

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

MEMORANDUM

DATE:

January 29, 2007

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN  
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS  
NORTH TEXAS HEALTH CARE SYSTEM  
DALLAS, TEXAS

Respondent

AND

Case

Nos. DA-CA-06-0232  
DA-CA-06-0320

ALTON HAINLINE, AN INDIVIDUAL

Charging Party

and

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2437

Charging Party

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

UNITED STATES OF AMERICA  
**FEDERAL LABOR RELATIONS AUTHORITY**  
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NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before 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, 2429.12, 2429.21, 2429.22, 2429.24, 2429.25, and 2429.27.

Any such exceptions must be filed on or before **FEBRUARY 28, 2007**, and addressed to:

Office of Case Control  
Federal Labor Relations Authority  
1400 K Street, NW, 2<sup>nd</sup> Floor  
Washington, DC 20005

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SUSAN E. JELEN  
Administrative Law Judge

Dated: January 29, 2007  
Washington, DC

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

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DEPARTMENT OF VETERANS AFFAIRS  
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John M. Bates, Esquire  
For the General Counsel

Alton Hainline  
For the Charging Party

Donald Burrell  
For the Charging Party

Kenneth S. Carroll, Esquire  
For the Respondent

Before: SUSAN E. JELEN  
Administrative Law Judge

**DECISION**

**Statement of the Case**

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 (hereinafter the Authority), 5 C.F.R. Part 2423.

On January 5, 2006, Alton Hainline (Hainline), an individual, filed an unfair labor practice charge in this matter against the Department of Veterans Affairs, North Texas Health Care System, Dallas, Texas (Respondent or VA Dallas). (GC Ex. 1(a))<sup>1/</sup> On February 8, 2006, the American Federation of Government Employees, Local 2437 (Union or Local 2437) filed an unfair labor practice charge in this matter against the Respondent. (GC Ex. 1(c)) On August 31, 2006, the Regional Director of the Dallas Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent refused to select Hainline under a Purchase and Hire appointment in violation of section 7116(a)(1) and (2) of the Statute. On September 8, 2006, the Respondent filed an answer to the complaint, in which it admitted certain allegations while denying the substantive allegations of the complaint. (GC Exs. 1(f) and 1(j)).<sup>2/</sup>

A hearing was held in Dallas, Texas on October 26, 2006, 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.

### **Findings of Fact**

The Department of Veterans Affairs, North Texas Health Care System, Dallas, Texas is an agency under 5 U.S.C. §7103

<sup>1/</sup> All references to the transcript are designated as Tr. followed by the page number. The Respondent's exhibits are identified as A Ex. (followed by a letter); the General Counsel's exhibits are identified as GC Ex. (followed by a number).

<sup>2/</sup> At the hearing, the General Counsel (GC) moved to amend paragraph 7 of the complaint to reflect the correct date of filing. The Respondent moved to amend paragraph 6 of its answer to reflect that it admits that Hainline is an employee under 5 U.S.C. 7103(a)(2). Both unopposed motions were granted. (GC Exs. 1(f) and 1(j); Tr. 8-9)

(a)(3). The North Texas Health Care System has various locations throughout the area, including the VA Hospital in Dallas and a facility in Bonham, Texas. At all times material to this matter, Charles Ballard has been the Associate Chief of Engineering, Rick Staley has been the maintenance foreman or supervisor for the Purchase and Hire (P&H) employees, and Kenneth Taylor has been the supervisor. (GC Exs. 1(d) and 1(e); Tr. 25, 130, 215, 217)

The American Federation of Government Employees (AFGE) is a labor organization under 5 U.S.C. §7103(a)(4). Local 2437 is an agent of AFGE for the purpose of representing employees at Respondent. (GC Exs. 1(f) and 1(j)) AFGE and the Department of Veterans Affairs have a current Master Agreement (M.A.); the Respondent and Local 2437 have a local agreement. (GC Ex 6; A Ex. A and B; Tr. 52-53, 132-133) Donald Burrell has been the President of Local 2437 since 1998. (Tr. 91-92)

