Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF VETERANS AFFAIRS
RALPH H. JOHNSON MEDICAL CENTER
CHARLESTON, SOUTH CAROLINA
Respondent

and Case No. AT-CA-80605

NATIONAL ASSOCIATION OF GOVERNMENT
EMPLOYEES, LOCAL R5-136
Charging Party

Cheryl Cote Counsel for the Respondent
Michele W. Snyder Counsel for the Charging Party
Brent S. Hudspeth 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 failed to comply with the provisions of section 7114(b)(4) of the Federal Service Labor-Management Relations Statute (the Statute), by refusing to provide information requested by the Union, and thereby violated section 7116(a)(1), (5), and (8) of the Statute. Respondent's answer admitted in part and denied in part the complaint's allegations.

Following a prehearing conference, the parties entered into a stipulation of facts with attached exhibits which "constitutes the entire record in this matter." The parties further stipulated "that the Respondent has committed an unfair labor practice as set forth below and that the only remaining issue is for the Administrative Law Judge to fashion an appropriate remedy." (General Counsel (GC) Exh. 1(n)). The parties filed briefs addressing that issue.

Based on the record, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

As noted, the parties stipulated to the following facts and exhibits, and I so find:

1. Th[e] unfair labor practice complaint and notice of hearing is issued under 5 U.S.C. §§ 7101-7135 and 5 C.F.R. Chapter XIV.

2. The National Association of Government Employees, Local R5-136 (the Union or

the Charging Party) is a labor organization under 5 U.S.C. § 7103(a)(4).

3. The Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina (the Respondent) is an agency under 5 U.S.C. § 7103(a)(3).

4. The original charge was filed by the Union with the Atlanta Regional Director on May 22, 1998.

5. An amended charge was filed by the Union with the Atlanta Regional Director on September 8, 1998.

6. Copies of the original and amended charge were served on the Respondent.

7. During the time period covered by th[e] complaint, the following persons occupied the positions opposite their names:

R.J. Vogel	Director
Stephen Johnston	Chairman, Office of Quality Management
Allan Graves	Chief of Human Resources
Sarah Williams	Associate Chief of Nursing & Patient Care

8. During the time period covered by th[e] complaint, those persons named in paragraph 7 were either a supervisor or a management official under 5 U.S.C. § 7103(a)(10) and (11).

9. During the time period covered th[e] complaint, those persons named in paragraph 7

were acting on behalf of the Respondent.

10. The Charging Party is the exclusive representative of a unit of employees appropriate for collective bargaining at the Respondent.

11. On or about August 23, 1996, the Respondent, through Williams, issued a Letter of Reprimand to Frank Bethune over an allegation of patient abuse that occurred on June 10, 1996. [Stipulated Exhibit (S. Exh.) 2]. The Respondent also reassigned Bethune from his position of Psychiatric Nursing Assistant, GS-5, to Nursing Assistant, GS-5 (Medical Surgical) as a result. The Union filed a grievance and, on October 17, 1997, Bethune requested that the Agency provide "all investigational information concerning the reprimand, lost wages, and removal or (sic) Frank Bethune from Ward 5BN. We would also like the statements from all of the staff that was interviewed." [S. Exh. 3].

12. Pursuant to the grievance described in paragraph 11, the Respondent and the Union scheduled an arbitration hearing for May 14, 1998.

13. On April 28, 1998, the Union requested Vogel to provide "all documents relied upon in imposing the Letter Of Reprimand on Frank Bethune, dated 23 August 1996." [S. Exh. 4].

14. In response to the request described in paragraph 13, on May 12, 1998, the Respondent, through Graves, furnished the Union with the witness statements of Frank Bethune and Frank Gadson. Graves had previously provided Bethune with the same statements in response to the request described in paragraph 11. [S. Exh. 5].

15. The information described in paragraph 13 includes a July 8, 1996 memorandum from Members, Administrative Board of Investigation, hereinafter, Board's recommendation), and documents listed therein as exhibits, which recommended the discipline described in paragraph 11.

[S. Exh. 6].

