

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of PAUL F. WHELAN and U.S. POSTAL SERVICE,  
PROCESSING & DELIVERY FACILITY, Scranton, PA

*Docket No. 00-2399; Oral Argument Held May 7, 2002;  
Issued July 5, 2002*

Appearances: *Paul F. Whelan, pro se; Thomas G. Giblin, Esq.,  
for the Director, Office of Workers' Compensation Programs.*

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DECISION and ORDER

Before ALEC J. KOROMILAS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether appellant has established that he sustained an emotional condition in the performance of his federal employment, as alleged.

On April 26, 1998 appellant, then a 49-year-old electronic technician and union representative (maintenance director), filed a notice of occupational disease (Form CA-2) alleging that he suffered from "stress to the point of total burnout" as a result of his federal employment. In a form submitted with his claim, appellant stated:

"Management engaged in a constant pattern of harassment directed at me. Their actions appear to have been solely motivated by animosity towards my union activities. Their unfair and unjust attempts to portray me as a danger or detriment to the [employing establishment] created an impossible work situation. On November 11, 1997 supervisor Walton Sickler (with the approval of upper management) took actions against me which caused me to flee this threatening environment."

Appellant also submitted a written statement dated April 11, 1998 wherein he contended: "[t]here was an intentional, malicious, illegal, disparate pattern of treatment by postal management" which resulted in "great emotional and physical harm" to appellant and his family and that in the summer of 1997 the maintenance supervisor (Sickler) "began an aggressive campaign to disrupt and thwart the grievance process to a much greater extent than he and maintenance manager Pete Parinisi had been doing for years." He noted:

"Supervisor Sickler's actions consisted of, but were not limited to, withholding requested information, attempting to charge for requested information, making himself unavailable for meetings and attempting to play favorites and create

disharmony among maintenance employees. At the same time, Mr. Sickler added duties to [t]our 1 but consistently refused to cover any of those vacancies which left me alone on the tour. This increased the pressures and difficulties on me to perform all my duties.”

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“Mr. Sickler’s animosity towards me reached the criminal in October 1997. During a grievance meeting he accused me of spending too much time on grievances and not doing my job. When I began to defend my work ethic, Mr. Sickler ordered me out of his office for insubordination. Then, against the advice of another supervisor, he ordered me to leave the building and took me out of a pay status. After I left the building, Mr. Sickler called the postal police in Philadelphia and the inspection service. He then changed the ‘charge’ from insubordination to ‘threatening a supervisor.’”

Appellant noted that the inspection service found the charges to be without merit. He also noted that on November 11, 1997 Mr. Sickler came in on his day off, took him into his office and asked him to sign a form for Employee Assistance Program (EAP) counseling which contained references to observed troublesome behavior and work habits. Appellant noted that Mr. Sickler told him that this referral was due to the incident in his office.

The employing establishment controverted the claim. The employing establishment contends that the meeting between appellant and Mr. Sickler on October 8, 1997 was not union business, but was to discuss appellant’s bypassing an assigned maintenance route and that as a result of appellant’s behavior in this meeting, he was referred to EAP. The employing establishment further alleged that when appellant was advised that he was being referred to EAP, he left the building and has not returned. The employing establishment also stated that appellant voluntarily signed the overtime desired list and voluntarily chose the courses and dates for training.

In support of his claim, appellant submitted numerous statements by officials of the union wherein they indicated that the union had difficulty in conducting negotiations with Mr. Sickler, who worked as superintendent of maintenance. These statements indicated that Mr. Sickler had numerous grievances filed against him, was a vindictive supervisor and a liar, was argumentative, had a volatile temper, becomes aggressive and belligerent when his actions are contested through the grievance procedure and had poor management skills. One former union officer stated that he found it hard to maintain his personal composure when dealing with Mr. Sickler and that Mr. Sickler often scheduled the wrong person to work overtime. In a statement on union letterhead dated April 23, 1998, Kevin Gallagher, who was the general president and assistant editor of the Scranton union, stated that he has had to spend an inordinate amount of time to deal with problems that existed “because of a recalcitrant, vindictive, personality driven vendetta by both Maint. Mgt. Parinisi and Maint. Supervisor Sickler.” He noted that “Mgr. Parinisi has conspired to obfuscate, delay, hamper and directly violate any and all tenets of the contract in an effort to ‘get back at’ [appellant].” Mr. Gallagher gave numerous examples of Mr. Parinisi’s problems with the union. He stated that Mr. Sickler “was incompetent, a liar, prone to outbursts of anger when questioned and extremely vindictive.

