FEDERAL LABOR RELATIONS AUTHORITY OALJ 17-20
Office of Administrative Law Judges
WASHINGTON, D.C. 20424

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION JESUP, GEORGIA RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3981 CHARGING PARTY	Case No. AT-CA-17-0204

Brian R. Locke
For the General Counsel

Kealin M. Culbreath
For the Respondent

Scott Hoyle
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION ON MOTIONS FOR SUMMARY JUDGMENT

Motions for summary judgment filed under § 2423.27 of the Authority's Rules and Regulations are governed by the same principles as motions filed under Rule 56 of the Federal Rules of Civil Procedure. *Dep't of VA, VA Med. Ctr., Nashville, Tenn.*, 50 FLRA 220, 222 (1995). Summary judgment is appropriate when there is no "genuine dispute as to any material fact" and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. In this case, the General Counsel and the Respondent have each filed a motion for summary judgment asserting that there are no genuine issues of material fact in dispute. After reviewing the motions and other pleadings, I find that summary judgment is appropriate as the only issues to be decided are questions of law.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding 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/FLRA), 5 C.F.R. parts 2423 and 2429.

On December 27, 2016, the American Federation of Government Employees, Local 3981 (Union) filed an unfair labor practice (ULP) charge against the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Jesup, Georgia (Agency/Respondent/FCI). Following investigation of the charge, a Complaint and Notice of Hearing was issued by the Atlanta Regional Director on April 11, 2017, alleging that the Respondent violated 5 U.S.C. § 7116(a)(1) and (2) when it issued a "minimally satisfactory" rating on the performance evaluation of a Union official after he provided notification of a security concern in an agenda for a labor management meeting. An Answer was filed by the Respondent in response to the Complaint on May 5, 2017, in which the Respondent admitted some allegations, denied others and denied violating the Statute.

The General Counsel (GC) filed Pre-Hearing Disclosures on June 15, 2017 (GC Exs. 2-7). The Respondent filed Pre-Hearing Disclosures on June 15, 2017, and amended them on June 21, 2017, and again on June 22, 2017. The Respondent also filed a Motion for Summary Judgment with Respondent Exhibits 1 through 2 on June 19, 2017. A Pre-Hearing Conference was held via telephone on June 22, 2017, and after the parties agreed that there were no genuine issues of material fact in dispute, an Order indefinitely postponing hearing was issued on June 26, 2017. The GC replied to Respondent's Motion for Summary Judgment and filed a Cross-Motion for Summary Judgment on June 26, 2017, attaching three affidavits and Exhibits 1 through 7. On July 5, 2017, the Respondent replied to the General Counsel's Opposition to the Respondent's Motion for Summary Judgment and Cross-Motion for Summary Judgment.

Based upon the entire record, I find that the Respondent violated § 7116(a)(1) and (2) of the Statute when it gave a Union official a minimally satisfactory rating in response to protected activity and did so to discourage Union activity. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

Henry Tucker (Tucker) is employed by the Respondent and is a Union official serving as Secretary for the Union. Tucker Aff. at 1. Scott Hoyle (Hoyle) works as a Recreational Specialist in the Recreation Department, and has served in this position for seventeen years. Hoyle Aff. at 1. In the course of his seventeen years of employment at FCI Jesup, Hoyle noticed the absence of razor wire atop a 30 to 40 yard long fence adjacent to a rooftop in the Recreation area. Hoyle Aff. at 1. Prior to this incident, Hoyle had brought his observation about the security risk presented by the lack of razor wire to the attention of his supervisor and the Respondent took no action regarding the concern raised by Hoyle. *Id.* In anticipation of an upcoming Labor Management Relations (LMR) meeting scheduled to take place on

December 13, 2016, Hoyle, the Union's chief steward notified Union secretary Tucker via email about his security concern. Tucker Aff. at 1; GC Ex. 2. Tucker, as Union secretary, placed this security issue on the agenda for the upcoming LMR meeting and about three hours later, emailed the agenda to the Associate Warden Lisa Jones (Jones), who also serves as the LMR Chair. *Id.* at 1-2; GC Ex. 3; Tucker Aff. at 1. Jones is also Tucker's third level supervisor. Tucker Aff. at 2.

