



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C.

OALJ 15-50

DEPARTMENT OF VETERANS AFFAIRS
VA MEDICAL CENTER
HAMPTON, VIRGINIA
RESPONDENT

Case No. WA-CA-14-0481

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 2328, AFL-CIO

CHARGING PARTY

Merritt C. Weinstein
For the General Counsel

Timothy M. O'Boyle
For the Respondent

Marylyn Bowman
For the Charging Party

Before: CHARLES R. CENTER
Chief Administrative Law Judge

DECISION

This case arose under the Federal Service Labor-Management Relations Statute (Statute), 5 U.S.C. §§ 7101-7135 and the Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), part 2423.

On July 23, 2014, the Regional Director of the Washington Regional Office of the FLRA issued a Complaint and Notice of Hearing in the above case alleging that the Department of Veterans Affairs, VA Medical Center, Hampton, Virginia (Respondent) violated 5 U.S.C. § 7114(a)(2)(B) and § 7116(a)(1) and (8) of the Statute by committing an unfair labor practice (ULP) when it denied a request for Union representation made by a bargaining unit employee during a meeting that he reasonably believed could result in disciplinary action. The Respondent filed its Answer to the Complaint on August 5, 2014, denying that the bargaining unit employee requested Union representation and denying that any request for Union representation was reasonable.

A hearing in the matter was conducted in Norfolk, Virginia, October 28, 2014. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. Both the General Counsel and Respondent filed post-hearing briefs which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I find that the Respondent did not commit an unfair labor practice by denying a bargaining unit employee's request for Union representation in a meeting between the employee, his supervisors, and a member of the training staff, who was also a bargaining unit employee. In support of this determination, I make the following findings of fact, conclusions of law, and recommendations.

FINDING OF FACT

The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. GC Ex. 1(c), (d). The American Federation of Government Employees, Local 2328, AFL-CIO (Union), is the exclusive representative of a unit of the Respondent's employees and is a labor organization within the meaning of § 7103(a)(4) of the Statute. *Id.* The Union's bargaining unit consists of 700 licensed professionals. Tr. 17.

The Respondent is a medical center that houses a spinal cord injury unit (SCI) among its departments. TR 28. The SCI has sixty-nine employees on staff, including nineteen registered nurses (RN), ten licensed practical nurses (LPN), and forty nursing assistants. Tr. 68, 69. The Respondent also hosts students from local colleges who take part in care delivery with staff. Tr. 69.

When seeing and treating patients, nurses are required to wear personal protective equipment (PPE). Tr. 71, 117. PPE is utilized to minimize a patient's risk of hospital-acquired infection. Tr. 70. Depending on the severity of the risk, PPE may include gloves, masks, and gowns. Tr. 19, 76. Signs posted outside of the hospital room inform the staff about the level of PPE required when treating patients in that room. Tr. 31, 41, 71. Nurses must change their PPE, particularly gloves, in between patients. Tr. 32, 76. As an additional means of reducing risk, patients may share rooms with other patients that have similar infections. Tr. 97.

A breach of PPE protocol may result in discipline. Tr. 93. However, discipline is rarely given. In the prior 25 years, no nurse has been disciplined at the Hampton medical center for violating PPE procedures. Tr. 95, 110. Instead, breaches of protocol are typically addressed through education and additional training. Tr. 92, 93, 118. If discipline were being considered, the Human Resources (HR) department would be consulted prior to any discussion with the employee involved in a breach of protocol. Tr. 125.

On February 28, 2014, two nursing students who were observing treatments reported that SCI nurse Kurt Kurosawa, a bargaining unit employee still in his orientation phase, failed to change his PPE between patients while administering wound care. Tr. 94. This failure to change gloves between patients was reported to nurse Dorothy Frazier, a nurse clinician and bargaining unit employee. Tr. 94. One of Frazier's primary roles at the

hospital is to provide education and training to the unit staff on PPE procedures. Tr. 104. She was not, and has never supervised or managed. Tr. 52, 72, 105. The nursing students were assigned to observe Kurosawa as he demonstrated wound care. Tr. 70. The two patients were in the same room, with their beds configured in an "L" shape. Tr. 84, 97. According to the students, in between administering wound care to the two patients, Kurosawa did not change his gloves. Tr. 71.