Mr. Gallagher contended that Mr. Sickler showed “absolutely no common sense as the [s]cheduling [c]oordinator for [m]aintenance.” He noted that Mr. Sickler made it difficult for appellant to meet with him concerning grievances. Mr. Gallagher also stated that Mr. Sickler did not follow EAP guidelines when he referred appellant for counseling.

Similar complaints were made with regard to Mr. Parinisi. Appellant also submitted copies of his letters with regard to union business. He also provided copies of letters wherein different persons indicated that he was an excellent employee, offering support for the work he did in the union and attacking Mr. Sickler and Mr. Parinisi.

The record also includes copies of appellant’s time sheets which include handwritten notes regarding time spent on union business, copies of forms indicating that appellant signed the “[o]vertime [d]esire [l]ist” along with a list of who got overtime and appellant’s request for various courses.

The employing establishment submitted a statement by Mr. Parinisi dated April 29, 1998 wherein he indicated that an incident took place on October 8, 1997 that resulted in appellant being sent home for insubordination towards his supervisor when during the discussion, appellant became very loud, screamed and “slammed the office door with such force that it had to be repaired.” He noted that, in a meeting the next day, it was decided that appellant would be referred to EAP for his behavior, that on November 12, 1997 Mr. Sickler issued appellant the referral slip which appellant refused to sign and that this was the last day appellant worked for the employing establishment. Mr. Parinisi also noted that appellant had very good technical abilities for his job as an electronics technician, but that as a union official, he has a tendency to get very upset when he feels management is not responding to his demands.

The record also contains a May 1, 1998 narrative by Mr. Sickler wherein he noted that an injury was never reported to him by appellant, that, during the October 8, 1997 meeting, appellant became angry and slammed the door, that he told him to clock off for being insubordinate, that he set appellant up for a meeting with EAP on November 13, 1997, but that when he presented the form to appellant, he would not sign it. Tim Burke signed the form concurring with the referral.

The record also contains a letter dated October 9, 1997, wherein Mr. Lemoncelli, a union steward, stated that he walked into a meeting between Mr. Sickler and appellant and that Mr. Sickler had a piece of paper that he noticed was on union letterhead.

A statement by Gene Biglin dated October 9, 1997 noted that on October 8, 1997 he entered Mr. Sickler’s room and he saw Mr. Sickler sitting at his desk holding a paper which seemed to be some sort of agenda and that appellant was sitting across from him with his notebook open. Mr. Biglin indicated, “[a]s it was evident to me that they were involved in a grievance discussion, through common courtesy I immediately withdrew from the room not wanting to overhear privileged information.”

In a statement dated October 9, 1997, Mr. Hoban indicated that he was standing on the workplace floor when Mr. Sickler and appellant approached. Mr. Sickler indicated that he was

having a discussion with appellant when appellant screamed and slammed the door so hard that it knocked a fixture off the back of the door.” He noted:

“[Appellant] said he had been waiting about twenty minutes to talk to [Mr. Sickler] about Union business. When he began to discuss what he had on his agenda [Mr. Sickler] changed the subject to whether [appellant] was completing his work orders or not and would not discuss the subject at hand. The discussion began to get a little heated so I ask them to let cooler heads prevail. At which time [appellant] said [Mr. Sickler] do you still want me to go home, [Mr. Sickler] answered yes and [appellant] left.”

The record contains a management referral to EAP dated November 10, 1997, noting a referral of appellant for an appointment on November 13, 1979 at 8:45, was signed by Mr. Sickler but that appellant refused to sign.

