

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK OFFICE OF ASYLUM, ROSEDALE, NEW YORK Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL NO. 1917 Charging Party	Case No. BN-CA-60151
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NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.26(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before **MARCH 31, 1997**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW, 4th Floor
Washington, DC 20424-0001

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 25, 1997
Washington, DC

UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: February 25, 1997

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION
SERVICE, NEW YORK OFFICE OF
ASYLUM, ROSEDALE, NEW YORK

Respondent

and

Case No. BN-CA-60151

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL NO. 1917

Charging Party

Pursuant to Section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits and any briefs filed by the parties.

Enclosures

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK OFFICE OF ASYLUM, ROSEDALE, NEW YORK Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL NO. 1917 Charging Party	Case No. BN-CA-60151

Mr. Todd Boucher
For the Respondent

Mr. Georgy Sirota
For the Charging Party

Gary J. Lieberman, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq. 1, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns two issues: First, whether Respondent conducted a formal discussion, within the meaning of § 14(a) (2) of the Statute, on October 16, 1995, without affording American Federation of Government Employees, AFL-CIO, Local

1

For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116 (a) (5) will be referred to, simply, as, "\$ 16(a) (5)."

No. 1917 (hereinafter, "Union") an opportunity to be represented, in violation of §§ 16(a)(1), (5) and (8) of the Statute; Second, whether Respondent terminated Tamara Coleman, a probationary employee, on November 30, 1995, because she engaged in protected activity, in violation of §§ 16(a)(1) and (2) of the Statute.

This case was initiated by a charge, filed on December 4, 1995 (G.C. Exh. 1(a)), which alleged violation of §§ 16(a)(1) and (2) of the Statute; and a First Amended Charge, filed on July 22, 1996 (G.C. Exh. 1(b)), which alleged violation of §§ 16(a)(1), (2), (5) and (8) of the Statute. The Complaint and Notice of Hearing issued July 23, 1996 (G.C. Exh. 1(c)) and set the hearing for October 8, 1996, pursuant to which a hearing was duly held on October 8 and 9, 1996, in New York City, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, November 12, 1996, was fixed as the date for mailing post-hearing briefs and Respondent and General Counsel each timely mailed a brief, received on, or before, November 21, 1996, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

FINDINGS

1. The New York Office of Asylum (hereinafter, "Respondent"), located at Rosedale (Queens, N.E. of Kennedy Airport), New York, was established in November, 1994, and was the eighth Office of the Asylum Corps of the Immigration and Naturalization Service (Tr. 19, 20, 96-97). Respondent reports directly to the Director of the Asylum program in Washington, D.C. (Tr. 20) and has no direct reporting relationship with the New York District of the Immigration and Naturalization Service (Tr. 98).

Ms. Yvette LaGonterie is Director of Respondent, having served in that capacity since its establishment in 1994 (Tr. 20, 96-97), and there is a Deputy Director, Ms. Patricia Trubiano (Tr. 27). At the time of the hearing, there were a total of 88 INS employees (Tr. 98) and three contract employees (Tr. 98). Below the Director and Deputy Director are eight supervisory Asylum Officers (Tr. 98); 48 Asylum Officers (Tr. 98); an Administrative Officer, a secretary and, reporting to the Administrative Officer, an administrative assistant and a clerk; at the clerical level are supervisory Asylum clerks, a pool of Asylum clerks; and

a pool of Immigration Officers and Immigration Information Officers (Tr. 98).

2. Ms. Tamara L. Coleman was hired by Respondent on June 19, 1995, as a GS-5 Personnel Clerk (Jt. Exh. 5; Tr. 87) in the Administrative Office. Her immediate supervisor was the Administrative Officer, Ms. Cheryl Joseph-Oyebisi (G.C. Exh. 6; Tr. 138).

Ms. Coleman has a Bachelor of Science degree in criminal justice from the New York Institute of Technology, having been graduated in August, 1994 (Tr. 87, 193). She was terminated on November 30, 1995, during her probationary period (Jt. Exh. 5; Tr. 87) and is now employed by the state of New York. The position description stated, inter alia, that,

"I. INTRODUCTION

"Position is . . . under the supervision of the Administrative Officer. The purpose of the position is to provide substantive clerical duties and other tasks related to the administrative and personnel functions of the Asylum Office.

"II. MAJOR DUTIES

[Set forth in great detail and concludes with,]

"Performs other duties as assigned such as ordering office supplies, maintaining subject files, handling and distribution of mail, answering telephone, etc." (G.C. Exh. 6)

In addition, the position description stated, under Physical Demands, that,

"The work is primarily sedentary but requires walking, standing, bending and carrying light objects." (G.C. Exh. 6).

Ms. Coleman conceded that when she was interviewed Ms. LaGonterie told her that she would help with supplies (Tr. 90).

3. Ms. LaGonterie stated that,

"A Ms. Coleman demonstrated that she was creative, that she was bright, and that she was willing to do her part.

"Q Did you personally have an opportunity to observe her conduct?

"A Yes, I did.

"Q And what was Ms. Coleman's conduct like?

"A Ms. Coleman seemed to have a problem dealing with authority and accepting supervision, accepting orders from those who were her supervisors. She seemed to be very concerned that people were talking down to her or disrespecting her and felt that she should be more in a position to tell others what to do, and often did." (Tr. 100).

Ms. LaGonterie further stated,

". . . Ms. Coleman was a bright young woman and she was able to perform her job well, but she had behavioral problems that I considered to be serious. . . .

"A I met with her personally on a few occasions to talk to her about her behavior, to hear her concerns, and then offered to counsel her about the need for her to listen to her supervisor and to take direction, as well as also to be able to communicate her ideas in a way that people would be receptive to them.

"Q And did her conduct improve?

"A No, it did not." (Tr. 102-103).

4. In a memorandum dated November 21, 1995 (Jt. Exh. 4), Ms. LaGonterie recommended that Ms. Coleman be terminated, stating, in part, as follows:

". . . Although she performs her duties in a satisfactory manner, she is unsuitable for Government employment. She has proven to be disruptive, rude and consistently insubordinate. Additionally, she has been instigating other employees to behave in a like manner. She appears to enjoy refusing to follow instructions and being openly defiant of authority.

"Ms. Coleman's immediate supervisor, Administrative Officer Cheryl Joseph-Oyebisi and I have both counseled her about her behavior

several times. In order to resolve the issues between she and the Administrative Officer, Supervisory Asylum Officer (SAO) Patricia Jackson was asked to meet with the two of them in order to arbitrate their differences. SAO Jackson reported that Ms. Coleman was unwilling to listen to the others in attendance and repeatedly stated that she is unwilling to take direction from her immediate supervisor, or anyone else.

"Additional occurrences that illustrate Ms. Coleman's insubordinate manner follow. It is the conclusion of the management of this office that, in spite of the efforts that have been taken to correct her behavior, Ms. Coleman is unsuitable for employment with the Service and that her probationary employment should be terminated. . . .

