United States Department of Labor
Employees' Compensation Appeals Board

R.L., Appellant	)	
	)	
and	)	**Docket No. 18-1375**
	)	**Issued: May 1, 2019**
DEPARTMENT OF VETERANS AFFAIRS, PUGET SOUND HEALTH CLINIC, Seattle, WA, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge

JURISDICTION

On July 5, 2018 appellant filed a timely appeal from a January 8, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUE

The issue is whether appellant has met her burden of proof to establish an emotional condition in the performance of duty.

FACTUAL HISTORY

On January 13, 2015 appellant, then a 58-year-old nurse, filed a traumatic injury claim (Form CA-1) alleging that she sustained an emotional condition on December 18, 2014 at 11:00

[1] 5 U.S.C. § 8101 *et seq.*

a.m. when the employing establishment police improperly arrested her with an unwarranted display of force while she was engaged in union duties. On the reverse side of the claim form, the employing establishment checked a box marked "Yes," indicating that she was injured in the performance of duty.

In a development letter dated January 21, 2015, OWCP requested additional factual and medical evidence in support of appellant's alleged December 18, 2014 traumatic injury. By separate letter of even date, it requested that the employing establishment provide comments regarding her claim, a copy of her position description, and the results of any investigation. OWCP afforded both parties 30 days to respond.

On January 15, 2015 Dr. Keith Sonnanburg, a licensed clinical psychologist, opined that appellant was totally disabled from work due to a work-related psychological injury. On February 2, 2015 he diagnosed work-related stress and anxiety. Dr. Sonnanburg checked a box marked "yes" to indicate that appellant's condition was caused or aggravated by her employment activity and added that her condition was directly related to episodes at her place of employment.

By decision dated February 24, 2015, OWCP denied appellant's traumatic emotional condition claim, finding that she had not met her burden of proof to establish her claim because she failed to provide specific details of the alleged December 18, 2014 employment incident.

On March 11, 2015 appellant requested a review of the written record from an OWCP hearing representative. She provided additional information in support of this request. On March 3, 2015 appellant described the events of December 18, 2014. She noted that she was the union vice president and was responsible for representing employees in meetings and hearings with management, for filing grievances, and for protecting employees' rights. In the course of representing an employee, R.G., a physician, appellant met with him on December 18, 2014 to discuss a fact-finding interview scheduled on that date. Appellant consulted *via* telephone with. J.M., a physician who was also the national union representative, who confirmed that R.G. was entitled to union representation at the scheduled fact finding interview. She and the chief union steward, A.T., met the acting director of the employing establishment, and R.N., an employing establishment official, in the hallway and the acting director informed them that R.G. did not have representation rights for the upcoming interview. Appellant disagreed and noted that he had requested her presence during the fact finding interview. She attended the interview with the permission of the interviewer, Dr. G. and took notes. Shortly, after the interview began, R.N. interrupted the meeting and insisted that appellant and A.T. leave. After she left the room, appellant informed R.N. that she would file an unfair labor practice complaint against the employing establishment, and requested his name. She remained outside of the conference room in the hallway on her cellphone. Two armed and uniformed employing establishment police officers, Lt. W.C., and Lt. E., began searching the area near the conference room, entered the conference room, and then returned to appellant. The officers asked her name and informed her that they had been asked to remove her from that area and floor of the employing establishment building. Appellant alleged that her removal was solely because of her protected union activities. She noted that Lt. W.C. became agitated and denied that there were any charges against appellant, but asked for her security badge. Appellant informed the officers that her badge was in her office and led them to her office to get it. The police denied that she was under arrest and released her from custody after reviewing her badge. Appellant alleged that this incident caused her heart

palpitations, shock, and fear. She was unable to continue her work that day and eventually went home. Appellant reported to work the next day and again experienced heart palpitations and tension. She felt that the stress was too much. Appellant had to ask coworkers to complete her assigned work for her. She began to have nightmares about working at the employing establishment.