The information Hoyle gave Tucker about his security concern in the Recreation area was the first time Tucker learned there was no razor wire on the fence as he does not work in that area, and unlike other correctional officers assigned to Recreation area, Tucker had no reason to observe the absence of razor wire while conducting mandatory inspections. Hoyle Aff. at 2; R. Ex. 2. Correctional officers assigned to work in the Recreation area had a duty to inspect and report such security issues to a supervisor. *Id.* Upon viewing the proposed LMR agenda from Tucker, Jones replied and advised that he should have immediately informed the Chief of Security of this "potentially serious security concern." GC PHD Ex. 4. Jones also advised Tucker that potential security issues should "not [be] placed on the LMR agenda or submitted by email. This is an important issue that [is] not appropriate for an LMR venue. . . ." *Id.*

Although the email from Tucker informing Jones of the security issue was sent on December 13, 2016, his use of the LMR forum to address the security issue rather than immediately informing a supervisor was the reason cited by his supervisor for rating him "minimally satisfactory" in a performance rating for an earlier rating period that ended on December 10, 2016. Tucker Aff. at 1-2; GC Ex. 2; GC PHD Ex. 6; Curl Aff. When the quarterly performance rating for the period ending on December 10, 2017, was issued to Tucker on December 27, 2016, he was given a "minimally satisfactory" rating in the category of "follows security procedures" solely because he "failed to report the problem to his [supervisor] or to any [other] supervisor, allowing this breach to continue unchecked. On all other accounts Officer Tucker complies with all security procedures as required in the performance of his duties." Curl Aff. at 2; Tucker Aff. at 1; GC Exs. 5, 6 & 7. No other correctional officer assigned to duty in the Recreation area was given a minimally satisfactory rating for failing to observe and report the serious security concern reported by Tucker via the LMR process even though the lack of razor wire was plainly visible. Hoyle Aff. at 2; Sumner Aff. at 1-2.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel asserts that the Agency engaged in discrimination based on union affiliation when the Agency gave a minimally successful performance rating to Union secretary Tucker on a quarterly performance report. GC Ex. 1(b). The GC argues that Tucker was engaged in protected activity and that the Respondent did not have a legitimate justification for differential treatment of Tucker. GC Br. at 5-6. The GC alleges that Tucker was the only employee of the Respondent to receive a minimally successful rating related to

the security issue he reported via the LMR process and that this discrimination was due to his union affiliation. *Id.* at 6. The GC asserts that the Respondent violated § 7116(a)(1) and (2) of the Statute when Tucker was given a lower performance rating for engaging in protected activity. *Id.* at 5.

Respondent

The Respondent contends that Tucker's union activity did not motivate the minimally satisfactory rating given on his quarterly evaluation. R. Br. at 7. The Respondent asserts that Tucker's rating was solely determined by his performance and his failure to immediately report a security concern that could have had dire consequences. *Id.* at 7-8. The Respondent maintains that this was a legitimate justification for Tucker's minimally successful rating because the failure to immediately report the security concern jeopardized the safety and security of the institution raising the possibility of serious harm. *Id.* at 9.

DISCUSSION

Timeliness

The Respondent incorrectly asserts that the GC's filing of the Response to Respondent's Motion for Summary Judgment and Cross Motion for Summary Judgment should not be considered because it was not timely filed. The Respondent filed its Motion for Summary Judgment on June 19, 2017. The GC responded on June 23, 2017, and included in its response was a Cross-Motion for Summary Judgment. The filing of the response by the GC was within the five day time requirement set forth in the Authority's rules and regulations, 5 C.F.R. § 2423.21(b)(1), which states that "responses shall be filed within 5 days after the date of service of the motion." The inclusion of a cross-motion for summary judgment as part of the Response was appropriate because the documents and affidavits filed with the Respondent's motion included information that made a cross motion for summary judgment appropriate. Therefore, the Respondent's argument that the GC's response and motion was not timely filed is rejected.