"Notices of within-grade increases were not distributed in a confidential manner but were placed in open mailboxes. One of the notices denied the within-grade and the lack of confidentiality caused concern and embarrassment to the employee in question. When this was brought to Ms. Coleman's attention by the Deputy Director, she became extremely defensive and stated that she had not been given instructions on the distribution of personnel papers and people should not look at things that don't concern them. This prompted the Deputy to issue the attached memo regarding procedures. Ms. Coleman's response is also attached.

"On Thursday morning, November 9, 1995, Ms. Coleman was observed typing in a standing position behind the Director's secretary. When the Deputy asked her if there was something wrong with her typewriter, she replied that there was not but she didn't feel like walking back and forth between her typewriter and the front office. The Deputy then asked her not to use that particular typewriter but to use her own. She replied that she would return to her own desk when she was finished. . . ." (Jt. Exh. 4) (Emphasis supplied).

Ms. LaGonterie transmitted with her memorandum of November 21, 1995, a copy of an eleven page account ". . . of some of the situations that have occurred between Tamara Coleman . . . and me . . . the Administrative

Officer" (Res. Exh. 6), prepared by Ms. Joseph-Oyebisi.² Ms. Coleman was not given a copy of either Joint Exhibit 4 or Respondent Exhibit 6.

5. By memorandum dated November 30, 1995³ (Jt. Exh. 5), Ms. Pauline A. Bergeron, Acting Personnel Officer (Tr. 39, 40, 73), notified Ms. Coleman that she was terminated as of the close of business November 30, 1995; on November 30, 1995, Ms. Coleman was called to the office of the Deputy Director, Ms. Trubiano, and present, also, were Ms. Jackson and Ms. Joseph-Oyebisi, at which time Ms. Coleman was given a copy of Joint Exhibit 5 and told that she, ". . . was terminated." (Tr. 87, 188). In her notice of termination, Ms. Bergeron stated, in part, as follows:

"Since your entrance on duty, you have repeatedly disobeyed your supervisors instructions. You have been uncooperative and disrespectful. For example, in September your supervisor asked you to return several phone books to the library that she had taken out. Your supervisor left you several notes to take the books back. When it became

2

This record was maintained by Ms. Joseph-Oyebisi as a business record, at the direction of Ms. LaGonterie, concerning the performance of an employee under her immediate supervision (Tr. 103). Ms. LaGonterie received it as a report from a subordinate supervisor concerning that supervisor's comments concerning Ms. Coleman. Nevertheless, because Ms. Joseph-Oyebisi did not testify and was not subject to cross-examination, I have made no use of this report and rely on no part of its content, except that it was information furnished to Ms. LaGonterie as a business record and, in turn, was transmitted by Ms. LaGonterie to Ms. Dorothy C. Swartwood, Director, Office of Human Resources and Career Development, Administrative Center, Burlington, Vermont (more commonly known as Personnel Officer. Tr. 69).

Ms. Joseph-Oyebisi was subpoenaed by General Counsel and was present both days of the hearing, but was not called as a witness by General Counsel or by Respondent (Tr. 232, 239). Also, Ms. Trubiano was not called as a witness. General Counsel asks that an adverse inference be drawn from their failure to testify. I specifically decline to draw any inference from the failure of either to testify.

3

Although dated November 30, 1995, Respondent's copy with routing signatures shows that it was, in fact, prepared and signed on November 22, 1995 (Res. Exh. 4; Tr. 77).

apparent that you were not going to follow her instructions, she asked you to take the books back. You told your supervisor that she would have to take them back herself.

"On another occasion your supervisor asked you to input inventory lists into the computer and to give her the printout when you were finished. You screamed at your supervisor in a loud voice, 'You mean that I have to input DJ's inventory! Do you know that I already did 10 pages of that stuff! Why do I have to do it?! You get Darlene to do her own work! I am not doing it!'

"On yet another occasion your supervisor inquired into the status of AIMS data entry. You became hostile and disrespectful. Your supervisor then explained to you that she would not continue speaking to you because of your disrespect. You told your supervisor, 'Shut up! I don't want to talk to you anymore, either.'

"I have determined, in view of the above, that it is in the best interest of the Service to terminate your employment effective at close of business on November 30, 1995." (Jt. Exh. 5).

6. With regard to the telephone books, referred to in Joint Exhibit 5, Ms. Coleman testified as follows:

". . . Jackie Olivier, a supervisory Asylum Officer, was Acting Director. And we had been assigned to finish certain tasks before the Director got back into town before the fiscal year ended.

"So I was over at my desk working on . . . inputting the overtime into the Lotus 1-2-3 system. And I had never been trained, so I had to go through the tutorial of the system first.

"So I was over at my desk reviewing the tutorial, and a filing clerk . . . came over and told me that . . . there was yellow pages over there (office 3413) with a post-it. In red letters it said: Tamara Coleman, take the yellow pages back to the library right now. [Tr. 145].

. . .

"Q And what did you do when the other employee told you about the post-it note?

"A Well, I finished up the tutorial and secured some of the paperwork I had out at my desk. I walked over to the area, because I really didn't understand. I figured maybe something was wrong, maybe Ms. Olivier's instructions had changed or something.

"Q You walked over to what area?

"A Office 3413. And I went to Cheryl's office (Oyebisi's office) and I asked her was there a problem. And she said that she wanted me to take the yellow pages back. So I told her that I didn't know that she had wanted me to take them back before, that I hadn't been over here since earlier in the morning. And so she stated that, you know, she wanted me to take them back.

"And I told her that I was at my desk working on something else. I'll take them back when I come over. Because every evening I came over and processed Federal Express shipments And I told her when I came over that evening, I would take them back then.

. . . .

"Q And did you speak to any other managers about the --

A Yes. I spoke to Ms. Lagonterie about it a little later, because I told her that the post-it method of Cheryl and I communicating wasn't working out. . . .

"Q Was that the same day or was it a different day?

"A It was the same day, later on in the afternoon, I believe.

"Q And what did the Director say?

"A Well, Jackie Olivier was the Acting Director, she said she would speak to her about it. . . .

"Q So Lagonterie wasn't there that day?

"A No, this was when she was out. I spoke to Lagonterie about it later, but that day I did speak to Jackie Olivier about it.

. . .

"Q So later . . . did you go to return those books?

. . .

"A Yes, . . . So I went over there and I asked the secretary where they were, and she said Cheryl had gotten Mary Witick to take them back" (Tr. 146-148).

Ms. LaGonterie testified, as to the telephone book incident, as follows:

"A To my knowledge, I don't know that she was given written counseling. But, she did come to me.

"Ms. Coleman came to me also to complain as her second line because, in fact, I was her second line supervisor, to complain about the order that she was given by her supervisor. And I, at that time, counseled her about that." (Tr. 26-27).

