Da90711

Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

FEDERAL MEDICAL CENTER

FORT WORTH, TEXAS Case No. DA-CA-90711
Respondent
and
AMERICAN FEDERATION OF GOVERNMENT

EMPLOYEES, LOCAL 1298
Charging Party
Bobby R. Devadoss, EsquireJohn M. Bates, Esquire For the General Counsel

L. Cristina Murphy, Esquire For the Respondent
Before: Eli Nash, Jr. Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-Management Relations Statute (the Statute), and the revised Rules and Regulations of the Federal Labor Relations Authority (the Authority).(1)

Based upon unfair labor practice charges filed on May 18, 1999 and first amended on August 11, 1999 by the American Federation of Government Employees, Local 1298 (herein called the Union), a Complaint and Notice of Hearing issued on November 30, 1999, alleging that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Medical Center, Fort Worth, Texas (herein called Respondent), violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (herein called the Statute), by discriminating against Patrick Showalter a bargaining unit employee, by suspending him for 3 days in retaliation for engaging in activities protected by the Statute.

A hearing was held in Dallas, Texas on February 9, 2000, at which time all parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. Counsel for the Respondent and the General Counsel filed timely briefs.

Based on the entire record, including my observation of the witnesses and their demeanor, and evidence, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

On or about May 19, 1999, Patrick Showalter was the Union's First Vice-President.[2] On that date, Showalter and Cindy Wright, Union President, met with Acting Warden Kenneth Spear, concerning a number of labor-management issues including a pending grievance pertaining to the evaluation of bargaining unit employee, Chad Lovett, who had been evaluated by Linda Rieck, Director of Nursing. During the discussion, Showalter testified that he uttered the phrase "fucking bitch" in reference to Rieck. Spear made no response to Showalter's remark at that time. Subsequently, however, an Office of Internal Affairs investigation was initiated by Warden Robert Guzik concerning the remark Showalter made in reference to Rieck, while presenting the Lovett grievance.

Thereafter on June 11, Showalter was interviewed by Paul Copenhaver, an Office of Internal Affairs agent concerning the remark he made in reference to Rieck at the May 19 meeting with Spear. On July 14 Showalter was issued a Proposed Notice of Suspension for 5 days by his supervisor Hector Solis, for the remark he made in reference to Rieck on May 19.

Upon receiving the proposed notice of suspension, Showalter met with Warden Guzik along with his Union representative, Cindy Wright. During the meeting, Showalter gave Warden Guzik his written response and explained to him that although it was unfortunate that he uttered the words "fucking bitch" in reference to Rieck, it nonetheless occurred while he was engaged in protected activity and that the normal employee standards did not apply in this particular instance. The Warden rejected this defense, and on August 3, Showalter received a Letter of Suspension from Warden Guzik. The letter stated that Showalter would be suspended for 3 days for the remark he made in reference to Rieck during the May 19 meeting. Showalter served the suspension from August 10, 1999 through August 12, 1999.

Conclusions

The yardstick for evaluating section 7116(a)(1) and (2) violations is found in *Letterkenny Army Depot*, 35 FLRA 113 (1990). Under *Letterkenny*, the General Counsel establishes a *prima facie* showing of discrimination by establishing that a preponderance of the evidence shows that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. Once a *prima facie* showing has been made, an agency may seek to establish an affirmative defense by showing: (1) there was a legitimate justification for its allegedly discriminatory action; and (2) the same action would have been taken even in the absence of protected activity. After presentation of a respondent's evidence of nondiscriminatory reasons, the General Counsel may seek to establish that these reasons are pretextual. An Administrative Law Judge may conclude that a respondent's asserted reasons for taking the action are a pretext even if those reasons were not asserted to be such during the unfair labor practice hearing.

The record reveals that Showalter was engaged in the protected activity of processing a grievance of a bargaining unit employee at the time the unfortunate remark herein was made. Respondent's motivation for suspending Showalter for 3 days is shown in the proposed letter of suspension and the letter of suspension, both of which reveal that Showalter was suspended for the remark he made in reference to Rieck during the May 19 meeting. Accordingly, it is found that the General Counsel proved its *prima facie* case under the *Letterkenny* standard in showing that Respondent's disciplinary action against Showalter was for conduct he engaged in while performing representational activity and the protected activity that Showalter was engaged in was a motivating factor for Respondent's disciplinary action against him.

