

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

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UNITED STATES DEPARTMENT OF
TRANSPORTATION, FEDERAL
AVIATION ADMINISTRATION,
EL PASO, TEXAS

Respondent

and

Case No. 6-CA-80122

ENRIQUE CANALES

Charging Party

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Charging Party
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Joe V. Wade, Esq.
For the Respondent

Christopher J. Ivits, Esq.
For the General Counsel

Before: WILLIAM NAIMARK
Administrative Law Judge

DECISION

Statement of the Case

Pursuant to a Complaint and Notice of Hearing issued on May 31, 1988 by the Regional Director, Federal Labor Relations Authority, Region VI, a hearing was held before the undersigned on October 18, 1988 at El Paso, Texas.

This case arose under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 et seq. (herein called the Statute). It is based on a first amended charge filed on April 27, 1988 by Enrique M. Canales, an Individual, (herein called Canales or the Charging Party) against United States Department of Transportation, Federal Aviation Administration, El Paso, Texas (herein called the Respondent).

The Complaint alleged, in substance, that since on or about July 23, 1987 Respondent discriminated against Canales by terminating his administrative duties assignment because he filed a grievance on behalf of the National Association of Air Traffic Specialists, the exclusive representative of Respondent's Traffic Control Specialists, in violation of section 7116(a)(1) and (2) of the Statute.

Respondent's Answer, dated June 28, 1988, denied the alleged act of discriminations as well as the commission of any unfair labor practices.

Both parties were represented at the hearing. Each was afforded full opportunity to be heard, to adduce evidence, and to examine as well as cross-examine witnesses. Briefs were filed with the undersigned which have been duly considered.

Upon the entire record herein, from my observation of the witnesses and their demeanor, and from all of the testimony and evidence adduced at the hearing, I make the following findings and conclusions:

Findings of Fact

1. At all times material herein the National Association of Air Traffic Specialists (herein called the Union) has been, and still is, the exclusive bargaining representative of Respondent's Traffic Control Specialists at El Paso, Texas.
2. At all times material herein the Respondent and the Union have been parties to a collective bargaining agreement in respect to terms and conditions of employment governing the employees in the aforesaid unit.
3. Canales has been an air traffic control specialist with the Federal Aviation Administration for about 12-13 years. He has spent eight years in this position at the El Paso Flight Service Station, and has acted as steward or union representative for about four or five years. In his position Canales controls and maintains flight services, briefs pilots on the weather as well as inbound and outbound flight plans. The air traffic control specialist performs critical duties which are performed with the pilots. Non-critical duties deal with inbound and outbound flight plans.
4. Respondent maintains an administrative staff of five employees. These individuals perform administrative duties

which involve keeping up the manuals, maintaining facility orders and letters of agreement, keeping supply cabinets up to date, and performing some training.^{1/} For the most part, these duties are concerned with paper work.

5. Record facts show that if a traffic control specialist reports he is not feeling well and prefers not to work in a control position (in-flight or fore-flight), management may permit the individual to perform non-critical duties: flight data (keeping an eye on traffic and flight plans) and data communications (receiving and transmitting flight plans). If an employee has been medically disqualified for his control tasks, or on prohibitive medicine, he is not usually permitted to perform flight data or data communication duties.

6. A friendly relationship between Canales and Carla Gonsalez commenced in 1978. At that time Gonsalez was manager of the Las Vegas Flight Service Station and Canales transferred there. The two individuals socialized together and were close friends. Thereafter both of them went to Highlines University to present a program to about 20 pilots which involved an explanation of weather charts. Canales asked Gonsalez if the latter would give him a special achievement award for this program. Gonsalez said he couldn't because a minimum of six months of activity was required. Gonsalez testified he did ask the airport manager to give Canales a letter of commendation but it was never done. Thereafter their relationship cooled.^{2/}

7. In 1981 Gonsalez became manager of the El Paso Station and later on Canales transferred to that station. While Canales was a Union representative, and prior to June 1987, he filed three grievances. Four grievances were filed by him subsequently.

^{1/} Record testimony reflects that training is not designated as an administrative duty if an employee is deemed to have impaired judgment.

^{2/} The record also reflects reciprocal hostility on the part of Canales toward Gonsalez. Thus, after Canales was denied an award he told the supervisor that, after the latter's accident, it would have been better if he had been killed. Further, that "things are going to get bad" in the future.

8. Alfonso Rey, an air traffic control specialist at the El Paso Station, testified to a conversation in November 1986 wherein Gonzalez discussed Canales' union activity. Based on said testimony, the manager asked Rey what Canales "was up to;" whether Rey was aware of the grievances Canales had been filing; did Canales keep the people informed and represent them; and suggested that Rey should run against Canales in the next election of a union representative.