I found Ms. LaGonterie a wholly credible and forthright witness who, when in error, readily admitted error (Tr. 117). On the other hand, I found Ms. Coleman to be an unconvincing witness who repeatedly was evasive and equivocal, at times contradictory and who refused to recognize any personal failure. Accordingly, when her testimony is contrary to other credible witnesses, I shall credit their testimony and not the testimony of

Ms. Coleman.⁴ Therefore, I credit Ms. LaGonterie's testimony that Ms. Coleman came to her to protest the order to return the telephone books -- not, on that occasion (cf., Tr. 101), about the method of communicating as

4

Whether Ms. Coleman knew of Ms. Oyebisi's instruction to take the telephone books back to the library at the time she gave the instruction was not the point. The issue was Ms. Coleman's refusal to comply. Ms. Coleman admitted a co-worker told her of the order; but she did not comply. Rather, she completed the tutorial and attended to other matters, then she went to Ms. Oyebisi's office. There, she saw the note and the books but did not comply. The order, "Tamara Coleman, take the yellow pages back to the library right now", was as clear as any order can be; but Ms. Coleman, rather than comply, went to Ms. Oyebisi to ask her "was there a problem". Ms. Oyebisi then told her "to take the yellow pages back"; but, again, Ms. Coleman refused and asserted she said she would do it that evening. In truth, Ms. Coleman, went to Ms. Olivier, Acting Director, and, when Ms. LaGonterie returned, to Ms. LaGonterie to protest having to comply with the order. Indeed, as she insisted, contrary to her testimony initially (Tr. 148), that Ms. LaGonterie was not there that day and that she had gone to Ms. LaGonterie on another day, it is plain from her testimony that she refused for more than one day to return the telephone books to the library. All of this, obviously, was over Ms. Coleman's refusal to comply with her supervisor's instruction. She could have complied in minutes, as she said that Mary Witick "took them back on the way back to her desk" (Tr. 148-149); she was physically there where the books were, it would have taken a fraction of the time she spent protesting to Ms. Oyebisi, to Ms. Olivier and to Ms. LaGonterie.

The picnic incident is relevant as to Ms. Coleman's credibility. First she testified, "A Well, my car broke down . . . And I broke down on the Southern State on the way, so I just stayed, with the car. And I called by father and then he towed me home. I called the office, but nobody answered the phone." (Tr. 143). On cross-examination, Ms. Coleman testified, "A We were supposed to go as a group. I was supposed to take Mary Witick with me, and Ms. Darlene Jones also was supposed to ride with me. Q Were you the last person to leave the office? A Pretty much, yes . . . Q Where did you break down? A I broke down, I would say -- because first I went halfway to the park because I led the secretary, Tamara Artis, and her mother there because they were leaving before I was able to leave. So then I went back to get Mary and them, and that's when I started noticing . . . it didn't have pickup. So I was hitting the

Ms. Coleman asserted. Indeed, in context, Ms. Coleman's assertion is an obvious subterfuge to avoid the reality of her refusal to comply with her supervisor's order. She was told of the written instruction; she came and saw the written order; she was told to take the books back, but she refused and protested the order to Ms. Olivier and to Ms. LaGonterie.

7. The third paragraph of Joint Exhibit 5 states, "On another occasion your supervisor asked you to input inventory lists into the computer and to give her the printout when you were finished. You screamed at your supervisor in a loud voice, 'You mean that I have to input DJ's inventory! Do you know that I already did 10 pages of that stuff! Why do I have to do it?! You get Darlene to do her own work! I am not doing it!'" (Jt. Exh. 5). Ms. Coleman testified as follows:

"Q Is that an accurate portrayal of what happened?

"A No.

"Q Why not?

"A Basically because we didn't have really an altercation about it. There wasn't any loud screaming. I was just asking could I have Darlene help me again, and she said no. And so I just told her, like I said before, that I wasn't going to be able to do it in the time frame that she wanted." (Tr. 188-189).

8. Joint Exhibit 4 refers to Deputy Director Trubiano's instruction to Ms. Coleman concerning distribution of personnel actions and Ms. Coleman's response. Ms. Coleman had placed notices of within-grade increases in open mailboxes. One notice had denied the increase and the employee complained to management. Ms. Trubiano told Ms. Coleman to place all personnel actions in a sealed envelope and not open in mailboxes. This is Ms. Coleman's testimony concerning the incident,

"A . . . It was basically I had always placed people's personnel information in their mailbox. If they didn't have a mailbox, I would call them and leave a message for them to come pick it up at my desk.

. . .

"A What had happened was, as usual I had put some information . . . into the Asylum Officer's mailbox, and apparently some of the Asylum Officers had taken some other documents out of a Ms. Isabel Coldor's box. And when they had done that, they left her personnel document in plain view in the mailbox open.

. . .

"A . . . What had happened was Ms. Coldor complained about the other employees touching her mailbox. And she said it was her confidential mailbox, and she had a -- she complained to them about it. And then Ms. Trubiano approached me in office 3413 . . .

. . .

"A She said she thought it would be obvious to any idiot that you shouldn't leave personnel documents in the mailbox.

"Q Were you offended by what she said?

"A Yes, I was, because I felt I hadn't been trained so nothing was really that obvious to me. Because I had never received any training on personnel procedures.

. . .

"A . . . So I explained to her that I had already had a system of doing things. If what she wanted done was going to be different from that, I would need clear and concise directions." (Tr. 173-175).

Deputy Director Trubiano issued a memorandum to Ms. Coleman on October 31, 1995 (Res. Exh. 7) stating, in part, as follows:

". . . personnel matters are confidential in nature and should be handled with the utmost discretion.

"All such paperwork . . . should be treated as personal and confidential . . . Assuming that others will avoid looking at that which does not concern them is imprudent, at best.

"All documents relating to personnel matters shall either be delivered . . . in person, housed in an inter-office envelope and placed in their mail box or on their desk or delivered to that employee's immediate supervisor. . . ." (Res. Exh. 7).

The following day, Ms. Coleman wrote a memorandum to Ms. Trubiano (Res. Exh. 8), in which she stated, in part, as she testified, but a bit more sharply, as follows:

"This incident is not the first time personnel paperwork has been put inside the mailboxes, I always disburse copies that way. All employee's paperwork is treated as personal, confidential and judiciously by the personnel clerk. Other's have no business whatsoever looking into another employee's mailbox which I feel most adults should know.

"So, since you want to start doing disbursement of personnel paperwork differently, you have to leave **Clear And Concise Instructions**, otherwise I will follow the procedures I currently use. Clarity with instructions significantly avoids these problems. And I also don't expect **any one to be condescending and state "I would assume it would be obvious that'"** (Res. Exh. 8).

9. With regard to the typewriter incident, referred to in the concluding paragraph of Joint Exhibit 4, Ms. Coleman acknowledged that she was typing at the Director's secretary's typewriter when Ms. Trubiano told her to go back to her desk and she told Ms. Trubiano she would go back when she was finished (Tr. 192-193).

