondent's decision to contact the VAP was related to the chief steward's union activity. *See U.S. Air Force, Lowry AFB, Denver, Colo.*, 16 FLRA 952, 963 (1984) (*Lowry*) (finding that a preponderance of evidence did not show that a manager's decision to label an employee a "troublemaker" was related to

the employee's union activity). Nor has the GC shown that the Respondent's conduct could have reasonably coerced or intimidated the Union steward. *See id.* The Authority uses an objective standard to determine whether a supervisor's statements violate § 7116(a)(1). *U.S. Dep't of the Air Force, Sheppard AFB, Wichita Falls, Tex.*, 67 FLRA 509, 518 (2014). "The standard by which one may determine interference, restraint, or coercion is not the subjective perceptions of the employee, nor is it the intent of the employer. Rather, the test is whether, under the circumstances of the case, the employer's conduct may reasonably tend to coerce or intimidate the employee, or, in the case of a statement, whether the employee could reasonably have drawn a coercive inference from the statement." *Lowry*, 16 FLRA at 963.

I do not find that it would be reasonable to draw a coercive inference from the Respondent's decision to notify the VAP of Gordon's behavior. The GC did not show evidence that the Respondent's police report filing "had the objective impact of discouraging Union Chief Steward[s] protected union activity." GC Br. at 10. Gordon testified that he talked with bargaining unit employees in the Respondent's shop on a daily basis and he gave no indication that he had ever been limited or prohibited by the Respondent from doing so. Tr. 22, 24, 26, 32; *See Ogden Air Logistics Ctr., Hill AFB, Utah*, 34 FLRA 834, 839 (1990) (interfering with employees who were discussing conditions of employment and other matters concerning the workplace violated the Statute). Additionally, Gordon was never threatened with disciplinary action because of his Union activities. *See U.S. Dep't of the Treasury, Customs Serv., Wash., D.C.*, 38 FLRA 1300 (1991) (finding that respondent violated the Statute when it threatened a bargaining unit representative with disciplinary action if he did not provide information regarding the conduct of another employee).

The GC also argues that Gordon was engaged in the protected activity as a Union official when he spoke with Prevallet. GC Br. at 9. However, this argument would require me to find that bullying bargaining unit employees was within the scope of protected activity and that Gordon was acting in his official capacity. Furthermore, Gordon testified that his talk with Prevallet about the overtime grievance was accomplished as a coworker and not as a Union official, meaning the conversations were not protected activity. Tr. 24. *See AFGE, Local 987*, 63 FLRA 362 (2009). Gordon testified that when he asks coworkers questions as a Union official, his normal practice is to tell them he is asking as such. Tr. 26. In his conversations with Prevallet, he did not indicate that he was asking about overtime in his capacity as a Union official. *Id.*

The GC has not shown by a preponderance of the evidence that the Respondent's actions were motivated by any protected activity. *See USDA, Food & Nutrition Serv., Alexandria, Va.*, 61 FLRA 16, 22 (2005) (concluding that the employee was terminated because of performance and conduct and not because of her invocation of a contractual right). Although Gordon told Respondent that he would file a grievance about overtime, a different Union steward filed the grievance. Tr. 16. The GC has provided no evidence that the Respondent was attempting to specifically target Gordon to prevent him from fulfilling his Union duties. Furthermore, inferring discriminatory motive is not warranted based on the timing and alleged treatment of the grievant. *See Dep't of the Air Force, Air Force Materiel Command, WRALC, Robins AFB, Ga.*, 55 FLRA 1202, 1205-06 (2000) (finding that a



supervisor did not choose the time for making negative appraisals, nor was there a basis to conclude that the date was tailored to respond to grievant's protected activities). Over a month had passed between the time the grievance about overtime was filed and when the Respondent contacted the police. Compl. at 2; GC Ex. 2.

Respondent's decision to file a report with the VAP was reasonable in light of Gordon's conduct towards Prevallet. The MCM and the parties' CBA require that threatening behavior be reported. R. Ex. 1. After repeatedly being told by Prevallet of Gordon's conduct towards him, Benjamin contacted the VAP only after conferring with his own supervisor, who agreed that the Gordon had threatened Prevallet. Tr. 96. Based on Prevallet's description of his interactions with Gordon, it was reasonable for Benjamin to conclude that Gordon's behavior was threatening. It is the duty of the VAP to investigate allegations of workplace violence, including allegations of bullying. Tr. 68. Thus, I find that it was reasonable for Benjamin to conclude that the VAP would be best able to protect an employee who was being bullied.

In using certain provisions of the MCM to argue that the Respondent should not have called the VAP, the GC conveniently dismisses other relevant provisions. Although the GC is correct to note that the MCM requires supervisors to coordinate with the TAT following allegations of workplace violence, the GC's position fails to acknowledge the VAP's investigative primacy over the TAT. R. Ex. 1. Under the MCM, Medical Center Staff are expected to report bullying "by notifying VA Police . . . notifying a supervisor or other management official or co-worker . . . [and] [c]ooperate fully with investigations by VA Police . . . ." R. Ex. 1 at 4. It does not instruct employees to initially notify the TAT. *See id.*

The Respondent complied with the MCM's instructions by reporting Gordon's repeated bullying of Prevallet to the VAP. Officers Smith and Blednick believed that the Respondent's actions were reasonable under the circumstances. Tr. 93. The MCM does not provide for reporting workplace violence solely to the TAT. R. Ex. 1. Even if the Respondent had initially gone to the TAT, the VAP would have become involved because the MCM requires that the VAP investigate allegations of bullying or other instances of workplace violence. Tr. 71, 85; R. Ex. 1. Respondent's actions are further buttressed under the CBA, which requires that, "Management will make reasonable efforts to protect employees from abusive and threatening occurrences . . . ." R. Ex. 2 at 153. As such, I find that the Respondent acted reasonably and within the boundaries of the MCM and the CBA when it reported the behavior of Gordon to the VAP, thus, the Respondent did not violate the Statute.

## CONCLUSIONS

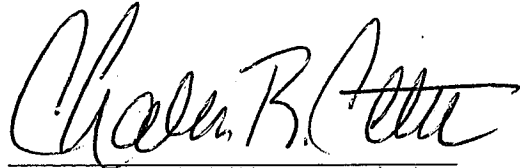
I find that the Respondent did not violate § 7116 (a)(1) of the Statute when it reported an incident of bullying to the VAP despite it arising in a conversation between a Union steward and a bargaining unit employee. And the Union steward was not acting in his official representational capacity, and his effort to intimidate and coerce a bargaining unit employee is not protected under the Statute.

Accordingly, I recommend that the Authority adopt the following Order:

**ORDER**

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

Issued, Washington, D.C., June 25, 2015

A handwritten signature in black ink, appearing to read "Charles R. Center". The signature is written in a cursive style with a horizontal line extending from the end of the name.

CHARLES R. CENTER  
Chief Administrative Law Judge