

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

.
FEDERAL AVIATION ADMINISTRATION .
SOUTHWEST REGION .
AIRWAYS FACILITIES SECTOR .
AUSTIN, TEXAS .
Respondent .
and .
DAVID MCFARLIN .
Charging Party .
.

Case No. 6-CA-01217

Lynda C. Coleman
Counsel for the Respondent

David McFarlin
Pro Se

Joseph T. Merli
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (2), by failing to select the Charging Party for the position of Maintenance Control Center Specialist because he was an active official in the Professional Airways Systems Specialists Union and by informing the Charging Party that the reason he was not selected was because of his membership and activities in behalf of the Union.

Respondent's answer denied the allegations. Respondent asserted that the statement was not made and that it selected two employees it believed best suited for the positions without regard to membership in or activities in behalf of the Union.

For the reasons discussed below, I find that a preponderance of the evidence does not establish that Respondent engaged in the unfair labor practices as alleged.

A hearing was held in Austin, Texas.^{1/} The parties 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

The Union

The Professional Airways Systems Specialists Union (PASS or Union) is the certified exclusive representative of a nationwide consolidated unit of Federal Aviation Administration (FAA) employees appropriate for collective bargaining. A master labor agreement exists between PASS and FAA. (Tr. 27; General Counsel (GC) Exh. 1(h)).

McFarlin's Activities on Behalf of the Union

At all times material, David N. McFarlin, the Charging Party, has been a bargaining unit employee and local representative for the Union. At the time of the alleged violations, McFarlin was a GS-12 Electronic Technician working at the Respondent's Austin facility. (Tr. 25). McFarlin's immediate supervisor at the FAA, Southwest Region, Airways Facilities Section (AFS) was Clarence Speers. The Austin sector manager was Dan Sieczkowski, and the assistant manager was William H. Bauerle. (Tr. 31).

There are three separate buildings which belong to the Respondent and are located at the Austin, Texas Airport.

^{1/} The unopposed motions to correct the transcript are granted; the transcript is corrected as set forth therein.

These are the sector headquarters building, the "SFO-2" office, and the Terminal and Control Approach (TRACON) building. (Tr. 31). McFarlin and his coworkers, including Air Traffic Controllers, worked in the TRACON building, while upper level management and staff, including Sieczkowski and Bauerle, and a small number of bargaining unit employees worked in the sector headquarters building. (Tr. 32).

McFarlin has been an active local Union representative for approximately three and a half years, representing about eleven employees in two groups in the Austin sector. (Tr. 28). His duties as a Union representative include counseling employees about their rights under the contract, filing grievances on behalf of employees, and preparing and negotiating working conditions. (Tr. 32-39). He served under the direction of Donald Crossland, sector representative for the Union, who was stationed in Lubbock, Texas. (Tr. 30).

In 1988, McFarlin represented an employee by the name of Carl Heidolph. Heidolph was a new employee, who, after a developmental training period, was transferred to Midland, Texas by William Bauerle, then acting Austin AFS manager. After about six months in Midland, Heidolph requested McFarlin's help as his Union representative so that he could return to an opening in Austin. (Tr. 39-41).

McFarlin met and spoke with local upper level management within the FAA and also contacted an aide of Congressman J. Pickle. Finally, McFarlin traveled to the Respondent's Division headquarters in Fort Worth, Texas and discussed Heidolph's case with Division manager Don Watson. The next day after McFarlin had talked to Watson, Bauerle personally flew out to Midland to inform Heidolph that he had been transferred back to Austin. (Tr. 41-46; 140). Bauerle, along with Sieczkowski, was the selecting official in the promotion at issue and is the immediate supervisor of the position. (General Counsel (GC) Ex. 1(h); Tr. 46).

Management and employees at the Austin facility were aware of McFarlin's efforts on behalf of Heidolph. (Tr. 141, 199). No comments were made by management to McFarlin concerning his representational activities for Heidolph. (Tr. 135). Bauerle testified that he was not upset at Heidolph being able to transfer back to Austin. (Tr. 200). Heidolph, a Union representative, has since been promoted at Austin. (Tr. 112-13; 200).

The Maintenance Control Center and the New GS-13 Position

In November, 1987, the Austin sector volunteered to be one of the prototype test sites for a new Maintenance Control Center (MCC) concept. (Tr. 191). MCC is a way of remotely monitoring air traffic control facilities by automated equipment.