10. With respect to the October 16, 1995, meeting in Ms. Patricia Ann Jackson's office, attended by Ms. Coleman, Ms. Oyebisi and Ms. Jackson (Tr. 164, 165, 215), Ms. Coleman stated that it lasted 35 to 45 minutes (Tr. 166); that Ms. Jackson told her that training was her (Coleman's) responsibility and she had to follow Ms. Oyebisi's instructions; that she responded, she did; and that was the end of the meeting (Tr. 165-166). I did not find Ms. Coleman's testimony convincing. On the other hand, I found Ms. Jackson to be a wholly credible witness and credit her testimony and find, inter alia, that: Ms. Oyebisi began the meeting by stating that Ms. Coleman was ignoring her; that when she gave Ms. Coleman assignments, Ms. Coleman would either ignore her or place them on her desk and not do them; that Ms. Coleman admitted this but asserted that Ms. Oyebisi was incompetent and she did not intend to follow

her orders; that Ms. Coleman said Ms. Oyebisi didn't pronounce her name properly, therefore, she didn't respond; that when Ms. Oyebisi spoke at the meeting, Ms. Coleman turned her back and faced the wall; that, while Ms. Coleman was pleasant to her (Jackson), she said she didn't like working for Ms. Oyebisi, that Oyebisi was incompetent; and that Ms. Coleman got up, said she was going to lunch and walked out of the meeting (Tr. 216-217).

Ms. Coleman stated that when Ms. LaGonterie told her about the meeting she (Coleman) stated, ". . . if there's going to be a meeting I'd like him [Mr. Georgy Sirota, steward and Acting Treasurer of the Union [Jt. Exh. 2,; Tr. 43]] present" (Tr. 163), and she further testified that when she arrived at the meeting she asked Ms. Jackson, ". . . could I have a Union representative or any other type of witness present. And they stated I didn't need one." (Tr. 165). Ms. LaGonterie denied that Ms. Coleman asked for a Union representative, stating, "A No, Ms. Coleman never asked me for Union representation." (Tr. 108); "A That's right. She did not request a Union representative at this meeting. I actually discussed the meeting with her before the meeting occurred, I told her what the meeting would be about, and she did not request a Union representative. Q Did you tell her that she did not need a Union representative at this meeting? A No, I did not. We did not discuss the Union at all." (Tr. 109-110). Ms. Jackson also testified that Ms. Coleman did not ask for Union representation (Tr. 216-217).

I credit the denials of Ms. LaGonterie and of Ms. Jackson and conclude that Ms. Coleman did not ask for Union representation either when she was informed by Ms. LaGonterie that there was to be a meeting or at the meeting on October 16, 1995. I do not credit Ms. Coleman's testimony for several reasons. First, as previously noted, I did not find Ms. Coleman to be an entirely credible witness but did find Ms. LaGonterie and Ms. Jackson to be credible witnesses. Second, Ms. Coleman demonstrated that she understood the meaning of "arbitration" and "arbitrator" (Tr. 204) and she well knew that when Ms. LaGonterie told her that Ms. Jackson was going to meet with her and Ms. Oyebisi to, ". . . iron out the rough edges or, you know, discuss the breakdown in communication we had been having" (Tr. 163), that Ms. Jackson wasn't going to arbitrate anything and, indeed, Ms. Coleman stated that, "I figured -- she said it wasn't a disciplinary meeting, it wasn't any problems. They were just going to talk to me about the breakdown in communication between me and Cheryl [Oyebisi] to see if they could resolve it." (Tr. 164) (Emphasis supplied). Consequently, it was not a meeting for

which she felt any need to request Union representation. Third, if this prospective meeting had been a meeting at which she wanted representation, at the very least she would have told Mr. Sirota, but she did not; and if she had wanted representation when she arrived at the meeting and it was denied, it is wholly "out of character" to believe that she would docilely have acquiesced. Her nature would have been to resist and to refuse to take part without representation. Her testimony that she requested Union representation appears contrived, after the fact, and is not credited.

11. By her choice of the word "arbitrate", Ms. LaGonterie has demonstrated that a little knowledge can be a dangerous thing. Generally, we merely laugh at malapropisms as mere blunders in the use of words; but here, Ms. LaGonterie's malapropos has had major consequences. General Counsel seized upon Ms. LaGonterie's use of "arbitrate" (Jt. Exh. 4; Tr. 38, 110, 111) and, in turn, Ms. Jackson's use of the same word, "arbitrate" (Tr. 221), to mean, "III. RESPONDENT APPOINTS SUPERVISOR JACKSON TO ARBITRATE, AND RESOLVE COLEMAN'S CONCERNS" (General Counsel's Brief, p. 6 (see, also pp. 6-8)).

Despite her atrocious misuse of the word, "arbitrate", the record is clear that she never intended that Ms. Jackson arbitrate anything. Rather, as she told Ms. Coleman she, LaGonterie, had, ". . . asked her [Ms. Jackson] to mediate some differences between them." (Tr. 38); ". . . The idea -- . . . was to counsel the two of them." (Tr. 111). And, as set forth above, Ms. Coleman fully understood that, "They were just going to talk to me about the breakdown in communication between me and Cheryl [Oyebisi] to see if they could resolve it." (Tr. 164).

Contrary to General Counsel's characterization (General Counsel's Brief, p. 6) the meeting was not for the purpose of resolving Ms. Coleman's concerns, although Ms. Coleman, in the course of the meeting, did interject her assertion that she was not receiving adequate training and she brought up her supply duties (Tr. 224). Ms. LaGonterie stated, ". . . I directed that meeting following a counseling session that I had with Ms. Coleman with her issues with her supervisor. She thought that her supervisor was not competent to give her direction, and she was refusing to take direction from her. She didn't like the way her supervisor communicated with her. I then talked to her supervisor about it and found that their communication had broken down entirely. In recognizing that her supervisor . . . was inexperienced in supervision, the first time she had ever supervised anyone, I asked a more

experienced supervisor to meet with the two of them to try to help them work out their differences." (Tr. 101).

Ms. LaGonterie talked to Ms. Coleman about what Ms. Coleman described as "the breakdown in communication" with Ms. Oyebisi; Ms. LaGonterie then discussed the matter with Ms. Oyebisi; selected Ms. Jackson, a supervisory Asylum Officer (Tr. 214), not in Ms. Coleman's chain of command (Tr. 215, 222), who had been a supervisor since March, 1991 (Tr. 214), to speak to Ms. Coleman and Ms. Oyebisi because, ". . . they didn't work well together, that Tamara [Coleman] was not accepting assignments from her supervisor, and she [LaGonterie] wanted to make it work. She said that Tamara was a very bright girl and she wanted to keep her on, but she wasn't doing the assignments that Cheryl was giving her. So she asked me to use my experience as a supervisor to come up with a way to get Tamara to do the assignments that Cheryl wanted her to do. So that's why I did." (Tr. 215).

The meeting was held in Ms. Jackson's office (Tr. 165); present when Ms. Coleman arrived were: Ms. Jackson, a supervisory Asylum Officer, and Ms. Oyebisi, Administrative Officer, and Ms. Coleman's immediate supervisor. Ms. Jackson conducted the meeting and had an agenda of sorts in the sense that Ms. Oyebisi would be asked to state her problems with Ms. Coleman, Ms. Coleman would be asked to respond, and Ms. Jackson would offer suggestions (Tr. 216). When Ms. Coleman said that she felt Ms. Oyebisi was incompetent and she did not want to do what Ms. Oyebisi wanted her to do, Ms. Jackson told her she must listen to her supervisor and follow her instructions and if she didn't like them or didn't agree, to take it up the chain of command to her second-line supervisor (Tr. 216, 223). Ms. Coleman said that she had responded that she had followed Ms. Oyebisi's instructions, except, ". . . I said the only problem I was having was that I couldn't follow her instructions when it came to supplies because it was starting to affect my health. I couldn't do the heavy lifting." (Tr. 166; 204). When Ms. Coleman mentioned that she was not receiving what she believed to be adequate training (Tr. 224), Ms. Jackson told her, ". . . that training was my responsibility, it stated so in the Union agreement." (Tr. 165-166; 224).