By decision dated November 10, 1998, the Office denied appellant’s claim, finding that he failed to establish that an injury occurred in the performance of duty. By letter dated December 2, 1998, appellant requested an oral hearing.

In further support of his claim, appellant submitted a folder containing information about EAP for the employing establishment. A brochure enclosed therein indicated that EAP was a counseling and referral service designed to help employees with personal, job or family problems. The folder included guidelines for a supervisor planning to refer appellant to the program. The recommended referral procedure noted that when it was first recognized that an employee’s attendance, job performance or conduct is deteriorating, the supervisor should document his files to enable him to talk specifics with the troubled employee. If this behavior continues to deteriorate, the supervisor should have a private talk with the employee about the problem areas. The guidelines state that if an employee does not bring his or her performances in line with what is acceptable during a set timeline, the supervisor should consult with EAP about a referral. According to the regulations included in the packet, the employee may be referred to EAP by fellow employees, union representatives, medical personnel, family members or social service agencies and management has the authority to require the employee to attend the initial EAP’s interview.

In a letter dated February 13, 1999 from Mr. Gallagher to appellant, he indicated that Mr. Sickler never followed the proper procedures for referring appellant to the EAP program. Appellant also submitted further letters of reference from other employees and various other letters from Mr. Gallagher to appellant discussing appellant’s case.

In a decision dated July 23, 1999, the hearing representative affirmed the Office’s decision denying appellant’s claim.

The Board finds that appellant failed to meet his burden of proof in establishing that he developed an emotional condition due to factors of his federal employment.

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the

concept of coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.<sup>1</sup>

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.<sup>2</sup> If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.<sup>3</sup>

Initially, the Board notes that appellant's contentions that working overtime and attending classes contributed to his emotional disability. The Board finds that these allegations regard administrative or personnel matters unrelated to appellant's regular or specially assigned work duties and do not fall within the coverage of the Act.<sup>4</sup>

However, the Board has found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment.<sup>5</sup> Appellant has not submitted evidence that management erred or acted abusively in any specific instance relating to these matters. With regard to his working overtime, the employing establishment has submitted forms indicating that appellant regularly volunteered to work overtime. Furthermore, although the employing establishment conceded that employees were required to take various classes to keep them up to date on various machines, they submitted records showing that appellant requested that he take the specific classes at specific times. Therefore, as appellant has not shown that management handled these issues in a manner establishing error or abuse, it is not sufficient to establish compensability under the Act.<sup>6</sup>

With regard to Mr. Sickler's referral of appellant to EAP counseling, this would also be considered an administrative or personnel matter. Appellant alleged that Mr. Sickler did not follow the proper procedures for referring him to EAP counseling and, therefore, his behavior

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> See *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

<sup>3</sup> *Id.*

<sup>4</sup> See *Janet I. Jones*, 47 ECAB 345, 347 (1996); *Abe E. Scott*, 45 ECAB 164, 171 (1993); *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990).

<sup>5</sup> See *Michael Thomas Plante*, 44 ECAB 510, 516 (1993).

<sup>6</sup> *Leroy Thomas*, 46 ECAB 946, 952 (1995).

amounted to error or abuse sufficient to establish compensability under the Act. The Board disagrees. The record indicates that appellant was given a management referral to EAP, dated November 10, 1997, referring appellant for counseling on November 13, 1979. Appellant refused to sign this document, but it was signed by Mr. Sickler and Mr. Burke. In support of his contention that, the employing establishment did not follow proper procedures in referring appellant to EAP, appellant submitted a folder containing various regulations and procedures with regard to EAP. The procedures recommend that, when it is first recognized that an employee's job performance is deteriorating, the supervisor should document his files to enable him to discuss the specifics with the troubled employee and that, if the supervisor sees the deterioration continuing, he should arrange a private talk with the employee and give the employee an acceptable time frame to bring his work activities within the proper standards. The guidelines state that if at that point the employee does not bring his or her performance to within acceptable standards, then a referral should be made to EAP. The Board notes that these procedures indicate that an employing establishment "should" follow these procedures, not that it "must." Nevertheless, the Board notes that appellant's supervisor did attempt to meet with appellant to discuss problems, but that it was at that meeting that appellant raised his voice and slammed the office door, causing management great concern. Therefore, the Board finds that the employing establishment acted within its discretion in referring appellant to EAP.

