

OFFICE OF ADMINISTRATIVE LAW JUDGES

WASHINGTON, D.C. 20424-0001

KIRTLAND AIR FORCE BASE
ALBUQUERQUE, NEW MEXICO

Respondent

and

Case No. DA-CA-40072

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
LOCAL 2263

Charging Party

Captain James M. Peters For the Respondent

Charlotte A. Dye, Esquire Susan E. Jelen, Esquire For the General Counsel

Ms. Yvon Lefebvre For the Charging Party

Before: WILLIAM B. DEVANEY Administrative Law Judge

DECISION

Statement of the Case

This proceeding, 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.⁽¹⁾, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns whether an employee was "chastised" for having given a witness statement to the Union and whether the employee was ordered to remain off the premises of the Transportation Department because he had given the statement to the Union, all in violation of §§ 16(a)(1) and (2) of the Statute.

This case was initiated by a charge filed on October 27, 1993 (G.C. Exh. 1(a)) which alleged violation of §§ 16(a)(1) and (4) of the Statute. A First Amended charge was filed on December 16, 1993 (G.C. Exh. 1(b)), to allege violation of §§ 16(a)(1), (2) and (4) of the Statute; and a Second Amended charge was filed on January 14, 1994 (G.C. Exh. 1(e)), which alleged violation of §§ 16(a)(1) and (2). The Complaint and Notice of Hearing issued on February 9, 1994 (G.C. Exh. 1(h)), alleged violation of §§ 16(a)(1) and (2) and the hearing was set for a date, time and place to be determined. By Order dated March 2, 1994 (G.C. Exh. 1(i)), the hearing in this, and other cases, was set for April 11, 1994, in Albuquerque, New Mexico; by Order dated March 12, 1994 (G.C. Exh. 1(m)), the place of the hearing in Albuquerque on April 11, 1994, was changed; and by Order dated April 4, 1994 (G.C. Exh. 1(n)), the date of the hearing was rescheduled for April 12, 1994, pursuant to which a hearing was duly held on April 12, 1994, in Albuquerque, New Mexico, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which all parties waived. At the conclusion of the hearing, May 12, 1994, was fixed as the date for mailing post-hearing briefs, which time was subsequently extended, on motion of Respondent, to which the other parties did not object, for good cause shown, to June 12, 1994. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, June 17, 1994, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. Mr. David Chavez (hereinafter referred to simply as "David" to distinguish him from Mr. Jesse Chavez, a supervisor, who will be referred to simply as "Jesse"), has been employed at Kirtland Air Force Base since December, 1978 (Tr. 12). From the date of his employment until February 22, 1993, David had worked in the Transportation Department. On February 22, 1993, David transferred to Base Supply (Tr. 12).

2. On February 3, 1993, David, Mr. José Marquez and Mr. Chris Lopez were sitting in the break room on their afternoon break talking. The telephone, presumably in the break room, rang, David answered it and called S/Sgt. Maurassi to the telephone. While Sgt. Maurassi talked on the telephone, David, Marquez and Lopez continued their conversation. Mr. Lopez told Sgt. Maurassi to keep his voice down. Sgt. Maurassi responded by saying, "Excuse me I'm on the phone", Mr. Lopez argued with him and said he was going to knock his block off. Sgt. Maurassi got off the telephone and left the break room. David talked to Sgt. Maurassi outside the break room and he was upset. Sgt. Maurassi then went to the Vehicle Maintenance Office (G.C. Exh. 2, Tr. 12-13).

3. The following day, February 4, 1993, David was called to the office of Mr. Jesse Chavez (hereinafter referred to as Jesse), Vehicle Maintenance Officer in charge of the 377th Transportation Maintenance Branch (Tr. 34), for whom he had worked since October 25, 1990 (Tr. 39). Jesse asked David what had occurred the previous day between Lopez and Sgt. Maurassi (Tr. 13, 40). David said that Mr. Milton Kernegay, another Vehicle Maintenance Officer, and two Master Sergeants were present (Tr. 13); but Jesse said that only Master Sergeant Hoffman was present (Tr. 52). Apparently, David did not tell Jesse what had happened at that time but agreed to submit a written statement (Tr. 13, 40) which he did on February 17, 1993 (G.C. Exh. 2) which recites the facts as set forth in Paragraph 2, above.

4. Sgt. Maurassi having filed a charge against Mr. Lopez for the threat against him, Jesse interviewed Marquez (Marcus), Lopez and Maurassi individually and, in reliance in large part on the written statement of David on whom he ". . . depended . . . I trusted in his honesty." (Tr. 40), recommend the discharge of Mr. Lopez (Tr. 41).

5. Thereafter, the Union requested a meeting with Jesse at which it produced a second written statement of David (G.C. Exh. 3). Jesse found the two statements inconsistent (Tr. 42), as indeed they are, by way of omission from his first statement. Thus, as Jesse stated,

". . . in the second statement that David Chavez gave, he had two items in there, one that he did not relate to me. And, that one was the fact that Mr. -- Sergeant Maurassi had taken off into the office and proceeded to destroy it in a sense of speaking. And, then (sic) second item that he put there, was that he prevented Sergeant Maurassi from going out into the shop and picking a fight with Mr. Salsa Lopez." (Tr. 42; see, G.C. Exh. 3).

