

IN THE MATTER OF AN ARBITRATION)	OPINION AND AWARD
)	OF THE ARBITRATOR
between the)	
)	
FEDERAL BUREAU OF PRISONS)	
FEDERAL TRANSFER CENTER)	THE BRYAN HOUCK
)	RETALIATION ARBITRATION
and the)	(FMCS CASE NO. 10-57731-8)
)	
AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES,)	
LOCAL #171)	SEPTEMBER 28, 2011

This matter came before Arbitrator Robert E. Allen on May 26, 2011 at the FTC Training Center located in Oklahoma City, OK. The American Federation of Government Employees, Local #171 (hereinafter referred to as the Union) was represented by Mr. Donny Boyte, president of Local #171. Ms. Loretta Burke represented the Federal Bureau of Prisons, Federal Transfer Center (hereinafter referred to as the Agency). A transcript of the hearing was prepared. The parties agreed to submit written closing arguments.

The Union called the following witnesses:

Jeff Ormiston, senior correctional officer;
 Sam Henderson, captain;
 Tawana Ingram, lieutenant,
 Jeff Stepp, correctional officer;
 Landon Awbrey, correctional officer;
 Mark Rudkin, correctional officer;
 Bryan Houck, senior correctional officer and Grievant, and;
 Tom Townley, correctional system officer and Local #171 vice president.

The Agency called one witness, Wayne Hortman, associate warden of operations.

THE ISSUE

The parties agreed to the following statement of the issue:

Did the Agency violate Master Agreement Preamble, Article 6 section b(3) and 6; Article 7 Section a, and 5 USC 7116 a(1), when on May 5, 2010, Lt. Ingram harassed, retaliated, threatened, interfered with,

restrained and coerced Union Steward Bryan Houck by taking pictures of his assigned post, Unit 5A, and reporting his failure to maintain a clean and sanitary unit, and if so, what is the remedy?

STATEMENT OF THE CASE

The events that directly led to the filing of the grievance under review herein occurred on May 5, 2010. On that date, Lt. Tawana Ingram entered Unit 5A that had been supervised by Officer Bryan Houck, the Grievant in this matter, on the previous shift. She claimed that in response to a complaint about the condition of the unit from Officer Landon Awbrey, the individual responsible for the unit at 5:00 a.m. when Lt. Ingram was making her rounds, she decided to inspect the unit. She testified that she found paper on the floor in the kitchen area, trash on the rec. deck, trash bags on the floor with trash spilling out of them, and that the shower room had not been cleaned. In response to the disheveled condition of Unit 5A, Lt. Ingram left the unit, and then returned to it with a camera. She took a number of photographs chronicling the mess she found in the unit. She testified that she took the pictures because it was the second time that Officer Houck had left Unit 5A inappropriately messy. She subsequently sent an e-mail to Captain Sam Henderson, her supervisor, complaining that Officer Houck had been negligent when maintaining the cleanliness of the unit (Union Exhibit #2). She concluded this e-mail by writing "this is the second time during morning watch that Officer Houck [sic] Unit has been dirty, filthy, nasty, and let's say unkept [sic]" (Union Exhibit #2). Captain Henderson was also provided with a copy of the photographs.

To understand Officer Houck's reaction to being reported for not properly maintaining Unit 5A, it is necessary to review events that occurred the previous day. Officer Houck testified that on May 4, 2010 he had a meeting with Captain Henderson in his capacity as a Union steward. During this meeting, he complained about the way Lt. Ingram mistreated two bargaining unit

members. Captain Henderson stated that he would discuss Officer Houck's concerns with Lt. Ingram and that he would get back with Officer Houck the next day. The record indicated that Captain Henderson did speak with Lt. Ingram before she left work on May 4, 2010 and that her interactions with the two officers of Officer Houck's concern were discussed. Before proceeding, it should be noted that May 4 and 5, 2010 were not the first times conflict arose involving Officer Houck and Lt. Ingram. About a month earlier, Officer Houck charged Lt. Ingram with conducting an improper investigation in response to disparaging postings to a Facebook page that concerned her. In November 2010, Lt. Ingram filed EEOC charges that included the claim that Officer Houck was a contributor to the hostile work environment that existed at the Federal Transfer Center (Union Exhibit #5).