In the instant case, the overwhelming majority of appellant's allegations regard problems he had with management and in particular with Mr. Sickler and Mr. Parinisi, with regard to his duties as a union steward. The Board has held that matters pertaining to union activities are generally not deemed employment factors.<sup>7</sup> The involvement of union activities, however, does not preclude the possibility that compensable factors of employment have been alleged. The Board has recognized an exception to the general rule in that the employees performing representational functions which entitle them to official time are in the performance of duty and entitled to all benefits of the Act if injured in the performance of those functions.<sup>8</sup> The underlying rationale for this exception is that an activity undertaken by an employee in the capacity of union office may simultaneously serve the interests of the employer.<sup>9</sup> The procedure manual indicates:

"When an employee claims to have been injured while performing representational functions, an inquiry should be made to the official superior to determine whether the employee had been granted 'official time' or in emergency cases, would have been granted official time if there had been time to request it. If so, the claimant should be considered to have been in the performance of duty."<sup>10</sup>

The Board concludes that the evidence does not establish that the employing establishment erred or acted abusively with regard to appellant and his union activities.

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<sup>7</sup> *Dinna M. Ramirez*, 48 ECAB 308, 313 (1997); *George A. Ross*, 43 ECAB 346, 353 (1991).

<sup>8</sup> *See Ray C. Van Tassell, Jr.*, 44 ECAB 316, 321 (1992); *Larry D. Passalacqua*, 32 ECAB 1859, 1862 (1981).

<sup>9</sup> *See A. Larson, The Law of Workers' Compensation* § 27.33(c) 1990.

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (March 1994).

Although there are numerous statements in the record from appellant's colleagues, both from union representatives and colleagues at work, which indicate problems in dealing with certain supervisors, these statements are not persuasive, as they are from individuals who acted as union stewards or individuals who were represented by appellant. Their statements are not impartial. Furthermore, the Board notes that there is no finding in the record of any official action taken against these supervisors on behalf of the union, nor that there was any finding by any panel that the employing establishment acted improperly in dealing with the union.

The Board notes that there is a dispute as to whether the meeting of October 8, 1997 concerned union business or appellant's work performance. Appellant insists that he went into Mr. Sickler's office to discuss union business, whereas Mr. Sickler contends that he called appellant into his office to discuss a matter involving appellant's job as an electronics technician, not union grievances. The fact that appellant may have clocked in as a union steward prior to going into Mr. Sickler's office is not sufficient to establish that this meeting was concerning union activities. Mr. Biglin's statement that he observed Mr. Sickler with what appeared to be an agenda and that it was obvious to him that they were in a grievance proceeding just indicates Mr. Biglin's thoughts on a very brief observance of the posture of appellant and Mr. Sickler during the meeting and does not provide proof as to what was being discussed. Mr. Sickler has continuously stated that this meeting was to discuss appellant's work performance. Although appellant may have mentioned union business while he was in the meeting, the evidence is clear that Mr. Sickler refused to discuss union business at this time. Accordingly, the purpose of the meeting was for discussing a work matter, not union activities. The discussion of appellant's job performance is an administrative matter.<sup>11</sup> There is no evidence that Mr. Sickler acted abusively in this meeting.

Appellant has not established that the employing establishment's action with regard to appellant's union activities were taken in error or were abusive. Furthermore, he has not established a compensable factor with regard to his employment activities. Therefore, appellant has not established any compensable factors of employment and, therefore, he has not established that he sustained an injury in the performance of duty.

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<sup>11</sup> *Michael Thomas Plante*, 44 ECAB 510 (1993).

Accordingly, the decision of the Office of Workers' Compensation Programs dated July 23, 1999 is affirmed.

Dated, Washington, DC  
July 5, 2002

Alec J. Koromilas  
Member

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member