### **Purchase and Hire Employees**

Purchase and Hire (P&H) is an excepted appointment which is not considered to be part of the civil service system. P&H employees are hired by the Respondent for building trade positions including electrician, carpenter and painter. P&H employees are considered to be employees as that term is defined in 5 U.S.C. §7103(a)(2), and they are part of the bargaining unit represented by the Union. P&H employees are paid hourly under the Special Wage Schedule determined by rates which prevail for similar types of projects per the Davis-Bacon Act of 1931, 40 USC §276. (GC Ex. 9, p. 3) On January 23, 2001, the Respondent and the Union entered into a Memorandum of Understanding which provided that the Respondent would fill eighteen permanent construction positions in the Engineering Service with P&H employees. The agreement further provided that P&H employees who were not converted to one of the eighteen permanent construction positions would continue to be employed following past practices under existing agreements. The agreement also specified that all new P&H employees hired subsequent to the agreement would be terminated after the project was completed according to Federal Regulations and that project appropriations would be the limiting factor on the continuation of employment of all P&H employees. (A Ex. C) However, during the period from 2001 through 2004 the Respondent continued to employ the P&H employees who were hired after January, 2001 rather than terminating them after each project. The P&H employees who

were hired both before and after January, 2001 were released due to a lack of funds at the end of each fiscal year. The P&H employees were then recalled by Respondent after several weeks. (Tr. 23) At the end of fiscal year 2005, the Respondent terminated all of the P&H employees who were hired after January, 2001, and these employees were required to re-apply for their positions. (Tr. 23, 63)

Alton Hainline is an employee within the meaning of section 7103(a)(2) of the Statute and is in the bargaining unit represented by AFGE and Local 2437. (GC Exs. 1(f) and 1(j); Tr. 8-9) Hainline is an electrician and was initially hired as a P&H employee in 2002. He started work at the Bonham facility and was transferred to Dallas in January 2003. Hainline was one of the nine P&H employees terminated in September 2005. (GC Ex. 7; Tr. 60) These P&H employees were required to reapply for positions at the VA Dallas; of the nine P&H employees terminated in September 2005, all reapplied for their positions. All of these employees, with the exception of Hainline, were selected for their previous positions.<sup>3/</sup> (Tr. 16-17, 20, 23-24, 62-63) An electrician who had worked in a prior summer was hired for the full time position previously occupied by Hainline. (Tr. 61)

### **Performance Issues**

On October 19, 2004, Hainline was called back to work after being laid off at the end of the fiscal year. He met with Taylor and Staley, who told him that they thought his production and work had slowed down and asked him to explain. Hainline told them he was very disappointed in Staley because Staley had refused to write him a letter of recommendation for a full time job in Bonham. (Tr. 53-54) Hainline also told them he thought the problem with his production was the availability of materials. They were always having to wait for materials and being pulled off of one job onto another during the wait. (Tr. 53-54) Hainline testified that he did not think his production had slowed down, but admitted that Staley and Taylor wanted to talk about this issue. (Tr. 55) Hainline also testified that this was the only time his production was discussed. (Tr. 55)

Both Staley and Taylor drafted Reports of Contact following their meeting with Hainline on October 19, 2004, concerning his decline in production. (A Exs. F and G) Staley's memo indicates that Hainline revealed that ". . . he

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<sup>3/</sup> This case does not involve the terminations of the P&H employees, including Hainline, in September 2005.

had developed a BAD Attitude over not being selected for a permanent position as an electrician in Bonham." (A Ex. F; Tr. 225) Taylor's memo stated that Hainline agreed that he ". . . had not been focused on his work and could do better." (A Ex. G; Tr. 176)

### **Protected Activity**

On February 25, 2005, Local 2437 sent a written notice to the Respondent naming Hainline as a steward. (GC Ex. 3; Tr. 27) The evidence reflects that from February 2005 through September 2005, Hainline asked for and received official time. There is no record of the exact amount of official time requested and used by Hainline. There is no evidence that Hainline was ever denied any request for official time or that there was any problem with Hainline's use of official time. The general consensus is that Hainline was active, although perhaps not as active as the previous P&H steward, Johnny Bankston.<sup>4/</sup> Union President Burrell was familiar with Hainline as a steward and indicated he was in the Union office on a regular basis. (Tr. 67-68, 92, 102)

In February 2005, several P&H employees who were part of the asbestos abatement team were informed that they would no longer be receiving the higher asbestos hourly wage. Most of these employees were laborers, and when working on asbestos abatement received additional pay in the form of environmental differential pay (EDP). Several of these employees approached Hainline to see if he could help. Hainline requested permission to take this issue to the Union office, which he did. He also later furnished additional information to the

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<sup>4/</sup> Bankston was a long-time P&H employee, who was terminated in the routine P&H manner in September 2004. According to the Respondent, Bankston was called to return to work, but declined to do so for personal reasons. According to the GC witnesses, Bankston was not recalled to work, and speculated it was in retaliation for his protected activity. There is no evidence that any grievance or unfair labor practice charge was ever filed on behalf of Bankston and his failure to return to work as a P&H employee. Neither the GC nor the Respondent called Bankston as a witness. In my view, there is no direct evidence to support either position and the attempts by both the Respondent and the GC to use the Bankston employment or lack of employment to bolster their individual positions was ineffective and has not been considered in my decision in this matter.

