



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

OALJ 15-39

DEPARTMENT OF VETERANS AFFAIRS
VA NORTHERN CALIFORNIA HEALTH CARE SYSTEM
MATHER, CALIFORNIA

RESPONDENT

Case No. SF-CA-13-0051

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1206, AFL-CIO

CHARGING PARTY

Yolanda C. Shepherd
For the General Counsel

Robert Brewer
For the Respondent

Gloria Salter
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

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 (FLRA/Authority), part 2423.

On November 5, 2012, the American Federation of Government Employees, Local 1206, AFL-CIO (Charging Party/Union) filed an unfair labor practice (ULP) charge against the Department of Veterans Affairs, VA Northern California Health Care System, Mather, California (Respondent). (G.C. Ex. 1(a)). On January 30, 2013, the Regional Director of the San Francisco Region of the FLRA issued a Complaint and Notice of Hearing, alleging that the Respondent violated § 7116(a)(1) of the Statute when the Respondent's supervisor told a bargaining unit employee that he would lower the employee's evaluation if

the employee consulted with the Union about his rating and then the employee would get no monetary award. (G.C. Ex. 1(b)). The Respondent timely filed an Answer to the complaint in which it admitted certain allegations but denied others, including the allegation that it violated the Statute. (G.C. Ex. 1(c)).

A hearing was held on April 10, 2013, in San Francisco, California. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel and Respondent timely filed post-hearing briefs, which I have fully considered.

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 Respondent is an agency under § 7103(a)(3) of the Statute. (G.C. Exs. 1(b) & 1(c)). At all material times, Fausto Gacutan, Supervisory, Medical Technologist, was a supervisor or management official under § 7103(a)(10) and/or (11) of the Statute and acted on behalf of the Respondent. (*Id.*).

The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization under § 7103(a)(4) of the Statute and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the Department of Veterans Affairs. (*Id.*). The Union is an agent of AFGE for the purpose of representing bargaining unit employees at the Respondent. (*Id.*).

The Union filed this charge based on statements that a supervisor, Fausto Gacutan, allegedly made in a November 1, 2012, meeting about bargaining unit employee John Caudle's performance evaluation. (G.C. Ex. 1(a)). Caudle has worked as a Health Technician in the Mare Island Outpatient Clinic since 1999. (Tr. 12; Jt. Ex. 4). In late 2011, Gacutan became Caudle's supervisor. (Tr. 38).

The performance appraisal for Caudle's position requires that his supervisor evaluate his performance in five different areas: knowledge of procedures/quality of work, phlebotomy/specimen processing/productivity, customer service/communication, safety, and information security. (Jt. Ex. 4). Based on his rating in those areas, the supervisor assigns an overall rating of: Outstanding, Excellent, Fully Successful, Minimally Satisfactory or Unsatisfactory. (Jt. Ex. 4). For many years, under his prior supervisor, Caudle received the highest rating of Outstanding. (Tr. 14). In order to achieve the rating of Outstanding, his supervisor had to rate him at the highest level in all five of the performance areas. (Jt. Ex. 4).

In 2012, Gacutan rated Caudle's performance for the first time. (Tr. 22, 38). Gacutan rated Caudle lower in the area of information security, leading to Caudle's overall rating falling to Excellent. (Jt. Ex. 4). Gacutan rated Caudle at the highest level in the other areas.

(*Id.*). In the area of customer service/communication, Gacutan noted that Caudle “projects a positive, caring and professional manner to patients, and all staff members,” that he has good interpersonal skills, and that he graciously listens to patients’ concerns. (*Id.* at 6).

On November 1, 2012, Gacutan and Caudle met to discuss Caudle’s 2012 performance evaluation. (Tr. 12). The meeting lasted less than thirty minutes. (Tr. 13-14, 35). Only Gacutan and Caudle were present in this meeting, and their accounts differ markedly.

