

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

.....
VETERANS ADMINISTRATION
MEDICAL CENTERS,
LONG BEACH, CALIFORNIA

Respondent

and

ROBERT L. MOORE

Charging Party
.....

Case No. 8-CA-00014

Patricia J. Geffner, Esq.
For the Respondent

Gerald M. Cole, Esq.
For the General Counsel of the FLRA

Robert L. Moore
Pro Se

Before: SAMUEL A. CHAITOVITZ
Administrative Law Judge

DECISION

Statement of the Case

This is a proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 et seq., hereinafter referred to as the Statute, and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2423.1 et seq.

Pursuant to a charge filed and amended by Robert L. Moore, an individual, against Veterans Administration Medical Center, Long Beach, California, hereinafter called VA Long Beach, the General Counsel of the FLRA, by the

Regional Director of Region VIII, issued a Complaint and Notice of Hearing alleging that VA Long Beach violated section 7116(a)(1) and (2) of the Statute by discharging Moore, a probationary employee, because he sought assistance from a union and by advising Moore he was being removed because he sought union assistance. VA Long Beach filed an answer denying it had violated the Statute.

A hearing in this matter was conducted before the undersigned in Los Angeles, California. VA Long Beach, Moore and General Counsel of the FLRA were represented and afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. Briefs were filed and have been fully considered.

Based upon the entire record in this matter, my observation of the witnesses and their demeanor, and my evaluation of the evidence, I make the following:

Findings of Fact

In January 1989, Moore was hired under the Veterans Readjustment Act by VA Long Beach as a housekeeping aid in the hospital facilities. Because of previous service with the VA Moore was promoted to WG 1-3 in February 1989 and to WG 2-2 in August 1989. Moore had to serve a one year probationary period.

When first employed Moore worked weekends under the supervision of Gladys Marshall, who stated in an interim performance rating for the period ending March 31, 1989, that Moore was performing at a fully successful level and that he had the potential of becoming an outstanding employee.

In April 1989 Moore was transferred to the Monday through Friday shift from 6 a.m. to 2:30 p.m. on Ward K-2, under the supervision of Johnny Flowe. He was then switched to Ward L-2, a psychiatric ward. Such a ward presents cleaning problems since psychiatric patients often drop food and sometimes throw things.

Employees assigned to clean wards are given work schedules requiring specific tasks be completed at specific times during the day. Housekeeping aids are also required to complete assignments set forth in weekly, monthly, and quarterly inspection sheets.

With respect to the following incidents and findings I credit Flowe's version of what occurred, and not Moore's. Moore was an evasive and unreliable witness who tried to provide information he felt would be helpful to him and not to answer the questions asked. Further Moore insisted other witnesses were not telling the truth with respect to incidents whereas the other witnesses had no reason to lie. Thus, I also credit the testimony of Leonard Odom and Edna Knight-Maiz. Odom and Knight-Maiz were candid, forthcoming and had no reason to tell untruths. Flowe also seemed candid and tried to recall the incidents, even though this sometime lead to confusion. Further Flowe's version of incidents, as well as the versions of Odom and Knight-Maiz, were more consistent with the surrounding circumstances than was Moore's. Further, Moore's demeanor was such as to make him not credible, whereas the demeanor of Flowe and the other witnesses convinced me that they were credible.

On June 28, 1989, Edna Knight-Maiz was acting charge nurse on Ward M-2. On that day, at about 9:20 a.m., she observed Moore showing a person around M-2. Knight-Maiz overheard Moore giving the other individual information, including that the person could take a break on the ward, pointing to a break room. This information was incorrect because only the ward staff could use this break room. Moore also indicated the person could use the microwave, which was also incorrect. Knight-Maiz pointed out the break room and microwave were specifically for M-2 staff. Moore became belligerent. Knight-Maiz asked him to leave the ward and tried to see Moore's name tag, which Moore covered with his hand. Moore cursed at Knight-Maiz as he left the ward. Knight-Maiz filled out a Report of Contact describing this incident and concluding that Moore's cursing and behavior was inappropriate and disrespectful.

In July 1989 Moore began having difficulty completing his assignments. Flowe was requiring Moore to clean the day room twice a day, the second time between 1:15 p.m. and 2:30 p.m., time he was previously doing specific tasks assigned by his supervisor and tasks set forth in the inspection sheets. Moore told Flowe that Moore could not complete all these assigned tasks in the time allotted. Flowe told Moore he was expected to complete these assignments. Moore said he would try, but requested a meeting with Mary Durham, the second level supervisor.

Moore, Flowe and Durham met in Durham's office and Moore set forth his problems in completing his assignments in a timely fashion. Moore was told to continue to clean the day

room twice a day and to perform the tasks set forth in the inspection sheets. Shortly after this meeting Moore was given a new work schedule that set forth clearly that he was to clean the day room twice a day.