On March 7, 1989 a Memorandum of Understanding was signed by Donald Crossland, PASS sector representative, and William Bauerle, assistant sector manager. (Respondent (R) Ex. 8). This memorandum set forth the agreements reached by PASS and FAA in Austin on the impact and implementation of the decision to implement MCC on a test basis in Austin. The memorandum covered issues including procedures for selecting and training bargaining unit employees during the test.

In accordance with the memorandum, a request for volunteers to staff the MCC during the test was issued to all Austin AFS employees on March 14, 1989. (R Ex. 10; Tr. 192). Seventeen employees, including David McFarlin, responded to the request. Robert Baird did not volunteer. By letter dated April 6, 1989, Arden Huffstutler was selected to serve as the principal MCC specialist during the test phase. Three other employees, including David McFarlin, were selected to provide backup support for the MCC operation during the test. (R Ex. 10.)

The MCC test proved successful and an Electronics Technician GS-856-13 (MCC Specialist) position was advertised under merit promotion procedures with a bid opening date of April 14, 1990. Two positions were to be filled. These two positions were located in the sector headquarters building, in an office adjacent to Sieczkowski and Bauerle's offices. (Tr. 49). As noted, the immediate superior for the two MCC Specialist positions was the assistant sector manager, William Bauerle. (Tr. 46).

The position description of the MCC Specialist called for the Specialist to provide the top level of technical management in the MCC. The MCC Specialist is responsible for directing the maintenance and certification of a large number of electronics systems and facilities throughout the sector and, in coordination with the sector manager, sets the policies and procedures for their maintenance and certification. The status of some 180 reportable and 200 other facilities are monitored by the MCC. Some 20 facilities are currently being monitored remotely using

automated equipment and more will be added as remote monitoring capabilities are developed. Technology is rapidly evolving and extensive changes in agency practices are frequently occurring. For those facilities without remote monitoring capabilities, the MCC Specialist may call out a technician to repair the facility. Contacts may include air traffic personnel and airway facilities personnel at the various locations, technicians, sector managers, airport managers, military officials, and the news media. (Tr. 183-84; R Ex. 2 and 9).

The Selection Process

McFarlin applied for one of these two MCC Specialist positions. If selected, the job would have been a promotion for McFarlin from a GS-12 to a GS-13 position. (Tr. 46).

Candidates were rated, ranked and referred in accordance with established procedures. David McFarlin received a rating score of 90, the highest numerical rating of the candidates. Arden Huffstutler received 83.5 and David Baird received 75.5. A list of ten highly qualified candidates was referred to the selecting official on August 17, 1990 without reference to numerical rating scores. (R Ex. 2, 3). The selecting officials were free to select any of the candidates referred. (R Ex. 2; Tr. 163-63, 165). Promotion candidates had been selected for other positions even though they had not scored the highest number of rating points. (R Ex's. 4, 5, and 6).

Candidates were interviewed by a 5-member panel of supervisors and managers which independently developed criteria to identify the best possible candidates. (Tr. 169 and R Ex. 11.) The panel only considered responses received during the interview. (Tr. 216.) The interview panel did not have copies of the bids submitted by candidates nor were they aware of the numerical rating scores of the candidates. (Tr. 217.)

Based on the interview process, three candidates were highly recommended to the selecting officials for consideration. The three were Robert Baird, Arden Huffstutler and David McFarlin. The interview panel rated Baird and Huffstutler average in the technical area and above average in skills such as communication, coordination, and assessment. McFarlin was rated above average in the technical area and average in the other skills. (Tr. 215-16).

The selections were made jointly by Daniel Sieczkowski, Austin sector manager, and William Bauerle, the assistant

sector manager after discussing each of the ten candidates referred. (Tr. 167; Tr. 197-198). Robert Baird and Arden Huffstutler were selected for the vacant MCC positions on September 11, 1990. (R Ex. 2).

McFarlin Not Selected

On September 21, 1980, Dan Sieczkowski, Austin sector manager, informed Mr. McFarlin of the selections made and that he was not selected. (Tr. 51). Sieczkowski told McFarlin that he would have been a very good selection, that he was in the top group of candidates referred for selection, but only two persons could be selected for the positions advertised. (R Ex. 7).