Union about the issue. Hainline discussed the issue with Staley, asking if the VA could do this. Staley told him that it had come from higher up. (Tr. 28-30) There is no evidence regarding the outcome of this issue.

In May and/or June 2005, Hainline believed that there were problems with the sub-basement, an area in which the P&H employees were scheduled to work. At one of the weekly safety meetings, Hainline asked Ballard if there had been a survey of the sub-basement and if it was safe to work in the sub-basement under the canteen. (Tr. 31) Staley made a statement that it was safe. Hainline knew through the Union that a survey had been completed and he asked for official time to go to the Union, which was granted. Hainline talked with Richard Shaw, who was the Union's safety officer. Shaw made a request on behalf of the Union for the survey, which was later furnished. Hainline did not talk to anyone else about this issue. (Tr. 32-34)

In May 2005, the Union pursued a group grievance regarding mileage reimbursement for travel for work in Bonham. Hainline was one of three P&H employees named in the group grievance.<sup>5/</sup> (GC Ex. 4; Tr. 34-35) There is no evidence regarding the final disposition of this grievance. During this same time frame, Hainline, as the Union Steward, went to Staley on behalf of P&H employee Tom Shastid regarding travel reimbursement. Staley explained the process, which Hainline then took back to Shastid. Shastid eventually dropped the issue. (Tr. 35-36)

On May 19, 2005, a group of employees was working in an area that previously had asbestos abatement. While removing part of the ceiling, some asbestos fell on the floor. Taylor determined that there needed to be immediate asbestos abatement and everyone left the area until that work could be accomplished. During the clean-up, monitors were placed in the area to check the air. After the clean-up was completed, the employees were told to return to work. The air monitors, however, had already been removed when they returned to work. Hainline was concerned about the air monitors being removed and went to the Union. (Tr. 38-40) The Union then sent a letter to Safety regarding the situation. (GC Ex. 5; Tr. 40) The letter does not specifically name Hainline, although he testified that he asked Taylor why the monitors had been removed and Taylor told him those were the guidelines from Safety. (Tr. 41)

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<sup>5/</sup> One of the three named individuals, Wendell Fretwell, has since been made a permanent employee at the Dallas facility. (Tr. 37)



## **Asbestos Issues**

According to the Respondent's witnesses, the engineering department has a specific protocol that employees are to follow when/if they encounter asbestos. Due to the nature of the work in construction and demolition, engineering employees sometimes encounter asbestos in insulation and floor tile mastic. Construction workers, including P&H employees, are trained to recognize asbestos. Once discovered, the procedure requires the employee to stop their work and notify their supervisor. The supervisor would then take appropriate action to secure the area and have the asbestos abated before employees could return to the work area. (Tr. 136-137)

In August and/or September 2004, the crew was doing demolition work at the Bonham facility. Asbestos was supposed to have been abated in the area, however, some asbestos came down from the ceiling, during the demolition. (Tr. 41-42) Hainline was not in the area when this occurred, but walked through after the asbestos was already cleaned up and bagged. (Tr. 43) One of the men had a camera and took pictures of the area. Hainline did not report this asbestos incident to either Taylor or Staley and presumed it had already been reported. (Tr. 44)

The Bonham incident was not reported by any of the employees involved, but the Respondent discovered it in December 2004 or January 2005. In January 2005, the Respondent called a meeting in a work area with everyone involved as well as the abatement team. Both Staley and Taylor were present, and, according to Hainline, Staley was upset. He told everyone that he should have been told about the asbestos; that they should have reported the incident. Staley wanted employees to recognize asbestos and report it to the supervisor so the work could be abated. Hainline testified Staley's comments were directed at the abatement team and that it was never discussed individually. Hainline did not mention that he had only walked through the area after the asbestos had been cleaned up. (Tr. 45-46) The Respondent made sure that the employees involved, including Hainline, received EDP for the asbestos exposure. (A Ex. H; Tr. 187)

In August 2005, there was another asbestos incident. Employees who were working on an eighth floor project came to Hainline about being exposed to some asbestos fibers. They told Hainline they had already told Taylor the week before and asked if he could do something for them. Taylor had not given them any response. Before he talked with Taylor or Staley,