When Officer Houck went to Captain Henderson's office on May 5, 2010 to follow up on their discussion from the previous day that concerned Lt. Ingram, he noticed photographs of his unit on Captain Henderson's desk. During the ensuing conversation, Captain Henderson reported that Lt. Ingram was the source of the pictures. He also told Officer Houck that pictures of other units had not been taken. Captain Henderson testified that he listened to Officer Houck's explanations for the two occasions on which his unit was found dirty. The first time involved a situation in which there was a shakedown of the unit. As a result, the unit's orderlies were locked down, and no cleaning took place. Officer Houck explained that on May 4, 2010, the orderlies refused to perform their cleaning duties. He, therefore, fired them and locked them down. Again, no cleaning took place. In response to these explanations, Captain Henderson told Officer Houck to "run your unit." He then shredded the photographs while Officer Houck was sitting there. On cross examination, Officer Houck acknowledged that he interpreted Captain Henderson's actions to mean that the matter (dirty unit allegations) was over. The fact of the

matter is that they were not over for Officer Houck. Officer Houck told Captain Henderson that he believed Lt. Ingram was targeting him personally because of his Union activities.

In response to the pictures being taken and a complaint made about his unit by Lt. Ingram, a grievance was filed (Joint Exhibit #2). In this grievance, the Union charged that Lt. Ingram and the Agency "harassed, retaliated, threatened, interfered with, restrained and coerced" Officer Houck. It was also contended that these actions interfered with Officer Houck's ability to perform his Union duties and to properly represent bargaining unit employees. The Union maintained that Lt. Ingram's actions violated Article 6 (Rights of Employees) of the Master Agreement that states:

Section b. The parties agree that there will be no restraint, harassment, intimidation, reprisal, or any coercion against any employee in the exercise of any employee rights provided for in this Agreement and any other applicable laws, rules and regulations, including the right

3. to be treated fairly and equitably in all aspects of personnel management.

6. to have all provisions of the Collective Bargaining Agreement adhered to.

The Union also charged that Article 7 was violated. The provision states:

Section a. There will be no restraint, interference, coercion, or discrimination against any employee in the statutory exercise of any right to organize and designate representatives of their own choosing for the purposes of collective bargaining, presentation of grievances, labor management related activity, representation of employees before the Employer, or upon duly designated Union representatives acting as an agent of the Union on behalf of an employee or group of employees in the bargaining unit.

Finally, the Union charged 5 U.S.C. 7116 a(1) was violated. This provision establishes:

Sec. 7116. Unfair Labor Practices

- (a) For the purpose of this chapter, it shall be an unfair labor practice for any agency
 - (1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

The Union's grievance was denied. The reason for the denial reads as follows:

One of the basic responsibilities of a Correctional Officer is to ensure sanitation policies and regulations are enforced. Supervisory Correctional Officers, such as Lieutenant Ingram, are tasked with ensuring that Correctional Officers are maintaining sanitary housing units. Furthermore, it is her duty to keep her supervisor (Captain Henderson) informed of situations as they occur. Due to the fact Lieutenant Ingram had received several complaints regarding the condition in which Mr. Houck was leaving the housing unit, I find no nexus between Mr. Houck's Union activity and Lieutenant Ingram's actions in this matter. (Joint Exhibit #3, p. 3)

The Union subsequently appealed this decision to arbitration.

POSITION OF THE UNION

The Union maintained that Lt. Ingram's actions on May 5, 2010 (taking pictures of a messy Unit 5A and making false statements about the matter to Captain Henderson) was blatant retaliation for Officer Houck reporting her harassment of two bargaining unit employees to Captain Henderson on May 4, 2010. In turn, this retaliation interfered with Officer Houck's ability to perform his duties as a Union steward. Officer Houck testified that he removed himself from representing employees in cases involving Lt. Ingram for fear of more retaliation from her that could put his job in jeopardy.

