



FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
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UNITED STATES DEPARTMENT OF VETERANS
AFFAIRS
VETERANS CANTEEN SERVICE
MATHER, CALIFORNIA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1206, AFL-CIO

CHARGING PARTY

Case No. SF-CA-10-0253

Stefanie Arthur
For the General Counsel

Michael E. Anfang
For the Respondent

Gloria Salter
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For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Raymond Larsen, a probationary employee, was called into his supervisor's office, so that she could counsel him concerning his absence from work the previous day. Larsen stated that he needed to have a union representative before discussing the matter further, and he left the work area to get a steward. After returning with a steward and engaging in a short discussion with his manager, he was sent home, charged with AWOL, and later discharged. Although the Agency insists that his leaving the work area was unauthorized and exceeded the boundaries of protected activity, I find that he was discharged for exercising his right to have a union representative assist him, and that the Agency thereby committed an unfair labor practice.

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

The case was initiated on January 26, 2010, when the American Federation of Government Employees, Local 1206, AFL-CIO (the Union or Charging Party) filed an unfair labor practice charge against the United States Department of Veterans Affairs, Veterans Canteen Service, Mather, California (the Agency or Respondent). After investigating the charge, the Regional Director of the San Francisco Region of the Authority issued a Complaint and Notice of Hearing on May 11, 2010, alleging that the Respondent had violated section 7116(a)(1) and (2) of the Statute by terminating a probationary employee, Raymond Larsen, because he engaged in activity protected by the Statute. The Respondent filed a timely Answer to the Complaint on June 7, 2010, admitting many of the factual allegations but denying that it had terminated Larsen because of his protected activity.

A hearing was held in this matter on July 13 and 14, 2010, in Sacramento, California. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel (GC) and the 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 make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The Respondent is an agency within the meaning of section 7103(a)(3) of the Statute. G.C. Ex. 1(b), 1(c). It operates a food service facility, or canteen, for employees, patients, and visitors at the VA hospital in Mather, a suburb of Sacramento. Tr. 291. The Mather canteen is open to the public on weekdays only, serving lunch at a variety of food court stations until 1:30 p.m., with one station remaining open until 3:30 p.m. Tr. 27-28, 157, 300. The canteen also prepares three meals a day, seven days a week, for patients and staff. The canteen staff work two overlapping shifts: a morning shift from 6:00 a.m. to 2:30 p.m. and an evening shift from 10:30 a.m. to 7:00 p.m. Tr. 26.

The American Federation of Government Employees, AFL-CIO, is the exclusive representative of a nationwide unit of employees at VA hospitals, a unit that includes employees at the Mather canteen. G.C. Ex. 1(b), 1(c). The Union, AFGE Local 1206, is a

labor organization within the meaning of section 7103(a)(4) of the Statute and is an agent of the AFGE for purposes of representing employees at the Respondent and at eleven other VA facilities in Northern California. G.C. Ex. 1(b), 1(c); Tr. 201.

Raymond Larsen worked at the Mather canteen from February 15, 2009, to January 28, 2010.¹ Initially hired as a Grade 3 food service worker or dishwasher, he was promoted on April 12 to lead cook, Grade 5, a position which put him in charge of the kitchen and the employees working there during his shift. Tr. 20-21, 25, 59, 243-44, 300-02. Larsen was working on a probationary period that ran until April 12, 2010. Resp. Ex. 1. Kay Mattarolo was the immediate supervisor of all the canteen employees at the Mather facility, and Michael Beday was the Chief of Canteen Services, who managed the canteens in Mather and Martinez, California, spending half his time at Mather and half at Martinez. Tr. 295. Beday and Mattarolo both worked Mondays through Fridays; Mattarolo worked from 6:00 a.m. to 2:30 p.m. Tr. 244.

Larsen's employment history, from a disciplinary standpoint, was uneventful until the last two days he worked, January 11 and 12, 2010. Tr. 389. Up until that time, Larsen was something of a rising star in the Mather canteen: having graduated from culinary school and owned his own restaurant, it is apparent that he had won the confidence of Beday, the canteen chief, who gave him an increasing range of responsibilities beyond cooking.² In September, he was told to prepare to assume the duties of the diet clerk, who is responsible for making sure the patients' special dietary needs are fulfilled. G.C. Ex. 5. Larsen had already been performing many of the duties of this position. Tr. 39-40. He was paid by Respondent to attend a week-long program in October to renew his certificate as a Serve Safe proctor, which would then enable him to train other canteen employees regarding food safety. Tr. 41-43; G.C. Ex. 6, 7. Beday described Larsen in November as "our food safety training coordinator" for the staff in both the Mather and Martinez facilities. G.C. Ex. 7 at 1. And in that same month, Beday also asked Larsen to take some online training to help increase sales from the canteen's vending machines (Tr. 47; G.C. Ex. 10); to oversee compliance with agency-wide sanitation standards at both facilities (Tr. 48; G.C. Ex. 11); and to train other canteen employees how to use the agency's computerized training system (Tr. 50-54; G.C. Ex. 11). For the first several months of his employment, Larsen rotated between the early and late shifts, but for the last few months, he worked almost exclusively on the 10:30 a.m. to 7:00 p.m. shift, with Wednesday and Thursday as his days off. Tr. 27.