Respondent contends that this isolated remark by Showalter constituted flagrant misconduct, and thus provided a legitimate reason for the disciplinary action it took against him. Respondent contends that Showalter made a profane and insulting statement in the workplace which violated both the agency's and Federal government Standards of Employee Conduct. Respondent fails to address whether Showalter was engaged in protected activity, but simply relies on agency policy. Thus, it is clear that Respondent suspended Showalter for violating the Standards of Employee Conduct and disregarded Showalter's claim that he was acting in a representational capacity. The Respondent ignored the fact that Showalter was engaged in protected activity, as disclosed by the Warden, who testified that he did not see any difference between a person acting as an employee and a person acting as a Union official. This testimony, as well as the proposed notice of suspension, makes it abundantly clear that Respondent judged Showalter's conduct only as an employee and never considered that he was a Union official who was engaged in protected representational activities. In so doing, Respondent acted at its peril.

The issue here is whether Showalter's statement was within the ambit of protected activity. *See for example*, *Veterans Administration Medical Center, Bath, New York and Veterans Administration, Washington, DC*, 12 FLRA 552 (1983); *Internal Revenue Service*, Washington, DC, 6 FLRA 96 (1981). Certainly remarks or conduct that are of an outrageous and insubordinate nature may remove them from the protection of the Statute. *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 916*, 34 FLRA 385, 389-90 (1990).

Heretofore, the Authority has balanced the employee's right to form, join, or assist any labor organization, or to refrain from such activity, without fear of penalty or reprisal, with the right of an agency to discipline an employee who is engaged in otherwise protected activity for remarks or actions that exceed the boundaries of protected activity such as flagrant misconduct. *American Federation of Government Employees, National Border Patrol Council and U.S. Department of Justice, Immigration and Naturalization Service, El Paso Border Patrol Sector*, 44 FLRA 1395 (1992). Clearly a union representative may use intemperate, abusive, or insulting language without fear of restraint or penalty, if he or she believes such rhetoric to be an effective means to the Union's point. *Department of the Navy, Naval Facilities Engineering Command*, *Western Division, San Bruno, California*, 45 FLRA 138, 155 (1992)(quoting *Old Dominion Branch No. 46, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 283 (1984)).

In deciding whether an employee has engaged in flagrant misconduct, the balance clearly permits leeway for impulsive behavior against the employer's right to maintain order and respect for its supervisory staff in the workplace. In striking this balance the Authority considers the following: (1) the place and subject matter of the discussion; (2) whether the employee's outburst was impulsive or designed; (3) whether the outburst was in any way provoked by the employer's conduct; and (4) the nature of the intemperate language and conduct. *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7, 11-12 (1995)(referring to *Department of Defense, Defense Mapping Agency, Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 80 (1985) and *Department of the Navy, Pudget Sound Naval Shipyard, Bremerton, Washington*, 2 FLRA 54, 55 (1979)).

Looking at the totality of the circumstances, it appears to the undersigned that Showalter's remark was clearly impulsive and not designed. The record disclosed that Showalter, Wright and Spear were discussing several labor- management matters such as the nursing roster, bargaining issues, and a pending grievance concerning a bargaining unit employee's evaluation. Showalter testified that on May 12, he attempted to informally resolve Lovett's evaluation issue with Spear, and he presented Spear with a significant amount of documentation which included Lovett's accomplishments that were not included by Rieck in her evaluation of Lovett. Showalter said that he informed Spear that he felt that he had a good grievance and that Rieck had historically retaliated against employees who came to the Union. Showalter also explained to Spear that the only two people who received an outstanding evaluation were the two people who had quit the Union in that rating period. Spear took all the documentation that Showalter had presented to him and said that he would get back to Showalter.