The Union asserted that Lt. Ingram did not tell the truth when she reported to Captain Henderson that she received complaints from correctional officers about the condition of Unit 5A on May 5, 2010 and that Officer Houck routinely left the unit in a disheveled condition at the end of his shift. The Union pointed out that these claims were contrary to the testimony provided

at the arbitration hearing. Officer Jeffrey Ormiston denied Lt. Ingram's claim that he had commented to her about the messiness of Unit 5A. In fact, he testified that he had relieved Officer Houck on numerous occasions and that he never had problems with the unit's condition. Although Lt. Ingram testified that none of the other units were dirty, Officer Ormiston held that this was not the case. He testified that the unit he was assigned to supervise (Unit 5B) was also in disarray on May 5, 2010 but that no pictures of that unit were taken. Officer Awbrey testified that he did not ask Lt. Ingram to look at Unit 5A on the morning of May 5, 2010. He also stated that he did not comment on the cleanliness of the unit or hear anyone else comment on the unit's condition. Officer Jeffrey Stepp's testimony revealed that he, too, had relieved Officer Houck on past occasions and that he had never heard anyone complain about the way Officer Houck left Unit 5A.

Lt. Ingram justified taking pictures on May 5, 2010 because she claimed it was the second time Unit 5A had been left messy by Officer Houck. The Union claimed that this was simply not true. Officer Stepp testified that he relieved Officer Houck during the quarter in which the first incident was supposed to have occurred. On the morning in question, Lt. Ingram walked through the unit and then told Officer Stepp to get the orderlies out of their cells early so that they could clean up the mess she found. He claimed that the unit was not dirty and that it took the orderlies only about five minutes to clean it.

By fabricating her allegations concerning the cleanliness of Unit 5A, the Union argued that Lt. Ingram retaliated against Officer Houck for performing his duties as a Union steward, and that by doing so she violated Article 6, section a of the Master Agreement. In support of this assertion, the Union pointed out that she took action the day after Officer Houck met with Captain Henderson to complain about Lt. Ingram harassing bargaining unit members. It was

held that by taking pictures of Unit 5A in an unkempt appearance and by fabricating a story about Officer Houck routinely maintaining an uncleanly unit, Lt. Ingram attempted to precipitate a situation in which Captain Henderson would make some type of negative performance entry into Officer Houck's record or possibly subject him to some form of discipline. It was argued that such actions also violated 5 U.S.C. 7116 (a) that establishes that employees cannot be restrained, coerced or discriminated against because they represented employees before the employer.

The Union added an additional claim in support of the charge that Lt. Ingram's actions on May 5, 2010 were in retaliation for Officer's Houck's activities as a Union steward that included him making charges against her. The record indicated that pictures had never been taken at the Federal Transfer Center in situations alleging poor housekeeping as in this case. Picture taking is reserved for situations such as inmate involvement in fights and assaults on staff members.

It was contended that because Lt. Ingram held a grudge against Officer Houck she tried to get him trouble by fabricating a story and taking pictures of Unit 5A on a morning it was a mess. These efforts violated Officer Houck's rights under the Master Agreement as well as national labor policy. As a consequence of this violation, Officer Houck was unable to perform the full range of his Union steward activities out of fear that Lt. Ingram would continue to retaliate against him. It was also argued that because Captain Henderson believed her claims, Officer Houck was discriminated against because he was not selected and promoted into a GL-8 position.

In conclusion, the Union asserted that it proved that Lt. Ingram fabricated stories about Officer Houck's performance in retaliation for his activities as a union steward, and by so doing, she created a "chilling effect" on his ability to fully represent the members of the bargaining unit

in violation of both the Master Agreement and public policy. As a remedy, the Union requested the following:

- Lieutenant Ingram be ordered to cease and desist from retaliating, harassing, restraining, and coercing Union steward Bryan Houck for duly representing employees and assisting the Union before the employer.
- Lieutenant Ingram be either removed from her position or receive forty hours training on the Master Agreement and 5 U.S.C.
- Lieutenant Ingram be ordered to give a written and oral apology to Union steward Bryan Houck for her actions at the next staff recall.
- A posting be made with an apology to Union steward Bryan Houck and the Union for no less than (90) days on all bulletin boards at the Federal Transfer Center in compliance with other unfair labor practices.
- Anything else deemed appropriate by the Arbitrator.
(Union brief)

POSITION OF THE AGENCY

The Agency held that Lt. Ingram did not harass, retaliate, threaten, interfere with restrain or coerce Officer Houck in the performance of his duties as a Union steward. It was argued that the record of this case demonstrated that Lt. Ingram found Unit 5A in an unkempt condition and that she reported her findings along with pictures because the May 5th situation was the second time she was aware of Officer Houck's failure to maintain the cleanliness of the unit. Therefore, she documented her concerns and forwarded them to Captain Henderson. After Captain Henderson discussed the matter with Officer Houck, he shredded the pictures and told him to go run his unit.