A Report of Contact dated July 10, 1989, was submitted by a Viera A. DeWald which stated that Moore was observed using the telephone at the K-2 Nurses Station, and that when DeWald advised him not to use the phone, "Moore responded in a highly inappropriate manner . . . 'this is none of your business, you probably have no business being at the nurses station, you have your own office.' At this point he walked away, still talking in an hostile manner."

On or about July 16, 1989 Moore was observed by Leonard Odom at 12:40 p.m. in the corridor of Building 122 talking to a young lady. On this occasion Odom was a supervisor temporarily acting as Moore's supervisor because Moore's regular supervisor was out. L-1, to which Moore was assigned, is located in Building 128. Odom reminded Moore that he was assigned to Building 128 and not to Building 122. Odom met with Moore in Odom's office at about 2:25 p.m. and Odom filled out a Report of Contact and a written counselling and gave a copy of each to Moore, advising Moore that this counselling would help Moore realize the importance of staying in his assigned areas. Moore became "boisterous" and cursed in his reply to Odom. With respect to this incident there is some uncertainty whether it occurred on July 16 or August 16.

In early August 1989 Moore talked with Sidney Keely, steward and safety officer for American Federation of Government Employees, AFL-CIO, Local 1061, hereinafter called AFGE Local 1061. AFGE Local 1061 is a labor organization representing VA Long Beach's housekeeping employees. Moore explained his problem completing his assigned tasks during the afternoon.

On August 17, 1989 Moore received a written counselling because on August 10, 1989, he was not able to provide to Flowe an inspection sheet Flowe had given to Moore which contained items Moore was to complete. Flowe gave Moore a written counselling.

At about 6:10 a.m. on August 18, 1989 Flowe saw Moore carrying a cup of coffee. Flowe advised Moore that he was not permitted to carry around a cup of coffee. Moore responded that he could do any "God damn thing" he wanted to and Flowe couldn't do anything about it. Later in the day,

on August 18, Flowe gave Moore a written counselling advising Moore not to have food or drink in his housekeeping aid closet or on his housekeeping aid cart. Before issuing this counselling Flowe had seen coffee cups on Moore's housekeeping cart on a number of occasions and had spoken to Moore about it on a number of occasions. That is why he issued the counselling on this occasion.

On or about August 20, 1989, Keely went to see Richard Brisard, VA Long Beach's Assistant Chief of Building Management, Moore's third level supervisor. Keely mentioned the two counsellings that Moore had received and the problem Moore had completing his work because he had to do two tasks at the same time, cleaning the day room and the inspection sheet duties. Brisard stated the bases for the counsellings were groundless and would be resolved and that Moore couldn't do two things at once. Keely advised Moore of this meeting.

Brisard recommended to Flowe that he not require Moore clean the day room a second time. Flowe agreed.

After the Keely-Brisard meeting, Flowe informed Moore that he would no longer have to clean the day room a second time in the afternoon. I find that Flowe was not angry and did not "put his finger" in Moore's face.

Sometime after the Keely-Brisard meeting Keely ran into Brisard again and Brisard told Keely that Moore's supervisor had been spoken to and had resolved the problems of the coffee and the check sheets.

On August 21, 1989, at about 9:40 a.m., Flowe instructed Moore to do some sweeping which would take about ten minutes. Flowe told Moore to complete the task by 11:00 a.m. Moore responded that he wasn't going to sweep anything and that Flowe could do it himself. Moore became ill that morning and received permission at about 10:00 a.m. to go to the health office, checking in there at about 10:33 a.m. The doctor told Moore he could go home and Moore left on sick leave at 11:00 a.m.

On September 20, 1989 Flowe discovered that Moore had initialed off on certain items on the weekly inspection sheet indicating the tasks had been completed, when in fact they had not been completed. Flowe brought this to Moore's attention, who started to make excuses and became very angry. Flowe told Moore he was to correct the items before initialing them.

Between August 21, and September 27, 1989 Flowe decided he wanted to discharge Moore. Flowe prepared the paperwork and then consulted with Brisard and Durham. Flowe based his decision that the appropriate level of punishment was discharge primarily upon Moore's refusal to perform the sweeping assignment on August 21 and his conduct on August 18 involving his carrying a coffee cup, as well as upon his general past conduct of being non-cooperative. In reaching the decision to discharge Moore, Flowe also considered the Reports of Contact filed by Odom, Knight-Maiz and DeWald, and Moore generally being disobedient.

