

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

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NORFOLK NAVAL SHIPYARD, .
PORTSMOUTH, VIRGINIA .
Respondent .
and . Case No. 34-CA-80213
TIDEWATER VIRGINIA FEDERAL .
EMPLOYEES METAL TRADES .
COUNCIL, AFL-CIO .
Charging Party .
.....

Ms. Marilyn L. Spence
For the Respondent

Mr. Howard Briggs
For the Charging Party

Patricia Eanet Dratch, Esquire
For the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges, in substance, that Respondent failed to comply with section 7114(a)(2)(B) of the Federal Service Labor-Management Relations Statute (the Statute), on or about November 4, 1987 when its Maintenance General Foreman, L. Riddick, met with and denied the request of a bargaining unit employee to be represented by a designated representative of the Charging Party (Union) during an examination in connection with an investigation which the employee reasonably believed could result in disciplinary action. The complaint alleges that Respondent thereby engaged in unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute.

Respondent's answer admitted the jurisdictional allegations as to Respondent, the Union, and the charge, but denied that it had denied a request by an employee for union representation and denied any violation of the Statute.

A hearing was held in Portsmouth, Virginia. The Respondent, Charging Party, and the General Counsel were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Respondent and General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

On November 4, 1987, Donnell Parker, a bargaining unit employee, was discovered by his supervisors, Charles West and Judson Baldwin, to be sleeping while on duty time following his lunch period. The supervisors took Parker to the office of the general foreman, Leonard Riddick, who was not in his office at the time. West asked Baldwin to go get Walter Rodgers, a Union steward, while he remained in Riddick's office with Parker.^{1/} Parker was aware of West's request.

Baldwin returned to his shop and told Union Steward Rodgers that Parker had been caught sleeping on the job. Baldwin asked Rodgers to accompany him to Riddick's office as Parker needed representation.

Baldwin and Rodgers arrived at Riddick's office to join West and Parker just before Riddick returned. When Riddick returned, West advised him that they had caught Parker sleeping during duty hours. Riddick asked Rodgers what he was doing there. Rodgers replied that Baldwin had asked him to come. Rodgers also said, "If this is going to result in

^{1/} I have credited the testimony of Respondent's witness Judson W. Baldwin concerning the circumstances surrounding his going to get Union Steward Rodgers. Baldwin's testimony was clear and specific and consistent with that of West and Union Steward Rodgers concerning the fact that Riddick was not in his office at first. This is contrary to the testimony of Parker, who testified that Riddick began to question him, but he refused to answer.

disciplinary action he (Parker) needs to be represented." Riddick looked at Parker who said nothing. Riddick told Rodgers, "We don't need you. Go back to work." Riddick advised Supervisor Baldwin not to issue Rodgers anymore Union time that week. Riddick appeared somewhat angry and spoke louder than usual.^{2/} Rodgers returned to his job site.

After Rodgers left, Foreman Riddick asked employee Parker some questions about the incident. Riddick asked Parker if it was true that he was sleeping on the job. Parker said, "Yes, sir."^{3/} Riddick told him they would put him on leave without pay for one hour. Riddick asked him if he wanted to go back to work, and Parker said, "Yes."

Parker received a pre-action communication from Respondent in January 1988. Parker was not placed on absent without leave on November 4, 1987, and no disciplinary action has resulted from the incident to date.

The record reflects that two months prior to the incident in question, Parker was taken to Riddick's office on two separate occasions for suspected intoxication on the job. On September 16, 1987 Parker did not request a Union representative at the initial meeting in Riddick's office, but did ask for one after he was taken to the police station and asked to take a breathalyzer test. A Union representative was provided. The next day, September 17, 1987, West also took Parker to Riddick's office for suspected intoxication. On this occasion, West asked Union Steward Rodgers to accompany them. West did so to forestall any delay between the time when Parker might be asked to take

^{2/} The reasons for Riddick's disposition and statement concerning official time are not clear from the record. Supervisor Baldwin testified that Rodgers had used excessive time that week. Riddick testified that he limited Rodgers' time due to the workload. Rodgers subsequently used two and one-half hours for previously scheduled meetings, but was denied additional time.

^{3/} I have credited the testimony of Respondent's witnesses Riddick, West, and Baldwin in this respect. Parker testified that after Rodgers left, he told Riddick he did not want to answer any questions until he had a Union representative or a witness. He testified that Riddick continued to ask him questions, and when he refused, Riddick told West to "write him up."

a breathalyzer test and the arrival of the Union representative if Parker requested one at that point. Parker did not request a Union representative on this occasion, but Rodgers was permitted to stay with Parker anyway throughout the time in Riddick's office and at the police station.

Discussion, Conclusion, and Recommendations

Section 7114(a)(2) of the Statute provides:

(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at-

.

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if-

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation.

The parties agree that 7114(a)(2)(B) would be applicable to the instant case if either (1) Parker requested representation, or (2) action by the Respondent obviated the need for such a request since all of the other necessary elements are present. I have found, based on the credibility of the witnesses, that Parker did not make a request for representation either prior to or during the examination. Therefore, the remaining issue is whether Respondent's request to the Union steward that he attend the meeting and the steward's subsequent attendance obviated the need for such a request.