Obviously, Ms. Coleman did not like handling supplies but whether she had a legitimate health problem at best is unknown. She said she hurt her back (Tr. 155-156) but did not go to see a doctor, ". . . because I wasn't sure I had coverage." (Tr. 196). Her leave and earnings statement would have shown whether a deduction had been made for health insurance as well as the enrollment code for the

health plan, if any. Indeed, there is some indication that the "back problem" was used as a convenient excuse (Tr. 151, 152, 155-156, 166-167). Ms. Coleman stated that she was not receiving training; but the record shows that she had received training (Tr. 126-127) and she conceded she was, ". . . taught things like Lotus 1-2-3" (Tr. 195). The record is silent as to what training Ms. Coleman believed she had been promised and had not received and there is no indication that she ever applied for any particular training or training course.

12. General Counsel contends that Respondent's reasons for dismissing Ms. Coleman were pretextual and she was terminated because she engaged in protected activity. General Counsel first notes that Ms. Coleman asked Ms. Joseph-Oyebisi about joining the Union, and ". . . She told me that I wouldn't be able to join the Union because of the sensitive nature of the documents I dealt with in personnel. Q When these problems arose, what did you do about it initially? What was the first thing you did? A Well, first I spoke to Cheryl about it. And I really didn't get any results from her. And then I went to Ms. Lagonterie about it. And she said she would speak to Cheryl" (Tr. 142).⁵ It would appear, although Ms. Coleman did not say and Ms. LaGonterie was not asked, that Ms. LaGonterie told her she was in the bargaining unit, because Ms. Coleman proceeded as if she were, contacted Mr. Sirota and even told Ms. LaGonterie that, ". . . she had

5

Later, Ms. Coleman stated,

". . . And she [Oyebisi] told me that I wouldn't be eligible to join the Union because of the sensi-tivity of my position.

"Q And did you believe her?

"A I sort of believed her, but then I realized there were other instances when she didn't have the correct information. So I double-checked it with Milicent Marshall, who was the Congressional liaison. And she said she really didn't know, for me to call and ask. And that's when, you know, I spoke to George and asked him about it. And he told me that only management is excluded from the Union." (Tr. 152).

Mr. Sirota said that, ". . . Tamara had some questions concerning rights, union rights and whether she was part of the bargaining unit." (Tr. 45); but he was never asked and never said what his response, if any, had been.

been in contact with a Union representative. I believe that was in September." (Tr. 108).

But, more to the point, nothing in Ms. Oyebisi's statement indicates any hostility to the Union or any anti-union bias. She may not have been correct, but her justification was consistent with statutory exclusions (§§ 12(b)(2) and/or (3)). By contrast, Mr. Sirota was unaware of Ms. Coleman's duties (Tr. 46).⁶

General Counsel couples with this, Ms. Oyebisi's cancellation of a meeting with Mr. Sirota and her subsequent failure to meet with him as a further indication of her anti-union bias. Mr. Sirota stated that he talked to Ms. Oyebisi and that they had scheduled a meeting for September 25, 1995, or at least that she ". . . didn't see any problem" to meeting on September 25 (Tr. 48); however, on September 22, Ms. Oyebisi called and cancelled that meeting (Tr. 48) and, ". . . she solicited specifics about the proposed meeting. She said that she's canceling the meeting because she wanted to know exactly what the agenda of the meeting would be. . . . she actually demanded that I supply this information, and at that time, she would decide whether such a meeting would be warranted." (Tr. 49). Mr. Sirota called her back and told Ms. Oyebisi that, ". . . in past practice I never had to provide a specific

6

Ms. Coleman stated that her duties were,

". . . to maintain the personnel files, process all personnel actions, help with all types of administrative duties such as ordering supplies" (Tr. 89).

Later, she expanded a bit, as follows:

"Basically, I took the vacancy announcements and I dispersed them to the staff. I updated and main-tained the bulletin board. I created the personnel files and organized the personnel file cabinet.

"I processed all personnel actions such as demotions, promotions, reassignments, transfers, things like that.

"And also, part of my job after I came on board involved receiving supplies, shelving them, organiz-ing them and making sure they're in the correct supply room because we had three supply rooms." (Tr. 91).

agenda" (Tr. 49). Indeed, he asserted in his grievance dated September 28, 1995, that, "it would be contrary to our past practice, and to our Negotiated Agreement, for me to discuss the subject-matter through formal means, such as putting it on paper." (Jt. Exh. 2).

In short, Ms. Oyebisi told Mr. Sirota she would not meet with him unless, and until, he indicated what it was he wanted to meet about. Mr. Sirota, in effect, said I won't tell you in advance what I want to meet about -- we'll discuss it when we get together. I did not find Mr. Sirota a convincing or credible witness. Rather, it appeared that his forte was misrepresentation and innuendo and not fact. Thus, except for the fact that Ms. Oyebisi cancelled a meeting scheduled for September 25 and insisted upon knowing what he wanted to meet about before agreeing to a meeting and the fact that he, Sirota, refused to tell Ms. Oyebisi why he wanted to meet, his assertions in Joint Exhibit 2 are utterly without basis or outright misrepresentations. For example, his statement that Ms. Coleman, ". . . elected to file a grievance, and was precluded" (Jt. Exh. 2, p. 2) is without basis in fact. Ms. Coleman did not say she had elected to file a grievance and she certainly did not say that she was precluded from filing a grievance. Interestingly, what she said she had contemplated filing a possible grievance, namely, training and supply duties, she had discussed both with Ms. Oyebisi (Tr. 141, 142) and then with Ms. LaGonterie (Tr. 172). Although she did not assert she had filed a grievance, plainly she had not been deterred from raising concerns. Mr. Sirota's assertion that Respondent prevented the Union from interviewing witnesses and the inference that the Union had not been afforded the opportunity to meet with Ms. Coleman is simply not true. Mr. Sirota never asked to meet with either Ms. Coleman or any witness and necessarily was never prevented contacting anyone. Mr. Sirota first visited Respondent's office in September, 1995 (Tr. 43, 233) and did not visit the office again until January, 1996 (Tr. 236). He had come in September, 1995, to see a Ms. Darlene Jones about, ". . . a possible grievance" (Tr. 233) and well knew that he could have come to see Ms. Coleman had that been his desire. In other words, whether he met with Ms. Oyebisi he could, had he wished, have met with Ms. Coleman. Instead, in October, 1995, he elected to meet Ms. Coleman on his own time, outside the Asylum Office (Tr. 53). Mr. Sirota conceded he never was denied official time (Tr. 53) but never asked for official time, ". . . because the meeting [with Ms. Oyebisi] was not agreed upon." (Tr. 54). In addition, his assertion that he met Ms. Coleman off Asylum premises because he did not want, ". . . to create any hostilities between Tamara and management . . ." (Tr. 53), was wholly contrived.

