

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

MEMORANDUM

DATE: February 2, 2010

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF VETERANS AFFAIRS
ALEDA E. LUTZ VA MEDICAL CENTER
SAGINAW, MICHIGAN

RESPONDENT

AND

Case No. CH-CA-08-0454

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 2274, 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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EMPLOYEES, LOCAL 2274, 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 8, 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 2, 2010
Washington, D.C.

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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U.S. DEPARTMENT OF VETERANS AFFAIRS
ALEDA E. LUTZ VA MEDICAL CENTER
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RESPONDENT

AND

Case No. CH-CA-08-0454

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2274, AFL-CIO

CHARGING PARTY

Gary W. Stokes, Esq.
For the General Counsel

Wayne A. Hales, Esq.
For the Respondent

Edward A. Mason
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), 5 C.F.R. Part 2423.

On June 2, 2008, the American Federation of Government Employees, Local 2274, AFL-CIO (Charging Party or Union) filed an unfair labor practice charge with the Chicago Region of the Authority, against the U.S. Department of Veterans Affairs, Aleda E. Lutz VA Medical Center, Saginaw, Michigan (Respondent or VA Saginaw). (G.C. Ex. 1(a)) On September 18, 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 telling a bargaining unit employee that he should not talk to the

Union and that doing so could get him in trouble. (G.C. Ex. 1(c)) 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(d))

A hearing was held in Saginaw, Michigan, on November 17, 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 have 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. (GC Ex. 1(c), (d)) During the period of time at issue in this matter, Kerry Swan was a bargaining unit employee and worked in the Facility Maintenance Service (FMS) as a journeyman carpenter. (Tr. 12, 31) Also during this period of time, Al Wright held the position of Chief of Police at VA Saginaw 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))

On May 9, 2008, Swan arrived at the carpenter shop at approximately 6:45 am and was the first person there. When he went to his locker to hang up his jacket, he found a black bolt with a black nut on it, hanging by a white rope, on a hook in his locker, which Swan referred to as a "noose." Swan, who is African American, testified that he was upset by what he found and first called his work-leader to come to the carpenter shop. When the work-leader told him that he could not be there for 10-15 minutes, Swan called the operator and requested that the police be sent to the carpenter shop. (Tr. 13-14, 69)

Officer Anderson arrived at the scene and looked at the noose hanging in the locker, asking if it was a joke. Swan indicated that it was not a good joke. (Tr. 14) Jeff Vincent, the work-leader, arrived a short time after that, and asked Swan if he had done this. (Tr. 14) Swan then saw the Union Chief Steward Diane Whitehead and asked her to look at the noose. Whitehead left to get her camera, but was not allowed to take pictures when she returned. (Tr. 14-15, 33) More co-workers and managers arrived at the carpenter shop and then Al Wright, Chief of Police at the VA Saginaw, arrived at the shop. Wright cleared the room and he and Officer Anderson shut the door. A short time later Wright asked Swan to come into the shop. He asked Swan a few questions and then took the noose from the locker and placed it in his pocket. (Tr. 15) Wright stated that he wanted to speak to everyone who had

keys to the carpenter shop and then decided he only needed the employees who had worked the night before. Wright told Swan to write down everything that had happened in the last three weeks and email that information to him. (Tr. 16, 69) In response, Swan sent an email to Wright later that morning, describing recent events in the shop. (R. Ex. 2, p. 52)

Later that same day, May 9, Swan was called to Wright's office for an interview. At the beginning of his meeting with Wright, Swan asked if he needed his Union lady, referring to Diane Whitehead. Wright told Swan that he didn't need her, that he was going to ask Swan the same questions he was asking everyone else. Wright gave Swan a piece of paper and told him to sign it; the paper explained the Weingarten rights to representation, and Swan signed the paper without reading it. (G.C. Ex. 2; Tr. 17-18)

Wright asked Swan several questions, including why he didn't go to lunch with the rest of the guys in the carpenter shop. Swan explained he brought his lunch from home. Wright told Swan that the other employees all said that Swan had done this, *i.e.*, hanging the noose in his locker, but Wright couldn't prove it. (Tr. 19)

Swan was getting very upset with the questioning and got up to leave. At that time, Wright told him "[Y]ou're not to talk to nobody about this, not even the Union, because it can get you in trouble and it will interfere with my investigation." (Tr. 19)

Swan then left Wright's office and went immediately to the Union office where he spoke with Whitehead. He told Whitehead that he had signed a piece of paper and he didn't know what it was. Swan also told Whitehead that Wright told him that he (Swan) had done it and that he wasn't to talk to Whitehead or tell nobody. Swan told Whitehead that she was his representative and he wasn't supposed to talk to her and he was afraid he was going to get into trouble. (Tr. 20) Whitehead told him that he should not have stayed in the meeting when he was told he couldn't have his representative. (Tr. 20)

Swan wrote a point of contact report that same night, noting his conversation with the Wright as well as his unhappiness with the way Whitehead had talked to him. (G.C. Ex. 3; Tr. 27)

Wright denies that he told Swan that he could not talk to the Union. Wright admits that he told Swan not to talk about the investigation, but this is consistent with what he tells all the witnesses he interviews during an investigation. This is standard policy for him and helps maintain the integrity of the investigation. Wright admits, however, that there is nothing that can be done if witnesses do talk to others about their testimony or the investigation. Wright denies that he specifically mentioned any particular person or entity that the witness, in this case Swan, should not talk to. (Tr. 59-60, 62)

Later there was an Administrative Investigation Board (AIB) investigation of the locker incident and Swan was interviewed twice. (R. Ex. 1; Tr. 23) The results of both Chief Wright's investigation and the AIB investigation were inconclusive. Swan no longer works at the VA Saginaw.