On November 9, Larsen witnessed an altercation at the canteen, during which a male employee yelled at a female employee, using racial slurs and culminating in the man throwing a sheet pan at her. Larsen prepared a written statement describing the incident.

G.C. Ex. 19. Not long afterward, an EEO meeting was held regarding the incident, and both

¹ Hereafter, all dates refer to events in 2009, except that January dates refer to 2010.

² Beday testified that Larsen's duties did not change during the course of his employment (Tr. 305-07), but I find this contention (like other aspects of Beday's testimony) inconsistent with the evidence as a whole, and particularly with documents he prepared himself.

the woman involved in the altercation and the Union's president asked Larsen for (and he gave them) a copy of his statement. Tr. 96-98. After the EEO meeting, Beday called Larsen aside when he reported for work and told him that the Union had cited Larsen's statement at the meeting, "and it seems like EEO and the Union are running with your statement, that they're using your statement for everything." Tr. 98-100. Beday then walked with Larsen through the hallway of the hospital, toward the lobby containing a commemorative plaque from President Bush. Beday mentioned to Larsen that he had recently seen Union President Gloria Salter on television, criticizing President Bush and demanding that the plaque be removed from the hospital. Tr. 100, 431-32. Beday testified that he then told Larsen that Salter's action was "silly" and "embarrassing to the veterans and the VA Medical Center." Tr. 432. Larsen testified that Beday "went on to say that – how Gloria [Salter] and Robin Trail [Union chief steward] have a mission to destroy the canteen . . . they represent the Union that is no good." Tr. 100-01. According to Larsen, Beday continued by saying, "I want you to be on the same page as me. We want you to move into the office in administration, and everything else, but I don't want you doing any dealings or talking to the Union . . . if you mess with these people, Gloria and Robin Trail, you know, it's going to go bad for you." Tr. 101.

In early December, the Union was handling a grievance concerning an alleged unilateral change in a canteen employee's work assignment. Chief Steward Robin Trail filed the grievance, and a dispute ensued between her and Beday on the merits of the grievance and the appropriate step of the grievance procedure to file it. G.C. Ex. 22, 23, 24.³ Beday took offense at some of Trail's comments, expressed in emails between Agency and Union officials on December 3 and 4. He wrote to Trail (with copies to Union President Salter and others), "I do not like your attitude Ms. Trail and do not feel comfortable working with you. I see you as adding hostility to the whole issue. I would like to see Ms. Salter's comments regarding your behavior." G.C. Ex. 22 at 1. When Salter told Beday that Trail was handling the grievance, Beday responded, "I do not like the aggressive behavior she has demonstrated. This is not acceptable. If the union is looking for cooperation with the canteen then is [sic] should be with respect on all parties or we will not get anywhere. You need toe [sic] council her on personal decorum if you want to work with me. I do not need the abuse." G.C. Ex. 24 at 1.

On January 8 (a Friday), Beday held a meeting with Larsen, Hosea Roundtree (the lead cook for the morning shift) and Robert Mariner, a cook who alternated working on both shifts. Tr. 56-59. According to Larsen, Mariner had been "bad-mouthing" him and resisting his directions as lead cook, causing Larsen to ask Beday to intervene in the matter. Tr. 57.

At the meeting, Beday told Mariner to follow Larsen's orders and "stop the negativity."

³ The Respondent objected to the admission of G.C. Exhibits 22-24, but I found them to be relevant, and I ruled that they did not need to be included in the General Counsel's prehearing disclosure, as they were introduced to rebut Mr. Beday's testimony. Tr. 372-80.

Tr. 58-59.⁴ Despite Beday's admonition to Mariner, Mariner angrily approached Larsen in the parking lot after work that same day, accusing Larsen of "trying to destroy his career". Tr. 68. According to Larsen, Mariner continued to resist his work instructions and to bad-mouth him on both the Saturday and Sunday shifts that weekend, leading Larsen to decide to speak to a lawyer and to file a grievance with the Union concerning the problem. Tr. 69-70. He called Union President Salter over the weekend but was unable to reach her, so he decided to take the day off Monday, in order to talk to these various people regarding the Mariner situation. Tr. 122-26, 180-82.

Accordingly, Larsen phoned the canteen on Monday, January 11, to notify them he would be using leave that day. Tr. 70. Clifford Davis, a food service worker, answered the phone, and Larsen told Davis that he was going to take the day off "for some personal business". Tr. 71, 248. He also told Davis that "there is no need to have anybody stay overtime, to come in and stay overtime, because Velma [the cook on the evening shift] was there." Tr. 71-72. Davis relayed the message to Mattarolo (the canteen supervisor), but the message that Mattarolo heard was, "'Ray won't be in.' He said, 'You don't need him anyway; Velma is going to be there.'" Tr. 248. Mattarolo then advised Beday that Larsen had called in to say that "he was not coming in, he was not needed, that Velma would be there, so he was not needed." Tr. 315-16. She asked Beday how she should handle the situation. Tr. 268-69. On checking Larsen's leave records, Beday saw that he did not have enough sick leave for the full day, so he directed Mattarolo to write an Absent Without Leave counseling memo and to give it to Larsen the following day. Tr. 246-47, 252-53, 316; Resp. Ex. 4.