It was argued that there was nothing to indicate that Lt. Ingram took the pictures and gave them to Captain Henderson as retaliation against Officer Houck. She was unaware of who was

responsible for Unit 5A when she made her rounds on the morning of May 5, 2010. Also, she was correct in her assessment of the Unit's condition. It was a mess. The Agency pointed out that sanitation is important in an institution like the Federal Transfer Center. Poor sanitary conditions can exacerbate the challenges of running an organization that has inmates in constant motion. Further, it was contended that for her not to take action when she observed the condition of the unit would have been irresponsible. It was noted that when Captain Henderson heard Officer Houck's explanation, he disregarded the issue. It was emphasized that if Unit 5A was not in an unsanitary condition and if it did not involve a second offense, the situation would not have been reported by Lt. Ingram. Such actions, because they were warranted, did not constitute a violation of the Master Agreement or 5 U.S.C. 7116 a(1). It was held that Lt. Ingram and the Agency did not harass, retaliate, threaten, interfere with, restrain or coerce Officer Houck in the performance of his Union duties. He was not disciplined in any way. Monitoring unit cleanliness is a legitimate supervisory function given the importance of proper sanitation to the Federal Transfer Center. It was proper for Lt. Ingram to report her concerns to Captain Henderson. Given these circumstances, the Agency requested that the grievance be dismissed as meritless.

DISCUSSION AND CONCLUSIONS

There are broad standards for determining whether retaliation has taken place. The analysis starts with the party claiming retaliation to establish a prima-facie case. This required the Union to prove three elements. First, it had to demonstrate that Officer Houck was engaged in a protected activity under the Master Agreement and U.S.C 7116 a(1). Second, an adverse employment action had to be shown. The third consideration was that the adverse employment action was causally related to the protected activity. When these standards were applied to the

facts of this case, it was concluded that the Union's burden to establish a prima-facie case of retaliation had been met. When complaining to Captain Henderson on May 4, 2010 about Lt. Ingram's harassment of two bargaining unit employees, Officer Houck was performing in his role as a Union steward, a protected activity under both the Master Agreement and national labor policy. The next day, Officer Houck was subjected to an adverse employment action when Lt. Ingram took pictures of his unit and complained to Captain Henderson that he had maintained Unit 5A in a "dirty, filthy, nasty and let's say unkept [sic] condition on at least two occasions (Union Exhibit 2). This report exposed Officer Houck to further investigation and possible discipline, i.e., adverse employment actions. The final element of the Union's prima-facie case required it to establish a causal link between the protected activity and the adverse employment action. This is not a very demanding requirement in the context of establishing a prima-facie case. By showing that the adverse employment action occurred the day after Officer Houck had engaged in a protected activity, the Union satisfied the causality requirement. For these reasons, it was concluded that the Union produced sufficient evidence to meet its prima-facie burden.

Given that the Union made a prima-facie case of retaliation, the burden shifted to the Agency to present a legitimate, non retaliatory reason for the action Lt. Ingram took against Officer Houck. The Agency did this by pointing out the Unit 5A had cleanliness problems at the end of Officer Houck's shift. This was not an issue. Even a Union witness (Officer Awbrey) testified that the unit was messy on the morning of May 5, 2010. Once this point was established, the burden shifted back to the Union to show that the Agency's explanation was simply pretext for retaliation.

The preponderance of the evidence indicated that the Union met this burden. Several factors were considered when reaching this conclusion. As mentioned above, the timing of Lt.

Ingram's report to Captain Henderson was a concern. Officer Houck complained about Lt. Ingram to Captain Henderson of May 4, 2010. Captain Henderson discussed Officer Houck's concerns with Lt. Ingram that same day. The very next morning after Captain Henderson spoke with her, Lt. Ingram brought the mess in Unit 5A to his attention. Temporal proximity by itself might not be enough to warrant the conclusion Lt. Ingram's pictures and report of a dirty unit were retaliation. However, when other information was considered, it was reasonable for the Arbitrator to conclude that Lt. Ingram's report to Captain Henderson was pretextual and constituted retaliation for Officer Houck's Union steward activities.