Discouraging Union Protected Activity

Discrimination based on union affiliation and protected activity is an unfair labor practice under § 7116(a)(1) and (2). In cases of alleged discrimination, the GC must establish 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 the Agency's treatment of the employee. *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*); *22nd Combat Support Group (SAC), March AFB, Cal.*, 27 FLRA 279 (1987). If the GC makes a prima facie case of discrimination, the agency can demonstrate by a preponderance of the evidence that there was a legitimate justification for the action and that the same action would have been taken in the absence of the protected activity. *Letterkenny*, 35 FLRA at 118. When the Respondent's asserted lawful motive is found to be unlawful because it was pretextual, the Respondent must then establish an additional lawful motive for the allegedly discriminatory action. *Id.* at 120.

Protected Activity

The Respondent does not challenge that Tucker was acting on behalf of the Union when he sent the email with the proposed LMR agenda to Associate Warden Jones. R. Br. at 7. When Tucker sent the LMR agenda and provided the Respondent with notice of the security issue the Union wanted to discuss in the meeting, he was engaged in protected activity under the Statute.

Motivating Factor

In *U.S. Dep't of Transp., FAA*, the Agency denied an employee a flight assignment due to an email he sent in his capacity as a union steward. 64 FLRA 365, 369-70 (2009). The timing of management action can be indicative of whether the action was a motivating factor in the treatment of an employee. *Id.* at 369. Tucker reported the security issue on December 13, 2016. Aff. at 1-2; GC Ex. 2; Tucker Aff. at 1. The rating period when Tucker was given the "minimally satisfactory" rating started on September 11, 2016 and ended December 10, 2016. GC PHD Ex. 6. The performance evaluation for that period was completed December 27, 2016. *Id.* Thus, the record demonstrates that Tucker was given the minimally successful rating shortly after he documented the security concern in the proposed LMR agenda emailed to Jones, even though his supposed failure to immediately report the security issue to a supervisor occurred after the rating period. If his failure to immediately report the security issue was the Respondent's only motivation, it should not have been addressed in a performance evaluation covering an earlier period. GC PHD Ex. 6-7. Giving a reduced performance rating near in time to when Tucker sent the email as Union secretary rather than during the relevant rating period demonstrates that the Respondent wanted to immediately discourage him from such Union activity. Furthermore, the Respondent's haste to downgrade the rating of Tucker while failing to downgrade the rating of other correctional officers whose failure to inspect, observe, and report this patent security concern which actually occurred during the relevant rating period demonstrates that the Respondent was motivated to discourage Tucker from engaging in such protected Union activity.

Further evidence of the Respondent's disapproval and intent to discourage Union activity is present in the email response sent to Tucker by Jones the next day in which she stated:

> Thank you for pointing out this potentially serious security concern, however, Officer Tucker, I would like to remind you that potential security items, (i.e., recognized potential for escape) should be immediately pointed out to the Chief of Security and not placed on the LMR agenda or submitted by email. This is an important issue that [is] not appropriate for an LMR venue. . . .

GC PHD Ex. 4.

Obviously, Associate Warden Jones did not appreciate that Tucker documented this breach of security as a Union concern in an email sent on behalf of the Union. However, contrary to the opinion of Jones, addressing workplace security and safety concerns that have heretofore been ignored by management is precisely the type of issue that should be addressed in the LMR process. Had management addressed the security concern raised by Hoyle previously, he would not have asked Tucker to raise it in the LMR meeting. GC Ex. 2. Jones' discouragement of such protected activity by Union representatives was as patent as the missing razor wire in the Recreation area. While a "serious security concern" and an "important issue", this security breach went unobserved for years by other correctional officers who conducted inspections of that area, and yet, only the Union official who provided notice of said security breach was given a downgraded performance rating, and it was given because he raised the security concern using the LMR process.