CREDIBILITY DETERMINATION

In order to determine the facts of the meeting between Wright and Swan, I must resolve the conflicting testimony of what occurred at the end of the meeting. I conclude that the testimony of Swan is the most reliable.

I find Swan's testimony regarding the substance of Wright's remarks – that he should not discuss the matter with the Union – consistent throughout. His conduct in immediately

going to the Union following the interview showed his concern about the entire course of the interview. Further, I note that Swan's VA report of contact regarding his interview with Wright is consistent with his verbal testimony. Although Swan was upset about the incident and the resulting investigation, his recall was more specific and more persuasive than Wright's, who had difficulty remembering his precise words.

The evidence reflects that Wright was aware that the Union had knowledge of the locker incident, having seen Chief Steward Whitehead at the shop earlier that morning. Further Swan asked at the beginning of the meeting if he needed his Union lady, referring to Whitehead. Although Wright was following standard policy when he told witnesses they should not discuss their testimony with others, he went too far with Swan by telling him specifically that he should not talk to the Union. The Respondent asserts that there was no evidence that Wright told any of the other witnesses not to talk to the Union and that the Charging Party must be asserting that Kerry Swan "was singled out and only his interview deviated from the accepted techniques." (R. Brief at p. 5) I find this defense questionable, since Swan was the one who was actually involved in the Union and it would be logical for him to seek assistance from the Union following the interview, particularly when he had just been accused of putting the noose in his own locker. Further, no other witnesses were called to testify at the hearing about their interviews with Wright, either by the General Counsel or the Respondent, and I will not rely on presumed testimony.

Therefore, I credit the testimony of Swan that Wright told him "[Y]ou're not to talk to nobody about this, not even the Union, because it can get you in trouble and it will interfere with my investigation." (Tr. 19)

POSITION OF THE PARTIES

General Counsel

The General Counsel (GC) asserts that the comments of Wright on May 9, 2008, violated section 7116(a)(1) of the Statute. The GC asserts that in telling Swan that he should not talk to the Union because it could get him in trouble and interfere with the investigation, Wright interfered with, restrained, or coerced the employee in the exercise of his rights under the Statute, and thereby committed an unfair labor practice. The GC further argues that the Respondent's assertion that this case should be viewed differently as compared to other

section 7116(a)(1) cases that do not involve underlying criminal matters, should be rejected. Section 7102 of the Statute guarantees broad rights to employees seeking assistance from their union representatives, including during a pending criminal investigation.

Respondent

The Respondent asserts that the criminal investigation into the incident involving Kerry Swan's locker was conducted in a proper, appropriate manner and in conformance with law enforcement policy and practice. Pursuant to commonly accepted law enforcement criminal investigation practices, witnesses are advised not to discuss their testimony with anyone, which is necessary to maintain the integrity of the investigation. (Tr. 46-47, 51-52, 60) The Respondent asserts that Wright did not say anything to Swan that he did not say to

other employees. Specifically, at the end of each interview, it is routine for Wright (or any interviewer) to tell the interviewee that he should not talk about his testimony with anyone else. Therefore, the allegation that the Agency violated section 7116(a)(1) of the Statute 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 Air Force Base, 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. Department of Agriculture, 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. Correctional Inst., Safford, Ariz.*, 59 FLRA 318, 322 (2003).

As stated above, I have found that, at the conclusion of his interview with Kerry Swan regarding the noose found in his locker, Wright told Swan that he should not talk to the Union about their discussion because he could get into trouble and it would interfere with the investigation. Such a statement clearly threatened a bargaining unit employee if he sought assistance from the Union.

Further, I reject the Respondent's assertion that a criminal investigation somehow lessens a bargaining unit employee's rights under section 7102 of the Statute. The complaint does not allege, nor has the GC asserted, that at the conclusion of an interview in a criminal investigation that the witness cannot be warned not to talk about his or her testimony. What

the complaint alleges, and what I have found, is that a violation of the Statute occurs when a bargaining unit employee is threatened if he talks to the Union about the investigation; this is a clear violation of an employee's section 7102 rights. While there may be occurrences where such conduct would not be a violation of the Statute, those facts are not present in this case.

Based upon the foregoing, I find that a preponderance of the evidence establishes that the Respondent violated section 7116(a)(1) of the Statute on or about May 9, 2008, when, during a meeting with employee Kerry Swan, Wright said "[Y]ou're not to talk to nobody about this, not even the Union, because it can get you in trouble and it will interfere with my investigation." Accordingly, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the U.S. Department of Veterans Affairs, Aleda E. Lutz VA Medical Center, Saginaw, Michigan, shall:

1. Cease and desist from:

(a) Telling employees in the bargaining unit represented by the American Federation of Government Employees, Local 2274, AFL-CIO, during interviews involving potential criminal misconduct, that they should not talk to the Union about the investigation because doing so could get them in trouble and interfere with the investigation.

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

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

(a) Post at the Aleda E. Lutz VA Medical Center, Saginaw, Michigan, 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 Director, VA Medical Center, and shall be posted and maintained for 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.

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

Issued, Washington, DC, February 2, 2010.

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 U.S. Department of Veterans Affairs, Aleda E. Lutz VA Medical Center, Saginaw, Michigan, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute, by telling employees during interviews involving potential criminal misconduct, that they should not talk to the Union about the investigation because doing so could get them in trouble and interfere with the investigation.

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

(Agency/Activity)

Dated: _____

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 any of its provisions, they may communicate directly with the Regional Director, Chicago Region, Federal Labor Relations Authority, and whose address is: 55 W. Monroe, Suite 1150, Chicago, Illinois 60603, and whose telephone number is: (312)866-3465.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. CH-CA-08-0454, 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 2, 2010
Washington, DC