

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

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DEPARTMENT OF VETERANS
AFFAIRS, WASHINGTON, D.C.
AND DEPARTMENT OF VETERANS
AFFAIRS MEDICAL CENTER,
CANANDAIGUA, NEW YORK
Respondent
and
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3306
Charging Party
.....

Case Nos. 1-CA-00107
1-CA-00161
(42 FLRA 1059)

Barry Tapp
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Martin R. Cohen
Counsel for the Charging Party
Peter F. Dow
Counsel for the General Counsel, FLRA
Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION ON REMAND

Statement of the Case

On October 25, 1991 the Authority remanded this consolidated unfair labor practice case to the undersigned to determine and consider the final administrative determinations made by Respondent pursuant to the exercise of its exclusive authority under title 38 regarding the proposed discharges of the two nurses in this case under 38 U.S.C. § 4110. The complaint alleged that the proposed

discharges violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1), (2) and (4), since they were issued by Respondent to Registered Nurse William Ward, President of the Charging Party (Union), and Registered Nurse David Bellomo, Vice President of the Union, because they were involved in filing unfair labor practice charges against the Respondent and because of their activities for and on behalf of the Union. The complaint issued, the unfair labor practice hearing was held, and the Administrative Law Judge's decision was rendered on the disputed proposed discharges before the final decision of the Secretary of Veterans Affairs in the disciplinary proceedings under title 38.

On May 21, 1992 Counsel for Respondent and Counsel for the Union agreed that the following documents would complete the factual record for purposes of the remand. The documents set forth additional administrative actions under 38 U.S.C. Section 4110:

1. Recommendations/Actions of the Disciplinary Boards.
2. Chief Medical Director's decisions.
3. Letter from Mr. Robert Coy, VA General Counsel to John Sturdivant, AFGE, concerning the receipt of the decision of the Administrative Law Judge in the unfair labor practice cases in the context of the appeal under 38 U.S.C. Section 4110.
4. Final Actions of the Secretary of Veterans Affairs.

While agreeing to this procedure, Counsel for the Union noted for the record that the Union is continuing to contest the factual findings of the Respondent in an action in United States District Court. Counsel for the General Counsel had no further evidence to submit and had no objection to this procedure.

The above documents were submitted for the record on June 15, 1992. Counsel for Respondent and Counsel for the Union submitted briefs, upon request, on June 29, 1992 setting forth their positions on how the analytical

framework, and the application of the analytical framework, as set forth by the Authority in the decision and order remanding complaint, should be applied to the record in this case consistent with the Authority's decision.^{1/}

Findings of Fact

The underlying facts are set forth in my initial decision and in the Authority's decision. See 42 FLRA at 1060-62; 1074-89.

William Ward

On or about November 5, 1990 the Disciplinary Board sustained one charge of verbal patient abuse against William Ward. Based on the testimony of two witnesses, the Board found that Ward, on March 31, 1989, threatened and intimidated a patient by repeatedly asking him if he wanted to fight and telling him that Ward would put him in cuff and belt and allow the patients to attack him. The Board found that this action constituted major abuse. The Board did not sustain the other two charges of patient abuse.

The Board recommended that Ward be discharged based on a consideration of certain Douglas factors. It found insufficient evidence to substantiate Ward's affirmative defense that the proposed discharge was reprisal for his Union activities.

On November 27, 1990 the Chief Medical Director considered the record, including the findings of the Disciplinary Board, and decided that Ward should be discharged effective December 3, 1990.

Ward appealed the decision to the Secretary of Veterans Affairs. On November 29, 1991 the Secretary sustained the Chief Medical Director's decision which discharged Ward. The Secretary stated, "This is the final decision on your appeal under 38 U.S.C. 4110 within VA."

^{1/} The Union's brief attached certain material described as "material which was received in response to a FOIA request to the defendants." (Charging Party's Brief at 12 n.5). As noted above, these documents were not among those agreed to for purposes of completing the factual record on remand. Accordingly, they have not been considered.

David Bellomo

On or about September 17, 1990 the Disciplinary Board sustained the charge of patient abuse against David Bellomo. It found that he used excessive force and inappropriate techniques to subdue and restrain a patient. The Board recommended that the penalty be reduced from removal to a suspension of 14 calendar days. The Board found mitigating circumstances which lessened the seriousness of the charge in that the patient initiated the assault, a nursing assistant froze and provided no assistance, and Mr. Bellomo did not have any other means to protect himself or bring the patient under reasonable control.

On November 26, 1990 the Chief Medical Director considered the record, including the findings of the Disciplinary Board, and decided that Bellomo should be suspended for 14 calendar days effective December 16-29, 1990.

Bellomo appealed the decision to the Secretary of Veterans Affairs. On March 4, 1992 the Secretary sustained the Chief Medical Director's decision suspending Bellomo for fourteen days. The Secretary noted, "This is the final decision on your appeal under 38 U.S.C. 4110 within VA."