As the result of the information in David's second statement, Jesse reduced the recommended discharge to a ten day suspension (Tr. 42) which Mr. Lopez completed on, or about, April 27, 1993 (Tr. 56).

6. David conceded that his two statements were quite different, asserting, ". . . The one statement I gave Sergeant Maurassi's side [G.C. Exh. 2] and the other Mr. Lopez' side [G.C. Exh. 3]." (Tr. 16).

7. As noted above, David transferred to Base Supply on February 22, 1993, just five days after he gave his first statement (G.C. Exh. 2). Jesse testified that he had seen David in the Transportation Compound in a vehicle on occasion after his transfer (Tr. 43) but only had the opportunity to wave or hollo until May 7, 1993, when he saw David wandering around the compound⁽²⁾ and sent word that he wanted to see him (Tr. 44). David said that he went to pick up softball equipment (Tr. 17), but conceded that he talked to Mr. Kernegay and to Master Sergeant Wilson (Tr. 18). David said Jesse came out of his office and asked him to come in but he didn't go until later (Tr. 18). Jesse testified that he saw David in the Compound in the morning and told Master Sergeant Hoffman, the superintendent (Tr. 52, 44), that he wanted to see him (Tr. 44); that he waited but David did not show up so he called several shops before locating David in the allied trades shop and he told the person who had answered the telephone to, "Tell David Chavez that I want to see him before he leaves the compound" (Tr. 44); that he waited about an hour and when David still had not appeared, called the allied trades shop again, was told that David was still there and then spoke to David and told him he wanted to see him before he left (Tr. 45). David said that when he arrived at Jesse's office, the secretary, Ms. Nona McManus, told him, "Boy are you in trouble for writing that statement." (Tr. 18). David said that when he went in, Jesse, ". . . said he was very unhappy with me that I wrote that statement on behalf of Mr. Lopez . . . he was very unhappy with what I wrote and that it contradicted the statement I had written before." (Tr. 18-19).

Jesse testified that David came to his office about fifteen or twenty minutes after he talked to him; that when he came in he said, "What's (sic) you doing here"; that David responded, "I'm visiting friends. I've got a lot of friends here" and that he had replied, "Well you don't come around here and visit friends . . . People's got to work. I got work to put out." (Tr. 45). Jesse stated that he told David, "This is the statement you gave me and then the statement you gave to somebody else was totally different" (Tr. 46). Jesse again testified that he asked David, "Why are you here in the compound"; that David said, "I'm visiting friends"; that he said, "David, you've been here for three, almost going on four hours . . . I don't want you in this compound, I want you to leave it and don't -- only come in here on official business"; that David responded, "Okay, if that's the way you want it." (Tr. 46).

David testified that when he got up to leave, Jesse, ". . . told me I was no longer welcome in transportation except for official business" and that he had responded, "Okay that's all right with me I'll just come on official business." (Tr. 20).

David denied that he was in the compound for more than a few minutes when Jesse came out of the back part of his office and asked him to come into his office (Tr. 65-66); denied that he talked to Jesse on the telephone, indeed denied that he was ever out of his truck (Tr. 66). David stated that he told Mr. Kernegay and Sgt. Wilson what Jesse had said; Jesse said he told Sgt. Hoffman of his conversation with David; but none was called as a witness.

8. David said that he had been back to the Transportation Compound since May 7, 1993, but only on official business (Tr. 21). His lament was that he had not gone back for social functions such as retirements and awards parties (Tr. 21, 22) because he was, ". . . not allowed to go back . . . Mr. Jesse Chavez made it very clear to me that I wasn't welcome." (Tr. 22).

David testified that he had received invitations after May 7, 1993, to attend retirement functions at transportation (Tr. 30, 67). He said, "I should be allowed to go if I am invited." (Tr. 29).

Jesse testified, without contradiction, that retirement and awards programs are official functions (Tr. 49); that they are for the Maintenance Branch and if outsiders want to attend, they must clear it through the Maintenance Office or with him (Tr. 50); that David had never asked to attend one of these functions after he transferred and if he had asked, permission would have been granted. (Tr. 50).

Conclusions

David admitted that his supervisor, Jesse, on February 4, 1993, asked him what had occurred the day before between Mr. Lopez and Sgt. Maurassi; and that he agreed to give a written statement which he did on February 17, 1993 (G.C. Exh. 2). Obviously, his statement of February 17 was written at his leisure, wholly free of intrusive pressure. Although asked what had happened on February 3, 1993, David's statement of February 17, 1993, would prove to be seriously lacking in candor - not by what David said, but by what he failed to say. The record is further clear that Jesse relied on David's statement in reaching his decision to recommend the discharge of Mr. Lopez. When the Union, sometime after his recommendation, asked to meet with him, Jesse was shown a second statement by David in which he set forth, in particular, two very important matters which he had wholly omitted from his first statement. Based on David's second statement, Jesse changed his recommended removal of Mr. Lopez to a ten-day suspension.