Larsen showed up for work at 10:30 the following morning, January 12, and entered his request for eight hours annual leave for "interviews and consolation [sic] with legal and union". Tr. 72, 253; G.C. Ex. 15. Shortly thereafter, Beday wrote "disapproved" and "AWOL" on the leave request. G.C. Ex. 15. Larsen went about his regular work routine, serving lunch at the Country Kitchen until approximately 1:10 or 1:15 p.m., when Mattarolo asked to talk with him in her office and had another employee take over for Larsen. Tr. 75, 156, 254. In both Mattarolo's and Beday's view, her counseling of Larsen was meant as a formality to advise Larsen of his responsibilities regarding coming to work; they expected the meeting to be brief, and if Larsen offered to get a doctor's note for his absence, he might even have the counseling rescinded. Tr. 254-55, 318-20, 328. But when Larsen was given the counseling notice with the reference to AWOL, he viewed it as a serious charge against him ("People get shot for that ." Tr. 192; see also Tr. 82.) and told Mattarolo, "I don't agree with this. There's no AWOL." Tr. 76, 159, 255-56. Mattarolo asked him to sign the counseling notice, but Larsen refused, saying he needed to contact his Union representative. Tr. 77, 159-60. Larsen told her that the notice misstated what he told Davis the previous day, and

⁴ Beday also described a meeting with his lead cooks, but it is not at all clear from his testimony whether it was the same meeting as the one described by Larsen, or a different meeting altogether. Tr. 307-12.

(according to Larsen's testimony) he asked her twice for permission to go get his Union representative, and she said, "Okay." Tr. 77, 159-60. According to Mattarolo, Larsen simply refused to sign the notice without Union representation and walked out, leaving the canteen area. Tr. 255-56. She denied giving him permission to leave the work area. Tr. 257.

Larsen immediately walked to the Union president's office, where he found Salter with Trail, and he explained his need for representation. Tr. 78. Ms. Salter asked Trail to accompany him, and Larsen estimated that he returned to the canteen with Trail about 15 or 20 minutes after he had left. Tr. 80. Mattarolo estimated Larsen returned at about 1:45. Tr. 259, 329. Mattarolo took the two of them to the office she shared with Beday, and Beday then approached. Tr. 261. Beday was surprised to see Trail, since meetings with the Union are usually scheduled in advance and held in a conference room, but he testified that since they insisted on meeting immediately, he agreed to do so. Tr. 331-32. Upon seeing Trail, Beday said, "What are you doing here? You do not belong in this kitchen". Tr. 80, 204. They explained that Trail was representing Larsen in regard to the counseling notice, but Beday said, "There is no meeting. And he does not deserve – he does not – he doesn't need to have counsel." Tr. 80-81, 204. Beday then asked Larsen to sign the counseling notice, but he said he didn't agree with it and wouldn't sign. Tr. 82, 205, 333. Larsen testified that he tried to explain to Beday that the notice improperly characterized his absence. He told Beday, "if there's any issues with the leave, or something like that, you know, I can go without – leave without pay. But AWOL, that's desertion." Tr. 82. When Larsen again refused to sign the notice, Beday told him, "You are now officially on administration [sic] leave. Go home." While Larsen and Trail described Beday's demeanor at the meeting as "[e]xtremely hostile. . . Very angry. Very loud[,]" and their own demeanor as calm, Beday saw it entirely differently. Tr. 81-83, 333-34. In his view, Larsen and Trail were "rather aggressive and demanding of me" and "not very compliant." Tr. 333. Larsen's face became flushed, and Beday felt that "the meeting escalated into a confrontation very fast, at which time I terminated the meeting." Tr. 333-34. Beday decided to release Larsen from duty "for the rest of the day and until we could determine what action to take further." Tr. 334. Beday later told Larsen to come in on his next regular work day, January 15, and at that time Beday met with him and Salter and notified Larsen that he was being charged with AWOL for the time between 1:15 and 1:45 p.m. on January 12 and that he was being discharged from his position, effective January 29. Tr. 84, 87, 340. G.C. Ex. 17, 18, Resp. Ex. 5, 6.

DISCUSSION AND CONCLUSIONS

Positions of the Parties

General Counsel

The General Counsel argues that Larsen engaged in protected activity on January 11 by seeking Union representation to help him refute the counseling memo Mattarolo was giving him that day, and that Beday discharged Larsen because of that protected activity. Therefore, applying the analytic framework articulated by the Authority in *Letterkenny Army*

Depot, 35 FLRA 113 (1990), for such cases, the GC insists that the Agency unlawfully discriminated against Larsen, and that the discharge violated section 7116(a)(1) and (2) of the Statute. The GC further asserts that the nondiscriminatory reasons asserted by the Agency for discharging Larsen were pretextual, and that the Agency would not have taken the same action in the absence of Larsen's protected activity.

Citing *U.S. Dep't of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, Cal.*, 38 FLRA 567 (1990), the General Counsel asserts that an employee's seeking of union assistance is protected activity, and that this was what Larsen was doing on January 11, when he brought Ms. Trail to participate with him in the counseling session that Mattarolo initiated. Moreover, by objecting to Mattarolo's allegation that he was AWOL the previous day, and by obtaining a Union steward to help him raise that objection, Larsen was raising a grievance within the meaning of section 7103(a)(9). This was clearly protected by the Statute and satisfies the first prong of the *Letterkenny* test.

