

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

| | |
|--|----------------------|
| MINOT AIR FORCE BASE, NORTH DAKOTA Respondent | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 4046 Charging Party | Case No. DE-CA-50399 |

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **APRIL 15, 1996**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

GARVIN LEE OLIVER
Administrative Law Judge

Dated: March 13, 1996
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: March 13, 1996

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: MINOT AIR FORCE BASE,
NORTH DAKOTA

Respondent

and

Case No. DE-CA-50399

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 4046

Charging Party

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

| | |
|--|----------------------|
| MINOT AIR FORCE BASE, NORTH DAKOTA Respondent | |
| and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 4046 Charging Party | Case No. DE-CA-50399 |

James T. Hedgepeth, Major, USAF
Counsel for the Respondent

Steven B. Thoren
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent, through a supervisor, violated section 7116(a) (1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a) (1) and (2), by not selecting Darwin (Sam) Kampman for a temporary supervisory position because he engaged in activity protected by the Statute, and separately violated section 7116(a) (1) of the Statute by telling Mr. Kampman that he was not selected for the position because he was the Union Steward.

Respondent's answer admitted that it was subject to the requirements of the Statute, but denied the alleged violations.

A hearing was held in Minot, North Dakota. The Respondent and the General Counsel were represented by counsel and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and

file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record¹, 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 Charging Party (Union) is the certified exclusive representative of an appropriate unit of employees of the Respondent.

In early January 1995 a temporary supervisory position, Aircraft Clearing Equipment Operator Supervisor, WS-8, known as "Snow One," became vacant on the swing shift in Respondent's 5th Civil Engineering Squadron due to the retirement of the incumbent of that position. Respondent decided to fill the position from January 8, 1995 to April 1, 1995, the anticipated remainder of the snow season. Since this period was less than 120 days, the merit promotion plan did not apply.

Shift supervisors notified employees of the vacancy and instructed them to inform one of the shift supervisors or James Scott, the horizontal construction foreman and selecting official, if they were interested in the vacancy and the temporary promotion.

Day shift supervisor Philip Christman asked Darwin (Sam) Kampman, a senior equipment operator on the swing shift, WG-7, if he was interested in the Snow One swing shift position. Kampman replied that he was. There is no evidence that Christman ever advised James Scott of Kampman's interest.

Respondent has a system whereby qualified employees are automatically considered for promotions and need not indicate interest or apply for such positions. If an employee is selected, then the employee is asked whether he wishes to accept the position.

Darwin (Sam) Kampman has been employed at Minot AFB for about 15 years. Kampman has been a union member since he started working there and a Steward for AFGE Local 4046 since about 1991.

Kampman has engaged in a variety of representational activity as a Steward. Among other things, he has

¹

Counsel for the General Counsel's unopposed motion to correct the transcript is granted; the transcript at page 15 (instead of 14) is granted as set forth therein.

represented employees concerning grievances, winter employment, and workers' compensation problems. Kampman has dealt with James Scott, his second-level supervisor and the overall shop foreman, in his capacity as a Steward. Scott was aware of Kampman's Union activity.

On about Thursday, January 5, 1995, Technical Sergeant (Sgt.) Angus, the military supervisor for the swing shift on which Kampman worked, announced that a selection had been made for the Snow One position. Angus announced that Richard Mathson had been selected and would be moving from the day shift to the swing shift to assume the Snow One position for the remainder of the snow season. Mathson served as Snow One from about January 9 until approximately April 1, 1995.

The next day that Kampman could talk to Foreman Scott about this was Monday, January 9. Kampman went to Scott's office and asked Scott why he had not been selected for Snow One, that he thought that he was the senior man in the shop. Scott replied that he could not select Kampman because he was the Union Steward.² There is no evidence that Scott, prior to the selection for Snow One, ever discussed with Kampman how his being a Union Steward could affect his qualifications to be a supervisor.