Hainline ran into Natalie Tiounnik from Safety, in the hall. He asked her how did anyone report asbestos? She told him to tell her and she would look into it. Hainline told her that he didn't have any details, but there was something on the eighth floor. That was his total involvement in this issue. He did not report the incident to either Staley or Taylor. (Tr. 49-50)

Staley indicated that he was contacted by Wiley Taylor from Safety, who told him that Hainline had reported a safety concern about asbestos. Staley and Wiley Taylor walked the 8<sup>th</sup> floor project and both were satisfied with the condition of the job site. Staley later talked with Tiounnik, who had received the complaint from Hainline, and explained the department's protocol on asbestos issues. Staley later asked Hainline about the asbestos concerns and he denied knowing anything about it. Staley wrote a report of contact on this incident on August 26, 2005. (A Ex. I; Tr. 181-184)

### **Contract Provision**

Article 28 (Safety, Health and Environment), Section 4 (Report, Evaluation, and Abatement of Unsafe and Unhealthful Working Conditions) of the Master Agreement, states, in part: "A. Any employee, group of employees, or representatives of employees who believe that an unsafe or unhealthful working condition exists in any workplace, has the right to report such condition to the appropriate supervisor, the facility director, the appropriate Department Safety and Health official, and the Union. In the case of an immediate threat to life or danger of serious physical harm, the employee shall immediately report the situation to the supervisor and/or facility Safety and Health personnel." (GC Ex. 6, page 108)

### **Termination And Failure to Rehire**

As stated above, Hainline was one of the nine P&H employees terminated in September 2005. (GC Ex. 7; Tr. 60) These P&H employees all received similar letters (GC Ex. 7; Tr. 59, 60) Sometime in September 2005, Staley met with Burrell and Gary Shelton, Administrative Assistant, to inform them that the P&H employees were being terminated. (Tr. 95, 190) On September 20, 2005, Burrell wrote a memo to Byron Abshier, Chief Engineering Service, requesting the names of

all P&H employees whose appointment would expire on September 30, 2005. (GC Ex. 10; Tr. 96-97) Abshier responded on September 26, 2005, with a list of the P&H employees, and also informed Burrell that the P&H employees would have an opportunity to apply for positions when they were listed by Human Resources. (GC Ex. 11; Tr. 98) The nine P&H employees terminated in September 2005 all reapplied for their positions. All of these employees, with the exception of Hainline, were selected for their previous positions. (Tr. 16-17, 20, 23-24, 62-63) Hainline received a letter from Human Resources in January 2006, informing him that he had not been selected for an electrician position. Hainline had already been told by his co-workers that another electrician had been hired for his former position. (Tr. 61).

On September 6, 2005, Staley sent a memo to Charles Ballard, with a copy to Taylor on the subject of the end of FY appointments. The memo states, in part:

I think I have talked to everyone in HR [Jay, Dane and Dali]. If you concur we will extend the appointments for the balance of the "52" group. Termination due to expiration of appointments for the P+ H employees not in the "52" category with one exception. Alton Hainline will be terminated for conduct unacceptable as noted by not following protocol in notifying supervisor of environmental hazard. I will provide Dane with documentation for his approval of two instances of failure. One in Bonham last FY and one last week in Dallas.  
(A Ex. J; Tr. 149, 201)

Staley sent a second e-mail to Ballard on September 7, stating:

I spoke to Dane this morning. He has reviewed the Report of Contact I submitted for Alton Hainline. He had talked to Adeline and she suggested terminating Alton the same as the others "Expiration of Appointment". However as you and I had discussed I had already talked to the union and explained how Alton would be terminated. Dane seemed to think that was not a problem and should still terminate Alton the same as the other P+ H employees. We would deal with him not being selected the next FY when it happened.  
(A Ex. J; Tr. 149, 201)

Staley testified that he determined that Hainline would not be rehired after September 2005. He stated this was a cumulative decision over the prior fiscal year and was based on Hainline's work habits and issues involving his failure to follow the asbestos protocol of reporting asbestos hazards to the supervisor. Staley further testified that employees had complained about Hainline's work habits, that he was not doing his own work and was preventing other employees from completing their work. (Tr. 184-185, 197)

Staley denied that his decision had anything to do with Hainline being a Union steward or engaging in protected activities. (Tr. 188)

### **Issue**

Whether or not the Respondent violated section 7116(a) (1) and (2) of the Statute by failing to rehire Alton Hainline for a P&H position because he had engaged in activity protected by the Statute?