9. In early June the Respondent's regional office conducted an evaluation of its El Paso facility. Included in the report (Resp. Exhibit 1), dated June 25,^{3/} is a reference to Canales' performance, which reads as follows:

Enrique M. Canales' performance - Consensus is that he is not pulling his load. Most FPL's chagrined by his laziness and using the telephone for personal business. Get area supervisors to monitor closely and correct as needed on the spot. Most feel it is prevalent when no supervision around. If FPL's see that supervisors are willing to correct his problems while they are there, they will put pressure on him to perform while they are not. To avoid appearance of retribution for past conflicts, Carlos must avoid any involvement unless it is initiated by the area supervisors.

10. Gonzalez discussed the performance of Canales with the two supervisors, Carl Hendrickson and Dino Baca. In order to improve the employee's attitude and performance, Hendrickson was assigned to counsel Canales. He set up a meeting with the employee June 25, but Canales was on sick leave.

11. Record facts reveal that when an employee is medically disqualified, a form is prepared which is signed by the regional flight surgeon. Although the individual is not in condition to perform his regular work, he may be assigned to lesser duties such as flight data and data communication tasks. The employee could be on medication which cause drowsiness and still be given administrative duties to perform.

^{3/} Unless otherwise indicated, all dates hereinafter mentioned occur in 1987.

12. In 1981 Alfonso Rey, an air traffic control specialist, had bronchitis and was given disqualifying medication which caused drowsiness. He was assigned flight data and data communication duties. In 1983 Rey had a muscle spasm. He was put on a muscle relaxer and pain pills, and the same duties were assigned him no medical decertification was given him, although such is given an employee who is on restrictive medication.

In 1985 Bobbie Flowers, air traffic control specialist, was taken off her critical duties since she did not pass an eye examination and needed glasses. Flowers was assigned to flight data and data communication duties. She never received a medical disposition form.

13. The record further reflects that on June 10, 1988 Air Traffic Control Specialist Jefferson Goldstein became ill with a heart disorder. He was on medication to regulate his heart beat. Since Goldstein was not able to perform his floor duties he was assigned to administrative duties for a month. The employee did receive a temporary medically disqualified certification and his doctor approved part time duties.

Gonzalez spoke to the doctor who stated he wanted to evaluate Goldstein and the employee could be given whatever tasks he could handle. The manager also spoke to Dr. Moore, flight surgeon, who said that Goldstein should be kept off the operations floor and assign him to part time administrative duties. Soon thereafter Goldstein was medically cleared.

14. Canales, who became ill with a stomach infection, was out on sick leave June 25 through June 29 and on July 2, 3, 5 and 6. Dr. Anthony Ziegler, Jr., Regional Flight Surgeon, issued a "Medical Disposition" on July 6 in which he commented re Canales as follows:

Person on sick leave past 13 days due to serious stomach and other medical illnesses that is required to take six (6) various kinds of medications that may be prohibitive singly or in combination.

In this report Dr. Ziegler certified that Canales was declared: "Temporarily Medically Disqualified"; "Any Type Administrative Duties Recommended"; "Must Be Rechecked By Medical Department Before Being Released For Full Duty."

15. Record facts show that while on sick leave Canales called in and gave his supervisor a list of the medications taken in connection with his illness. There were six medications and the list was given to Gonsalez. The latter then called Dr. Ziegler and spoke to his assistant, Dr. Moore, re the effect of those medications. Gonsalez was advised that one of the medications was prohibitive since it caused drowsiness. While you could work if the medicine was taken every eight hours, Canales was taking it every two hours.

16. Under date of July 7 Gonsalez wrote Canales reciting that Dr. Ziegler had medically disqualified him for air traffic control specialist duties to the medication prescribed for him. Further, that a medical summary with specified data was to be sent to Ziegler from Canales' doctor,^{4/} and that the employee was not to return to duty until agreed to by Ziegler.

17. On July 9 Canales reported to Gonsalez' office and gave him the note from Dr. Blesius. At that time Canales asked to be given administrative duties as allowed by the doctor. Gonsalez stated that Canales was to be on sick leave. When the employee asked why he was to be on such leave, Gonsalez told him to call Dr. Ziegler and to leave the office. Canales did call the doctor who advised that the employee could perform administrative duties. He then told this to Hendrickson who said he saw no problem. Upon leaving his supervisor's office, Canales met Gonsalez and he informed the manager that Dr. Ziegler recommended administrative duties for the employee. Gonsalez stated that Canales would be on sick leave; that there was no administrative work for him to do.