On January 11, 1995, Kampman furnished Duane Desilets, the President of Local 4046, oral information and, at Desilets' request, written memoranda concerning the matter. Shortly thereafter, Kampman and Desilets spoke with Sgt. Angus about the selection for Snow One. They explained what Scott had told Kampman and inquired whether Scott had said anything to Angus. Angus responded that he did not

2

When Kampman asked why he had not been selected or considered for the job, Mr. Scott testified that he replied, "You were. But, you know, you can't hold the position of Union steward and supervisor at the same time." According to Scott, Kampman said he would have dropped being a Union steward if Scott had asked, and Scott then said, "I didn't know you were interested, you know, so that's why I didn't ask." Scott denied that he told Kampman specifically that he was not chosen for the position because he was the Union steward and would not have made such a statement because "[i]t's illegal." I have credited Mr. Kampman's version, but note that even Mr. Scott's admitted statements are confusing and could have clearly indicated to Mr. Kampman that his Union activity was a motivating factor in the selection process rather than, as Respondent's counsel urges, a mere reminder that had he been chosen, he could not have continued as a Union steward.

hear Scott say anything like that, but was not surprised that Scott would have made such a statement.³

Mr. Scott testified that the selection for the Snow One position was made by sitting down with all of the supervisors and going over the roster of eligibles. According to Mr. Scott, they considered all eligible employees, including Mr. Kampman, and narrowed it down to four or five candidates. Mr. Scott testified that the unanimous selection of all the supervisors was Richard Mathson.⁴ Mr. Scott testified that he selected Mr. Mathson due to his dependability, productivity, meticulous work behavior, initiative, experience, and coolness under pressure. Calvin Clouse was considered second best. Mr. Scott stated that they considered all of the candidates' appraisals, and that while they did not count up total points, they did look at their overall performance ratings. Mr. Mathson's most recent rating, as well as Mr. Kampman's, was an "excellent."

While Kampman and Mathson had the same overall rating of excellent, in the most recent appraisal prior to the selection (for the appraisal year from July 1, 1993 to June 30, 1994), Kampman had an overall total of 68 points compared to Mathson's total of 66 points. The Air Force uses a 9 factor appraisal with 9 points for each factor, with a total of 81 points available. Scott was the reviewing official who signed the appraisals for both Kampman and Mathson. In fact, Kampman had overall ratings of excellent for each of his three previous appraisals, while Mathson had received the excellent only in 1994, with his two previous appraisals being fully successful, a lower rating.

With regard to the "productivity" factor considered by Mr. Scott, the performance appraisal for "work productivity" reflects that Mr. Kampman received an "8" (far above fully

3

Sgt. Angus denied making such a statement. He testified that when Mr. Kampman asked him why he was not picked for the Snow One position, he just responded that he picked Dick Mathson as best qualified. I have credited Messrs. Kampman and Desilets' account of the conversation. Mr. Desilets impressed me as being very exact in making inquiries and reports.

4

Sgt. Angus testified that he recommended Mr. Mathson based on his work habits and ability to get along with the rest of the employees. Angus testified that Gordon Christenson, the individual vacating the position, also recommended Mathson.

successful) in both 1993 and 1994 while Mr. Mathson received a "7" (above fully successful) in 1993 and a "8" in 1994.

With regard to the "initiative" factor, the performance appraisals reflect that both Mr. Kampman and Mr. Mathson received an "8" for "Work Effort," including initiative, in 1993 and 1994, and Mr. Kampman received an "8" in both years for "Problem Solving" while Mr. Mathson only received "7s."

With regard to the "dependability" factor, the performance appraisals reflect that Mr. Kampman received "8s" in both 1993 and 1994 for "self-sufficiency" (works independently, follows through, accomplishes all tasks), while Mr. Mathson received a "7" in 1993 and an "8" in 1994.

With regard to the "meticulous work" factor, the performance appraisals reflect that Mr. Kampman received "8s" in "Skill in Work" in both 1993 and 1994 while Mr. Mathson received "7s" during this period. Both received "7s" in "Work Management."

Concerning the "coolness under pressure" factor, the performance appraisals for 1994 reflect that both Mr. Kampman and Mr. Mathson received "7s" for "Adaptability to Work" in 1994, but that Mr. Mathson received an "8" in this category in 1993. Mr. Kampman received "8s" in "Problem Solving" in both 1993 and 1994 while Mr. Mathson received "7s."

With regard to the "working relationships with others" factor, the performance appraisals reflect that both Mr. Kampman and Mr. Mathson received "7s" in the "Working Relationships" factor in both 1993 and 1994.