At the May 19 meeting, after discussing Lovett's evaluation, Spear said that he had reviewed all of the documentation that was presented to him on May 12, and saw no reason to upgrade Lovett's evaluation. Showalter sought to demonstrate that Lovett was targeted for retaliation by Rieck because he had come to the Union. Showalter cited two employees that he believed were marginal, who had not performed as well as Lovett but had received "outstanding" evaluations because they had quit the Union. Showalter then asked how Spear could, in the face of all that evidence, deny the request to upgrade Lovett's evaluation. Spear responded

that he had other information. Showalter testified that Spear's response made him angry because he knew that the "other" information could have come only from Rieck, and it was then he referred to Rieck under his breath as a "fucking bitch." Showalter also testified that he was frustrated because Rieck had a pattern of retaliating against employees who came to the Union for assistance and this was not the first time the Union had brought this kind of allegation to Spear's attention. Showalter added that Spear had always been unresponsive when the Union had expressed these kinds of concern to him. According to Showalter, Spear just sits there and listens but does not take any action. Showalter did not apologize to Spear for his remark about Rieck since Spear made no response to Showalter's remark, and he did not realize that there was an issue. Showalter did not apologize to Rieck because he was not aware that Rieck even knew about the remark since she was not present when it was made. In the circumstances, it is found that Showalter's isolated remark was made out of frustration and anger over the manner in which his case had been received by Spear, and was impulsive and not designed.

In considering whether Showalter's outburst was in any way provoked by the Respondent's conduct, the record demonstrates that Showalter presented what he considered to be a compelling argument in favor of raising Lovett's evaluation including documentation, and that Spear had refused to consider upgrading Lovett's evaluation. Showalter added that Spear told him that he had "other" information which Showalter knew could only have come from Rieck. Wright, who was also present at the meeting, testified that despite all the information that was presented by Showalter, Spear was unresponsive and he stated to Showalter that "you don't have all the information I have on him" referring to Rieck. Thus, after presenting what he thought was an overwhelmingly good case, only to have it rejected in an indifferent manner by Spear, it is reasonable to conclude that Showalter reacted to Spear's statement that he had "other" information in an angry manner. Consequently, it is found that Spear's response to what Showalter thought was a compelling case could reasonable be found to have provoked Showalter to make the remark about Rieck. Furthermore, this case involved a single isolated incident of profane language which Respondent failed to show warranted the type discipline given to Showalter. Thus, Respondent offered no evidence that it had disciplined any employees for using profanity although the record revealed that use of profanity by employees in this institutional setting was commonplace.

Finally, *Defense Mapping Agency* deals with the nature of the intemperate language and conduct. Here, the Respondent asserts that the single remark "fucking bitch" constitutes flagrant misconduct because it was of such an outrageous and insubordinate nature that it must be removed from the protection of the Statute. It is well established that an employee, when acting in his/her capacity as a union representative, is entitled to greater latitude in both speech and action than in normal circumstances. *Grissom AFB,* 51 FLRA at 7; *INS*, 44 FLRA at 1395. Conduct that has been found flagrant misconduct and outside the ambit of protected activity can be found in *Veterans Administration Medical Center, Birmingham, Alabama and American Federation of Government Employees, Local 2207*, 35 FLRA 553 (1990); *Veterans Administration, Washington, DC and Veterans Administration Medical Center, Cincinnati, Ohio*, 26 FLRA 114 (1987). The instant case, however, does not involve either life-threatening conduct or racial epithets as found in the above cases.

Respondent argues that the term "bitch" is a "knock on the female gender" and therefore sexist. Although there is a clearly expressed policy against sexual discrimination in the workplace and sexual stereotyping tends to undermine that policy, which I am certain the Authority endorses, sexual epithets do not fall within the protection of the Statute. More importantly, however, record testimony illustrated that the term "bitch" is not considered a sexual epithet at Respondent's facility. Quite clearly, the record reveals that the term "bitch" is commonly used by employees who work at the prison. Thus, Wright testified that managers and supervisors have referred to her as a "bitch" and have made comments such as "you know, you can be a real bitch." Furthermore, Showalter stated that the employees at the prison use profanity frequently on the job, and the use

of profanity is common in a prison environment. Showalter added that during the negotiations for a local supplemental collective bargaining agreement both sides exchanged profanity back and forth. Even Rieck admitted that Respondent's negotiators would occasionally curse during the negotiations using words such as "shit" and "damn." Thus it appears to the undersigned that both employees and management officials at the prison use forms of profanity with impunity. Moreover, even if the term "bitch" is considered to be a sexual epithet, the use of such language by Union officials while engaged in protected representational activity does not necessarily constitute flagrant misconduct.