Appellant noted that she had filed a Federal Labor Relations Authority (FLRA) complaint against the employing establishment, but had not yet received a final decision. She alleged that the employing establishment interfered with protected union activity when it called the police after she left the interview.

Appellant provided a February 19, 2015 witness statement from R.G., who noted that he had requested that she accompany him to the interview to protect his rights. R.G. invited her into the interview and Dr. G., who was conducting the interview, indicated that he did not have a problem with her presence. He reported that, shortly after the interview began, management officials, including R.N., entered the room and informed the participants that R.G. did not have the right to union representation. Appellant then left the room.

In a February 19, 2015 statement, B.A., the union president, described the events of December 18, 2014 and confirmed that the police officers denied that appellant was under arrest, but escorted her into her office and examined her badge. Appellant told B.A. that the officers had been called to remove her from the area of the meeting. B.A. stated that an officer informed her that the "panic button" had been pushed as a means of calling the police to the scene.

A February 20, 2015 e-mail from J.M., a physician who is the national union representative, indicated that he was aware that appellant was acting as R.G.'s representative in the scheduled interview. On February 20, 2015 A.T., chief union steward, reported that he attended the December 18, 2014 meeting with her and R.G. He confirmed that Dr. G, the interviewer, consented to their presence during the interview. A.T. was taking notes when R.D. entered and asserted that union representation was not allowed. Appellant and he then left the room.

In an undated form report, Dr. Sonnanburg noted that appellant was attending a meeting as a union representative and was shocked by the employing establishment police who responded to an improper panic signal and removed her. He diagnosed adjustment disorder with mixed anxiety and depressed mood with post-traumatic stress disorder symptom pattern.

In a letter dated April 24, 2015, appellant petitioned to withdraw her request for a review of the written record. On May 1, 2015 OWCP's Branch of Hearings and Review granted her petition to withdraw. On May 5, 2015 appellant requested reconsideration of the February 24, 2015 OWCP decision.

By development letter dated September 29, 2015, OWCP requested additional factual information from the employing establishment including a statement from a supervisor regarding the accuracy of appellant's claim, whether her job was stressful, and a copy of her position description. It afforded 30 days for a response. The employing establishment did not respond until December 17, 2015. It contended that R.G. was not entitled to union representation at the

December 18, 2015 interview and that appellant was aware of this fact. Appellant entered the room where the interview was scheduled on December 18, 2015 and R.N. had asked her to leave. The employing establishment asserted that she commented that she would leave the room, but would stand immediately outside the door. Appellant then demanded information from R.N. in a loud and aggressive manner. R.N. informed her that her behavior was inappropriate and asked her to leave the floor. Appellant refused. R.N. then asked the receptionist to summon the police and she activated the panic button. The police arrived and asked to see appellant's identification. They escorted her to her office to retrieve her badge.

The employing establishment contended that appellant was not arrested, accosted, or subject to unwarranted display of force. It asserted that R.G. had no right for union representation, that she was advised of this, that she refused to leave the area when asked, and that she was, therefore, acting on her own volition, not as part of protected union activity. The employing establishment asserted that appellant was not in the performance of duty.

By decision dated January 19, 2016, OWCP modified the February 24, 2016 decision to reflect that there was no evidence that the employing establishment's actions regarding the December 18, 2014 meeting were abusive, erroneous, or improper. It found that appellant's reactions were self-generated and not compensable.

Appellant requested reconsideration of the January 19, 2016 decision on January 18, 2017. She provided an additional narrative statement dated January 14, 2017. Appellant asserted that on December 18, 2014 she attended a meeting on the fifth floor of the employing establishment in room 523 to represent R.G. She was ordered to leave the room and did so. Appellant remained in the hallway, outside of the room awaiting R.G. in case her assistance was needed. She alleged that she was quiet, that she was not disruptive, and that she was checking her cellphone for a phone number of a colleague to ask for advice. Appellant noted that she was so quiet that the police officers did not notice her and had to ask where she was. When she asked what charges were being leveled against her, one of the officers became red-faced and flustered. The police officer used an angry voice to tell appellant that she had to leave the fifth floor and that he had to remove her from the area. Appellant believed that she had no choice but to leave with the police under their escort. The police officers walked on either side of her and escorted her to her office on the fourth floor. On the fourth floor they notified appellant that she was free to go.