Concerning the "experience" factor at the time of the selection for Snow One in January 1995, Kampman had more seniority than Mathson. Kampman had worked full-time for Minot AFB since 1981 and in the maintenance shop since 1987. Mathson, on the other hand, had worked as a temporary for several years, and was not made a permanent employee until 1994, when he was made permanent under the Veterans Readjustment Act (VRA). Under the VRA, the employee has a two-year probationary period, and Mathson was still on his VRA probation at the time that he selected for Snow One.

The record does not indicate that either Kampman or Mathson had any supervisory experience prior to the Snow One selection. Mr. Scott testified that one day he put Mr. Kampman in the dispatch office and that Kampman was lost, had trouble talking on the radio, and answering the phone. Mr. Scott stated, "If he can do that, then how

could he run, you know, the airfield?" On cross-examination, Scott acknowledged, and Sgt. Angus also testified, that the duties of a dispatcher are not similar to that of the Snow One supervisory position.

In filling positions for the 1995-1996 snow season, Respondent chose Mr. Mathson as Snow One for the graveyard shift and Calvin Clouse as Snow One for the swing shift.

Discussion and Conclusions

The Statement

Section 7102 of the Statute protects each employee in the exercise of the right to form, join, or assist a labor organization, including the right to act as a labor organization representative, or to refrain from any such activity, without fear of penalty or reprisal. Section 7116 (a) (1) provides that it is an unfair labor practice for an agency to interfere with, restrain, or coerce any employee in the exercise by the employee of such right.

The Authority has held that the standard for determining whether management's statement or conduct violates section 7116(a) (1) of the Statute is an objective one. The question is whether, under the circumstances, the statement or conduct would tend to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Although the circumstances surrounding the making of the statement are taken into consideration, the standard is not based on the subjective perceptions of the employee or the intent of the employer. U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky, 49 FLRA 1020, 1034 (1994).

When Union Steward Kampman asked Foreman Scott why he had not been selected for the Snow One temporary supervisory position, Scott replied that he could not select Kampman because he was the Union Steward. Scott's statement, made after the selection and apart from any attempt to reach an accommodation between the employee's protected right and management's right to manage effectively, drew a direct connection between Kampman's protected activity and his ability to obtain a temporary supervisory position. It would, under the circumstances, tend to coerce the employee from exercising the right accorded him by the Statute to act for a labor organization in the capacity of a representative in order not to forego promotional opportunities. Thus, the statement violated section 7116(a) (1) of the Statute, as alleged.

The Discrimination

Section 7116(a) (2) of the Statute provides that it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" Under the analytical framework set forth in Letterkenny Army Depot, 35 FLRA 113

(1990), in determining whether the Respondent violated Section 7116(a)(2) of the Statute, the General Counsel must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and that consideration of such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. Id. at 118. If the General Counsel makes this required prima facie showing, the respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the consideration of protected activity. Id.

There is no dispute that Steward Kampman was engaged in activities protected by the Statute and that Respondent was aware of those activities. The General Counsel made a prima facie showing that consideration of such activity was a motivating factor in Kampman's non-selection for the position by Foreman Scott's statement, as discussed above, which drew a direct connection between Kampman's protected activity and his ability to obtain the temporary supervisory position. Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891, 898 (1990) (the Authority found that statements, regarding an employee's engaging in protected activity, made after an action taken by management do not constitute an attempt at reasonable accommodation, and can be evidence of the illegal motivating factor.) The General Counsel also showed that Kampman's experience and performance record were better than Mathson's in several respects, as set forth above.

In addition to urging that the alleged statements by Foreman Scott and Sgt. Angus were not made or were misinterpreted, and, thus, that there was no illegal motivation, Respondent contends that there was a legitimate justification for its action and that Mr. Mathson would have been chosen anyway. Respondent relies on the testimony of Mr. Scott that all of his subordinate supervisors recommended Mr. Mathson and also on Mr. Scott's and Sgt. Angus' testimony concerning Mr. Mathson. The only testimony specifically comparing Mr. Mathson with Mr. Kampman, and regarding Kampman not being more qualified than Mathson, was the attempt by Scott to show that Kampman had not performed well on a one-day detail as a dispatcher. Scott and Angus acknowledged that the duties of the dispatcher were not in any way similar to that of Snow One and that the dispatcher has no supervisory responsibilities. This attempt at a justification appears pretextual.