There is no dispute that Jesse, on May 7, 1993, did berate David - not because he had given the Union a statement, but because he had given Jesse a dishonest and misleading statement by the omission of critical information. By failing to tell the whole truth, David had, indeed, lied, in the sense that he had deceived by withholding vital information. That the information was vital is beyond question inasmuch as, on the basis of that information, Jesse changed his recommendation of dismissal to a suspension of ten days. Nor is there any doubt whatever that David fully understood that he was berated because ". . . he was very unhappy with what I wrote and that it contradicted the statement I had written before." (Tr. 19). I do not credit David's testimony that Jesse said, ". . . that wasn't the truth, that was not what took place." (Tr. 19). First, the truth of what David said in his statements was never questioned as was demonstrated by the fact that, on the basis of David's second statement, Jesse changed his prior recommendation. Second, David, even at the hearing, did not, or would not, recognize his deceitfulness in willfully withholding in his first statement vital information. Indeed, his cavilling retort was, ". . . I was only giving both sides of the story. . . ." (Tr. 19). Third, I found Jesse's testimony as to what occurred wholly credible and convincing. Thus, Jesse, testified, in relevant part, as follows:

" . . . 'This is the statement you gave me and then the statement you gave to somebody else was totally different'. And, then he proceeded to tell me that the statements were the same as far as he's concerned and he can't see nothing different.

So, I read both statements to him and I said, 'I would have made a different decision if I

could have had the second statement, if you would have told me everything that transpired'. . . ."

(Tr. 46).

Accordingly, as the record shows, and I find, that David was berated solely because he had given Jesse a statement which, by its omissions, was deceitful and inaccurate and had led to a decision which would not have been made had David told all that happened, Respondent did not violate § 16(a)(1) by its beratement of David for having given, effectually, a false statement.

The Transportation Compound is an enclosed enclave with controlled access. Outsiders are not permitted free access and, if Jesse's ire caused him to tell David that he was no longer welcome in the Transportation Compound except on official business, he did not violate §§ 16(a)(1) or (2). Indeed, David was merely subjected to the same limitation applicable to all non-Transportation personnel. However, the record shows that there was a wholly independent reason for Jesse telling David to come to the compound only on official business, namely, that David was spending too much time in the compound visiting with friends. As noted, this is an enclosed compound with controlled access. Outsiders, including customers, are not allowed in the shops while mechanics are working and employees are required to account for all time spent working on vehicles (Tr. 36-38). Jesse testified that David spent too much time visiting which disrupted the work of employees. While David conceded that he talked to Mr. Kernegay and Sergeant Wilson (Tr. 17-18, 65), he minimized his visiting, even asserting that on May 7, 1993, he had never got out of his truck (Tr. 66); nevertheless, by a Freudian slip of the tongue he admitted he continued to visit with Mr. Kernegay and Sergeant Wilson after being summoned. Thus, when asked if he went to Jesse's office when Jesse asked him to come in, he replied, "A bit later, yes I did." (Tr. 18). I credit Jesse's testimony that he told David that, "My people's got to work, the people's got to put out work" (Tr. 46). Indeed, David expressed no disagreement whatever with being told to come to the compound only on official business. He testified, "I told him, 'Okay that's all right with me I'll just come on official business'." (Tr. 20) and Jesse testified that David responded, "Okay, if that's the way you want it". (Tr. 66). David's only concern was that he should be allowed to attend Transportation social affairs if he were invited (Tr. 29). Jesse testified without contraction that retirement and/or awards affairs were solely for the Maintenance Branch and that if outsiders wished to attend they must clear their attendance through the Vehicle Maintenance Office or with him (Tr. 50). David never sought permission to attend any Transportation social function after his February 22, 1993, transfer. In any event, social functions were not mentioned by Jesse on May 7, 1993. Clearly, David believed the admonition, come to the compound only on official business, included social functions; but he never inquired if he could attend social events, which, had he asked, he would have known he could (Tr. 50). Jesse testified that his admonition applied only to visiting during performance of work, not social affairs, as to which the procedure always had been that attendance by outsiders is permitted if cleared by the Vehicle Maintenance Office, or by him, which means that the charge for the visitor is paid (Tr. 51) and, if the visitor is an employee of Respondent, his or her absence has been approved by his or her supervisor (Tr. 51). Having applied to David the same limitations and procedures as applicable to all non-Transportation employees, Respondent did not violate §§ 16(a)(1) or (2).

Accordingly, it is recommended that the Authority adopt the following,

ORDER

The Complaint in Case No. DA-CA-40072 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY

Administrative Law Judge

Issued: September 15, 1994

Washington, DC

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(2) will be referred to, simply, as, "§ 16(a)(2)".
2. There are seven shops in one compound enclosed by a high fence. (Tr. 35). Access is through a controlled gate (Tr. 35). The Transportation Branch has two other shops outside the compound which are also enclosed by a fence (Tr. 35).