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

DEPARTMENT OF VETERANS AFFAIRS. MEDICAL CENTER, BROCKTON AND WEST ROXBURY, MASSACHUSETTS Respondent	
and	Case No. 1-CA-10230
STEVEN J. GIBERTI Charging Party	

Carol Waller Pope, Esquire
For the General Counsel

David F. Toomey, Esquire
For the Respondent

Mr. Steven J. Giberti
Charging Party, pro se

Before: JESSE ETELSON
Administrative Law Judge

DECISION

It is an unfair labor practice for an agency to discipline an employee because s/he has filed an unfair labor practice charge. Charging Party Giberti, an employee of the Respondent, received a written reprimand which stated that it was based on Giberti's failure to take a required test, and on his "subsequent actions and statements [which] indicate [his] failure to complete the test was deliberate." An unfair labor practice complaint alleges that the reprimand was issued because Giberti had filed some unfair labor practice charges after the test in question but before the reprimand was issued. Based on this alleged motivation, the reprimand is further alleged to violate sections 7116(a)(1) and (4) of the Federal Service Labor-Management Relations Statute (the Statute).

A hearing was held in Boston, Massachusetts, on June 21, 1991. Counsel for the General Counsel and for the Respondent filed post-hearing briefs. Counsel for the General Counsel also filed an unopposed motion to correct the transcript of the hearing. It is granted.

Findings of Fact

Steven Giberti is an electrician in the Respondent's engineering section. At a monthly staff meeting of that section, held on January 15, 1991, Safety Manager Robert Mansfield showed a film about hazardous materials. This hazardous material training was designed to meet the requirements of the Occupational Safety and Health Administration (OSHA) and the Joint Commission of Accreditation of Health Care Organizations. The training package with which the film came also included a brief multiple-choice test about hazardous materials.

While the film was being shown, Mansfield passed the test sheet out to the approximately 46 employees in attendance. When the film was over, he told them that the test, consisting of five questions, was part of the documentation that the employees had received this training. No one gave direct orders to the employees to complete the test or to put their names on it. However, the test sheet contained a "Name:" line and a "Date:" line. Before the tests were collected, a discussion of the questions was held. During that discussion someone mentioned the fact that the answers were printed (upside down) at the bottom of the sheet.

Giberti did not complete the test. He left it blank. Mansfield collected the test papers, and, when he noticed that Giberti had failed to "take" it, informed the Associate Chief of Engineering Services, Peter Lopes. Lopes instructed Giberti's immediate supervisor to have Giberti report to Lopes' office on the afternoon of the same day, January 15. Lopes intended at that time to administer the test to Giberti. Before that scheduled meeting, Lopes spoke briefly with Supervisory Personnel Management Specialist Jacqueline Andrews about the fact that Giberti had failed to take the test. Lopes testified that he began exploring appropriate disciplinary actions with her at that time, but Andrews did not recall that he did so during that "very brief contact" (Tr. 131). I credit Lopes, however, to the extent that he was, at this time, at least considering what steps to take regardless of whether Giberti was about to refuse Lopes' order to take the test or was about to consent after putting management to this special effort.

When Giberti arrived, he told Lopes that he wanted to have a union representative present. Lopes told Giberti that he wanted him to take the test. It is not clear whether Giberti asked for a union representative before or after Lopes told him to take the test, but both testified that Lopes told him he did not need a union representative. At some point, Giberti indicated that he thought his right to a representative was being violated. Lopes characterized Giberti as being argumentative, harsh in tone, and his general tenor as "disrespectful and surly" (Tr. 45). Nevertheless, when given the test sheet, Giberti completed it and handed it back to Lopes.

During the next three weeks, Lopes talked again with Personnel Management Specialist Andrews, and with Lopes' superior, Chief of Engineering Services M. Joseph Murray, about possible disciplinary action against Giberti. However, Lopes stopped short of any further pursuit of the matter. He explained that he thought Giberti "seemed hot" on January 15, and needed a "cooling off period" before a further meeting to "get a resolution to the situation." Also, vacancies on Lopes' staff caused "an awful lot" of his time to be tied up in performing the duties of the vacant positions. (Tr. 74-75.)

Giberti drafted several unfair labor practice charges, including one that he signed and dated January 31, 1991, complaining about Lopes' treatment of him at their January 15 meeting. Lopes became aware of this charge sometime before February 4 (Tr. 26). On February 4, Giberti was informed by Paul Jost, his immediate supervisor, that he was to report to Lopes' office and that he could have a union representative present. Giberti declined union representation and went to Lopes' office. Supervisor Jost was also present. Lopes attempted to question Giberti about the events of January 15, but Giberti said he would not discuss them because they were the subject of an unfair labor practice. When the meeting ended, Lopes "started to draft up [a disciplinary] action" (Tr. 48).

Lopes discussed the matter of discipline further with Supervisor Jost and with people in personnel, including Ms. Andrews. He decided that Giberti's "offense" was one characterized in the applicable agency regulations as "Deliberate failure or unreasonable delay in carrying out instructions." A range of penalties, included among guidelines accompanying these regulations, suggests an "admonishment" as the minimum penalty for a first offense of this nature and a "reprimand" as a maximum. On February 15,

Lopes again had Giberti called to his office. At this time he gave him a letter of reprimand.