I conclude that the Respondent provided no objective or credible testimony to establish any legitimate justification for the selection that would offset Kampman's documented performance and experience advantage, nor refute the statement by Scott, who was the selecting official, that the reason that Kampman was not selected was because he was the Union Steward.

Based on the foregoing, it is concluded that the General Counsel has established by a preponderance of the evidence that Darwin (Sam) Kampman was not selected for the Snow One position because he engaged in activity protected under the Statute. Accordingly, Respondent violated section 7116(a)(1) and (2) of the Statute, as alleged. The remedial order proposed by the General Counsel to effectuate the policies of the Statute in this case is appropriate and will be recommended.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that Minot Air Force Base, North Dakota, shall:

1. Cease and desist from:
 - a. Discriminating against unit employees for engaging in activities protected under the Statute, such as refusing to select employees for a temporary supervisory position because they serve as Union Stewards.
 - b. Making statements to employees which interfere with, coerce, or discourage any employee from exercising the rights accorded by the Statute to act for a labor organization in the capacity of a representative freely and without fear of penalty or reprisal.
 - c. In any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights assured to them by the Statute.
2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:
 - a. Re-administer the selection process for the Snow One position conducted in January 1995, without considering any applicant's activity protected under the

Statute. If Kampman is selected for the Snow One position for January to April 1995, re-administer the selection process for the Snow One positions conducted in about November or December 1995, without considering any applicants activity protected under the Statute, without considering Richard Mathson's time as Snow One from January to April 1995, and considering that Kampman shall be credited for time as Snow One from January to April 1995. If Darwin Kampman is selected for the position or positions, make him whole for loss of pay, allowances, or differentials, with interest and other benefits, consistent with 5 U.S.C. § 5596.

b. Post at Minot Air Force Base, North Dakota copies of the attached Notice to All Employees on forms furnished by the Federal Labor Relations Authority. Upon receipt of the forms, they shall be signed by the Commander, Minot Air Force Base, and they shall be posted and maintained for 60 consecutive days 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.

c. Pursuant to Section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Federal Labor Relations Authority, Denver Region, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, March 13, 1996

GARVIN LEE OLIVER
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that Minot Air Force Base, North Dakota violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify our employees that:

WE WILL NOT make statements to bargaining unit employees represented by American Federation of Government Employees, AFL-CIO, Local 4046 (the Union) to the effect that the reason that they were not selected for a position was because of their role as a representative of the Union.

WE WILL NOT consider unit employees' protected activity under the Statute, including their right to join, form, assist, and act as a representative of the Union, when making selections to fill positions, or in any like or related manner encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL re-administer the January 1995 selection process for the Snow One position, and, if necessary, subsequent selections, without considering any applicants' protected activity under the Statute. If Darwin Kampman is selected for the position, or positions, we will make him whole for loss of pay, allowances, or differentials, with interest and other benefits, consistent with 5 U.S.C. § 5596.

(Activity)

Date:

By:

(Signature)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or

covered by any other material. If employees have any questions concerning this Notice or compliance with its provision, they may communicate directly with the Regional Director for the Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, Colorado, 80204-3581, and whose telephone number is: (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. DE-CA-50399, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Major James T. Hedgepeth
U.S. Air Force
Central Labor Law Office
1501 Wilson Boulevard, 7th Floor
Arlington, VA 22209

Mr. Steven B. Thoren
Counsel for the General Counsel
Federal Labor Relations Authority
1244 Speer Boulevard, Suite 100
Denver, CO 80204-3581

Mr. Douglas P. Goetz
Attorney at Law
5BW/JA
300 Summit Drive, Suite 211
Minot AFB, ND 58705-5038

REGULAR MAIL:

Johnnie Gorthy, Chief Steward
American Federation of Government
Employees, AFL-CIO, Local 4046
P.O. Box 1736
Minot, ND 58702

National President
American Federation of Government
Employees, AFL-CIO, Local 4046
80 F Street, NW
Washington, DC 20001

Dated: March 13, 1996
Washington, DC