When McFarlin asked why he was not selected, Sieczkowski replied that he had "no real PC experience." (Tr. 63). If by "PC" Sieczkowski meant personal computer experience, personal computer experience was not listed as a requirement for the position. (Tr. 65). However, if, as appears likely, he was referring to automation generally, the MCC position is a data base type of automation, and the Agency uses tandem assembly language to program the computers. One of the selectees, Huffstutler, was trained in data base. McFarlin has not had data base or tandem assembly language training. (Tr. 121-22).

On September 22, 1990, Mr. McFarlin signed an unfair labor practice charge against the Respondent alleging that he "was by far the best candidate for the position . . . but due to his past union activities was denied this promotion." The charge was filed September 27, 1990. (GC Ex. 1(a)).

McFarlin met with Sieczkowski again on September 24 or 25, 1990 and presented him with the unfair labor practice charge. McFarlin told Sieczkowski about his college training in computers. McFarlin had taken computer courses in FORTRAN and BASIC computer languages, had attended an FAA course in computers, and had used some computers in his FAA work in Puerto Rico. Sieczkowski said that was not the reason McFarlin was not selected; it was that he was not motivated. (Tr. 63-64).

After the meetings with Mr. Sieczkowski on September 21 and 24 or 25, 1990, Mr. McFarlin sent Sieczkowski purported records of their conversations. Sieczkowski replied by letter dated October 17, 1990 that the documents were not true and accurate records of the discussions and reiterated that McFarlin would have been a very good selection for one

of the MCC positions, but only two persons could be selected. He offered to meet with McFarlin in an effort to settle the unfair labor practice charge. (Tr. 178; R Ex. 7). McFarlin replied that Sieczkowski must have had a lapse in memory. (Tr. 176-77).

On October 23, 1990 a meeting was held between Mr. McFarlin and Mr. Sieczkowski in an attempt to resolve the unfair labor practice charge. Mr. Crossland, the Union sector representative, was a participant by telephone. The meeting lasted one and one half hours.

Mr. McFarlin and Mr. Crossland testified that when McFarlin asked Mr. Sieczkowski why McFarlin had not been selected for the MCC position, Sieczkowski replied that lower level managers had a problem with Sieczkowski selecting a Union representative who would be working in the sector office so close to the sector manager. (Tr. 54, 116, 143). According to McFarlin and Crossland, Sieczkowski also stated that McFarlin had not been selected because McFarlin did not get along well with people. (Tr. 65, 144). McFarlin testified that Sieczkowski said he (McFarlin) was "by far the most qualified candidate" and offered to write a letter stating that in writing if it would resolve the unfair labor practice charge. (Tr. 55, 60-61, 148). McFarlin acknowledged that Sieczkowski could have said that McFarlin "was the best qualified technically." (Tr. 120). Crossland testified that Sieczkowski offered to put in writing that McFarlin was the most qualified (Tr. 148), and that Sieczkowski had told him some six to eight months previously that McFarlin was "probably the best technician he had, and so far as it relates to his technical ability, the ability to deal with people, to motivate, train and get along with them." (Tr. 145). According to Crossland, Sieczkowski had told him on several other occasions that McFarlin was the most qualified technician in the entire sector and that he would be "hard pressed" not to select McFarlin for one of the MCC positions. (Tr. 144-52).

Mr. Sieczkowski testified that during the October 23, 1990 meeting he specifically denied about three times that McFarlin was not selected because he was a Union representative. He testified that McFarlin accused his assistant, William Bauerle, of having hard feelings against him and preselecting Bill Baird. Sieczkowski said he replied to this accusation in the same manner he had on previous occasions responded to Crossland. On these occasions, Crossland had lobbied on behalf of McFarlin while intimating that Huffstutler had been preselected and trained. Sieczkowski claimed he responded, "that's about like saying

that my managers and supervisors felt that I was going to preselect David because he was a Union rep; and that I really wanted to enhance the relationship with PASS." (Tr. 171, 176). Sieczkowski denied that he had ever been told by anyone that there was a problem with a Union representative being on his staff. (Tr. 174). Sieczkowski testified that at the meeting he offered to write McFarlin a letter stating that he was "the best qualified technically" if it would resolve the unfair practice charge. (Tr. 172). Sieczkowski testified that McFarlin was an excellent candidate, but he was not the best candidate at that time; that there was a choice among the three and Huffstutler and Baird were selected; and that McFarlin was not not selected because of his Union activities. (Tr. 174-75).