In a January 3, 2017 letter, B.A. indicated that R.G. requested union assistance and that on December 18, 2014 appellant was engaged in representational functions at the time of her injury. She noted that she was appellant's supervisor and that she was entitled to official time at the time of her injury.

On January 4, 2017 A.B., an administrative assistant, provided a statement noting on December 18, 2014 she observed appellant enter the conference room. She reported that appellant was asked to leave the room and did so. R.N. then asked A.B. to call security which she did. A.B. noted that appellant was in the hallway after leaving the conference room and did not raise her voice or make noise. She asserted that appellant did not cause any commotion or disturbance from the time when appellant left the conference room until the police removed her from the area.

Appellant provided a copy of the FLRA settlement agreement signed by the acting regional director of the employing establishment on January 23, 2016 and the FLRA notice to employees which was signed by the employing establishment's medical center director on January 24, 2016. Under the FLRA settlement agreement, the employing establishment was required to ensure that all references to the police encounter with her on December 18, 2014 was expunged from its records, and forbidden to rely on this incident in any future action. It was also required to post the following notice to all employees:

> "On or about December 18, 2014 [the employing establishment] police removed [appellant] from a location where she was waiting for an employee to exit a meeting. The [FLRA] statue prohibits an [employing establishment] from interfering with an employee's exercise of protected activity and/or taking an action against an employee because of the exercise of protected activity."

The notice further provided that the employing establishment would not interfere with the exercise of protected activity or take an action against an employee because of the exercise of protected activity. The notice concluded, "WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured by the [FLRA]."

On March 17, 2017 the employing establishment responded to appellant's January 18, 2017 request for reconsideration. In a statement dated November 3, 2015, A.B., noted that she was sitting at her desk on December 18, 2014 near room 523 at the employing establishment. She reported that R.N. asked her to contact the police and that appellant was asked to leave the area, but refused to go. A.B. contacted the police due to "the disruptive behavior of [appellant]." She asserted that she was shaken by the behavior of another employee and that appellant was standing right in front of her desk when the police arrived.

In an e-mail dated May 28, 2015, R.N. reported that the December 18, 2014 meeting was not associated with personnel issues, that the union have no vested interest in attending, and that both R.G. and the union were made aware of these facts prior to the meeting. He asserted that the union presence was disruptive and unnecessary. R.N. asked the union officials to leave. He alleged that appellant became confrontational and initially refused to leave the room. Appellant then agreed that she would leave the room, but asserted that she would stand immediately outside the door in an outer office area. Once in the office area, she then demanded identification from R.N. R.N. asserted that appellant's demeanor was loud and aggressive. He informed her that this behavior was inappropriate and again asked her to leave, and she refused. A.B. was asked to summon the police and activated a panic button. When the police arrived, they asked to see appellant's identification. Appellant did not have identification and the officer escorted her out of the area. R.N. asserted that she was not engaged in protected union activity and that her disruptive behavior in the outer office work environment was inappropriate.

In an e-mail dated November 23, 2015, an employing establishment police officer, Lt. W.C., noted that on December 18, 2014 he was called to room 523 due to a disruptive situation. He indicated that he contacted someone in the office who informed him that they were conducting a meeting, that appellant was being disruptive, and that person requested that appellant be escorted out of the office as the meeting did not require union presence. Lt. W.C. asserted that appellant was argumentative toward the staff, loud, and disruptive. He noted that he advised her that she

needed to leave the area and that she became argumentative toward him and told him that it was her right to be in the office. Lt. W.C. alleged that appellant's demeanor was argumentative and loud. He escorted her to the union office and directed her actions to the union president. Appellant explained that Lt. W.C. did not know how to do his job.