Legitimate Justification

The Respondent argues that Tucker was given a reduced performance rating because he failed to properly notify his supervisor in a timely manner of a potential security risk. This argument borders upon the absurd for several reasons. First, as discussed above, the incident documented in his performance rating as the only reason he was given a minimally successful rating did not occur during the rating period. Second, Tucker reported the security issue to the Respondent at 2:50 p.m. on December 13, after Hoyle told him about it at three hours and one minute earlier at 11:49 a.m. that day. However, other correctional officers who work in the Recreational area failed to report this "serious security concern" for days, weeks, months, even years. Despite the fact that the absence of razor wire was openly observable by all, only the Union official who reported it via the LMR process within three hours of finding out about it, received a downgraded performance rating. Furthermore, the Respondent's argument that Tucker was the only employee for whom it had evidence of a failure to report rings hollow when every correctional officer has a duty to inspect for and report such security issues as part of their duties. Jones Dec. at 2; R. Ex. 2 at 2, 4-5.

Of particular note regarding the duty to inspect is paragraph 8 of the Respondent's Institutional Supplement, which requires a weekly inspection of the roof of the FSL Recreation area, during which staff should look for items or avenues which could facilitate an escape or other breach in security. R. Ex. 2 at 4. An ability to facilitate an escape via the roof due to the absence of razor wire was precisely the reason cited by the Union in the proposed agenda for why the absence thereof needed to be addressed. Despite their failure to inspect and observe that type of security breach, no other correctional officer was given a downgraded performance report for those repeated failures. Only the Union official who reported the potential security breach using the LMR process received a downgraded rating. The absence of razor wire on a fence 30 to 40 yards long is an observation that could and should have been made by correctional officers required to inspect and report security issues. Hoyle Aff. at 1. That no correctional officer who actually works in the Recreation area was given a "minimally satisfactory" rating for the failure to observe and report this obvious security breach demonstrates the discriminatory nature of the rating given to Tucker. Hoyle Aff. at 1-2; Sumner Aff. at 1-2.

Furthermore, a third reason the Respondent's justification must fail is the fact that while his supervisor Edward Curl declared that Tucker was given a minimally successful rating because he "failed to report the problem [sic]to his or to any other supervisor", "any other supervisor" would include Associate Warden Jones, who is Tucker's third-level supervisor. If reporting the security issue to any supervisor would have averted a minimally successful rating, the rating was imposed not because of who he reported it to, but that he reported it using the LMR process. In short, even the Respondent's after the fact explanation of its justification demonstrates that the proffered justification is pretextual.

Prior Failure to Act

Although Associate Warden Jones declared the breach reported by Tucker a serious security concern (GC Ex. 4), it was not deemed so serious when Hoyle raised it with his supervisor years earlier. Hoyle Aff. at 1. In fact, had the absence of razor wire been given the same kind of attention when raised by a subordinate as it was when it was raised by a Union officer using the LMR process, this charge and complaint would not exist. However, that action was not taken and that failure further demonstrates that the Respondent downgraded Tucker's performance to minimally successful because he raised the security issue within the LMR process.

In its Reply Brief, the Respondent attempts to negate the affidavit of Hoyle, who averred that his previous concern about this security issue was ignored by the Recreation supervisor, by submitting declarations from two former supervisors declaring that they do not recall Hoyle informing them of the issue. Medlin Dec.; Kelly Dec. Aside from the fact that only one of them was a first level supervisor and was so for a period of less than two and one-half years, there is little in the world of litigation more meaningless than a declaration that one does not recall something. In making such a declaration, the only factual statement being made by the declarant is about his own memory. It is a statement intended to entice others to infer that the incident did not happen without definitely declaring that it did not happen. A definitive statement rebutting the act averred to by Hoyle would be "Scott Hoyle did not discuss that security issue with me." At that point, there would be a conflict between the two assertions that could only be resolved with additional evidence bolstering one of the claims, or a credibility determination between the two declarants.