Following the October 23, 1990 meeting, McFarlin gave Sieczkowski a written statement alleging that Sieczkowski had stated at the meeting that lower level managers were concerned about his having a Union representative in sector headquarters. (Tr. 176). Sieczkowski did not respond to McFarlin's written statement because he felt that the statement was not accurate and McFarlin was trying to build a case. Sieczkowski had responded to McFarlin's first two letters and received in reply what he considered to be insulting letters. He saw no point in building a paper trail. (Tr. 176-82).

Mr. Sieczkowski became a manager in the early eighties and received training in labor-management relations. In April 1990, he was commended by David McFarlin; in October 1990, by the PASS regional vice president, and, in November 1990, by Don Crossland, PASS sector representative, for improving the relationship with PASS. (Tr. 172-73). Prior to the instant case, he approved official time and travel expenses for McFarlin to attend the George Meany School for Labor Relations in New York. (Tr. 146, 153).

The Candidates

The record reflects that Mr. McFarlin does exceptional work in providing on-the-job training for developmental technicians on a volunteer basis. (Tr. 14, 78-79, 197; GC Ex. 14). Among other things, he was also commended in February 1990 for his work on the MCC test project (GC Ex. 6); in February 1990, for helping the Waco facility, (GC Ex. 7, 8); in December 1986, for conducting a training class (GC Ex. 12) and, in October 1987, for volunteering to speak to pilots on navigational aids and other aspects of

the FAA. (Tr. 88). He received a special achievement award for superior performance from 1979 to 1980 (GC Ex. 8); and was commended in November 1978 for teaching a class in San Juan, Puerto Rico (GC Ex. 10). McFarlin has served on special committees for both management and the Union (Tr. 85-86). His immediate supervisor gave him the highest score in his bidding performance evaluation for writing skill, accepting responsibility, and accomplishing program objectives. (GC Ex. 13 and 14) He had experience in all four of the technical areas contained in the rating criteria while the other two candidates had experience in three. (Tr. 124-25; GC Ex. 3, 4, 5).

On the negative side, Mr. McFarlin held two staff positions in Austin from 1982 to 1984 in which management felt his work was not outstanding in some respects. He did not excel in writing letters and other non-technical materials and had some difficulty in tracking a cost avoidance and reduction program for which he was responsible. (Tr. 196). In 1990, he also did not come forward to volunteer to train the technicians in Waco when he knew a problem existed. He did a good job once he was specifically asked to help by Gilbert Elizalde, support manager. (Tr. 122-23; 219-21).

As noted, Arden Huffstutler and Robert Baird were selected for the MCC Specialist positions. The record reflects that Huffstutler was the automation expert for the sector and was involved in the establishment of a prototype maintenance control center concept in the sector. He had been in the test MCC position for nine months to one year and had developed many of the software applications that are being used in the MCC operation. (Tr. 91, 167-68, 191). Robert Baird, the other selectee, had served as an acting supervisor and had developed on his own initiative a new method for remote maintenance monitoring and a tracking system for periodic maintenance. (Tr. 168-69).

Discussion, Conclusions, and Recommendations

The issues presented are (1) whether Dan Sieczkowski told David McFarlin that he was not selected for the MCC position because lower level managers had a problem with Sieczkowski selecting a Union representative who would be working in the sector office so close to the sector manager; (2) if so, whether such a statement violated section 7116(a)(1) of the Statute; and (3) whether Respondent failed to select David McFarlin for the MCC Specialist position because he was an active official in the Union, in violation of section 7116(a)(1) and (2) of the Statute.

I find that Sieczkowski did not make the above statement, as attributed to him by McFarlin and Crossland, and that McFarlin and Crossland misinterpreted the content and context of what Sieczkowski actually said as reflected in the record.^{2/} Accordingly, Respondent did not violate section 7116(a)(1) of the Statute in this respect as alleged.

Section 7116(a)(2) of the Statute provides that it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" Under the analytical framework set forth in Letterkenny Army Depot, 35 FLRA 113 (1990), in determining whether the Respondent violated Section 7116(a)(2) of the Statute, the General Counsel must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and that consideration of such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. Id. at 118. If the General Counsel makes this required prima facie showing, the respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and that the same action would have been taken even in the absence of the consideration of protected activity. Id. If the General Counsel fails to make the required prima facie showing, the case ends without further inquiry. Id.