It is also my opinion that the Respondent failed to establish a legitimate justification for suspending Showalter. In this regard, the record shows that the use of profanity and even the use of the term "bitch" are common at Respondent's facility. Furthermore, there is no evidence that anyone other than Spear and Wright overheard Showalter's remark. In these circumstances, it can only be concluded that the reasons asserted by the uncorroborated testimony of the Warden are a pretext. *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force* Base, *Utah*, 35 FLRA 891 (1990). Accordingly, it is found that Showalter's remark was within the ambit of protected activity and it was the only reason for his 3 day suspension.

In summary, the record in this case demonstrated by a preponderance of the evidence that Showalter was engaged in protected representational activity at the time he made the remark about Rieck, and that the remark did not amount to flagrant misconduct because: (1) the comment was made during a labor-management discussion in a closed room and there is no evidence that it was heard by anyone other than the three participants in that meeting; (2) the comment was impulsive, not premeditated; (3) Showalter was provoked by Spear's mentioning of "other" information which Showalter knew could have only come from Rieck; and (4) the language contained in the comment was well within the "leeway" afforded to employees acting as Union representatives. Despite the fact that all of the factors mentioned in *Defense Mapping Agency* were met in the case at hand, it should be noted that the Authority has also held that these factors need not be cited or applied in any particular way in determining whether an action or conduct constitutes flagrant misconduct. *U.S. Department of Defense, Defense Logistics Agency and American Federation of Government Employees, Local 2963*, 50 FLRA 212 (1995). In *Defense Logistics Agency*, the Authority held that although the grievant's statements were found by the arbitrator to be not impulsive, and not made as a response to a specific act by the supervisors, the statement was still found not to be of such outrageous and insubordinate nature as to remove it from the protection of the Statute. Here, there is an isolated use of profanity directed at someone who was not participating in the meeting and is not alleged to have overheard the remark. In my view, Showalter's remark does not amount to flagrant misconduct as defined by case law. Moreover, since there is no corroboration or documentation to support Respondent's claim of a legitimate justification for its action, I am constrained to conclude that Respondent's reasons for suspending Showalter for protected activity he engaged in as a Union representative are pretextual. See *Department of Housing and Urban Development, Pennsylvania State Office, Philadelphia, Pennsylvania*, 53 FLRA 1635 (1998). Accordingly, it is found that Showalter's statement fell within the ambit of protected activity and that disciplining him for that remark was discriminatorily motivated.

It is concluded that the General Counsel established by a preponderance of the evidence that Showalter's 3-day suspension was motivated solely by his protected activity. It is also concluded that the Respondent's proffered reasons for its action were pretextual and not supported by the record. Accordingly, it is found that Respondent violated section 7116(a)(1) and (2) of the Statute by suspending

Showalter for protected conduct that occurred while acting in his capacity as a union representative engaged in a labor relations meeting.

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

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of Justice, Federal Bureau of Prisons, Federal Medical Center Fort Worth, Texas, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing its employees by disciplining Patrick Showalter or any other representative of the American Federation of Government Employees, Local 1298, the exclusive representative of a unit of our employees, for conduct engaged in while performing union representational duties under the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing our 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 Statute:

(a) Expunge from its files all records of, and references to, the 3-day suspension given to Patrick Showalter, and make him whole by reimbursing him for all losses he incurred as a result of the 3-day suspension, including backpay with interest, and any other benefits lost due to the suspension.

(b) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 1298 are located, 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 Warden, U.S. Department of Justice, Federal Bureau of Prisons, Federal Medical Center, Fort Worth, Texas, 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.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas 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, June 29, 2000.

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ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Medical Center, Fort Worth, Texas, 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 interfere with, restrain, or coerce our employees by disciplining Patrick Showalter or any other representative of the American Federation of Government Employees, Local 1298, the exclusive representative of our employees, for activity protected by the Federal Service Labor-Management Relations Statute.

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 expunge from our files all records of, and references to, the 3-day suspension given to Patrick Showalter and make him whole by reimbursing him for all losses he incurred as a result of the 3-day suspension, including backpay with interest, and any other benefits lost due to the suspension.

_____

(Respondent/Agency)

Dated:_____ By:_____

(Signature) (Warden)

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: 525 Griffin Street, Suite 926, Dallas, TX 75202 and whose telephone number is: (214)767-4996.

1. Although this case was consolidated for hearing with Case No. DA-CA-90712, the parties decided to sever the cases for a separate decision. Therefore, a separate decision will be issued in DA-CA-90711, today.

2. All dates are 1999, unless otherwise indicated.