Frazier reported the students' observation to Diane Pair, nurse manager for the SCI unit. Tr. 71. Pair in turn reported the complaint to Vernadine Hampton, the chief nurse for SCI unit. Tr. 100. Hampton is the immediate supervisor for nursing assistants, nurse managers, and the resident assessment coordinator. Tr. 101. Shortly afterwards, Kurosawa was called to a meeting with Frazier, Pair, and Hampton. Tr. 106. Prior to the meeting, there was no discussion between Frazier and Pair about disciplining Kurosawa for the reported procedural breach. Tr. 72, 89. The purpose of the meeting was to discuss Kurosawa's PPE education and to offer him additional training. Tr. 71, 89, 106.

At the start of the meeting Pair informed Kurosawa that the meeting was informational and not an investigation. Tr. 93. Kurosawa was informed of the observation reported by the students and asked if he had changed his gloves between patients. Tr. 77, 106. Kurosawa denied a failure to follow PPE procedures. Tr. 90, 107. He asserted that he kept extra gloves in his pockets and that it was his habit to change his gloves. Tr. 73. Kurosawa also stated that he did not wear a protective gown because he did not know he had to wear one. Tr. 77. Frazier informed Kurosawa that he needed to review PPE policy and that it was important to follow proper procedures and to change PPE in between patients. Tr. 77.

In addition to additional training on PPE procedures, Hampton asked Kurosawa if he would participate in service recovery by speaking to the students about the wound care they observed. Tr. 73, 107. Service recovery is usually performed after an issue is reported; it involves recognizing problematic behavior and finding alternative interventions. Tr. 73-74, 105. At the time, the students had gone to their post-clinical round at the psychiatric unit around the corner from where the meeting with Kurosawa was held. Tr. 90. Kurosawa declined to meet with the students and the meeting was concluded. Tr. 74, 81, 108. The entire meeting lasted about ten minutes. Tr. 108. Prior to the meeting, the Human Resources office was not consulted about disciplining Kurosawa. Tr. 125. Kurosawa was not disciplined as a result of the observation about his PPE procedures reported by the students, nor was he disciplined in response to additional incidents that occurred approximately one month later. Tr. 51, 91, 111.

POSITION OF THE PARTIES

General Counsel

The General Counsel (GC) argues that the Respondent violated § 7114(a)(2)(B) and § 7116(a)(1) and (8) by denying bargaining unit employee Kurt Kurosawa's request for Union representation at a meeting that he reasonably believed could result in disciplinary action.

The General Counsel asserts that on February 28, 2014, Nurse Kurosawa was asked to attend a disciplinary meeting with Nurse Manager Pair, Nurse Clinician Frazier, and Chief Nurse Hampton after two student nurses reported Kurosawa for not changing gloves in between patients during wound care. The GC notes that changing gloves relates to Personal Protective Equipment protocols, a violation of which may result in discipline up to and including termination. Consequently, the GC asserts that the presence of managers at the meeting made it reasonable for Nurse Kurosawa to believe that the meeting could result in discipline.

The GC next argues that Nurse Kurosawa said "I call Weingarten" during the meeting. The GC asserts that Kurosawa's request was immediately dismissed and that Pair specifically told him that he did not need Union representation. The GC asserts that the Respondent wanted to extract an admission of guilt from Kurosawa and that the Respondent refused to accept his denial of the failure reported by the nursing students.

As a remedy, the GC seeks a Notice signed by the current Medical Center Director. The GC seeks to have the Notice emailed to all bargaining unit employees and posted on bulletin boards in the Department of Veterans Affairs, VA Medical Center, Hampton, Virginia.

Respondent

The Respondent asserts that it did not improperly deny Kurosawa Union representation. The Respondent refutes the General Counsel's assertion that Kurosawa requested Union representation during his meeting with Nurse Manager Pair, Nurse Clinician Frazier, and Chief Nurse Hampton. In support, Respondent points to the testimony of Pair, Hampton, and Frazier, all of whom indicated that Kurosawa did not request Union representation or utter the words: "I call Weingarten." Respondent highlights the testimony of Nurse Frazier because she is not a manager, but a bargaining unit employee, who testified that she did not recall Kurosawa requesting Union representation during the meeting.

Next, the Respondent argues that even if Kurosawa had requested Union representation, he did not have a reasonable belief that the meeting could result in discipline. According to the Respondent, the presence of Frazier, a bargaining unit employee whose duties include training in the area of PPE, demonstrates that the purpose of the meeting was for training and education. The Respondent also cites the testimony of Pair and Hampton as proof that the purpose of the meeting was training and education as Nurse Frazier was included in the meeting specifically for that purpose. As a bargaining unit employee, she would have no reason to be present for an investigation that might result in discipline. Finally, the Respondent notes that Kurosawa admitted that he was told that he would not receive any discipline over the incident. Accordingly, the Respondent requests that the complaint be dismissed.