16. On May 14, 1998, the Respondent, through Johnston, testified at the arbitration proceeding described in paragraph 12 that it was the Board's recommendation to issue the discipline towards Bethune, as described in paragraph 11.

17. On May 14, 1998, the Respondent, through Williams, testified at the arbitration proceeding described in paragraph 12 that she looked at the Board's recommendation and its exhibits, as described in paragraph 15. Specifically Williams testified that she looked at the nurses' testimony as well as the patient's testimony. Williams also testified that she looked at the Table of Penalties and the Board's recommendation and saw that it provided a framework. Williams testified that she made the decision to issue the discipline described in paragraph 11 after looking at Messrs. Bethune and Gadson's statements.

18. On May 14, 1998, during the arbitration proceeding described in paragraphs 12, 16, and 17, the Respondent offered into evidence the July 8, 1996 memorandum from Members, Administrative Board of Investigation, which recommended the discipline described in paragraph 11. At this time, the Respondent provided the Charging Party a copy of the Board's recommendation but did not provide any of the exhibits listed in that document.

19. The information described in paragraphs 13 and 15 is normally maintained by the Respondent in the regular course of business.

20. The information described in paragraphs 13 and 15 is reasonably available.

21. The information described in paragraphs 13 and 15 is necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of bargaining.

22. The information described in paragraphs 13 and 15 does not constitute guidance, advice,

counsel, or training provided for management officials or supervisors, relating to collective bargaining.

23. The information described in paragraphs 13 and 15 is not prohibited form disclosure by law.

24. Beyond that described in paragraphs 14 and 18, since April 28, 1998 and May 14, 1998, the Respondent has refused to furnish the Union with the information described in paragraphs 13, 15, and 18 through 23.

25. By the conduct described in paragraph 24, the Respondent refused to comply with the provisions of 5 U.S.C. § 7114(b)(4).

26. By the conduct described in paragraphs 24 and 25, the Respondent has committed an unfair labor practice in violation of 5 U.S.C. § 7116(a)(1), (5), and (8).

Discussion and Conclusions

The Violation

The parties stipulated, the stipulation and the stipulated exhibits support, and I conclude, that by the Respondent's conduct in failing to provide to the Union the information requested, including a July 8, 1996 memorandum from Members, Administrative Board of Investigation, and documents listed therein as exhibits, the Respondent refused to comply with section 7114(b)(4) of the Statute and thereby committed an unfair labor practice in violation of section 7116(a)(1), (5), and (8) of the Statute.

The Remedy

A. The Positions of the Parties

1. The Union's Position

The Union claims that, if the Respondent had provided the information when requested, it may have been able to resolve the matter prior to arbitration or, at the very least, it would have utilized the information in the defense of the employee at the arbitration hearing. The Union claims that it and the employee have suffered damages.

The Union requests that the Respondent be ordered to (1) return the employee to his prior position and work schedule, (2) pay the employee backpay and differentials with interest, including compensation for his lost income from outside employment, which was precluded by his altered schedule, and (3) remove any reference to the letter of reprimand from his file and correct any action taken as a result of the letter.

The Union also requests that Respondent be ordered to reimburse it for all expenses and attorney fees incurred in connection with the arbitration and this unfair labor practice proceeding. Counsel for the Union have submitted itemized statements and affidavits in support of the fee requests.

2. The Respondent's Position

The Respondent contends that the Union's request for a remedy is premature as the arbitrator has not rendered his opinion. The Respondent urges that if the arbitrator decides in favor of the grievant, the request will be moot. The Respondent also claims that the grievant was not disadvantaged at the arbitration hearing by not having the entire investigation file and was afforded fundamental due process.(1)

3. The General Counsel's Position

The General Counsel notes that the Respondent, subsequent to issuance of the complaint, provided the Charging Party with the data at issue. Therefore, under the circumstances of the instant case, the General Counsel requests a cease and desist order against the Respondent and that the Respondent also be required to (1) post a notice to employees signed by the Center Director and, (2) submit, upon the Union's request, a joint request that the arbitrator reopen the record, either through witness testimony or written submission, so that the arbitrator may consider any evidence or arguments that the Union is able to present based upon its receipt of the data at issue. The General Counsel further suggests that any costs associated with the reopening of the record be submitted to the arbitrator for ruling on that issue.