G.C. Ex. 18 and Resp. Ex. 6 indicate that Mr. Beday discharged Larsen for being AWOL. Although this document does not explain the charge, Beday did in his testimony, when he stated:

Mr. Larsen's actions demonstrated . . . irresponsibility to his position in regards to Mr. Larsen chose not to show up for work on January 11th, and then Mr. Larsen – when attempting to counsel him on that, on the 12th, Mr. Larsen chose to abandon his position in the workplace.

Tr. 342. Beday expanded on this by stating:

With that said, if he had followed through and received that letter of counseling and went through due diligence and the process with respect for the department and adequately defending his concern, he still would have been employed with me.

Tr. 422. The GC thus argues that Beday concedes that Larsen was discharged for his conduct in obtaining Union assistance and arguing his case with Beday. Notwithstanding Beday's assertion that Larsen had "abandoned" his position by going to get a Union steward, the GC relies on Larsen's testimony that he explicitly requested, and received, permission from Mattarolo to get a Union representative. And the GC points to Beday's own descriptions of Larsen as "aggressive", "demanding", "not very compliant", and "argumentative" to support its position that Beday fired Larsen for his manner of defending himself and for insisting on having Union assistance to do so. Tr. 333-34, 430.

The General Counsel also asserts that Beday was shown to have demonstrated an animus to the Union in general, and to Ms. Trail in particular, which reveals the pretextual nature of Beday's explanations for his decision to fire Larsen. This animus was evidenced by Beday's lecture to Larsen in November that Salter and Trail were on a "mission to destroy the canteen" and that Larsen should not deal with them (Tr. 100-01), as well as Beday's comments to Salter that Trail's "aggressive behavior" regarding a grievance was "not acceptable." G.C. Ex. 22, 24. When Beday's actions on January 12 and 15 are viewed in the context of his attitude toward Trail and the Union, the GC argues that Beday's stated reasons for discharging Larsen are pretextual, and that he would not have fired Larsen if he had not sought Union assistance to protest the counseling notice.

Respondent

The Respondent insists that it discharged Mr. Larsen because he was absent without leave on January 11 and for a half hour on January 12, not because of any protected activity he may have engaged in. It argues that the testimony of Ms. Mattarolo and Mr. Beday were more credible than Larsen's; therefore, where they differ in material ways, Larsen's testimony should be rejected.

With respect to the January 11 AWOL charge, Respondent notes that Larsen was not engaged in any protected activity on that date, and Beday directed that he be counseled for AWOL based solely on Mattarolo's account. It argues that employees were supposed to speak to Mattarolo if they call in for an unscheduled absence (Tr. 250), and that Larsen improperly decided on his own that he was not needed at work that day. Even if Larsen's telephone message to Davis was not accurately relayed to Mattarolo and Beday, there was no evidence that the decision to charge Larsen with AWOL for January 11 was in retaliation for any protected activity. Larsen had the opportunity to correct the record with Mattarolo the following day, but he lost that opportunity by virtue of his misconduct on January 12.

In the Respondent's view, the key factual disputes regarding the events of January 12 are whether Larsen asked for permission to meet with a Union representative, and whether Mattarolo granted the request. Because Larsen was upset at being charged with AWOL, and because Mattarolo had no reason to lie, Respondent argues that her testimony is much more credible than his. Mattarolo would not have allowed Larsen to leave the canteen at that time, and thus Larsen's departure was unauthorized. Beday testified that Larsen had the right to obtain Union assistance for a grievance, but that any meeting with respect to that grievance must be scheduled at a mutually convenient time, not suddenly in the middle of lunch. Tr. 429-30. By leaving the canteen without permission, Larsen's actions "exceeded the boundaries of protected activity." *United States Dep't of the Air Force, Aerospace Maintenance & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636 (2003)(*Davis Monthan AFB*). Accordingly, Beday was lawfully entitled to discipline Larsen for walking out of the canteen as he did.

Finally, the Respondent emphasizes that Larsen was a probationary employee, and thus he could be discharged for any good reason, or no reason at all. *United States Dep't of Agric., Food & Nutrition Serv., Alexandria, Va.*, 61 FLRA 16, 22 (2005). While Respondent agrees that Larsen could not be discharged for protected activity, it submits that the GC has failed to establish that protected activity was a motivating factor in Beday's decision. It dismisses the evidence of Beday's alleged hostility to the Union as lacking credibility or corroboration. Rather, Respondent argues that Beday had legitimate reasons to fire Larsen, and that he would have done so even if Larsen had engaged in no protected activity at all.

ANALYSIS

As both sides have recognized, the analytical framework for evaluating section 7116(a)(2) allegations was set forth in *Letterkenny, supra*. In this analysis, the General Counsel has the burden of establishing a *prima facie* case of discrimination by proving that (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion or other conditions of employment. Once the GC makes the required *prima facie* showing, an agency may seek to establish, as an affirmative defense, that (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of protected activity. The GC may then seek to establish that the agency's reasons for taking the action were pretextual. Under the *Letterkenny* analysis, the GC bears the burden of establishing by a preponderance of the evidence that an unfair labor practice was committed. *See Letterkenny*, 35 FLRA at 122; *Dep't of the Air Force, AFMC, Warner Robins Air Logistics Ctr., Robins AFB, Ga.*, 55 FLRA 1201 (2000).