Several other factors were considered when deciding that Lt. Ingram's actions were in retaliation for Officer Houck complaining about her harassment of bargaining unit members to Captain Henderson. First, it appeared that Officer Houck was singled out for special attention. The record indicated that Unit 5B was also messy on the morning of May 5, 2010. However, the record indicated that she did nothing in response to that situation. This suggested that she treated Officer Houck differently when compared with other officers who had dirty units. Second, Lt. Ingram's response to the mess in Unit 5A was different than how such situations are usually handled at the Federal Transfer Center. She took pictures of Unit 5A and forwarded them to Captain Henderson. The consistent testimony was that pictures are not taken in situations involving messy units. Use of cameras at the Federal Transfer Center appeared to be limited to violent situations involving inmates and assaults on staff. Lt. Ingram's actions indicted that she was building a case against Officer Houck unlike that in any other situation involving messy units. This factor combined with a lack of attention to other messy units indicated that Lt. Ingram was giving special attention to Officer Houck's situation that was not warranted by the nature of the problem. It must be remembered that Officer Awbrey, the individual who relieved

Officer Houck, testified that Unit 5A did not meet his standards of cleanliness but that the unit was not that messy. He testified that it took the orderlies about five minutes to clean it up. This special attention to what appeared to be a relatively minor problem could not be explained away by Lt. Ingram's argument that the May 5, 2010 incident was the second one in recent months involving Officer Houck.

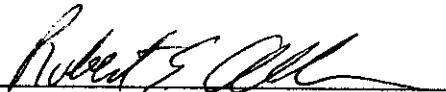
The third factor given weight when deciding that Lt. Ingram retaliated against Officer Houck was that she embellished her report to Captain Henderson. The Agency provided no support for statements Lt. Ingram included in her e-mail (Union Exhibit #2). This was an important consideration because the grievance denial letter mentioned that several complaints had been made about the condition of Unit 5A at the end of Officer Houck's shift. For example, Lt. Ingram claimed two officers told her that leaving the unit messy was common practice for Officer Houck, and that if officers said anything to him about the mess, they would "suffer behind it" (Union Exhibit #2). The Union provided witnesses who denied making such statements (Officer Ormiston and Officer Awbrey). Such embellishments indicated that Lt. Ingram was out to "get" Officer Houck when she had the opportunity.

The fourth consideration was that Lt. Ingram had alternatives to reporting the messy unit to Captain Henderson but did not use them. Instead, she took the most direct step that could have gotten Officer Houck into trouble, i.e., reported the matter to Captain Henderson. The record established that there are legitimate reasons for units being left messy. For example, events such as shakedowns and the termination of orderlies can interfere with cleaning activities. It was reasonable to expect an experienced supervisor to do a preliminary investigation to determine if there was an acceptable excuse for the mess before reporting a problem to a superior. Nothing was accomplished by reporting the situation to Captain Henderson given Officer Houck had a

legitimate explanation for the condition in which he left Unit 5A at the end of his shift. It must be remembered that Lt. Ingram was not Officer Houck's direct supervisor. They worked different shifts. She could have reported her concerns to the lieutenant to whom Officer Houck reported. Or, she could have spoken with Officer Houck. Had she done so she would have learned that the orderlies had been fired, and as a result, the cleaning did not get finished on the evening watch. Reporting her concerns so quickly and without any investigation supported the Union's claim that her purpose was to get Officer Houck in trouble. For these reasons, it was decided that Lt. Ingram's decision to send pictures and an e-mail to Captain Henderson on May 5, 2010 was an act of retaliation that reasonably interfered with Officer Houck's ability to perform his Union steward duties.

AWARD

After a thorough review of the entire record in this matter, it was decided that the Agency violated the Master Agreement Preamble, Article 6 section b(3) and 6; Article 7 Section a, and 5 USC 7116 a(1), when on May 5, 2010, Lt. Ingram retaliated against Union steward Bryan Houck by taking pictures of his assigned post, Unit 5A, and then reporting his failure to maintain a clean and sanitary unit to Captain Henderson. As a remedy, the Agency and Lt. Ingram are directed to cease and desist from retaliating, harassing, restraining, and coercing Union steward Bryan Houck from duly representing bargaining unit employees and assisting the Union before the Agency.


Robert E. Allen
Arbitrator