A letter to Moore was prepared for the signature of Dean R. Stordahl, VA Long Beach Medical Center Director, which reflected Keely's decision, as described above. The letter was dated September 27, 1989, and advised Moore that he was being separated during his trial period effective October 11, 1989. The letter stated Moore was being separated "based on evidence of the following record". In the following subparagraph lettered "a" the August 21 incident involving Moore's refusal to perform the sweeping assignment was described. This subparagraph then referred to VA Regulation 820(B) which stated that improper behavior included ". . . Deliberate or willful resistance toward or refusal to carry out the proper order of a superior." Subparagraph lettered "b" described the incident involving Moore's being instructed not to carry a coffee cup and Moore's response. This subparagraph stated that this conduct could not be tolerated and was in violation of VA Regulation 820(B).

Paragraph 2 of this letter stated that an employee during the trial period is expected to demonstrate the qualities and skills that would justify his retention. This paragraph went on to advise Moore, "During your period of employment, you have been counseled about your attitude toward your supervisor's instructions. Despite counselling, your conduct has not improved sufficiently to warrant retention in the Federal service."

This letter was signed for Stordahl and was given to Moore on September 27.

On September 29, 1989, Moore went to Flowe to fill out an accident form after Moore had seen a doctor. As discussed above, I indicated that I credited Flowe's version of events and discredited Moore's and I set forth the reasons for such conclusion. Accordingly, I discredit Moore's contention that Flowe asked Moore why he was

complaining and when Moore responded, "So you're saying this because I complained . . . you're lying on me because I complained to the Union," Flowe responded, "Yes . . . I am going to show you whose complaints count and whose don't." I credit Flowe's denial that Moore asked Flowe anything about the discharge at this encounter. I credit Flowe's testimony that when he decided to discharge Moore or during the encounter on September 29, 1989, he did not know that Moore had sought the assistance of a union in approaching Brisard about Moore's problems.

Discussion and Conclusions of Law

General Counsel of the FLRA contends that VA Long Beach violated section 7116(a)(1) and (2) of the Statute by discharging Moore. Section 7116(a)(2) provides that it is an unfair labor practice for an agency to encourage or discourage membership in a union by discrimination in connection with hiring, tenure, promotion or other conditions of employment.

General Counsel of the FLRA contends VA Long Beach discharged Moore, a probationary employee, because he sought aid from AFGE Local 1061 in resolving a dispute with his supervisor. This discharge, it is contended, constituted discrimination against Moore with respect to his tenure of employment because he sought union assistance and thus violated the Statute.

All parties agreed that discharge of a probationary employee because of his union activity would violate section 7116(a)(2) of the Statute. Cf. Oklahoma City Air Logistics Center, (AFLC), Tinker Air Force Base, Oklahoma, 6 FLRA 159 (1981) and Marine Corps Logistics Base, Barstow, California, 5 FLRA 725 (1981); see also Defense Logistics Agency, Defense Contract Administration Services, Atlanta Region, Marietta, Georgia, OALJ 89-121, adopted without precedential significance, October 27, 1989.

In Department of the Navy, Naval Weapons Station Concord, Concord, California, 33 FLRA 770 (1988), hereinafter referred to as Naval Weapons Station, the FLRA, relying on United States Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983), held, using very broad language, that a probationary employee can be removed summarily, with no indication there is any limitation on the reasons or motivation for such an agency's action. Naval Weapons Station, supra, would seem to say that an agency can fire a probationary employee

because of his membership in or activities on behalf of a labor organization without the agency violating the Statute. This, however, was not the situation presented nor the activity engaged in by the employee in Naval Weapons Station, supra.

I need not reach the question of whether Naval Weapons Station, supra, would control the subject case because I conclude Moore was not discharged because he sought the assistance of AFGE Local 1061. Rather I conclude, based on the credited testimony, that Flowe decided to separate Moore because Moore had engaged in misconduct, was uncooperative and had a bad attitude.

In reaching the foregoing conclusion, I rely upon Moore's record of misconduct and his poor attitude when his shortcomings were brought to his attention. Moore had disputes with personnel outside his work area and argued when talked to about the misconduct. Reports of Contact were made of these encounters and when considered in conjunction with his conduct at his work assignment, Flowe was persuaded to separate Moore.

The credible evidence herein fails to establish any evidence of anti-union animus on the part of Va Long Beach officials. Additionally when Flowe decided to separate Moore, Flowe was unaware Moore had sought the assistance of a labor organization.

In light of all of the foregoing, I conclude Moore was not separated because he sought assistance from a labor organization and therefore VA Long Beach did not violate section 7116(a)(1) and (2) of the Statute. Accordingly, I recommend that the Authority issue the following Order:

ORDER

The Complaint in Case No. 8-CA-00014 is hereby DISMISSED.

Issued, Washington, D.C., October 19, 1990.



SAMUEL A. CHAITOVITZ
Administrative Law Judge