### **Analysis and Conclusion**

In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the Authority established an analytic framework for evaluating alleged discrimination violations of the Statute. The General Counsel bears the burden of establishing a *prima facie* case by showing that: (1) the employee against whom the alleged discriminatory action was taken was engaged in activity protected by the Statute; and (2) such protected activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* at 118. As part of its *prima facie* case, the GC may seek to establish that the Respondent's asserted reasons for taking the allegedly discriminatory action are pretextual. *Id.* at 122-123. The record as a whole may be considered in determining whether the GC has established a *prima facie* case of discrimination. *United States Department of Justice, Federal Bureau of Prisons, United States Penitentiary (Administrative Maximum), Florence, Colorado*, 60 FLRA 752, 757 (2005).

If the GC establishes a *prima facie* case, the burden shifts to the Respondent to rebut the *prima facie* case by establishing that there was a legitimate justification for its

actions and the same action would have been taken even in the absence of the protected activity. *Letterkenny* at 118.

### **The GC Has Established a *Prima Facie* Case**

The evidence in this case establishes that beginning in February 2005, Hainline was engaged in protected activity and that the Respondent had knowledge of that activity. Hainline was named as the steward for Local 2437 and engaged in a number of representational activities, primarily taking issues involving the P&H employees to the Union. These issues, as discussed more fully above, included changes in pay for certain P&H employees involved in asbestos abatement, travel reimbursement issues, and various asbestos issues. The evidence clearly reflects that Hainline took these issues to the Union, which, in turn, contacted various departments at the Respondent. Hainline asked for and received official time from his two supervisors, Staley and Taylor, although there is no evidence regarding the actual amount of official time used by him from February through September 2005. There is no evidence that the Respondent had any problems with Hainline's use of official time.

The Union President, Burrell, testified regarding two conversations he had with Staley, in which Hainline was discussed. The GC uses these conversations to support its contention that Hainline was not rehired in retaliation for his protected activity. The first conversation occurred at a meeting held in May 2005, between Burrell and Shelton and Staley and Ballard. Before Ballard joined the meeting, according to Burrell, Staley stated that Hainline was always asking for official time and that he was originally hired as an employee and he needed to focus on his job. Staley further stated that not doing his job could cause him to not have a job and called Hainline a troublemaker. Burrell asked Staley what he meant by that, but Staley did not explain. At that point Ballard came into the meeting and there was no further discussion regarding Hainline. (Tr. 93-94, 109) According to Burrell, this discussion was between Staley and Shelton. (Tr. 111) Shelton did not testify at the hearing. Staley did not recall a meeting in May, but denied that he ever called Hainline a troublemaker and denied that he ever told Burrell that Hainline was always asking for official time and causing an uproar. (Tr. 186, 190, 194)

For a number of reasons, I do not find that Burrell's version of this May meeting credible. First, there is no mention of this meeting in the affidavit taken by the office

of the General Counsel during the investigation of this unfair labor practice charge and Burrell's explanation that the meeting just came to him is not believable. Further, I find it implausible that a Union representative of Burrell's experience would have not demanded an explanation of such statements from the supervisor, particularly once a higher level of management (Ballard) came into the meeting. Finally, the GC offered no explanation of why Shelton was not called as witness. Since Shelton is retained by the Union, it would seem reasonable that his testimony would have been favorable to the Union and the failure to call him indicates that his testimony would not have been favorable. I, therefore, take an adverse inference that Shelton's testimony would not have supported Burrell's version of the May 2005 statements from Staley. *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, D.C., 54 FLRA 987, 1017-1018 (1998).*

The evidence does reflect that in mid-September 2005, Staley went to the Union office to inform Burrell and Shelton that the P&H employees would be laid off at the end of fiscal year. At that time Staley also informed them that Hainline would not be coming back to work. According to Burrell, Staley called Hainline a troublemaker and said he was always talking to the other employees; that they would be doing their work fine and things going smooth, but when he would speak to them, he would get them in an uproar. (Tr. 113, 114) Staley again denied that he ever called Hainline a troublemaker. (Tr. 190, 194) Shelton also did not testify regarding this September conversation. Although the evidence is clear that Staley informed Burrell and Shelton that Hainline was not going to be rehired, I specifically credit Staley's testimony that he did not call Hainline a troublemaker. And although Burrell and Shelton indicated at the meeting that they thought this action was taken against Hainline because of his protected activity, Staley denied that protected activity played any part in this decision.