The General Counsel argues that Respondent, through Supervisor West, recognized the employee's need for representation and, in the interest of expediency, summoned the steward, effectively preempting the employee from exercising his right to determine whether or not he desired Union assistance. The General Counsel claims that a request

for representation thereafter by the employee would have been, at best, superfluous. The General Counsel contends that when Union Steward Rodgers was ordered out of the meeting, Parker was not required to ask that he remain because of the obvious futility of any such request, and because Parker could have created additional problems for himself by further inciting Foreman Riddick who already appeared to be somewhat angry. The General Counsel also asserts that by summoning the Union representative and then removing him from the meeting, Respondent independently violated the Statute.^{4/}

Respondent defends on the basis that Parker never made a request for representation, and when he could have requested that Rodgers remain, he acquiesced in the representative's leaving the meeting, thereby waiving his right to representation. Respondent claims that it did not have an obligation to allow the Union representative to remain in the meeting absent a request from the employee, and to have done so would have coerced the employee in the exercise of his right under the Statute to choose not to have a Union representative present.

A request for representation is a prerequisite to any obligation under section 7114(a)(2)(B) of the Statute. Department of Justice, Bureau of Prisons, Federal Correctional Center, 14 FLRA 334 (1984). The Authority has held that a valid request must be sufficient to put the employer on notice of the employee's desire for representation. United States Department of Justice, Bureau of Prisons, Metropolitan Correctional Center, New York, New York, 27 FLRA 874 (1987) (Bureau of Prisons), Decision on Reconsideration, 29 FLRA 482 (1987). Nonverbal conduct may on occasion clearly be the equivalent of spoken words and thus constitute a valid request.^{5/}

4/ The complaint does not allege this as an independent violation.

5/ In Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 32 FLRA 222 (1988), an employee brought his union representative to an investigatory meeting within the meaning of section 7114(a)(2)(B) and that representative was asked to leave and did leave the meeting. The employer insisted that the employee should have been represented by a different union. The parties evidently accepted the fact that the employee's conduct in bringing the representative to the meeting constituted an appropriate "request" as this was not an issue in the case.

In this case no conduct, verbal or otherwise, put the Respondent on notice of the employee's desire for representation. The action of the lower level supervisors in making the Union steward available in case Parker decided to request him did not preempt the employee from exercising his right to determine whether or not he desired Union assistance. The Union representative was merely made available by Respondent at the outset of the meeting before the examination began. If Parker had requested representation, the Union representative's presence at that time at the instigation of Respondent would have saved time for all concerned. In the absence of a request Respondent had no obligation to allow the Union representative to remain.

A request by the employee would not have been superfluous, as contended by the General Counsel. While the Respondent had obtained the presence of a Union representative and allowed him to remain during a previous investigation of Parker, this single instance is insufficient to establish a practice of Respondent requesting representation for Parker, since the record also shows another instance when Parker himself verbally requested Union representation.

The circumstances do not demonstrate that when the Union steward was ordered out of the meeting, any request by Parker for him to remain would have been futile. On the contrary, Respondent had provided Union representation to the employee upon request in the past and in this instance took steps to ensure that the Union representative would be readily available to the employee at the outset of this meeting if requested. Parker had requested Union representation in the past and was fully aware that Rodgers was a Union representative and could have assisted him. There is no indication in the record that Riddick's statements, tone of voice, or demeanor toward Rodgers were coercive or tended to interfere with employee rights. Department of the Army, Reserve Personnel Center, St. Louis, Missouri, 32 FLRA 665 (1988).

It is clear that Parker never made a request for representation, and when he could have requested that Rodgers stay he remained silent. He did not in any manner put Respondent on notice that he desired Union representation. Parker thereby acquiesced in the Union representative's leaving and thereby waived his right to representation at the meeting. Cf. Army and Air Force Exchange Service, 16 FLRA 794 (1984); Department of Justice, Bureau of Prisons, Federal Correctional Center, 14 FLRA 334 (1984).

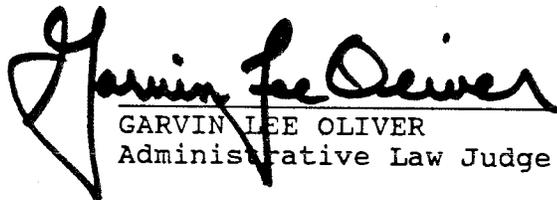
It is concluded that a preponderance of the evidence does not demonstrate that Respondent failed to comply with section 7114 (a)(2)(B) of the Statute since a request for representation is a prerequisite to any obligation under that section. It follows that Respondent did not engage in unfair labor practices in violation of section 7116(a)(1) and (8) of the Statute, as alleged.

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

ORDER

The complaint in Case No. 34-CA-80213 is dismissed.

Issued, Washington, D.C., April 13, 1989


GARVIN LEE OLIVER
Administrative Law Judge