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

MEMORANDUM DATE: February 16, 2010

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER
BATTLE CREEK, MICHIGAN

RESPONDENT

AND Case No. CH-CA-09-0354

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 1629, AFL-CIO

CHARGING PARTY

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(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

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U.S. DEPARTMENT OF VETERANS AFFAIRS
MEDICAL CENTER
BATTLE CREEK, MICHIGAN

RESPONDENT

AND

Case No. CH-CA-09-0354

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1629, AFL-CIO

CHARGING PARTY

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard by the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves her 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. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 22, 2010**, and addressed to:

Office of Case Intake & Publication
Federal Labor Relations Authority
1400 K Street, NW., 2nd Floor
Washington, DC 20424-0001

SUSAN E. JELEN
Administrative Law Judge

Dated: February 16, 2010
Washington, D.C.

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

U.S. DEPARTMENT OF VETERANS AFFAIRS MEDICAL CENTER BATTLE CREEK, MICHIGAN RESPONDENT AND AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1629, AFL-CIO CHARGING PARTY	Case No. CH-CA-09-0354

Greg A. Weddle, Esq.
For the General Counsel

Margaret A. Smith, Esq.
For the Respondent

Jeffrey Cunningham
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. §7101, *et. seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority/FLRA), 5 C.F.R. Part 2423.

On March 25, 2009, the American Federation of Government Employees, Local 1629, AFL-CIO (Charging Party or Union), filed an unfair labor practice charge (ULP) with the Chicago Region of the Authority, against the U.S. Department of Veterans Affairs, Medical Center, Battle Creek, Michigan (Respondent or VA Battle Creek). (G.C. Ex. 1(a)) On September 29, 2009, the Regional Director of the Chicago Region of the Authority issued a

Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) of the Statute by making statements to a bargaining unit employee to the effect that he had hurt himself by having the Union represent him. (G.C. Ex. 1(c))[1] On October 13, 2009, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(e))

A hearing was held in Battle Creek, Michigan, on November 18, 2009, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel and the Respondent filed timely post-hearing briefs which have been fully considered.

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

STATEMENT OF THE FACTS

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. (G.C. Ex. 1(c), (d)) The Union is a labor organization within the meaning of section 7103(a)(4) of the Statute. (G.C. Ex. 1(c), (d)) During the period of time at issue in this matter, Tim Stoken was a bargaining unit employee and worked as a rehab technician in physical therapy. (Tr. 11) Also during this period of time, Bill Bernherd held the position of Assistant Human Resources Director at the VA Battle Creek and was a supervisor and/or management official within the meaning of section 7103(a)(10) and (11) of the Statute. (G.C. Ex. 1(c), (d))

In December 2008, Stoken was issued a five day suspension for leave usage. During the time he was serving the suspension, Bernherd called him at home after receiving a call from Stoken. They discussed the suspension and Bernherd told him that he would try to do something for him. Stoken ended up serving the entire five days. (Tr. 12-13,18) On December 8, 2008, the Union filed an unfair labor practice charge in Case No. CH-CA-09-0148 regarding Bernherd's telephone conversation with Stoken. (G.C. Ex. 2; Tr. 32-33) Sometime in early March 2009, the Chicago Region of the FLRA informed Bridgett Griffore, Recording Secretary of the Union, that a complaint had been authorized in that case. (Tr. 33) There is no evidence of whether or when the Chicago Region contacted anyone representing VA Battle Creek regarding this decision.[2]

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[1] The Chicago Region issued a consolidated complaint on September 29, 2009, covering three separate unfair labor practice charges, CH-CA-09-0186, CH-CA-09-0314 and CH-CA-09-0354. Prior to the hearing, the cases were severed and this case was heard separately.

[2] Apparently as a result of a settlement, Stoken's five day suspension was mitigated to one day and the ULP charge in Case No. CH-CA-09-0148 was withdrawn. (Tr. 61)

On March 11 and 12, 2009, Stoken and Bernherd unexpectedly met in the canteen. According to Stoken, on March 11, he saw Bernherd in the canteen at work. This was the first time they had spoken since December 2008. Bernherd asked Stoken if he was following him around; Stoken replied no. (Tr. 13, 24)

On March 12, Stoken again saw Bernherd in the canteen, at around 8:00 a.m. When they met, Bernherd said "Mr. Stoken, how did a guy like you let the Union fuck you, sir?" (Tr. 14) Stoken testified that he did not say anything because he didn't want to get into trouble. He left the canteen and went to the kinesiotherapy clinic where he works. He told Bill Walkoviak, a kinesiotherapist, about what Bernherd had said to him. Walkoviak suggested he go to the Union. (Tr. 15, 26-27)

Stoken then went to the Union office and spoke with Jeffrey Cunningham, President, and Griffore, probably within an hour of when Bernherd had spoken to him. (Tr. 15) He told them what Bernherd had said to him. (Tr. 16) Griffore testified that Stoken told them that Bernherd had confronted him and approached him and asked the question why did you let the Union – why did the Union fuck you, a man like you. (Tr. 34) Griffore testified that Stoken came to the Union office about 18 to 20 minutes after the confrontation with Bernherd. (Tr. 34-36)

While Bernherd admits that he ran into Stoken two days in a row in the canteen, he denies making the alleged statements of the complaint. On March 11, he and Stoken crossed paths in the VA Battle Creek canteen; it had been some time since they had seen each other. They said hello and nothing else. Bernherd said this occurred in the morning, around 8:15 am, and that he routinely goes to the canteen for breakfast. (Tr. 62)