The GC asserts that Staley's statements clearly refer to Hainline's protected Union activity and demonstrate animus toward Hainline because of that activity. Therefore, Staley's statements to Burrell are sufficient to establish that Hainline's protected Union activity was a motivating factor in the Respondent's decision not to rehire Hainline. See *United States Department of Veterans Affairs, Golden Gate National Cemetery, San Bruno, California, 59 FLRA 956 (2004) (National Cemetery); United States Department of Transportation, Federal*

*Aviation Administration, El Paso, Texas, 39 FLRA 1542 (1991)* (FAA). However, as noted above, I have not credited Burrell's testimony regarding Staley's comments and therefore such statements are not supportive of the GC's *prima facie* case.

The Respondent argues that although Hainline was engaged in protected activity, there was no evidence that such activity was a motivating factor in the decision not to rehire him. Rather the Respondent asserts that the reasons not to rehire Hainline was based on (1) Hainline repeatedly violating reporting rules with regard to asbestos; and (2) Hainline's lax work habits and his failure to get his work done. (Tr. 184)

The evidence establishes that Hainline was counseled about his production in October 2004, prior to becoming a Union steward. Hainline admits that his production had suffered the previous year since he had been upset with Staley for not recommending him for a full time position in Bonham. I find Hainline's further explanation that supply issues contributed to his production problems to be ineffective, particularly in view that such supply issues would affect all of the employees and not just Hainline. Therefore, I find that the evidence supports the Respondent's contention that Hainline had production issues even from before the time that he began engaging in protected activities and that these issues were brought to his attention.

However, it is apparent from the evidence as a whole, that the primary catalyst for the Respondent's decision not to rehire Hainline occurred in August 2005 and related to the reporting of possible asbestos on the 8<sup>th</sup> floor to Safety rather than to supervision. As described more fully above, a group of employees working on the 8<sup>th</sup> floor came to Hainline in his capacity as a Union steward and asked his assistance with regard to a possible asbestos issue where they were working. Hainline reported the possible asbestos to Tiounnik, who works in Safety, but did not report the possible asbestos to either Staley or Taylor. Someone from Safety then met with Staley and the two of them examined the work site and determined that no asbestos was present. Immediately after this, Staley wrote a report of contact that referenced the earlier Bonham incident and noted that Hainline had again failed to follow the Engineering protocol of reporting suspected asbestos to supervision. These two incidents also form the basis for the memo Staley wrote informing Ballard of his attempts to actually terminate Hainline prior to the end of the fiscal

year.<sup>6/</sup> Apparently, human resources determined that Hainline would be treated as the other P&H employees and let go at the end of the fiscal year, but would not be recalled in the next fiscal year.

With regard to the issue of reporting suspected asbestos, Hainline admitted that he had been told to report asbestos to his supervisor. (Tr. 72) The GC asserted that Hainline had a right under the Master Agreement (Article 28, Section 4) to advise others, such as safety officials and the facility director, about those issues. (Tr. 153-154). The Respondent asserts that it has never contended that Hainline did not have a right to report safety issues to individuals other than his supervisor, in accordance with the M.A., but it does assert that Hainline also had an obligation as an employee to immediately report asbestos issues to his supervisor. The M.A. does not restrict the agency from creating safety rules to further safety in the work place. (Tr. 162, 210) The Respondent further points out that neither Hainline nor the Union has ever contended, via grievance, ULP or otherwise, that the Agency does not have the right to require that of its employees. Thus, the Respondent argues that failing to immediately report asbestos issues to his supervisors is not a protected activity, but a failure by an employee to comply with safety rules.

**The exercise of a right under a collective bargaining agreement, such as the reporting of an asbestos issue under Article 28, Section 4 in this matter, has long been recognized as a protected activity. U.S. Department of Labor, Employment and Training Administration, San Francisco, California, 43 FLRA 1036, 1039 (1992). The GC appropriately asserts that Hainline was acting in his capacity as a Union steward in conveying the information regarding the 8<sup>th</sup> floor asbestos issue. I find this incident to be pivotal in the Respondent's decision not to rehire Hainline. Further, although the Respondent argues that Hainline's reporting the asbestos issue to Safety is separate from his failure to report the same issue to his immediate supervisor, for the purpose of determining whether the GC has established a *prima facie* in this matter, I find that the elements cannot be so distinguished. I, therefore, find that Hainline's protected activity was a motivating factor in the Respondent's**

<sup>6/</sup> In his testimony at the hearing, Staley also referenced a third incident in which Hainline failed to follow the protocol. This occurred in May 2005, when Hainline went to the Union about the removal of air monitors after asbestos had been abated in a work area.

determination not to rehire him and the GC has, therefore, established a *prima facie* case in this matter.