Discussion and Conclusions

In Letterkenny Army Depot, 35 FLRA 113 (1990), the Authority articulated a fairly elaborate structure for analyzing cases of alleged discrimination, based on the kinds of shifting burdens of persuasion used by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), and adopted for private sector unfair labor practices by the National Labor Relations Board. See NLRB v. Transportation Management Corp., 462 U.S. 393 (1983). The instant case provides a textbook illustration of how these shifting burdens work.

In this case, the alleged primary unfair labor practice lies under section 7116(a)(4) of the Statute, the alleged motivating factor being Giberti's filing of unfair labor practice charges, particularly the one involving his confrontation with Lopes over taking the test. There can be little doubt that Letterkenny applies to section 7116(a)(4) as well as to section 7116(a)(2) discrimination cases.

It has been said that timing is everything. Whether or not one subscribes to that proposition in general, it has a great deal of force here. The timing of the reprimand with respect to the events of January 15 and the meeting of February 4, when the unfair labor practice charge involving the January 15 events was discussed, warrants the inference that Giberti's filing of that charge was at least a motivating factor in Lopes' decision to impose formal discipline. Lopes essentially admitted this under cross-examination. Thus, Counsel for the General Counsel asked Lopes whether the "subsequent action" that indicated (as stated in the letter of reprimand) that Giberti's failure to take the test was deliberate, was his challenging of the test in an unfair labor practice charge. Lopes answered, "No . . . not solely" (Tr. 25-26). That is the prima facie case. See Letterkenny, at 118.

The crucial part of the Letterkenny analytic structure for purposes of this case, therefore, is the burden on a respondent employer successfully to rebut a prima facie case. Judge Posner of the Seventh Circuit put this burden into appropriately plain language, which I paraphrase as closely as possible while tailoring it to fit cases arising under the Statute: The respondent employer can defend only by showing that it would have taken the action anyway.

Sonicraft, Inc. v. NLRB, 905 F.2d 146, 150 (7th Cir., 1990). This is a burden our respondent employer is unable to carry.

In scrutinizing the proposition that Lopes would have disciplined Giberti anyway, I find again that the timing of the events provides a decisive consideration. Lopes exhibited only indecision up to the time he learned that Giberti had filed the charge. The lapse of almost three weeks before taking any positive steps even to initiate disciplinary action detracts significantly from the persuasiveness of the proposition that the Respondent must prove. One normally does not wait so long. (The collective bargaining agreement in effect at the Respondent's facilities makes 15 days the guideline for maximum time to initiate discipline in simple cases. Joint Exh. 1 at 9-10.)

Lopes' asserted reasons for the delay are credible but do not advance very far the proposition that he would have proceeded independent of the unfair labor practice charge. Thus, his desire to give Giberti time to "cool off" before confronting him about his January 15 behavior feasibly accounts for only a few days. Lopes' coupling of that explanation with that of being too busy indicates some doubt on his part that the "cooling off" reason could explain the extent of the delay. Granted that he was unusually busy between January 15 and February 4, there is no indication that he was less so between February 4 and February 14, when he did get around to the disciplinary process. Lopes' admission that he was motivated (though "not solely") by the filing of the charge provides the best available explanation of why he overcame his inertia when he did.

This is where the burden of rebuttal kicks in and defeats the Respondent. Lopes' actions between January 15 and the date--between January 31 and February 4--when he learned about the charge Giberti filed do not persuasively show that he was about to pursue the disciplinary route. Nothing in the record or in my experience convinces me affirmatively that, absent the unfair labor practice charge, it is more likely that he eventually would have gotten around to it than that he would have let the matter drop. Thus, as Judge Posner said in Sonicraft, supra, 905 F.2d at 150: "The [agency] had the burden of persuasion, and failed to carry it." Accordingly, I conclude that the Respondent violated sections 7116(a)(4) and (1) when it disciplined Giberti and I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Rules and Regulations of the Federal Labor Relations Authority and section 7118 of the Statute, the Authority hereby orders that the Department of the Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts, shall:

1. Cease and desist from:

(a) Reprimanding any employee because s/he filed an unfair labor practice charge with the Federal Labor Relations Authority.

(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 affirmation action in order to effectuate the purposes and policies of the Statute:

(a) Remove any record of the reprimand from the personnel file of employee Steven J. Giberti and restore to him any right or privilege he may have lost as a result of such disciplinary action.

(b) Post at its Brockton and West Roxbury, Massachusetts, facilities, 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 Director of the Medical Center, 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 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, of the Boston Regional Office, Federal Labor Relations Authority, 10 Causeway Street, Room 1017A, Boston, MA 02222-1046, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 26, 1991

JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT reprimand any employee because s/he filed an unfair labor practice charge with the Federal Labor Relations Authority.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Statute.

WE WILL remove any record of the reprimand from the personnel file of employee Steven J. Giberti and restore to him any right or privilege he may have lost as a result of such disciplinary action.

_____
(Activity)

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 any of its provisions, they may communicate directly with the Regional Director of the Boston Regional Office, Federal Labor Relations Authority, whose address is: 10 Causeway Street, Room 1017A, Boston, MA 02222-1046, and whose telephone number is: (617) 565-7280.