According to Caudle, the meeting began when Gacutan walked into his work area and asked him when he was going to retire and allow another employee, Cruz, to take over. (Tr. 12). Gacutan and Caudle then walked into Caudle’s office. (*Id.*). Gacutan said that Caudle would not be happy with his evaluation. (*Id.*). Gacutan said that Caudle was not an Outstanding employee and that he had received a complaint from a patient about Caudle. (*Id.*). At some point, Caudle asked why he was rated lower in information security, and Gacutan said that no one passes information security. (Tr. 22). Caudle said that he was going to the Union because he did not believe what Gacutan was telling him about his evaluation. (Tr. 13). According to Caudle, Gacutan then said, “I’ll guarantee you, you won’t get another monetary award and I will downgrade you to a [F]ully [S]uccessful employee.” (Tr. 13).

Later that same day, Caudle met with David Cruz, a Union Steward. (Tr. 14, 25). Caudle told Cruz what had happened with Gacutan. (Tr. 14-15). Cruz recalled Caudle telling him that his supervisor said he would be downgraded if he filed a complaint with the Union. (Tr. 25). Cruz recalls being flabbergasted and told Caudle to write down what happened. (Tr.15, 25).

According to the written statement, Caudle told Gacutan that he did not agree with the evaluation and that he would let the Union look at it. (Jt. Ex. 2). Caudle wrote that Gacutan responded, “[I]f I go to the union that he will change my eval from [E]xcellent to [F]ully [S]uccessful, and then I would not get a monetary award.” (*Id.*).

The following day, Caudle met with John Moore, another Union Steward. (Tr. 15, 27). Caudle gave Moore his written statement. (Tr. 28). Moore recalls Caudle telling him that Gacutan told him that if he went to the Union his evaluation would be lowered even further. (Tr. 27-28). Moore drafted this ULP charge that day. (G.C. Ex. 1(a)).

Gacutan remembers the November 1 meeting with Caudle almost entirely differently. He recalled that the meeting began with him telling Caudle that he gave him an Excellent evaluation. (Tr. 33). Caudle then immediately stood up and kept saying, “No, no, no,” in a loud tone of voice. (*Id.*). Gacutan testified that Caudle was extremely upset and that when he stood up at one point in the meeting, he “wasn’t really sure what [Caudle] was going to do.” (Tr. 35, 37). Gacutan asked Caudle to sign the evaluation, and he refused. (Tr. 33). Gacutan then told Caudle that his evaluation could have been lower because of several complaints about Caudle not answering the telephone. (Tr. 33-34).

Gacutan also testified that at some point in the meeting, Caudle went outside the lab and sent the students who work in the lab home. (Tr. 37-38). He also said that at some point, after he told Caudle about the evaluation, a travel clerk went into the room to ask for Gacutan's signature, and when the travel clerk was walking away, Caudle said, "He's giving me my evaluation. Throw that paperwork in the wastebasket." (Tr. 38).¹ Gacutan testified that Caudle finally signed the evaluation and said he was going to get the Union involved. (Tr. 34). Gacutan says he told Caudle, "Fine, that's up to you." (*Id.*). Gacutan then asked Caudle where the copier was, and Caudle said he did not know. (*Id.*).

Gacutan denied saying that if Caudle went to the Union he would change Caudle's evaluation from Excellent to Fully Successful. (Tr. 36). He said that when he "mentioned about changing the evaluation, it's because of the service, not because [he's] going to the Union." (*Id.*).

Gacutan testified that about an hour after the meeting he called his supervisor Martha Goodwin and discussed the matter with her. (Tr. 35). He testified that he spoke to her after he completed the evaluations for each of the other employees he supervises as well. (Tr. 43). Goodwin testified that she did not check in with Gacutan after each evaluation. (Tr. 52). Goodwin said that after the meeting, Gacutan said that Caudle was very upset and refused to sign the evaluation. (Tr. 49). She says that Gacutan relayed that he told Caudle that: "You know, I could have given you a lower rating because I did have some customer service issues over the past year." (*Id.*). She says Gacutan relayed to her that Caudle said, "Well, then, I'm going to go to the Union," and Gacutan said, "Fine. That's your right." (*Id.*).