In this case, it is clear that Larsen engaged in a variety of protected activities during the course of his employment. In November, he gave a written statement to the Union regarding an incident involving two other employees, and his statement was used by the Union in an EEO meeting relating to that incident. Beday conveyed his knowledge of that statement to Larsen shortly after the EEO meeting. Tr. 90-100. On January 11, Larsen took the day off to consult with the Union, and he indicated this on his annual leave request the following day. G.C. Ex. 15. And on January 12, when Mattarolo began to counsel him about his taking the previous day off, Larsen stated that he needed a Union representative before continuing the meeting; he left the canteen to find a Union official, returned with Chief Steward Trail, and proceeded to defend his actions in a meeting with Beday. I will evaluate separately whether Mr. Larsen exercised his statutory rights appropriately, and whether aspects of his conduct exceeded the boundaries of protected activity; but in any case, his insistence on having a Union representative at his meeting with Mattarolo or Beday, and his expressions of disagreement with the Agency's decision to counsel him for AWOL, constituted the preliminary stage of a grievance, and this activity was certainly protected by section 7102 of the Statute. *See Davis Monthan AFB*, 58 FLRA at 645, and cases cited therein.

I further find that Larsen's protected activity was a motivating factor in Beday's decision to discharge him. The crucial events of January 12 are best understood in the context of Mr. Beday's prior dealings with, and attitude toward, the Union in general, and Ms. Trail in particular. Respondent's counsel objected to some of this evidence (G.C. Ex. 22, 23, 24), but it is well established that a supervisor's anti-union animus can shed light on that supervisor's motivation concerning a disciplinary action, and that principle is true here. *See United States Dep't of Transp., Fed. Aviation Admin., El Paso, Tex.*, 39 FLRA 1542, 1552-53 (1991). Beday's hostility to the Union was most graphically illustrated in his lengthy comments to Larsen about the Union in November, while they were walking in a hallway near a presidential commemorative plaque. Beday admitted that he called some recent remarks by Salter "silly." but he denied telling Larsen to stay away from the Union. Tr. 432-33. Notwithstanding Beday's denial, I find Larsen's testimony more credible and consistent with the record as a whole. I find that he told Larsen that he wanted to give him more administrative work, but that Larsen should avoid dealings with the Union, because Salter and Trail were on a mission to destroy the canteen. Tr. 100-02. Beday's particular animus to Trail was reflected in the exchange of email communications leading up to a grievance meeting concerning another canteen employee, when Beday objected to Trail's participation in the grievance. He wrote to Trail, with a copy to the Union president, "I do not like your attitude Ms. Trail and do not feel comfortable working with you. I see you as adding hostility to the whole issue. I would like to see Ms. Salter's comments regarding your behavior." G.C. Ex. 22 at 1. Almost simultaneously, he sent an email to Salter saying, "I do not like the aggressive behavior she has demonstrated. This is not acceptable. If the union is looking for cooperation with the canteen then is [sic] should be with respect on all parties or we will not get anywhere. You need toe [sic] council her on her personal decorum if you want to work with me. I do not need the abuse." G.C. 24 at 1.

Not long after this email exchange, the actual grievance meeting was held, and even Beday admitted that he and Trail got off to a rocky start there. Tr. 344-46. After characterizing his interaction with Trail as "unique[,] " he said he "felt apprehension" and "became frustrated" with Trail's manner of pursuing the grievance. Tr. 346. However, as the meeting progressed, Beday felt they became "a little bit more comfortable with each other[,] " as each side made some compromises. Tr. 346-47. According to Patricia Winn, a nurse and a Union steward who was brought into this grievance meeting primarily to serve as a "buffer" or "mediator" between Beday and Trail, Beday referred to Trail as "being aggressive, being a troublemaker, causing problems with the employees, instigating the employees in the canteen." Tr. 224-26, 346. Trail, in turn, testified that Beday "got aggressive and exhibited body language that was angry[]" at the meeting. Tr. 209.

I should note at this point that there is nothing inherently unlawful about a manager expressing his disagreement with the manner in which a union official carries out her representational duties. Just as employees are allowed greater leeway to engage in heated debate in a grievance, so a manager is entitled to speak his mind, even when it is critical of a

union official. I also acknowledge that Trail's email comment to Beday that the Union "will not continue to entertain your lack of knowledge regarding proper protocol" was indeed insulting, and likely triggered Beday's own angry response. G.C. Ex. 23 at 1. But a manager must not allow such comments to affect his handling of subsequent personnel matters, and he certainly must not transfer his hostility to a union official onto employees who are represented by that official. That is what happened in this case. The problem is not that Beday stated in December that he didn't like Trail's attitude or found her aggressive, but rather that these views affected his treatment of Mr. Larsen.

Beday testified that he based his decision to discharge Larsen on the two incidents of AWOL on January 11 and 12. Tr. 342. His testimony makes clear, however, that the overriding reason for the termination was the January 12 incident. He simply wanted to counsel Larsen for his January 11 absence, and this counseling was not a disciplinary action. Tr. 318-20, 396, 421-22. But Larsen's conduct in response to Mattarolo's attempt to counsel him was what convinced Beday that "I didn't feel that at that point that he was following the expectations of what a lead position should -- how a lead position should support the department." Tr. 422. He explained: "Through his actions and negligence to the department, it showed that Mr. Larsen couldn't receive this criticism in regards to his attendance even, the lowest low level of communication to them, without becoming aggressive, leaving the workplace, demanding union representation right then." Tr. 430. Similarly, he described the conduct of Larsen and Trail when he met with them on January 12: "[I]t was quite a brief discussion. I do recall that Ms. Trail and Mr. Larsen were rather aggressive in their demeanor and not really complying with our concerns in the department in following the master agreement to communicate to employees when they're not following policies and procedures." Tr. 333. When asked to elaborate on this, Beday stated, "They were rather aggressive and demanding of me. And when I approached them to ask them to sign the particular 'Notice of Absence Without Leave,' they were not very compliant with it . . . It started to turn into an argument." Tr. 333-34.