The Respondent has failed to establish that it would have not rehired Hainline even in the absence of his protected activity.

The Respondent asserts that it has shown by a preponderance of the evidence that there was a legitimate justification for not re-hiring Hainline, and that the same action would have been taken even in the absence of the protected activity.

First, the Respondent asserts that there is no dispute that it had a safety rule with respect to asbestos, which required employees to immediately report asbestos issues to their supervisor. Hainline was aware of this safety rule and had received training in January 2005. The Respondent asserts that it is irrelevant that Section 4 of the M.A. provides certain "rights" to employees about reporting dangerous situations. The basis for the decision not to rehire Hainline was grounded in the Respondent's safety policy and not any employee right under Section 4. The Respondent further asserts that the GC's argument that Hainline was engaged in Union activity in reporting asbestos issues to the Union misses the point. It was Hainline's failure to immediately report the matter to a supervisor that resulted in his failing to follow policy. Reporting the matter to the Union was simply an additional act which he was entitled to do.

With regard to the Respondent's second reason for not rehiring Hainline, both Staley and Taylor confirmed that Hainline's work habits had declined and that he was counseled about this in October 2004. Four separate witnesses described Hainline's lax work habits; that his work habits were "lazy"; that it would take him 3-4 times as long to do the work as other electricians, and that he spent a lot of time talking and preventing other employees from getting their work done. **Neither Hainline nor Burrell dispute the Respondent's contention that Hainline had lax work habits. Hainline admitted that he was counseled in late October 2004, prior to becoming a Union steward.**

The GC argues that the Respondent has failed to establish that it had legitimate justification for the decision not to rehire Hainline. With regard to his work habits, the GC notes that Hainline admits he was counseled by Staley and Taylor on

October 19, 2004, that his production had slowed down. This was the only occasion in which anyone in management ever counseled him, and he was never given anything in writing regarding his work habits or production.

Furthermore, on September 6, 2005, Staley sent a email message to Ballard in which he informed Ballard that Hainline would be terminated for conduct unacceptable for not following protocol in notifying his supervisor of environmental hazards. Staley noted two instances of Hainline's failure to notify his supervisor of environmental hazards - one in Bonham the previous year and one in Dallas the week before. There is no mention in the email of any problem with Hainline's work habits or lack of production. (A Ex. J) Staley felt the two instances of failure to report were sufficient, standing alone. (Tr. 204)

The first instance occurred in the last few weeks of fiscal year 2004, when a number of P&H employees were working on a demolition job in Bonham. The second instance of failure to report occurred on May 18, 2005, after asbestos was discovered during a demolition, and Hainline's activity concerned reporting the issue of the air monitors to the Union. Staley did not mention this incident in his September 6 email message to Ballard as a reason why Hainline should be terminated. The third instance in which the Respondent claims that Hainline failed to report asbestos to his immediate supervisor took place in August 2005 and, as discussed above, concerned several P&H employees working on the 8<sup>th</sup> floor who came to Hainline in his capacity as a Union steward.

There is no evidence that Hainline was ever individually counseled about any of the three instances in which he allegedly failed to comply with the policy which requires that an employee report asbestos to their immediate supervisor nor was he ever given anything in writing to indicate that he had failed to follow the policy. The GC asserts the evidence establishes that the reasons given by the Respondent for its refusal to rehire Hainline were completely pretextual in nature. *U.S. Geological Survey and Caribbean District Office, San Juan, Puerto Rico, 50 FLRA 548 (1995); National Park Service, 54 FLRA 940 (1998); Indian Health Service, Crow Hospital, Crow Agency, Montana, 57 FLRA 109 (2001); National Cemetery, supra; FAA, supra.*