In this case, there is an affirmative statement of action by Hoyle, "I immediately reported it to the Recreation supervisor at the time but no one did anything about it", countered by a declaration of one former immediate supervisor who does not recall such a security concern being reported to him. That does not mean it was not reported to the Supervisor of Recreation who was Hoyle's first level supervisor prior to Kelly assuming that position, or it could mean that Kelly's memory is faulty. But one thing is certain, Kelly does not indicate that the act asserted by Hoyle did not occur. Absent evidence that Hoyle is not truthful in general, his affirmative statement is fully credited as the only statement of fact about the issue present in the record.

CONCLUSION

Based upon the entire record, I find that the Respondent discriminated against Henry Tucker for engaging in protected activity by giving him a minimally satisfactory rating shortly after he reported a bargaining unit employee's security concern using the LMR process. Therefore, I find that the Respondent violated § 7116(a)(1) and (2) of the Statute.

REMEDY

To remedy the Respondent's violation of the Statute, the Respondent must cease and desist from giving employees lower performance ratings in response to protected Union activity. The Respondent is required to post a Notice to Employees at its facilities where bargaining unit employees are located, and to disseminate a copy of the Notice through its email system. *See DOJ, BOP, Fed. Transfer Ctr., Okla. City, Okla.*, 67 FLRA 221 (2014) (holding electronic notice-posting to be a traditional remedy used to disseminate notices to employees). Further, the Respondent must rescind the "minimally satisfactory" rating given to Henry Tucker in the third quarter performance evaluation that is the subject of this Complaint, and assess Tucker's third quarter performance for the period from September 11, 2016 to December 10, 2016, without consideration of Tucker's December 13, 2016, email about the LMR agenda to Associate Warden Jones. Lastly, the Respondent cannot give a "minimally satisfactory" rating to Tucker for the period during which his email regarding the LMR agenda was sent unless it is based upon deficiencies related to something other than the security concern discussed in that email.

Accordingly, I recommend that the Authority **GRANT** the General Counsel's Motion for Summary Judgment, **DENY** the Respondent's Motion for Summary Judgment, and issue 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 Justice, Federal Bureau of Prison, Federal Correctional Institution, Jesup, Georgia, shall:

1. Cease and desist from:

(a) Giving employees low performance ratings based upon protected Union activity.

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

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

(a) Rescind the "minimally satisfactory" rating in Henry Tucker's third quarter performance evaluation for 2016.

(b) Re-evaluate Tucker's third quarter performance without considering Tucker's December 13, 2016, email to the Associate Warden.

(c) 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 Warden, FCI, Jesup, Georgia, 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.

(d) In addition to physical posting of the paper notices, notices shall be distributed electronically, on the same day, such as by email, posting on an intranet or an internet site, or other electronic means if such is customarily used to communicate with bargaining unit employees.

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

Issued, Washington, D.C., August 14, 2017

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 Justice, Federal Bureau of Prison, Federal Correctional Institution, Jesup, Georgia, violated the Federal Service Labor-Management Relations Statute (Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT discriminate against designated representatives of the American Federation of Government Employees, Local 3981, and interfere with, restrain, or coerce bargaining unit employees by giving them low performance ratings because they reported a security concern as part of their representational responsibilities.

WE WILL rescind the minimally satisfactory performance rating given to a Union representative on December 27, 2016, and re-evaluate his performance with consideration of the security concern reported in an email as part of the LMR process.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of the 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 any of its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is: 225 Peachtree Street, Suite 1950, Atlanta, GA 30303, and whose telephone number is: (404) 331-5300.