The next day, March 12, at about the same time, they ran into each other again. Bernherd said what, are you following me around now or something like that, as a joke. (Tr. 63) Stoken did not respond and just left. (Tr. 63) Bernherd said he did not know about the alleged statement until the unfair labor practice charge in this case was filed, and that he was both surprised and offended. (Tr. 64) Bernherd denied that he ever said anything to Stoken to the effect of how did a guy like you let the Union fuck him? (Tr. 64)

CREDIBILITY DETERMINATION

In order to determine the facts of what occurred when Bernherd and Stoken met in the canteen on March 12, 2009, I must resolve the conflicting testimony of what occurred at the brief meeting. While I have problems with the testimony of both of the primary witnesses in this matter, I conclude that the testimony of Bernherd is the most reliable and persuasive.

In this regard, Bernherd's testimony recalling the two encounters at the same time, two days in a row, seemed grounded in his normal routine. I do find Bernherd's testimony

regarding his lack of knowledge of whether Stoken was represented by the Union in his disciplinary matter in December disingenuous at best; it is ridiculous to assert that he had no such knowledge, considering his position, his expertise, as well as his specific interaction with Stoken. Despite this lapse, I do not find the remainder of his testimony suspect, and find his testimony regarding the two encounters to be consistent and straightforward. I find his denial of the allegations of the complaint to be sincere and believable.

Although I found Stoken to be earnest, I find his testimony of the sequence of events improbable. It is more likely that the two men spoke briefly on the first day they ran into each other in the canteen on March 11. And it is more likely that on the second day, March 12, rather than the first day, that Bernherd said something about Stoken following him around. Further, I do not find the Union representative's testimony to be sufficient to overcome my doubts about the testimony. The GC seems to argue that since Griffore knew that the Chicago Region was going to issue a complaint on the ULP involving the December 2, 2008, telephone conversation between Stoken and Bernherd that Bernherd somehow also had this information and was angry about it, to the point he would threaten an employee and use foul language in a public place. As noted above, there is no evidence that any VA Battle Creek representatives were aware that a complaint had been authorized. Also, there is no evidence that the Union had so informed the Agency, and no evidence as to when the actual complaint had been issued. I am unwilling to infer a motive for the alleged conduct based on such a tenuous connection.

Therefore, I credit the testimony of Bernherd and find that the alleged March 12, 2009, statement was not made.

POSITION OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the comments of Bill Bernherd on March 12, 2009, violated section 7116(a)(1) of the Statute. The GC asserts that by making statements to a bargaining unit employee to the effect that he had hurt himself by having the Union represent him, Bernherd interfered with, restrained or coerced the employee in the exercise of his rights under the Statute and thereby committed an unfair labor practice.

Respondent

The Respondent asserts that Bernherd did not make the alleged statement, and the complaint should be dismissed.

DISCUSSION AND ANALYSIS

Section 7102 of the Statute protects employees in the exercise of the right to form, join, or assist a labor organization, 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 of their section 7102 rights. The legal standard for determining whether comments by agency officials violate section 7116(a)(1) is set forth in *Dep't of the Air Force, Ogden Air Logistics Center, Hill AFB, Utah*, 35 FLRA 891, 895-96 (1990):

> The standard for determining whether management's statement or conduct violates section 7116(a)(1) is an objective one. 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 . . . . In order to find a violation of section 7116(a)(1), it is not necessary to find other unfair labor practices or to demonstrate union animus. . . . While 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 on the intent of the employer.

(Citations omitted) See also *U.S. Dep't of Agr., U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994).

The Authority has long held that the right to seek and accept union assistance and representation concerning conditions of employment falls within the ambit of Section 7102. *Dep't of the Navy, Portsmouth Naval Shipyard*, 7 FLRA 766, 777 (1982); *See also Navy Resale System, Field Support Office Commissary Store Group*, 5 FLRA 311, 316 (1981) (affirming a Statutory right of employees to request their Union's representation). An Agency's interference with an employee's section 7102 rights to seek assistance constitutes a violation of section 7116(a)(1) of the Statute. *United States Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Safford, Ariz.*, 59 FLRA 318, 322 (2003).

As stated above, I have found that Bernherd did not make the statement alleged in the complaint.[3] Therefore, the General Counsel has not established a violation of the Statute and I recommend that the Authority adopt the following Order:

ORDER

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

Issued, Washington, D.C., February 16, 2010

SUSAN E. JELEN
Administrative Law Judge

[3] The Respondent argued in their brief that it was spurious to suggest that the March 12, 2009 statement, if it had occurred, interfered with Stoken's protected right to seek and rely on the Union to assist him in violation of section 7116(a)(1). (R Brief at p. 9). This is based on the evidence that Stoken did seek out the Union following his meeting with Bernherd. Further Stoken testified that the statement did not discourage him in any way. (Tr. 28-29) The Respondent misconstrues the Statute and the case law on this point. As noted above, the standard for determining whether there has been a violation of section 7116(a)(1) is not the subjective perceptions of the employee or the intent of the employer, but whether the alleged statement, under the circumstances, tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. Since I have found that the alleged statement was not made, it is unnecessary to rule specifically on this portion of the Respondent's defense.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. CH-CA-09-0354, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

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Catherine Turner
Office of Administrative Law Judges
Federal Labor Relations Authority

Dated: February 16, 2010
Washington, DC