Goodwin also testified that she made sure to review the evaluation in detail with Gacutan. (Tr. 48, 53). She said that this was necessary in part because, as she discussed with Gacutan, she anticipated that Caudle would be upset with the evaluation. (Tr. 53). Gacutan testified that he thought Caudle would be fine with the evaluation. (Tr. 36; 40-41).

POSITIONS OF THE PARTIES

General Counsel

The General Counsel first argues that the statement, as testified to by Caudle, is objectively coercive under the Statute because it constituted a direct threat against an employee for going to the Union. *U.S. Customs Serv., Pac. Region*, 47 FLRA 459, 466-67 (1993) (*Customs*); *Nat'l Weather Serv. Training Ctr., Kan. City, Mo.*, 16 FLRA 379 (1984) (*Weather Service*).

¹ On rebuttal, Caudle denied sending the student home and denied that a travel clerk was present. (Tr. 57). Neither the student nor the travel clerk were called by either the General Counsel or the Respondent.

The General Counsel argues that Caudle's account of the meeting should be credited for several reasons. The General Counsel argues that Caudle's demeanor supported his credibility and that he testified confidently and consistently. The General Counsel also argues that Caudle has no history of dishonesty and nothing to gain by fabricating this event. The General Counsel also rejects the Respondent's argument that Caudle's ability to process what occurred in the meeting was diminished by his anger or emotions.

Further, the General Counsel argues that Gacutan's testimony was not reliable. The General Counsel argues that Gacutan had more motive to lie because an illegal statement would reflect poorly on him as a new supervisor. The General Counsel argues that Gacutan testified inconsistently. He initially testified that he told Caudle that his evaluation could have been lower because of customer complaints, but later admitted that he discussed changing Caudle's evaluation. Also, the General Counsel noted that there were inconsistencies between Gacutan and Goodwin's testimony.

Lastly, the General Counsel rejects the Respondent's argument that Caudle misheard Gacutan's statement that he could have received a lower rating for customer service. According to Gacutan, the statement about a lower rating occurred before Caudle mentioned the Union, and Gacutan's only reply to the statement about the Union was "Fine, that's up to you." The General Counsel argues that Caudle could only misconstrue or mishear Gacutan's statement if the statement about the lower rating was in close proximity to the statement about the Union. The General Counsel also argues that it strains credibility that Caudle would confuse a response of "fine" with a threat to lower his evaluation.

Respondent

The Respondent concedes that if Caudle's version of the statement is correct, the statement violated the Statute. Respondent argues that Gacutan's version of events should be credited. Gacutan had a contemporaneous discussion with his supervisor about the evaluation meeting before the ULP charge was filed, and thus had no reason to fabricate a story in preparation for litigation that he did not know would occur. Further, Gacutan did not subsequently lower Caudle's evaluation after he went to the Union.

Finally, the Respondent argues that Caudle's version of events can be attributed to his aggravation, rather than to what Gacutan actually said. The Respondent argues that the statements can be explained by Caudle's displeasure with Gacutan's supervisory oversight and his ill will towards Gacutan. Because of this, it is more likely that he took umbrage with Gacutan's statement that his evaluation could have been lower because of customer service issues and mistakenly attributed it to supervisory misconduct.

ANALYSIS AND CONCLUSIONS

The standard for evaluating statements alleged to interfere with employees' protected rights under the Statute is an objective one. *U.S. Dep't of Transp., FAA*, 64 FLRA 365, 370 (2009) (*FAA*). The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. (*Id.*).

Here, as the Respondent concedes, if Gacutan made the statement Caudle attributes to him, it would violate the Statute. That is, Caudle testified that Gacutan told him that if he went to the Union, Gacutan would change his evaluation from Excellent to Fully Successful and that he would not get a monetary award. (Tr. 13, 15, 18; Jt. Ex. 2). If Gacutan made that statement or a statement to that effect, it would clearly constitute interference in violation of § 7116(a)(1) of the Statute. *See, e.g.*, 64 FLRA at 370 (statement linking steward's protected activity to the decision to disqualify him from an assignment violated the Statute); *Customs*, 47 FLRA at 459 (statement that employee's career would be ruined if she provided a written statement on behalf of another employee violated the Statute); *Bureau of Engraving & Printing*, 28 FLRA 796, 797 (1987) (statements that if employees or their bargaining representatives continue to file grievances, the agency will contract out their work violated the Statute); *Dep't of the Treasury, U.S. Customs Serv., Region IV, Miami, Fla.*, 19 FLRA 956, 969 (1985) (statement suggesting that an employee's career opportunities would be limited if he assisted the union violated the Statute); *Weather Service*, 16 FLRA at 380 (statements that a steward would be getting better performance evaluations if he were not continually questioning management decisions and pursuing union matters violated the Statute).

