

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

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DEPARTMENT OF VETERANS AFFAIRS .
DEPARTMENT OF VETERANS AFFAIRS .
MEDICAL CENTER, DENVER, COLORADO .

Respondent .

and .

AMERICAN FEDERATION OF GOVERNMENT .
EMPLOYEES, LOCAL 2241 .

Charging Party .
.

Case No. 7-CA-10207

Douglas D. Doane, Esq.
For Respondent

Nicholas J. LoBurgio
For General Counsel of the FLRA

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 called the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA), 5 C.F.R. Chapter XIV, § 2423.

Pursuant to a charge filed by the American Federation of Government Employees, Local 2241 (AFGE Local 2241), against Department of Veterans Affairs, Department of Veterans Affairs Medical Center, Denver, Colorado (VAMC Denver and Respondent), the General Counsel of the FLRA, by the Regional Director of the Denver Region, issued a Complaint and Notice of Hearing. The Complaint alleges that Respondent violated section 7116(a)(1) and (8) of the Statute by conducting formal discussion within the meaning

of section 7114(a)(2)(A) without providing AFGE Local 2241 with advance notice and an opportunity to be represented.

VAMC Denver filed an Answer and Amended Answer admitting the factual allegations of the Complaint and denying that it had violated the Statute. The case was referred to the undersigned.

The Regional Director of the FLRA's Denver Region issued an Order transferring the "Motion of Counsel for the General Counsel for Summary Judgment" to the FLRA's Chief Administrative Law Judge for action. VAMC Denver filed a "Response to Motion for Summary Judgment" denying that it had violated the Statute but also stating that there are no questions of material fact.

Based upon the Motion for Summary Judgment, the attachments to the motion, the brief in support of the motion, the Response to Motion, the attachments to the response, and the brief in support of the response, I conclude there are no questions of material fact¹, a hearing is not necessary, and this case can appropriately be decided based upon the above described documents.

The documents described above constitute the record in this case and based upon this record I make the following:

Findings of Fact

At all material times the American Federation of Government Employees (AFGE) has been certified as the exclusive representative of a nation-wide unit of employees of the Department of Veterans Affairs (VA). AFGE Local 2241 is an agent of AFGE for representing unit employees at VAMC Denver. At all times material AFGE and VA have been parties to a collective bargaining agreement.

At all times material Douglas Doane has been an attorney in the VA Office of the District Counsel, Denver, Colorado, and was acting on behalf VAMC Denver as its attorney.

VAMC Denver took removal action against I.L. Freeman, a VA police officer prior to this removal. Freeman appealed

¹ In this regard I note that neither party disputes the statement of facts submitted by the other party. Accordingly, I accept all the facts as stated and submitted by each party.

his removal to the Merit System Protection Board (MSPB) by an appeal dated October 9, 1990.

AFGE Local 2241 was the representative of Freeman during the MSPB proceeding.

Prior to taking disciplinary action against Freeman, VAMC Denver conducted an investigation through a three person board which took statements from employees Velma Tolson, Jeffrey S. Brizzee, Catheryn Smith, Willie Jones, and Robert Wilson, members of the collective bargaining unit represented by AFGE Local 2241. Copies of the investigative report and the statements were provided to Freeman.

MSPB issued an Order dated November 6, 1990, ordering, among other things, that a list of witnesses and a summary of testimony be exchanged. VAMC Denver provided this list of witnesses and summary of testimony to Freeman and his counsel on or about November 15, 1990. Tolson, Brizzee, Jones and Wilson were listed on this witness list and Smith was presumably referred to as "Katherine, last name unknown,"

By memoranda dated November 20, 1990, VAMC Denver, by its Chief of the Personnel Service, informed Tolson, Brizzee, Smith, Jones and Wilson, that each had been scheduled for an interview with Doane with reference to the MSPB hearing and that the interview would be conducted on December 7, 1990. The memoranda also set forth the times and places of the interviews. The memoranda also stated that each employee's tour of duty may have to be adjusted in order to accommodate the interview. By memorandum dated December 10, 1990, Suzanne Kibel was advised by VAMC Denver's Chief of the Personnel Service of an interview with Doane on December 10, 1990. In other respects this memorandum was the same as the ones issued November 20, 1990. Kibel was an employee of VAMC Denver in the unit represented by AFGE Local 2241.

By memoranda dated November 21, 1990, VAMC Denver notified Tolson, Brizzee, Smith, Jones, and Wilson of the MSPB hearing date and that they would be called as witnesses.

On December 7 and 10, 1990, Doane conducted individual interviews with Tolson, Brizzee, Smith, Jones, Wilson, and Kibel concerning their testimony for the impending MSPB hearing involving Freeman. These interviews were held in the Employee Relations Section, a location other than the normal work sites of these named employees. Each interview lasted about 10 to 20 minutes. In addition to Doane,

Carl Westman, Supervisory Employee Relations Specialist for VAMC Denver, attended the interviews of Kibel and Tolson.

AFGE Local 2241 was not provided with notices of the interviews conducted on December 7 and 10, 1990, or an opportunity to be represented.

After interviewing Kibel on December 10, 1990, VAMC Denver added her to its witness list for the MSPB hearing.

Discussion and Conclusions of Law

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

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

"(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; . . ."