First, his letter of September 28, 1995 (Jt. Exh. 2) had already highlighted Ms. Coleman. Second, Mr. Sirota in October brought a variety of Union material for Ms. Coleman to post and/or to distribute (Tr. 54).

Not only did Mr. Sirota not ask to talk to Ms. Coleman, Ms. Coleman never "filed" a grievance⁷ and she said that she and Mr. Sirota never discussed the possibility of filing a grievance (Tr. 153). Of course, the grievance route would have afforded a further opportunity to meet with Ms. Oyebisi but was never invoked.

Finally, Ms. Coleman's statement that she overheard Ms. Oyebisi and Ms. Trubiano discussing the Union's grievance (Jt. Exh. 2); that Ms. Trubiano said, ". . . it looked to her like they just wanted some type of response." (Tr. 154-155) and Ms. Oyebisi had replied, ". . . she wasn't going to be bullied into meeting with the Union and she wasn't going to meet with them. She didn't have to, it was the end of the fiscal year." (Tr. 155). From this, General Counsel asserts that, ". . . Respondent's supervisors did not want to be 'bullied' to deal with the Union, refusing to meet with Sirota to discuss Coleman's concerns." (General Counsel's Brief, p. 11). In a sense this was true; but from Mr. Sirota's testimony and his written comments (Jt. Exh. 2), it is clear that Ms. Oyebisi did not refuse to meet with Mr. Sirota but, rather, that she refused to meet unless, and until, Mr. Sirota said what he wanted to meet about, Mr. Sirota refused and, accordingly, no meeting was ever held. But to put the blame on Ms. Oyebisi for the failure to meet is pretty much like the pot calling the kettle black. Mr. Sirota may believe that

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Article 47, entitled "Grievance Procedure" provided, in part, as follows:

"E. Step I: Informal grievance must be filed with in twenty-two (22) workdays after the incident occurs. . . . The grievance shall first be taken orally by the concerned employee with the first level of supervision . . . He or she may, if he or she desires, be assisted in the presentation by the Union representative.

. . . ."

Step II: If the employee is dissatisfied with the result of the oral presentation, he or she may file a formal written grievance within ten (10) work-days" (Jt. Exh. 1, Art. 47, Sec. E).

he, as a Union steward, can sit down and talk to management whenever he pleases; but management, certainly, has the right to know what he wants to talk about so that it can decide whether a meeting is warranted. If Ms. Coleman had a grievance, Article 47 of the Agreement provides that, as the concerned employee, she "file" the grievance with her immediate supervisor. Nothing in Article 47 even remotely suggests that if an employee is thinking about filing a grievance, before doing so, the Union can insist upon meeting with the supervisor to decide if it should file a grievance. And more important, in view of Mr. Sirota's contentions, nothing in Article 47 provides, or even suggests, that the purpose of a meeting may not be disclosed. To the contrary, when a Step I grievance is "filed", obviously, notice is given that a grievance is involved; and a Step II grievance must be submitted in writing.

13. Finally, General Counsel points to two high recommendations given by Ms. LaGonterie as further demonstrating that her reasons for terminating Ms. Coleman were pretextual (General Counsel's Brief, pp. 9-10, 11, 14, 15). There is no dispute whatever that Ms. LaGonterie gave Ms. Coleman two high recommendations, the first, in September, 1995 (G.C. Exh. 7). The second has a typed date of November 22, 1995 (G.C. Exh. 8), which Ms. Coleman entered, this being the date she mailed it (Tr. 180). Ms. Coleman said she got this memorandum back around November 20 (Tr. 180). The "Basic Appraisal Work Sheet" of General Counsel Exhibit 8 is a copy of the sheet from General Counsel Exhibit 7 which Ms. Coleman said were good for six months (Tr. 181).

Ms. LaGonterie stated that she certainly did not give the second recommendation on November 22, 1995, she stated, "It would have been much earlier . . . I believe this [G.C. Exh. 8] was written in September of '95 as well. Q So you gave two recommendations in September of '95. A Yes. Q Why would you need two recommendations in -- A She applied for two jobs. . . . A There's one job she applied as an inspector, and she also applied for a temporary position in the District Citizenship USA Program . . . Q And are you sure this was September of '95? A I believe it was, yes. It was certainly not November of '95." (Tr. 116).

When asked about why she would give a high recommendation to an employee who was insubordinate, Ms. LaGonterie stated,

". . . I have given a highly recommended to an employee after it had been reported to me that she had been insubordinate.

"Q Is that good management practice?

"A I believed that she was going to rehabilitate herself. That's why I did not dismiss her at that time."

As previously noted, I found Ms. LaGonterie a credible witness and I credit her testimony that she gave the second recommendation, General Counsel Exhibit 8, well before November, 1995, and probably in September, 1995.

CONCLUSIONS

1. Respondent did not violate § 16(a)(1) or (2) by the termination of probationary employee Coleman

In Veterans Administration Medical Center, Baltimore, Maryland, Case No. 3-CA-60541, ALJ Decision Reports No. 69 (December 4, 1987), I ordered reinstatement of a probationary employee discharged because of engagement in protected activity in violation of §§ 16(a)(1) and (2) of the Statute. Judge Etelson, in Department of Defense, Defense Logistics Agency, Defense Contract Administration Services, Atlanta Region, Marietta, Georgia, Case No. 4-CA-80716, ALJ Decision Reports No. 85 (November 6, 1989), noted my decision in Veterans Administration, supra, and likewise ordered reinstatement of a probationary employee discharged because of engagement in protected activity. In Department of the Navy, Naval Weapons Station Concord, Concord, California, 33 FLRA 770 (1988), a case involving grooming standards, I had held that the discharge of a probationary fireman was proper because the employee had been insubordinate, id. at 804-805. The Authority agreed that the discharge was proper but stated as follows:

". . . the Judge found that the Respondent's termination of Mr. Gilmour was proper because he was terminated for insubordination during his probationary period. ALJ Decision at 30. In United States Department of Justice, Immigration and Naturalization Service v. FLRA, 709 F.2d 724 (D.C. Cir. 1983), the United States Court of Appeals for the District of Columbia Circuit held that in the Civil Service Reform Act of 1978, Congress expressly preserved an agency's discretion to remove summarily a probationary employee. Accordingly, the Respondent had the

right to remove Mr. Gilmour summarily during his probationary period. The Judge's finding that Mr. Gilmour was insubordinate was not required to establish that the Respondent had legally terminated him." (id. at 771).