As set forth above, the Respondent gives two primary reasons for its failure to rehire Hainline: (1) his failure

to follow the policy that requires an employee report asbestos to supervision and (2) his lax work habits. The Respondent relies on three incidents regarding the safety policy. The only written document involving this policy is in Staley's September 6 memorandum and only covers the Bonham incident and the August 2005 incident. As noted above the Bonham incident occurred in August 2004 and led to training for all P&H employees on the Respondent's policy in January 2005. In the August 2005 incident, Hainline was not actually working in the 8<sup>th</sup> floor area himself, but only received information about the possible asbestos issue in his capacity as a Union steward from the affected employees. According to Ballard, the Respondent's policy of requiring that an employee report the discovery of asbestos to their immediate supervisor would only apply in a situation where an employee actually discovers asbestos either by himself or with other people and it would not apply in a situation where someone merely told an employee about asbestos or the employee heard a rumor about the existence of asbestos. (Tr. 152). The third incident, which occurred in May 2005, was not mentioned in Staley's memorandum, although it was considered in the decision not to rehire Hainline. In that incident, a P&H employee reported asbestos to Taylor, who shut down the job site. Hainline's activity in this incident was to bring his concerns regarding the lack of use of air monitors after the asbestos abatement had been completed to the Union's attention. Therefore, in examining the three incidents of failure to follow the safety policy regarding reporting asbestos to a supervisor, it appears that two of the incidents, from May and August 2005, are not really in conformance with the Respondent's own definition of the policy. The Bonham incident involved multiple P&H employees; the May 2005 incident actually dealt with the use of air monitors as opposed to the reporting of asbestos; and the August 2005 incident concerned the other employees' concerns about asbestos as opposed to Hainline's actual knowledge of the same.<sup>7/</sup>

With regard to Hainline's work habits, the evidence does reflect that Hainline was counseled regarding his work habits in October 2004, prior to becoming a Union steward. There is no further documentation or counseling regarding his work

<sup>7/</sup> As the GC points out, Staley and a representative from Safety examined the 8th floor work site for asbestos and were satisfied that the work site was safe. (Tr. 222) Therefore, Hainline was penalized for failing to report asbestos which never even existed and which he learned of from other employees who actually worked in the area. There was no evidence that those employees were penalized in any way.

habits or production, nor is there any mention of such in Staley's September 6 memo. Further, it appears that the primary reason for the decision not to rehire Hainline was based on the safety policy issues rather than production issues, and Hainline's work habits were merely an afterthought in the Respondent's defense.

Under these circumstances, I find that the Respondent has failed to demonstrate that it had legitimate justification for its failure to rehire Hainline and that it would have taken the same action even in the absence of his protected activity.

Having concluded that the Respondent violated section 7116(a)(1) and (2) of the Statute, I recommend 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 Federal Service Labor-Management Relations Statute (Statute), the Department of Veterans Affairs, North Texas Health Care System, Dallas, Texas, shall:

1. Cease and desist from:

(a) Discriminating against Alton Hainline, or any other employee, by refusing to select him under a Purchase and Hire appointment, because of the exercise of protected rights assured them by section 7102 of the Statute.

(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) Offer Alton Hainline immediate and full reinstatement to his former or substantially equivalent position on a Purchase and Hire appointment.

(b) Make Alton Hainline whole, with interest, in accordance with the Back Pay Act, 5 U.S.C. §5596, for any loss that he may have suffered by reason of our failure to recall him to work by paying him the sum of money equal to the amount that he would have earned from the day that he would have been recalled to the date of the offer of reinstatement, less any

money earned through other employment during the above noted period.

(c) Post at its facilities, where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Director 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.

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

Issued, Washington, DC, January 29, 2007

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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 Department of Veterans Affairs, North Texas Health Care System, Dallas, Texas, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

**WE WILL NOT** discriminate against Alton Hainline, or any other employee, because of the exercise of protected rights assured them by section 7102 of the Statute, which includes the right to serve as a union representative.

**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.

**WE WILL** offer Alton Hainline immediate and full reinstatement to his former or substantially equivalent position on a Purchase and Hire appointment and **WE WILL** make him whole, with interest, in accordance with the Back Pay Act, 5 U.S.C. §5596, for any loss that he may have suffered by reason of our failure to recall him to work by paying him the sum of money equal to the amount that he would have earned from the day that he would have been recalled to the date of the offer of reinstatement, less any money earned through other employment during the above noted period.

\_\_\_\_\_  
(Agency)

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 its provisions, they may communicate directly

with the Regional Director, Dallas Regional Office, whose address is: Federal Labor Relations Authority, 525 Griffin Street, Suite 926, LB 107, Dallas, Texas 75202-1906, and whose telephone number is: 214-767-6266.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case Nos. DA-CA-06-0232 and DA-CA-06-0320, were sent to the following parties:

**CERTIFIED MAIL & RETURN RECEIPT**

**CERTIFIED NOS:**

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**REGULAR MAIL:**

American Federation of Government  
Employees, AFL-CIO  
80 F Street, NW  
Washington, DC 20001

DATED: January 29, 2007  
Washington, DC