18. On July 10 supervisors Hendrickson and Baca approached Gonsalez and asked him to approve administrative duties for Canales. They said that human relations would be enhanced and the supervisors would make up work for Canales to do. Gonsalez testified that there were no extra duties for Canales to perform, but he consented to the supervisors' request. He sent a memo to Canales, dated July 10, assigning him to administrative duties pending resolution of his medical status, effective July 13. Further, Gonsalez stated that the assignment was "contingent on the availability of

^{4/} Dr. Cornelius K. Blesius wrote a note dated July 8 that Canales had "duodenitis."

meaningful administrative work and may be terminated for lack thereof."

19. Hendrickson told Canales that his administrative time was approved, that he would be posted for two weeks and then the situation would be evaluated to decide if there were meaningful duties left for him to do. The supervisor testified that he did not assign Canales any duties involving flight data and data communications because Dr. Ziegler said not to do so.

20. Record facts show that during the second week that Canales was on administrative duties Gonzalez noticed that Canales was frequently away from his station and wandering around. He spoke to the supervisors who said they would take care of it. Hendrickson testified that there were ongoing discussions with Gonzalez regarding the fact that there was not enough meaningful administrative duties for Canales to perform. On Wednesday, July 22 Gonzalez spoke to Baca and they concurred there was nothing much for Canales to do. The manager concluded on approximately that date that Canales should be taken off administrative duties.

21. On July 23 Canales filed a grievance concerning the removal of a desk in the working area and replacement by an unsatisfactory one. He gave it to Gonzalez who remarked it was a nit-picky and mickey-mouse grievance.

22. On July 24 Gonzalez prepared a memo which was addressed, and given, to Canales. It recited that Gonzalez had determined there no longer existed enough meaningful administrative work to justify the continued assignment to Canales of administrative duties. Further, the assignment was terminated at the end of Canales' shift on July 24, and the employee could use his sick leave until the Flight Surgeon restores his medical certification.

23. Canales remained on sick leave for three days. On July 28 he reported to the Flight Station and spoke to Hendrickson. He told the supervisor that the no longer was taking medication and would like to be put back on his traffic control duties. After checking with the doctors treating the employee, Hendrickson restored Canales to his regular traffic control schedule effective July 28.

Conclusions

The issue for determination herein is whether Respondent removed Canales from administrative duties because he filed

a grievance on behalf of another employee, thereby requiring Canales to take three days sick leave before resuming his regular tasks as an air traffic control specialist.

General Counsel contends that Respondent terminated the employee's administrative duties on July 24 because he filed a grievance the preceding day. It is maintained that the reasons advanced by management for taking such action were pretextual in nature; that union animus existed on the part of Gonzalez; and that the timing of the termination reveals the discriminatory motivation for such action taken by Respondent toward Canales.

In order to establish that an employer has discriminated against an employee in violation of section 7116(a)(1) and (2) of the Statute, the General Counsel must make a prima facie showing of such discrimination. To do so it must be shown that an employee was engaged in protected activity known to the employer, and that said conduct was a motivating factor in an agency's decision which adversely affected the employee. U.S. Department of the Treasury, Internal Revenue Service, et. al., 30 FLRA 1013; Internal Revenue Service, Washington, D.C., 6 FLRA 96.^{5/}

No question arises with respect to the fact that Canales was engaged in protected activity when he filed a grievance concerning the removal of a desk and its replacement by another one. Neither can it be disputed that Respondent had knowledge of such activity since the grievance was submitted to Manager Gonzalez. Contrariwise, a sharp dispute exists as to whether the action taken by management toward Canales was motivated by union animus so as to constitute discrimination.

General Counsel properly asserts that case law supports the view that discriminatory motivation may be inferred from circumstantial evidence. In this regard, it is further argued that timing may be indicative of such illegal motivation. Since the grievance was filed on July 23 and the removal of Canales from administrative duties occurred the following day, it is insisted that this sequence warrants such adverse inference. It is true that timing may

^{5/} Once this is established, the agency is required to show by a preponderance of the evidence that it would have reached the same decision as the adverse action in the absence of the protected activity.

be a factor which justifies inferring discrimination. However, it must be considered along with other facts which bear on union animus, if any, as well as the reasonableness of the grounds for management's conduct. See the discussion by Judge John H. Fenton in his decision adopted by the Authority in Department of the Air Force et. al., 33 FLRA 352, at pages 372-373.

At first blink it may be viewed with suspicion that the removal of Canales from administrative duties followed the day after the grievance was filed. Thus, the formal notification from Gonsalez to Canales was written on July 24 while the grievance was filed on July 23. While it may be concluded that the decision to take this action was made on July 24, record facts show these were ongoing discussion between supervisor Hendrickson and Gonsalez that there were not enough meaningful duties for Canales to perform. Moreover, on July 22 Gonsalez spoke to supervisor Baca at which time they also came to the same conclusion, and Gonsalez testified he decided then to take Canales off administrative duties. These facts militate against considering the time sequence as string support for raising an inference of illegal motivation. Unless other circumstances prevail which justify inferring discriminatory action by Respondent, I would not conclude that the timing herein warrants imputing an illegal motive herein.