In U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Detroit Teleservice Center, Detroit, Michigan, 42 FLRA 22 (1991), Judge Arrigo examined the argument at length and concluded that, "Naval Weapons Station Concord did not specifically treat the question of the general availability of the Statute to probationary employees or whether a probationary employee would have Statutory protection to engage in union activity. . . . Accordingly, . . . I . . . find the Authority does indeed have proper jurisdiction over the termination of probationary employee Marie Thornton." (id. at 54-55). However, applying Letterkenny Army Depot, 35 FLRA 113 (1990). Judge Arrigo concluded that Respondent would have terminated Ms. Thornton, ". . . even if Respondent had not considered Ms. Thornton's protected activity . . ." (id. at 66). The Authority adopted the Judge's decision (id. at 23). Because reinstatement was not ordered, there remained no Authority order of reinstatement and Department of Veterans Affairs, Veterans Affairs Medical Center, Jackson, Mississippi, 48 FLRA 787 (1993), rev'd on reconsideration, 49 FLRA 171 (1994), although holding that, "We find no basis on which to conclude that the employees' status as probationers affects their statutory rights . . . under section 7114(a)(2)(B)." (48 FLRA at 797), did not order reinstatement but, rather, on request of the Union and the employees involved, ordered that Respondent repeat the examinations; afford these employees their right to union representation by allowing the union representative to actively participate; and after repeating the examination, reconsider the actions taken. (In Department of Veterans Affairs, Medical Center, Leavenworth, Kansas, 49 FLRA 1624 (1994), I followed VA Medical Center, Jackson, including the same remedy. Following my decision, the Authority had reversed its decision in VA Medical Center, Jackson, and reversed my decision. The Authority stated, in part, "In light of our conclusion, there is no basis on which to grant the relief requested by the Charging Party . . . or to reconsider our precedent on remedial relief for violations of section 7114(a)(2)(B) of the Statute." (49 FLRA at 1628)).

However, in Federal Deposit Insurance Corporation, Division of Depositor and Asset Services, Oklahoma City, Oklahoma, 49 FLRA 894 (1994), the Authority denied exceptions to an arbitration award which ordered renewal of

a temporary appointment which had been denied "almost exclusively" as the product of Union animus (5 U.S.C. §§ 7501(1) [Subchapter I - Suspension for 14 days or less] and 7511(a)(1)(A) [Subchapter II - Remand, Suspension for more than 14 days, etc.] each exclude from the definition of "employee", a person serving a probationary period or under a temporary appointment), and stated, in part, as follows:

" . . . we conclude that the fact that the grievant could not contest the non-renewal of his appointment as an adverse or performance-based action through statutory or negotiated procedures does not require, or support, a conclusion that the grievant also could not challenge the non-renewal as an alleged unfair labor practices before the Authority.^{9/}

9/ We also note, in this connection, that probationary employees are not precluded under the Statute from pursuing alleged unfair labor practices through statutory procedures. See U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Detroit Teleservice Center, Detroit, Michigan, 42 FLRA 22, 54-55 (1991)." (id. at 899).

Consequently, the Authority has made it clear that a probationary employee could be ordered reinstated if discharged for engaging in protected activity.

Respondent discharged probationary employee Coleman because, it informed her, ". . . you have repeatedly disobeyed your supervisors instructions. You have been uncooperative and disrespectful." (Jt. Exh. 5; Res. Exh. 4). General Counsel contends that Respondent's reasons for discharging Ms. Coleman were pretextual and that Respondent discharged Ms. Coleman because she engaged in protected activity. In mixed motive cases, the burden is on the General Counsel to make a prima facie showing that the employee had engaged in protected activity and that this conduct was a motivating factor in the agency's decision. Once this is established, the agency must show by a preponderance of the evidence that it would have reached the same decision in the absence of the protected activity. Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981); United States Department of the Treasury, Internal Revenue Service and United States Department of The Treasury, Internal Revenue Service, New Orleans District,

New Orleans, Louisiana, 30 FLRA 1013, 1021 (1988);
Letterkenny Army Depot, 35 FLRA 113, 118-119 (1990).

Here, General Counsel has shown that Ms. Coleman contacted a Union representative; that Ms. LaGonterie, the Director who effected the removal of Ms. Coleman, knew that she had contacted a Union representative; knew that the Union representative attempted to arrange a meeting with Ms. Coleman's immediate supervisor; and knew that the Union filed a grievance over the failure of Respondent to meet; further, Respondent knew Ms. Coleman posted Union material. I do not believe that Ms. Coleman's protected activity was a motivating factor in her removal; nevertheless, awareness of such activity makes it possible that it was a motivation. Accordingly, I have assumed that General Counsel has made a prima facie showing that Ms. Coleman's protected activity was a motivating factor in Respondent's decision to terminate her employment. Respondent has shown by a preponderance of the evidence that it would have made the same decision to remove her in the absence of protected activity. Respondent's reasons for her removal were legitimate and were not pretextual. I have considered at length some of the reasons for her removal as developed by the testimony of witnesses at the hearing and have not considered other reasons reported to Ms. LaGonterie but not developed by the testimony of witnesses at the hearing. On the basis of the credited testimony, the record showed that Ms. Coleman repeatedly refused to comply with instructions of supervisors -- indeed admitted she refused to return telephone books to the library for convoluted reasons and admitted she refused to stop using another person's typewriter and told the supervisor she would stop when she was through. Ms. Jackson's testimony as to Ms. Coleman's statements concerning her immediate supervisor showed a total refusal to follow the instructions of her immediate supervisor. Ms. LaGonterie credibly testified that she had counseled Ms. Coleman, including telling her she must return the telephone books to the library; etc.

General Counsel's argument that Respondent's reasons for terminating Ms. Coleman were pretextual turn principally on the fact that Ms. LaGonterie gave Ms. Coleman two "highly recommended" recommendations. General Counsel argues that Ms. LaGonterie did not think Ms. Coleman's conduct, ". . . was at all consequential because she provided Coleman with a high recommendation" and further that Coleman received a second high recommendation, ". . . evidencing that Coleman's termination did not have a legitimate justification, and would not have happened in the absence of her protected activity." (General Counsel's Brief, p. 15). As noted above, I have found, as Ms. LaGonterie credibly testified,

that the second recommendation, G.C. Exh. 8, was not given in November but probably in September, shortly after the first recommendation (G.C. Exh. 7).

Ms. LaGonterie testified that Ms. Coleman was, ". . . a hard worker with good organizational skills." (Tr. 33); she, ". . . demonstrated that she was creative, that she was bright, and that she was willing to do her part" (Tr. 100); but, "Ms. Coleman seemed to have a problem dealing with authority and accepting supervision, accepting orders from those who were her supervisors. . . ." (Tr. 100). In designating Ms. Jackson to meet with Ms. Coleman and Ms. Oyebisi, Ms. Jackson stated,

"Yvette Lagonterie, the Director, asked me to speak to the two of them. She had said that they didn't work well together, that Tamara was not accepting assignments from her supervisor, and she wanted to make it work. She said that Tamara was a very bright girl and she wanted to keep her on, but she wasn't doing the assignments that Cheryl was giving her. . . ." (Tr. 215).