Conclusions of Law

In U.S. Department of Veterans Affairs, Veterans Administration Medical Center, San Francisco, California, 40 FLRA 290 (1991) (VA Medical Center), the Authority dismissed a portion of a complaint alleging that respondent had separated a staff registered nurse from her position in reprisal for her exercise of rights protected by section 7102. The Authority noted that the Respondent asserted a lawful reason for separating the nurse, namely that she had abandoned her position during a two-year probationary period; that her separation was effected pursuant to the respondent's exclusive authority and was final; and, as such, was not substantively reviewable in the unfair labor practice proceeding. The Authority held that other aspects of the complaint could be adjudicated. They dealt with allegations that respondent violated the Statute by making certain statements, impermissibly interrogating an employee, and promulgating an allegedly improper no-solicitation, no-distribution rule. The Authority noted that no reason was asserted, or was otherwise apparent, why these other

allegations could not be processed further. The Authority summarized its holding as follows, 40 FLRA at 301-02:

In sum, we conclude that the Charging Party, and other professional medical employees, are entitled to exercise rights pursuant to section 7102 of the Statute, including the right to form, join, or assist a labor organization without fear of penalty or reprisal. Unlawful interference with such rights constitutes a violation of section 7116(a)(1) and, in certain circumstances, section 7116(a)(2) of the Statute. The Authority has, and will exercise, statutory jurisdiction to resolve complaints alleging such violations.

In resolving such complaints, however, the Agency's exclusive authority to determine working conditions and make decisions regarding inaptitude, inefficient, and misconduct under title 38 must be observed. If as here, a respondent asserts a lawful reason for a disputed action, and such assertion is consistent with action taken pursuant to its exclusive authority under title 38 of the United States Code and is final, the determination made pursuant to that authority is not substantively reviewable in an unfair labor practice proceeding. If, however, a respondent does not make such assertion, the respondent will be found to have violated the Statute.^{9/}

^{9/} We express no view on what remedies may be appropriate or permissible in such cases.

The Authority in its decision and order remanding complaint in this case stated, in part, as follows, 42 FLRA at 1071:

On remand, absent settlement, the Judge must determine, consistent with this decision and VA Medical Center, whether the disputed proposed discharges are consistent with final action taken by the Respondent pursuant to its

exclusive authority under title 38.^{13/} If the proposed discharges are consistent with such final action, the complaint must be dismissed. If the proposed discharges are not consistent with such final action, the Judge must resolve the merits of the complaint.

13/ In determining such consistency, we find no basis on which to conclude, and none is urged for concluding, that mitigation of penalty, standing alone, would demonstrate that the proposed discharges are unlawful under the Statute.

In these cases Respondent asserted lawful reasons, instances of patient abuse, for the disputed proposed discharges. Such assertions are consistent with action taken pursuant to its exclusive authority under 38 U.S.C. § 4110, relative to the appointment of disciplinary boards to determine charges of inaptitude, inefficiency, or misconduct. See 42 FLRA 1066-70, 1074-75, 1089-90.

In the case of Ward, one charge of verbal patient abuse was sustained while two other charges listed in his proposed notice of discharge were not sustained. The sustained charge was considered major abuse, and his discharge on this ground was upheld by the Secretary. In Bellomo's case, the one charge of patient abuse listed in his proposed notice of discharge was sustained, but the penalty was mitigated from removal to a suspension of 14 calendar days. The proposed actions are now "final." The Authority held in the remand decision that

"final" action, within the meaning of VA Medical Center, encompasses a final administrative determination made pursuant to the exercise of exclusive authority under title 38. That is, an action taken under title 38 is final, for purposes of unfair labor practice proceedings, at such time as that action is accorded administrative finality under title 38 or regulations issued pursuant to title 38. We find no reason, however, and none is asserted, for holding that any subsequent judicial review of title 38 proceedings affects administrative finality for our purposes. [footnote omitted]

42 FLRA at 1068-69.

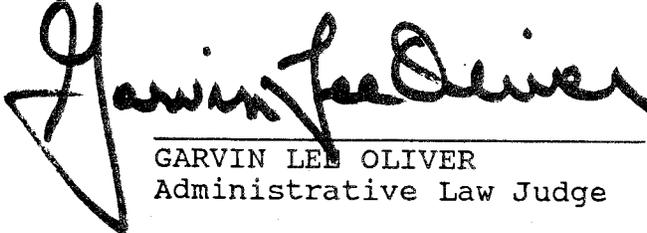
Pursuant to the analytical framework, and the application of the analytical framework, set out by the Authority in its decision on remand and in VA Medical Center, it is concluded that the proposed discharges are consistent with the final action of Respondent pursuant to its exclusive authority under title 38 and, accordingly, the complaint must be dismissed.

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

Order

The consolidated complaint is dismissed.

Issued, Washington, DC, August 4, 1992



GARVIN LEE OLIVER
Administrative Law Judge