It is maintained by General Counsel that record testimony reveals a clear anti-union attitude by Gonsalez. Further, that this was directed toward Canales and is responsible for the action taken against the employee on July 24, 1987.

The record does disclose that for several years prior to 1987 a very unfriendly relationship existed between Canales and Gonsalez. It started apparently when the latter balked at recommending the employee for a specialist award. Each individual claimed that he was being harassed by the other. Moreover, Gonsalez even suggested in November 1986 that another employee, Alfonso Rey, run against Canales for union representative.

Despite this background and a few comments made by Gonsalez concerning the Union, I am unable to conclude that the manager evinced such pronounced anti-unionism so as to warrant the inference that it formed the basis for his action on July 24. Record facts show that Canales filed at least seven grievances, and three were filed before July 1987. While Gonsalez did question Rey in 1986 whether the latter was aware of grievances filed by Canales, there is no

showing that the manager confronted Canales in regard to any grievances he filed in the past.^{6/} No other issue was raised re Canales' activities as a union representative, and no incident occurred with respect to the seven grievances filed during his years as such representative. The record, it would appear, is supportive of the conclusion that the animus exhibited by Gonsalez was directed toward Canales as an individual and not based on his status as union representative. The hostility between these two persons prevailed for several years since Canales did not receive the requested award, and pervades their day to day relationship. Under these circumstances, and in the absence of any other evidence that demonstrates Union opposition or objection, I conclude that General Counsel has not established union animus upon which to base a finding of discriminatory action by Respondent.

It is true, as asserted by General Counsel, that disparate treatment of an employee may be a significant determinant in finding that such individual was discriminated against by an employer. In the instant case it is argued that both Rey and Flowers, although unable to perform critical duties, were allowed to perform flight data and communication data duties. Further, that even though Canales was on medication which made him drowsy, he performed such duties. Moreover, Goldstein continued to perform administrative duties even though there was insufficient work for him to do.

The disparate treatment alluded to by the General Counsel does not, in my opinion, warrant an inference that it was discriminatorily motivated. The illnesses befalling Rey and Flowers were not of the same serious nature as that suffered by Canales. In 1981 Rey was ill with bronchitis and in 1983 he was afflicted with a muscle spasm. While he took medicine in 1981 which produced drowsiness, the record indicates that Canales was taking six medications which, as Dr. Ziegler stated, may be prohibitive. No particular problem seemed apparent in assigning Rey and Flowers to flight data duties. However, the medical illnesses of Canales, which were deemed serious by Dr. Ziegler and involved taking prohibitive medications, may well justify not

^{6/} His reference to the July 22 grievance as "nit-picky" in nature may reflect annoyance on the part of Gonsalez but does not, in my opinion, give rise to a finding of intense opposition or hostility to the practice.

assigning such duties to Canales. Furthermore, Dr. Ziegler advised supervisor Hendrickson that Canales should not be assigned duties which concerned flight data and data communications.

General Counsel stresses the fact that while Gonzalez purportedly terminated Canales' administrative duties for lack of meaningful work, employee Goldstein and others continued with such duties despite insufficient work being available for them. However, it is noted that supervisor Hendrickson testified there were no meaningful duties for Canales to perform when the latter was given administrative duties on July 10. Nevertheless he and Supervisor Baca persuaded Gonzalez to assign those duties to Canales "for human relations purposes." Thus, the employee was given administrative duties "contingent on the availability of meaningful administrative work and may be terminated for lack thereof." The record also reflects that there were ongoing discussions which Gonzalez had with the supervisors as to the fact that Canales had little work to do. Although it is true that management did not terminate administrative duties of other air traffic control specialists, to therefore foreclose Respondent from ever doing so when no meaningful work is available for another employee would be unreasonable. Since there is a regular group which handles these duties, one could well anticipate that an employee assigned such work would not continue to perform these duties for an extended time.

In sum, I conclude that discontinuing Canales' administrative duties on July 24, 1987 and thereby compelling the employee to take three days sick leave before he resumed his regular position as an air traffic control specialist was not due to his filing a grievance on July 23, 1987, and was not discriminatory within the meaning of section 7116(a)(2) of the Statute.

It is recommended that the Authority issue the following Order:

ORDER

The Complaint in Case No. 6-CA-80122 is DISMISSED.

Issued, Washington, D.C., August 15, 1989



WILLIAM NAIMARK
Administrative Law Judge