There is a common theme here of Mr. Beday interpreting disagreement with him as "aggression" and "noncompliance," with respect to both Larsen and Trail, and with respect to both the December grievance and the January 12 meeting. In his December 4 emails (G.C. Ex. 22, 24), Beday described Trail as "aggressive" and told the Union president that he was not comfortable working with her, even though he had never previously dealt with Trail in her steward capacity. Tr. 210. His words there ("If the union is looking for cooperation with the canteen then is [sic] should be with respect on all parties or we will not get anywhere.") resonate now as a self-fulfilling prophecy in the wake of the events of January 12. G.C. Ex. 24 at 1.

In my considered opinion, on January 12, Mr. Larsen was simply attempting to defend himself against (what he believed to be) an inaccurate characterization of his absence as AWOL. While he clearly went about his defense in a way that upset Beday's expectations, those expectations unduly conflict with the statutory right of an employee to form, join, or assist a labor organization, and to file grievances over issues relating to conditions of

employment. Both Mattarolo and Beday expected her counseling session with Larsen to be brief and informal, and Beday expected his lead cook to be “supportive” of management. Indeed, if Larsen had simply signed the memo and said, “I’m sorry,” or if he’d added a brief explanation of what he was doing the day before, that would have been the end of the matter. But Larsen was not required to accept the counseling, and he was entitled to seek a Union representative to assist him in presenting his side of the issue. This may have been a strategic mistake on his part, but it was unlawful for Beday to penalize Larsen for defending himself more stridently than Beday would have liked. It is clear to me, from the evidence as a whole, that Beday’s motivation for terminating Larsen’s employment was inextricably entwined with Larsen’s seeking help from the Union, and not simply that Larsen chose “to abandon his position”. Tr. 422. Larsen’s reappearance at the canteen with Trail, and their “aggressive” attempt to defend Larsen’s actions of the previous day, raised the same red flags that Beday had seen in his prior dealings with Trail, and they triggered the same concerns he had previously discussed with Larsen when he told Larsen that he wanted to move him into administration, while advising him that “mess[ing]” with the Union would “go bad for you.” Tr. 101, 334. If Larsen could not accept routine counseling without calling the Union, he could not be trusted by Beday to be his “eyes and ears.” Tr. 102, 422. In other words, Larsen’s protected activity was a motivating factor in Beday’s decision to discharge him, and the General Counsel has met its initial burden of a *prima facie* case of unlawful discrimination.

The Respondent contends, however, that Larsen’s behavior on January 12 was legitimate justification for discharging him, and that it would have fired him for this behavior even if he had not engaged in any protected activity. I have just noted my view that at least a significant portion of Larsen’s actions on January 12, to which the Agency objects, was simply lawful protected activity -- Larsen’s attempt to defend himself. But the Respondent contends that Larsen went beyond merely defending himself: he walked out of the canteen without permission to get a Union representative, and then he returned and insisted on a meeting immediately, while there was still work to do in the canteen. The linchpin of the Agency’s case, therefore, is its insistence that Larsen left the canteen without permission: he “abandon[ed] his position in the workplace.” Tr. 342

One major flaw in the Respondent’s argument is that Beday did not observe the counseling session between Mattarolo and Larsen, and Mattarolo’s memory of the incident was vague, to say the least. Tr. 247, 255-56, 271, 273. This is typified by her answer when questioned about the counseling session with Larsen on January 12 (Tr. 255-56):

Q: What did you say to Mr. Larsen?

A: I just said I had a counseling here for him, and I asked him what was going on. I said, “What happened yesterday?” And he said -- and then I said, “Can you sign it?” And he just said, “No.” And he threw it down on the desk and walked out.

In other words, she skipped right over Larsen’s answer to her initial question, in which he presumably explained why he didn’t work the previous day and what he had told Davis when

he called in. That portion of the conversation is totally missing from her memory. When pressed for more details of the meeting, Mattarolo did say that Larsen “flipped out” or “lost control”, and she stated that “he said he wouldn’t sign anything without union representation.” Tr. 279. Similarly, there was this line of questioning (Tr. 256):

Q: Did he make any kind of reference at all to wanting union representation?

A: He said he wanted to talk to Mike [Beday], and something, some -- I don’t know. And I sort of just talked to him again and he just walked off. He never did really finish talking to me. I don’t remember the exact words of the whole situation.

Q: Well, it’s very important, Ms. Mattarolo, so --

A: Okay.

Q: -- you need to recall, as best you can.

A: He said he wasn’t signing anything without union representation, yes.

Q: And --

A: And I said, okay.

Q: What is your response to the claim that you allowed Mr. Larsen to leave at that particular time to actually seek out union representation?