B. Conclusions

I agree with Counsel for the General Counsel that, in addition to a cease and desist order and the posting of a notice, an order is appropriate requiring the Respondent to submit, upon the Union's request, a joint request that the arbitrator reopen the record so that the arbitrator may consider any evidence or arguments that the Union is able to present based upon its receipt of the data at issue. The arbitrator is in the best position to evaluate the record of the arbitration in that light. Such an order would best place the parties in the position they would have been, absent the Respondent's violation of the Statute. *SeeU.S. Department of the Treasury, Internal Revenue Service, Washington, D.C.*,40 FLRA 303, 312 (1991) (Authority ordered agency to supply information and, upon request of the union, proceed with the arbitration process).

The Charging Party's request for attorney fees for this proceeding should be initially addressed to the Authority pursuant to the Back Pay Act, 5 U.S.C. § 5596(b)(1), in the event the Authority, in its action on this decision pursuant to 5 C.F.R. § 2423.41, corrects or directs the correction of an unjustified or unwarranted personnel action. *See U.S. Department of Veterans Affairs, Medical Center, Allen Park, Michigan*, 49 FLRA 405, 406 n2 (1994)*; U.S. Customs Service*, 46 FLRA 1080 (1992).

The Union's request for attorney fees and expenses in the arbitration proceeding must be presented to the arbitrator. A motion for attorney fees related to an unjustified or unwarranted personnel action must be determined by an "appropriate authority," as defined in 5 C.F.R. § 550.807(a). When an arbitrator has resolved a grievance over an unjustified or unwarranted personnel action, the arbitrator, not the Authority, is the "appropriate authority" for resolving the request for an award of attorney fees. *U.S. Department of the Army, Red River Army Depot, Texarkana, Texas and National Association of Government Employees, Local R14-52*, 54 FLRA 759,(1998)*; Department of the Air Force Headquarters, 832D Combat Support Group DPCE, Luke Air Force Base, Arizona*, 32 FLRA 1084, 1093 (1988).

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

ORDER

Pursuant to section 2423.41(c) of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the National Association of Government Employees, Local R5-136, the exclusive representative of certain of its employees, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Submit, upon the Union's request, a joint request that the arbitrator reopen the record, either through live testimony or written submission, so that the arbitrator may consider any evidence or arguments that the Union is able to present based upon its recent receipt of the data which should have been promptly furnished pursuant to the Statute in response to the Union's request of April 28, 1998. In the event the record is opened, the parties will also submit any costs associated with the reopening of the record to the arbitrator for a ruling on that issue.

(b) Furnish to the Union, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

(c) Post at its facilities 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 of the Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to their employees are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41 of the Authority's Rules and Regulations, notify the Regional Director, Atlanta Regional Office, 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 10, 1999

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 the Department of Veterans Affairs, Ralph H. Johnson Medical Center, Charleston, South Carolina 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 fail and refuse to furnish the National Association of Government Employees, Local R5-136, the exclusive representative of certain of our employees, upon request, data which is normally maintained in the regular course of business, which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining, which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors relating to collective bargaining, and which is not prohibited by law from release.

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 Federal Service Labor-Management Relations Statute.

WE WILL submit, upon the Union's request, a joint request that the arbitrator reopen the record of Frank Bethune's arbitration, either through live testimony or written submission, so that the arbitrator may consider any additional evidence or arguments that the Union is able to present based upon its recent receipt of the data which we should have promptly furnished pursuant to the Statute in response to the Union's request of April 28, 1998.

_____

(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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, Atlanta Region, Two Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303-1270 and whose telephone number is: 404-331-5212.

1. The Respondent's brief also asserts that the agency provided the Union the information requested. If this argument is intended to address whether there was a violation of the Statute rather than the remedy aspects of the case, and be separate from the Respondent's position that the grievant was not disadvantaged but provided fundamental due process, then it has not been considered. The stipulations by the Respondent and the other parties set forth above admit to a violation of the Statute under the circumstances of the case and have disposed of the issue of whether there was a violation of the Statute.