On April 26, 2017 OWCP provided appellant with a copy of the employing establishment's responses and afforded her 20 days to submit comments. On May 15, 2017 appellant responded and asserted that, in the FLRA posting, the employing establishment posted a notice regarding protected activity and employees' rights in accordance with FLRA statute. She further noted that the settlement agreement included that her interactions with the employing establishment police on December 18, 2014 would be expunged from the employing establishment's records.

By decision dated June 27, 2017, OWCP denied appellant's request for reconsideration of the merits of her claim, finding that her request was untimely filed, as it was received on January 20, 2017, and it failed to demonstrate clear evidence of error. It listed the evidence submitted with her request for reconsideration, including the FLRA settlement agreement.

In a telephone memorandum dated September 7, 2017, OWCP's claims examiner noted reviewing appellant's claim file and found that her requests for reconsideration were hand delivered and entered into integrated Federal Employees Compensation System on January 18, 19, and 20, 2017. The claims examiner directed appellant to either appeal her claim to the Board or to make an additional request for reconsideration, which would not be timely, but noted that the date of her original request for reconsideration would establish clear evidence of error.

On September 20, 2017 appellant requested reconsideration of the January 19, 2016 decision. She noted that her initial request for reconsideration was received by OWCP on January 18, 2017 and was thus timely.

By decision dated January 8, 2018, OWCP reviewed the merits of appellant's claim, but denied modification of its prior decision. It noted, "A supervisor overturned the untimely decision and you filed a new reconsideration request received on September 11, 2017." Substantively, OWCP found that appellant had submitted no evidence to demonstrate that the employing establishment acted in an abusive or improper manner in regard to the December 18, 2014 meeting. It further found that the FLRA settlement agreement did not provide an admission of error or abuse on the part of the employing establishment. OWCP determined that appellant's emotional reaction was self-generated and, therefore, not due to a compensable factor of her employment.

LEGAL PRECEDENT

To establish that appellant sustained an emotional condition causally related to factors of her federal employment, the claimant must submit: (1) factual evidence identifying and supporting employment factors or incidents alleged to have caused or contributed to her condition; (2) rationalized medical evidence establishing an emotional condition or psychiatric disorder; and

(3) rationalized medical opinion evidence establishing that the emotional condition is causally related to the identified compensable employment factors.[2]

Workers' compensation law does not apply to each and every injury or illness that is somehow related to one's employment. There are situations where an injury or illness has some connection with the employment, but nevertheless does not come within the purview of workers' compensation. When disability results from an emotional reaction to regular or specially assigned work duties or a requirement imposed by the employment, the disability is deemed compensable.[3] However, disability is not compensable when it results from factors such as an employee's fear of a reduction-in-force, or frustration from not being permitted to work in a particular environment, or hold a particular position.[4]

An employee's emotional reaction to administrative or personnel matters generally falls outside FECA's scope.[5] Although related to the employment, administrative and personnel matters are functions of the employing establishment rather than the regular or specially assigned duties of the employee.[6] However, to the extent the evidence demonstrates that the employing establishment either erred or acted abusively in discharging its administrative or personnel responsibilities, such action will be considered a compensable employment factor.[7]

The Board has adhered to the principle that union activities are personal in nature and are not considered to be within the course of employment.[8] Attendance at a union meeting, for example, is exclusively for the personal benefit of the employee and devoid of any mutual employer-employee benefit that would bring it within the course of employment.[9]

The Board has recognized an exception to this general rule. Employees performing representational functions which entitle them to official time are considered to be in the performance of duty if injured during the performance of those functions.[10] The underlying

[2] *C.M.,* Docket No. 17-1076 (issued November 14, 2018); *Kathleen D. Walker*, 42 ECAB 603 (1991).

[3] *A.C.,* Docket No. 18-0507 (issued November 26, 2018); *Pamela D. Casey*, 57 ECAB 260, 263 (2005); *Lillian Cutler*, 28 ECAB 125, 129 (1976).

[4] *Cutler id*.

[5] *G.R.,* Docket No. 18-0893 (issued November 21, 2018); *Andrew J. Sheppard*, 53 ECAB 170-71 (2001); *Matilda R. Wyatt*, 52 ECAB 421, 423 (2001); *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991).