A: I didn’t allow him to leave. I was still talking and he walked right out of the office on me.

In contrast, Larsen’s description of the counseling session was much more detailed, and those details did not need to be forced out of him. In his account, Mattarolo initially showed him the counseling memo (G.C. Ex. 16), and after he read it, he told her that the information on it was incorrect. Tr. 77. Mattarolo responded by asking him to sign the document, prompting him to say, “I need to have legal representation with this. I need to go contact my union rep.” *Id.* Shortly thereafter, he testified: “And so I asked her again, ‘May I go? It will only take a minute.’ And she said, ‘Okay.’” *Id.*

Comparing the two accounts, both Larsen and Mattarolo agree that Larsen did tell her that he wouldn’t sign anything without union representation. On this basis alone, it should have been quite obvious to Mattarolo that Larsen was going to the Union office when he left the canteen. Moreover, her admitted failure to say anything to Larsen as he left, her failure to try to get him to stop and wait for a better time to meet with the Union, suggests to me that she understood he was going to find a Union representative and that she consented to it, at least by silence. But I am convinced that Mattarolo did more than simply offer silent consent to Larsen’s departure; rather, she gave *express* consent to his action, if only by the utterance of a single word, “Okay.” I think that events moved very quickly and unexpectedly for Ms. Mattarolo, once Larsen did not respond to the counseling memo in the way she anticipated. Larsen’s explanation of the events of January 11 made no imprint on her memory; the only thing that stuck in her mind was that he refused to sign the counseling form without a Union representative. Larsen then asked to go find a representative, and Mattarolo said “Okay,”

probably without considering it fully. Once she realized that Larsen had left the canteen, she likely knew that Beday would not be happy with an unscheduled union/grievance meeting, and so she said nothing about that to Beday. But in the brief moment at which Larsen asked her if he could go to find a Union representative, Mattarolo consented to his departure, and thus it was not an “abandonment of his position,” nor was he absent without leave.

If, as I so conclude, Larsen had Mattarolo’s permission to leave the canteen on January 12, then Larsen committed no misconduct on January 12 that would justify disciplinary action. When Larsen returned a short time later with Trail, he proceeded to plead his cause with Beday, and he refused to sign the counseling memo, but he did nothing that could be construed as “flagrant misconduct or otherwise exceeded the boundaries of protected activity.” *Davis Monthan AFB*, 58 FLRA at 636 (emphasis omitted), citing *Dep’t of the Air Force, 315th Airlift Wing v. FLRA*, 294 F.3d 192, 201-02 (D.C. Cir. 2002).⁵ According to Beday, once he agreed, at Trail’s insistence, to meet with her and Larsen, he showed them the counseling memo and asked Larsen to sign it. Tr. 333. The ensuing discussion was brief, as “[t]hey were rather aggressive and demanding of me. . . . the meeting escalated into a confrontation very fast, at which time I terminated the meeting. It started to turn into an argument.” Tr. 333-34. Later, Beday testified that:

And when I brought the letter in, I was expecting to go formally to issue the letter and give him an opportunity, with the Union there, to make a statement about it. But he was rather argumentative at that point. There was no substance in what he was saying in regards to replying to the letter in his defense.

Tr. 415.

Although Beday used words like “aggressive” and “noncompliant” to describe Larsen’s demeanor that day, there is nothing in Beday’s testimony that would suggest Larsen’s aggression became physical or abusive. Beday did not indicate that Larsen used profanity. The only type of noncompliance that Beday mentioned was Larsen’s refusal to sign the counseling memo. Accordingly, even viewing Beday’s testimony most favorably (something I do not do, for the most part), Larsen did not commit anything that could remotely be considered flagrant misconduct. There is no doubt that Larsen was emotional in defending his actions of January 11, and he may even have gotten “agitated,” as Beday states. Tr. 415. I reject Beday’s contention that Larsen gave “no substance” to back up his assertion of innocence, as it is evident to me from the full record that Larsen considered it very important to explain that Davis had inaccurately relayed his telephone comments to Mattarolo the day before, and that his absence should not be treated as AWOL. Tr. 82, 191.

⁵ The Authority wrote in *Davis Monthan AFB*, “we take this opportunity to clarify that when the alleged discrimination concerns discipline for conduct occurring during protected activity, a necessary part of the respondent’s defense is that the conduct constituted flagrant misconduct or otherwise *exceeded the boundaries of protected activity*.” 58 FLRA at 636.

But Larsen said or did nothing during this conversation that was improper. And while Beday and the Respondent argue that Larsen's departure from the canteen to get a Union representative exceeded the boundaries of protected activity, I have already rejected that claim, since he left with the consent of Ms. Mattarolo.

The Respondent defends Beday's decision to charge Larsen with AWOL for his January 11 absence, on the grounds that Beday acted solely on the account given to him by Mattarolo, a person who is not accused of any anti-union bias. Even if Mattarolo was not given an accurate account of Larsen's telephone conversation with Davis on the morning of January 11, neither Beday nor Mattarolo was aware at that point of any protected activity on Larsen's part; thus Respondent argues that it had a legitimate, or at least nondiscriminatory, basis for the initial AWOL charge against him. A similar argument could be made for the January 12 AWOL charge as well: even if Mattarolo allowed Larsen to leave the canteen to get a Union representative, Mattarolo didn't tell that to Beday, who then decided to terminate Larsen under the belief that Larsen had left without permission.