The record reflects that Mr. McFarlin has served employees as a local PASS representative for approximately three and a half years and that management was well aware of his activity. Although closeness in time between an agency's employment decision and protected activity may support an inference of illegal anti-union motivation, it is not conclusive proof of a violation. U.S. Department of Labor, Washington, D.C., 37 FLRA 25, 37 (1990).

^{2/} McFarlin's tendency to overreach to support his position is shown by his testimony on direct examination that Sieczkowski told him on October 23, 1990 that he was "by far the most qualified." This alleged statement is nearly identical to his September 22, 1990 charge that he "was by far the best candidate for the position. . . ." McFarlin acknowledged on cross-examination that Sieczkowski could have said he was "the best qualified technically." I find that this latter statement is what Sieczkowski said, and offered to put in writing, and it is consistent with the record.

As additional proof of management's illegal motivation, Counsel for the General Counsel points to Sieczkowski's alleged statement as well as assistant manager Bauerle's "loss of face" because of McFarlin's successful handling in 1988 of Heidolph's transfer request. Counsel for the General Counsel also maintains that Respondent's asserted reasons for McFarlin's nonselection were pretextual and not supported by the preponderance of the evidence.

I have found that the alleged statement was not made. Further, the record does not support a finding that management had, or continued to hold, a hostile feeling or attitude toward McFarlin because of his successful handling of Heidolph's transfer request in 1988. The timing of this representational activity and the selection is not close, no specific remarks or threats were made to McFarlin as a result of his activity, and there is no history of union animus. Heidolph, also a Union representative, has since been promoted.

With respect to the various explanations for Mr. McFarlin's nonselection which were given to him, I find that, in the context of the entire record and apart from the one comment that he did not get along with people, the reasons given are not inconsistent and indicative of discrimination. McFarlin was repeatedly told that he would have been a very good selection, but only two persons could be selected for the position, meaning that he was well qualified for the position, but management considered the other two candidates to be better qualified. The statement that he had "no real PC experience," was an imprecise reference to his lack of data base or tandem assembly language training as used in the MCC operation. The comment that he was not motivated referred to his lack of initiative as observed by Gilbert Elizalde and as contrasted by the initiative which management felt had been demonstrated by the other two candidates.

There is no dispute that Mr. McFarlin was, and is, a highly qualified candidate. He received the highest numerical rating, although final selections among the top candidates need not be based on the numerical rating. Apart from this rating, he was placed among the top three candidates by a panel of supervisors and managers. He was found to be the most qualified technically and was so informed by Mr. Sieczkowski. It is also understandable that, considering Mr. McFarlin's background, Sieczkowski would also comment favorably on McFarlin's qualification for the position to PASS sector representative Crossland several

months prior to the final selection before the application and selection process was completed.

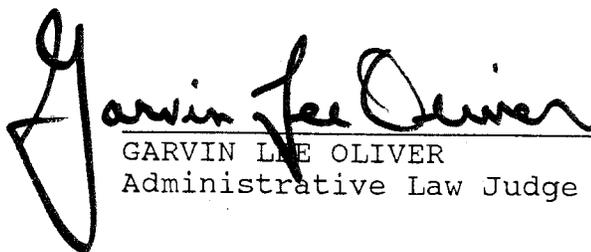
A preponderance of the evidence does not support the General Counsel's argument that Respondent had no legitimate reason not to select Mr. McFarlin and that he would have been selected in the absence of his protected activity. In spite of Mr. McFarlin's superior technical qualifications, the other two candidates who were selected were rated by the panel as superior to McFarlin in skills such as communication, coordination, and assessment. In addition, one of those selected had occupied the MCC Specialist test position for nine months and the other selectee had been an acting supervisor and had developed on his own initiative a new method for remote maintenance monitoring and a tracking system for periodic maintenance. Thus, the two candidates selected had adequate technical backgrounds in addition to demonstrated abilities to develop and operate remote monitoring systems during the developmental stages.

It is concluded that Respondent did not violate section 7116(a)(1) and (2) of the Statute as alleged. Based on the above findings and conclusions, it is recommended that the Authority issue the following Order.

Order

The complaint is dismissed.

Issued, Washington, DC, October 24, 1991.


GARVIN LEE OLIVER
Administrative Law Judge

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