Thus, as both parties agree, resolution of this case depends on whether Caudle's account of the meeting is credible. After reviewing the record, the demeanor of the witnesses, and the consistency and plausibility of their testimony, I conclude that Caudle's account is credible and that Gacutan's is not.

Credibility determinations may be based on a number of considerations including the consistency of the witness's testimony with other record evidence, the inherent improbability of the witness's testimony, and the witness's demeanor. *See U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph AFB, San Antonio, Tex.*, 63 FLRA 256, 259 (2009); *U.S. Dep't of Commerce, NOAA, Nat'l Ocean Serv., Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1006 n.11 (1998) (citing *Hillen v. Dep't of the Army*, 35 MSPR 453, 458 (1987)); *U.S. Penitentiary, Leavenworth, Kan.*, 55 FLRA 704, 707 (1999).

Caudle testified consistently and believably that Gacutan told him that if he went to the Union, Gacutan would change his performance evaluation from Excellent to Fully Successful and that he would not get a monetary award. (Tr. 13, 15, 18). Caudle's account is consistent with his notes and statements to two Union stewards shortly after the meeting. (Jt. Ex. 2; Tr. 25, 27-28). Caudle had little or nothing to gain by fabricating the statement.

Gacutan's testimony, on the other hand, was less consistent and overall, less believable. As to consistency, Gacutan testified that he had told Caudle that his evaluation could have been lower because of his customer service. (Tr. 33). Gacutan later testified that he mentioned *changing* the evaluation because of the customer service. (Tr. 36).

Further, Gacutan's testimony seemed overblown. In that regard, he testified that after he told Caudle that he gave him an Excellent evaluation, Caudle immediately stood up and kept saying "No, no, no," in a loud tone of voice and that Gacutan "wasn't really sure what he was going to do." (Tr. 33, 37). He said that during the meeting Caudle sent home the students he had working in the lab and told a travel clerk to "[t]hrow that paperwork in the wastebasket." (Tr. 37-38). Gacutan took no notes on any of these events, and they were not otherwise corroborated. (Tr. 40). I find that if this meeting had transpired this way, it would likely have been documented or corroborated in some manner. I also find it unlikely that Caudle would react so strongly to the performance evaluation discussion without any provocation. That very day, Gacutan had described Caudle in his performance evaluation as projecting "a positive, caring and professional manner to . . . all staff members[]" and having good interpersonal skills. (Jt. Ex. 4 at 6). Gacutan's testimony is not consistent with his own evaluation of Caudle's disposition.

There were also inconsistencies between Gacutan's account of the events and his supervisor's account. For example, Gacutan said that he spoke with Goodwin after every performance review, while Goodwin said that she did not speak to Gacutan after each performance review.² (Tr. 43, 52). Gacutan could reasonably fear that admitting to making such a transparent threat would reflect poorly on him as a new supervisor. While not central, these inconsistencies, coupled with Gacutan's motive to be less-than-forthcoming, detracted from the overall credibility of Gacutan account.

Finally, I reject the Respondent's assertion that Caudle mistakenly attributed the statement that his evaluation could have been lower because of customer issues to supervisory misconduct. To the extent the Respondent implies that Caudle was lying, I reject that contention because I find that he testified credibly. To the extent it implies he no longer remembers what occurred, I reject that contention because Caudle's prior statement in writing and his prior statements to the Union stewards were consistent with his testimony at the hearing.