But these arguments are too slippery to hold water. First of all, Mattarolo is a supervisor and an agent of the Respondent, and the Respondent is bound by her actions as well as Beday's. While I don't think she acted in this case to discourage Larsen's protected activity, neither she nor Beday gave any thought to waiting for Larsen's account of the events of January 11 before concluding he was AWOL. Mattarolo clearly did not make the decision to charge Larsen with AWOL for the January 11 incident: she simply told Beday about her conversation with Davis and asked Beday what he wanted to do about it. Tr. 268-69. But both supervisors acted precipitously in drawing adverse conclusions against Larsen, and this type of conduct is one of the long-recognized indicia of unlawful motivation.⁶ And even if Beday sincerely believed that Larsen had walked out of the canteen on January 12 without permission, his ultimate decision to fire Larsen was thoroughly tainted by his anti-union animus. Beday believed that the Union was on a mission to destroy the canteen, and he particularly found Trail to be a person who added hostility to grievances rather than helping to resolve them. Unfortunately for Mr. Larsen, it was Trail who stood next to him in Mr. Beday's office on January 12, and Beday's response to Larsen's claims of innocence was

⁶ *Dep't of Housing & Urban Dev., Pennsylvania State Office, Phila., Pa.*, 53 FLRA 1635, 1653 (1998); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). I also found it counterproductive for the Respondent to argue that canteen employees are required to speak directly to Mattarolo when they can't come to work. Resp. Br. at 8. Mattarolo testified that it "would be nice" if employees talk to her when they can't come to work, but she further explained that they could also "talk to a machine" to report their absence. Tr. 250. Her latter statement is consistent with Larsen's testimony that employees can, and frequently do, leave a message with whoever answers the phone in the canteen when they call in. Tr. 70, 129-30. While the exact details of the events of January 11 are relatively insignificant, because the Agency clearly did not consider the incident to be worthy of disciplinary action, the Agency's shifting and inconsistent explanations of Larsen's misconduct, and its refusal to credit any aspect of Larsen's account of the January 11 events, are further indicia of pretext.

clouded by his animosity to Trail and the Union, and by Larsen's demonstration of loyalty to the Union. Beday's earlier comments to Larsen about the Union show that he was offering Larsen an iron fist within a velvet glove: he held out to Larsen the prospect of growing administrative responsibilities, but Larsen should avoid Trail and Salter. When Larsen returned to the canteen with Trail on January 12 and began defending his actions, his words fell on deaf ears, because Beday now realized that Larsen would go to the Union whenever he felt he needed help, and this was not what Beday was seeking in a lead cook.

Having carefully reviewed the testimony of all the witnesses, and having observed their demeanor, I find that the Respondent did not have a legitimate justification for terminating Larsen's employment. The decision to discharge Larsen was inextricably connected with Larsen's protected activity; in the absence of that protected activity, Beday would not have discharged him. The General Counsel has, therefore, proved that Respondent discharged Larsen in order to discourage activity on behalf of the Union, in violation of section 7116(a)(1) and (2) of the Statute.

In order to remedy this violation, and to make Larsen whole, the Respondent must, among other things, reinstate him to his position of lead cook and pay him back pay for any lost wages and benefits suffered as a result of his termination. *See, e.g., Indian Health Service, Crow Hospital, Crow Agency, Mont., 57 FLRA 109, 114 (2001).*

Accordingly, I recommend that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the United States Department of Veterans Affairs, Veterans Canteen Service, Mather, California, shall:

1. Cease and desist from:
 - (a) Terminating the employment of, or otherwise discriminating against, Raymond Larsen, or any other unit employee, because the employee engaged in activity protected by the Statute .
 - (b) In any like or related manner, interfering with, restraining, or coercing bargaining unit employees in the exercise of their rights assured them by the Statute.
2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:
 - (a) Rescind the action terminating the employment of Raymond Larsen and offer him immediate and full reinstatement to his former position or a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

(b) Make Raymond Larsen whole, consistent with applicable laws and regulations, for any losses he incurred as a result of his unlawful termination, by providing him with backpay and benefits, with interest and appropriate differentials, from January 28, 2010, until the effective date of the offer of reinstatement, less any amount earned through other employment during this period.

(c) Post at its facilities where bargaining unit employees 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 of the Canteen Service, 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.

(d) Pursuant to section 2423.41(e) of the Authority's Regulations, notify the Regional Director, San Francisco Region, 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, D.C., January 19, 2012.

RICHARD A. PEARSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Veterans Affairs, Veterans Canteen Service, Mather, California violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT terminate the employment of, or otherwise discriminate against, Raymond Larsen, or any other bargaining unit employee, because the employee engaged in activity protected by the Statute.

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

WE WILL rescind the action terminating the employment of Raymond Larsen and offer him immediate and full reinstatement to his former position or a substantially equivalent position, without prejudice to his seniority and other rights and privileges.

WE WILL make Raymond Larsen whole, consistent with applicable laws and regulations, for any losses he incurred as a result of his unlawful termination, by providing him with backpay and benefits, with interest and appropriate differentials, from January 28, 2010, until the effective date of the offer of reinstatement, less any amount earned through other employment during this period.

(Agency/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, San Francisco Regional Office, Federal Labor Relations Authority, and whose address is: 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 356-5000.