General Counsel of the FLRA contends that the interviews of the employees in the unit on December 7 and 10, 1990, by Doane, concerning the testimony they were to give at the MSPB hearing, were formal discussions concerning a grievance within the coverage of section 7114(a)(2)(A) of the Statute. Thus, it is argued that AFGE Local 2241 was entitled to advance notice and an opportunity to be present at these interviews. General Counsel of the FLRA alleges, therefore, that VAMC Denver's failure to give the Union such advance notice and opportunity to be present at the interviews violated section 7116(a)(1) and (8) of the Statute.

In various cases in which the FLRA discussed and interpreted section 7114(a)(2)(A), it cited, with approval, National Treasury Employees Union v. FLRA, 774 F. 2d 1181 (D.C. Cir. 1985) (NTEU v. FLRA). E.g., Veterans Administration Medical Center, Long Beach, California, 41 FLRA 1370 (1991) (VAMC Long Beach); Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 35 FLRA 594 (1990) (McClellan II); Department of the Air Force, Sacramento Air Logistics Center, McClellan Air Force Base, California, 29 FLRA 594 (1987) (McClellan I); U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, (Ray Brook, New York), 29 FLRA 584 (1987) (Ray Brook).

Doane's interviews of the employees in the unit concerning the impending MSPB hearing constituted discussions within the meaning of section 7114(a)(2)(A). Discussion, as used in this section of the Statute, is synonymous with "meeting" and the interviews fall within this meaning. See VAMC Long Beach, supra; McClellan I, supra; and NTEU v. FLRA, supra.

In Department of Health and Human Services, Social Security Administration, Bureau of Field Operations, San Francisco, California, 10 FLRA 115, 118 (1982) (SSA), the FLRA set forth a series of elements to be considered in determining whether a discussion is "formal" within the meaning of section 7114(a)(2)(A). In the subject case the unit employees were instructed to attend the interviews by written memoranda from VAMC Denver's Chief of Personnel Services and told additionally to adjust schedules if necessary. These memoranda also stated that the subject of the interviews was the impending MSPB hearing concerning Freeman's appeal. The interviews were conducted in an office in the Employee Relations Section, not the normal work place of any of the employees interviewed, by Doane, an attorney representing VAMC Denver in the MSPB proceedings. In these circumstances, and in light of the elements set forth in SSA, supra, I conclude the interviews of the unit employees conducted by Doane on December 7 and 10, 1990, were formal discussions within the meaning of section 7114(a)(2)(A). Cf VAMC Long Beach, supra.

The interviews of the unit employees conducted by Doane were between one or more agency representatives and one or more unit employees. Doane, attorney for VAMC Denver, was a representative of the agency as was Westman, who attended two of the of the interviews conducted by Doane. Cf VAMC Long Beach, supra.

The FLRA has held that an MSPB appeal hearing is a "grievance" within the meaning of section 7114(a)(2)(A) and, in so doing, it rejected the argument urged by VAMC Denver in this case, that NTEU v. FLRA, 800 F.2d 1165 (D.C. Cir. 1986), requires a contrary result. VAMC Long Beach, supra.

Accordingly, I conclude that the interviews of the unit members by Doane, on December 7 and 10, 1990, concerning their testimony at the MSPB appeal hearing concerning Freeman, are within the scope of section 7114(a)(2)(A) and that, therefore, AFGE Local 2241 was entitled to advance notice of the interviews and an opportunity to be represented at them. VAMC Long Beach, supra.

VAMC Denver argues that the Union's presence at the interviews would violate the attorney work product privilege, the attorney client privilege, the Freedom of Information Act, and the Privacy Act. All these contentions are rejected and have been rejected by the FLRA. VAMC Long Beach, supra.

In light of all the foregoing, I conclude that VAMC Denver violated section 7116(a)(1) and (8) of the Statute when it failed to give AFGE Local 2241 advance notice of the interviews of unit employees by Doane on December 7 and 10, 1990, and an opportunity to be represented at these interviews. VAMC Long Beach, supra.

Based upon all the foregoing, I hereby GRANT the Motion for Summary Judgment filed by the General Counsel of the FLRA.

Having concluded that VAMC Denver violated section 7116(a)(1) and (8) of the Statute I recommend the Authority issue the following Order:

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Statute, the Department of Veterans Affairs, Department of Veterans Affairs Medical Center, Denver, Colorado shall:

1. Cease and desist from:

(a) Conducting formal discussions with its employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 2241 (the Union), concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews in preparation for third-party hearings such as Merit System Protection Board proceedings, without first affording the Union prior notice and the opportunity to be represented at such formal discussions.


(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 2241 are located, 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 and shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices are customarily posted. Reasonable steps shall be taken to ensure that such notices are not altered, defaced, or covered by any other material.

(b) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Denver Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order as to what steps have been taken to comply.

Issued, Washington, DC, October 28, 1991



SAMUEL A. CHAITOVITZ
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 OUR EMPLOYEES THAT:

WE WILL NOT conduct formal discussions with our employees in the bargaining unit exclusively represented by the American Federation of Government Employees, Local 2241 (the Union), concerning grievances or any personnel policies or practices or other general conditions of employment, including interviews in preparation for third-party hearings such as Merit System Protection Board proceedings, without first affording the Union prior notice and the opportunity to be represented at such formal discussions.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

(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 Federal Labor Relations Authority, Regional Office, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204 and whose telephone number is: (303) 844-5224.