To the extent the Respondent implies that Caudle misheard or misunderstood Gacutan's statements, I reject that contention as implausible. First, I find it unlikely that Caudle would conflate a statement that was made *before* he raised the Union with a *response* to his comment that he was planning to seek Union assistance. Second, Gacutan's account

² Also, Goodwin said that she discussed Caudle's evaluation with Gacutan before the evaluation and that they discussed her expectation that Caudle would be upset about the evaluation. (Tr. 53). Gacutan testified that his expectation was that Caudle would be fine with his evaluation. (Tr. 36, 40-41). Goodwin testified that after Caudle said he would contact the Union, Gacutan said "Fine, that's your right," while Gacutan said he said, "Fine, that's up to you." (Tr. 49, 34).

would also require that Caudle did not hear Gacutan's actual response of "Fine, that's up to you." (Tr. 34). Third, the statements alleged to have been confused are not very similar. Caudle's near-contemporaneous notes said that Gacutan said he "will change my eval from excellent to fully successful, and then I would not get a monetary award." (Jt. Ex. 2). At the hearing, he also specifically recounted that Gacutan had said that, in addition to downgrading or lowering his evaluation, he would not receive a monetary award. (Tr. 13, 15). Gacutan testified only that he told Caudle that "his evaluation could have been lower because of the customer service." (Tr. 33). I find it unlikely that Caudle would hear something so different than what was actually said.

Based on the totality of the evidence, including the witnesses' demeanor, I find that Caudle's testimony was more credible than Gacutan's, and I credit Caudle's version. Therefore, I find that the Respondent violated § 7116(a)(1) of the Statute when Gacutan said that if Caudle went to the Union, Gacutan would change his evaluation from Excellent to Fully Successful and that he would not get a monetary award.

REMEDY

The parties entered into a joint stipulation that if a violation is found in this case, the parties agree that the notice should be posted on the Respondent's VA Northern California Health Care System (VANCHCS) Intranet site as well as on bulletin boards. (Jt. Ex. 1). This is consistent with the Authority's decision that unfair labor practice notices should, as a matter of course, be posted both on bulletin boards and electronically. *See U.S. DOJ, Fed. BOP, Fed. Transfer Cir., Okla. City, Okla.*, 67 FLRA 221 (2014).

CONCLUSIONS

Based upon the foregoing, I find that Gacutan made a statement to Caudle on or about November 1, 2012, that if Caudle went to the Union, Gacutan would change his evaluation from Excellent to Fully Successful and that he would not get a monetary award. As such, I find that Gacutan's statements would reasonably tend to coerce or intimidate an employee in the exercise of rights assured by the Statute and thus violated § 7116(a)(1) of the Statute.

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

ORDER

Pursuant to § 2423.41(c) of the Rules and Regulations of the Authority and § 7118 of the Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, VA Northern California Health Care System, Mather, California, shall:

1. Cease and desist from:

(a) Telling a bargaining unit employee represented by the American Federation of Government Employees, Local 1206, AFL-CIO (Union), that his performance evaluation will be lowered and he will not receive a monetary award if he goes to the Union about his performance evaluation.

(b) In like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of the rights assured them by the Statute.


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

(a) Post at its facilities where bargaining unit employees represented by the Union are located, 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 Medical Center Director, in Mather, California, and shall be posted and maintained for sixty (60) consecutive days thereafter, in conspicuous places, including all 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) In addition to physical posting of paper notices, electronically post the notice on the VANCHS Intranet site. This Notice will be electronically posted on the same day that the Notice is physically posted.

(c) Pursuant to § 2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing, within thirty (30) days of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., July 28, 2015



SUSAN E. JELEN
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 Northern California Health Care System, Mather, California, 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 tell a bargaining unit employee that his performance evaluation will be lowered and he will not receive a monetary award if he goes to the Union about his performance evaluation.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured by the Statute.

(Agency/Respondent)

Dated: _____

By: _____
(Signature) (Title)

This Notice must remain posted for sixty (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 its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, Federal Labor Relations Authority, and whose address is: 901 Market Street, Suite 470, San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.