DISCUSSION

Under the Statute, "an exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at any examination of an employee in the unit by a representative of the agency in connection with an investigation if the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests representation." 5 U.S.C. § 7114(a)(2)(B). "The purpose of § 7114(a)(2)(B) is to create representational rights for federal employees similar to rights provided by the NLRB in interpreting the NLRA." *U.S. Dep't of VA Med. Ctr., Fort Wayne, Ind.*, 39 FLRA 717, 720 (1991).

A bargaining unit employee is entitled to union representation only when he reasonably believes that he may be disciplined and requests representation. See § 7114(a)(2)(B). The adequacy of a request for representation depends on the facts of each case. *DOJ*, 55 FLRA at 393. To be valid, a request need not be made in a specific form. A request for union representation must be sufficient to put the respondent on notice of the employee's desire for representation. *Norfolk Naval Shipyard, Portsmouth, Va.*, 35 FLRA 1069, 1074 (1990) (*Norfolk Naval*). See also *U.S. DOJ, Fed. BOP, Office of Internal Affairs, Wash., D.C.*, 55 FLRA 388, 393 (1990) (The Authority looks to see whether, in all the circumstances, the request for representation was sufficient to put the respondent on notice of the employee's desire for representation).

A valid request for union representation gives an agency three options: (1) grant the request; (2) discontinue the interview; or (3) offer the employee the choice between continuing the interview without representation or having no interview. *Norfolk Naval*, 35 FLRA at 1077. Absent a valid request, an employer is not obligated to provide or permit union representation. See *U.S. DOJ, U.S. INS, U.S. Border Patrol, Wash., D.C.*, 41 FLRA 154, 158 (1991) (Employee's failure to ask for representation during the exam meant that the agency did not violate the statute when it questioned the employee).

In this case, I find that Kurosawa did not request a Union representative during the short meeting conducted to discuss the observation reported by two nursing students. While the testimony that Kurosawa never requested Union representation provided by the two management employees alone would be compelling, even more persuasive is Nurse Frazier's testimony that she did not recall Kurosawa asking for representation or saying "I call Weingarten." There is no reason why Frazier, a bargaining unit employee familiar with Weingarten rights would not recall such a request being made, were it actually made. Tr. 78. She also testified that the "union never came up" during the meeting and I find it highly improbable that Frazier would not remember a request for Union representation made with the peculiar syntax of "I call Weingarten." Tr. 78. Based on the above, I find that Kurosawa did not request representation and that his testimony to the contrary is not credible and without merit. Therefore, the Respondent did not fail to comply with such a request.

Furthermore, the Authority utilizes a totality of circumstances test in determining the reasonability of a request for representation. Thus, even if Kurosawa had requested Union representation, to be valid it would have to be a reasonable request. Under these facts, such a request would not be valid. In the last twenty-five years no nurse at the Hampton Medical

Center has been disciplined for violating PPE procedures. Tr. 95, 110. Kurosawa himself did not know of any nurse at the Medical Center that had been disciplined for a breach in PPE. Tr. 53. The topic of discipline did not come up during the meeting, (Tr. 109), and Kurosawa was told they were seeking an admission that he failed to follow PPE procedures. Tr. 59.

Although the factors outlined above demonstrate the unreasonableness of any request for Union representation, that conclusion is further bolstered by the fact that Kurosawa knew the meeting included employees who were not part of management. Instead the meeting included a nurse who was a bargaining unit employee responsible for education and training on PPE procedures. Tr. 52. In accordance with that duty, Frazier suggested that Kurosawa undergo additional training. Tr. 53. There is no reason why management would have requested a trainer/bargaining unit employee to be present at the meeting if the purpose was disciplinary in nature. Finally, Kurosawa was told early in the meeting that the purpose was education and training in response to what the MCI student had reported. Tr. 78, 93, 106, 119. Based on these circumstances, I find that it was unreasonable for Kurosawa to believe that the meeting might result in disciplinary action.

CONCLUSION

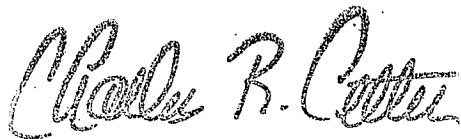
I find that the Respondent did not violate § 7114(a)(2)(B) and § 7116(a)(1) and (8) when it met with a bargaining unit employee for the purpose of providing additional training to an employee still in his orientation phase without providing Union representation. I find that Kurosawa did not request representation and even if he had, it would have been an unreasonable request under the circumstances.

Accordingly, I recommend that the Complaint be dismissed.

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., September 21, 2015



CHARLES R. CENTER
Chief Administrative Law Judge