[6] *C.M., supra* note 2; *David C. Lindsey, Jr.*, 56 ECAB 263, 268 (2005) *McEuen id*.

[7] *Id.*

[8] *J.G.,* Docket No. 17-1948 (issued September 13, 2018); *Jimmy E. Norred*, 36 ECAB 726 (1985).

[9] *J.G., id.*; *C.M.,* Docket No. 10-0753 (issued December 15, 2010).

[10] *J.G., id.*; *R.F.,* Docket No. 14-0770 (issued September 29, 2015) (those on official time performing activities related to the internal business of a labor organization such as soliciting new members or collecting dues are not considered to be in the performance of duty. The singular fact that one is on paid official time for union representation is not enough to establish that every interaction during such official time is within the performance of duty).

rationale for this exception is that an activity undertaken by an employee in the capacity of a union official may simultaneously serve the interest of the employing establishment.[11] OWCP's procedures indicate that representational functions include authorized activities undertaken by employees on behalf of other employees pursuant to such employees' right to representation under statute, regulation, executive order, or terms of a collective bargaining agreement.[12]

ANALYSIS

The Board finds this case not in posture for a decision.

OWCP procedures discuss union representational functions and official time.[13] There are specific guidelines for case development when union activity may be involved:

> "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…."[14]
>
> "If [an employing establishment] states that the employee was not performing an activity for which official time is allowed, [OWCP] should issue a letter warning [appellant] that the case will be denied unless additional information is provided, and allowing [30] days for a response. If there is no timely response from [appellant], a formal decision should be issued on the ground[s] that [appellant] is not in the performance of duty.
>
> "If [appellant] provides evidence contradicting the [employing establishment's] position, the official superior should be asked to reply to this evidence, providing documentation in the form of appropriate regulations, executive order or union agreement covering the specific situation. [OWCP] will accept the ruling of the [employing establishment] as to whether a representative was entitled to official time unless the ruling is later overturned by a duly authorized appellate body."[15]

Appellant asserted that she was performing a representative function for R.G. on December 18, 2014 at 11:00 a.m. when she sustained her emotional condition. B.A., the union

[11] *J.G., id.*; *Marie Boylan*, 45 ECAB 338, 342-43 (1994).

[12] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Performance of Duty*, Chapter 2.804.16 (July 1997).

[13] *Id.*

[14] *Id.*

[15] *Id.*

president noted that she was appellant's supervisor and that appellant was entitled to official time on December 18, 2014.

In its January 21 and September 29, 2015 development letters to the employing establishment, OWCP did not ask whether appellant, the union vice president, utilized official time at 11:00 a.m. on December 18, 2014 when she alleged that her injury occurred, and the employing establishment has not specifically addressed this issue.[16] It, therefore, never clarified with the employing establishment, pursuant to its procedures, whether she was on official time as the union vice president at 11:00 a.m. on December 18, 2014. In addition, OWCP's procedures required the employing establishment to provide documentation in the form of appropriate regulations, executive order, or union agreement covering the specific situation, in this case a "fact-finding" interview.[17] OWCP has not requested this information and the employing establishment has provided no documentation in support of its allegations.

On remand, OWCP must request that the employing establishment address appellant's use of official time. If on official time it should provide documentation establishing her representational function at the fact finding interview on December 14, 2018.[18] If the employing establishment finds that appellant was not on official time, she should be advised of the finding and be provided an opportunity to submit relevant evidence on the issue.

As OWCP did not follow its own procedures with respect to the development of the claim, the case is not in posture for decision. After such further development as deemed necessary, it shall issue a *de novo* decision.

CONCLUSION

The Board finds that this case is not in posture for decision.

[16] *Supra* note 12 at Chapter 2.804.16.e.

[17] *Id.*

[18] *R.F.*, Docket No. 12-1816 (issued May 21, 2013).

ORDER

IT IS HEREBY ORDERED THAT the January 8, 2018 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Issued: May 1, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board