Ms. LaGonterie stated that she gave Ms. Coleman the two high recommendations because, "I believed she was going to rehabilitate herself" (Tr. 117). This is reflected in her instruction to Ms. Jackson; she wanted to keep her; she wanted to make it work; but she did not close her eyes to Ms. Coleman's refusal to follow instructions. This was the reason for having Ms. Jackson meet with Ms. Coleman and Ms. Oyebisi; this was the reason for Ms. Oyebisi's continuing report to Ms. LaGonterie (Res. Exh. 6). Ms. Coleman's refusal to accept supervision and to obey orders of her supervisor was of continuous concern and when it became clear to Ms. LaGonterie that she was not going to change, she concluded she was unsuitable for the job and recommended her termination (Tr. 107). Respondent's reasons for terminating Ms. Coleman were legitimate and substantial and Respondent would have terminated Ms. Coleman even in the absence of her protected activity. Accordingly, Respondent did not violate § 16(a)(1) or (2) of the Statute when it terminated a probationary employee.

2. Respondent violated §§ 16(a)(1) and (8) by conducting a formal discussion on October 16, 1995, without notice to the Union

The meeting of October 16, 1995, was odd in several ways. For example, Ms. LaGonterie in her memorandum of November 21, 1995, has stated, ". . . In order to resolve the issues between she (sic) and the Administrative Officer

[Oyebisi], Supervisory Asylum Officer (SAO) Patricia Jackson were asked to meet with the two of them in order to arbitrate their differences. . . ." (Jt. Exh. 4); but despite her atrocious misuse of the word, "arbitrate", as noted above, Ms. Coleman fully understood that, "They were just going to talk to me about the breakdown in communication between me and Cheryl [Oyebisi] to see if they could resolve it." (Tr. 164). Second, while it was a counseling meeting, it was conducted by a lateral supervisor not in the chain of command of either Ms. Oyebisi or Ms. Coleman, and was directed both to a supervisor, Oyebisi, and an employee, Coleman. As stated by Ms. LaGonterie, ". . . I directed that meeting following a counseling session that I had with Ms. Coleman with her issues with her supervisor. She thought that her supervisor was not competent to give her direction, and she was refusing to take direction from her. She didn't like the way her supervisor communicated with her. . . . I asked a more experienced supervisor to meet with the two of them to try to help them work out their differences." (Tr. 101). Third, although told of the meeting at least a day in advance, Ms. Coleman did not tell the Union nor, as I have found, request representation either when Ms. LaGonterie told her of the meeting or at the meeting. Fourth, according to Ms. Coleman, although she said it lasted 35 to 45 minutes, it consisted of Ms. Jackson telling her that she had to follow Ms. Oyebisi's instructions; that she responded that she did; and that Ms. Jackson told her that training was her, Coleman's, responsibility; and that was the end of the meeting (Tr. 165-166).

No minutes were taken and the only agenda was Ms. Jackson's intent to have Ms. Oyebisi state her problems with Ms. Coleman; Ms. Coleman would reply; and she, Jackson, would try to make suggestions to resolve their differences. As I have found, inter alia, Ms. Oyebisi did begin the meeting by stating that Ms. Coleman was ignoring her; that when she gave Ms. Coleman assignments, Ms. Coleman would either ignore her or place the assignments on her desk and not do them; that Ms. Coleman admitted this but asserted that Ms. Oyebisi was incompetent and she did not intend to follow her orders; and that Ms. Coleman got up, said she was going to lunch and walked out of the meeting (Tr. 216-217). Ms. Jackson reported to Ms. LaGonterie that she had been unable to come up with a way for Ms. Coleman to follow Ms. Oyebisi's instructions (Tr. 231).

I fully agree with General Counsel, that,

"The Authority has consistently held that a formal discussion will be found only if all the

elements of section 7114(a)(2)(A) are present: there must be (1) a discussion; (2) which is formal; (3) between one or more representatives of the agency and one or more employees in the unit of their representatives; (4) concerning any grievance or personnel policy or practices or other general condition of employment. *General Services Administration, Region 9*, 48 FLRA 1348 (1994) (GSA). In applying these elements, the Authority is guided by the intent and purpose of section 7114(a)(2)(A) -- to provide the union with an opportunity to safeguard its interests and the interests of employees in the bargaining unit -- viewed in the context of a union's full range of responsibilities under the Statute. *Veterans Administration, Washington, D.C. and VA Medical Center, Brockton Division, Brockton, Massachusetts*, 37 FLRA 747 (1990) (*Veterans Administration*). (General Counsel's Brief, p. 16).

Here, all four elements of § 14(a)(2)(A) were present. There was a discussion U.S. Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania, 38 FLRA 671, 677 (1990). The meeting was formal in nature. It was arranged by Ms. LaGonterie, Director; it was conducted by a lateral supervisor, Jackson, in Ms. Jackson's office; attendance was mandatory; and while no notes were taken, Ms. Jackson reported on the results of the meeting to Ms. LaGonterie. The meeting did not, as General Counsel contends, concern a grievance; but it did concern personnel policy or practices or other general conditions of employment, namely Ms. Coleman's refusal to take direction from her supervisor, which Ms. Coleman euphemistically called "breakdown in communication." It did involve two supervisors and an employee, Ms. Coleman.

Because it is the right of the Union under § 14(a)(2)(A) to be given an opportunity to be represented at any formal discussion, it is wholly separate and distinct from the request, or even desire, of the employee. Respondent gave the Union no notice and afforded it no opportunity to be present at the October 16, 1995, formal discussion and thereby violated §§ 16(a)(1) and (8) of the Statute. U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution, Bastrop, Texas, 51 FLRA No. 109, 51 FLRA 1339 (1996).

Having found that Respondent violated §§ 16(a)(1) and (8) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 2423.29, 5 C.F.R. § 2423.29 of the Authority's Rules and Regulations, and § 18, 5 U.S.C. § 7118, of the Statute, it is hereby ordered that the U.S. Department of Justice, Immigration and Naturalization Service, New York Office of Asylum, Rosedale, New York, shall:

1. Cease and desist from:

(a) Conducting a formal discussion with any bargaining unit employee without affording the American Federation of Government Employees, AFL-CIO, Local No. 1917 (hereinafter, "Union"), the exclusive representative of certain of its employees, prior notice of and the opportunity to be represented at any formal discussion.

(b) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide prior notice to the Union and the opportunity to be represented at any formal discussion.

(b) Post at its facilities at Rosedale, New York, 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 New York Office of Asylum 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to § 2423.30, of the Authority's Rules and Regulations, 5 C.F.R., § 2423.30, notify the Regional Director of the Boston Region, Federal Labor Relations Authority, 99 Summer Street, Suite 1500, Boston, MA 02110-1200, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

WILLIAM B. DEVANEY

Administrative Law Judge

Dated: February 25, 1997
Washington, DC

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

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Immigration and Naturalization Service, New York Office of Asylum, Rosedale, New York, violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

We hereby notify bargaining unit employees that:

WE WILL NOT conduct a formal discussion with any bargaining unit employee without affording the American Federation of Government Employees, AFL-CIO, Local No. 1917 (hereinafter, "Union"), the exclusive representative of bargaining unit employees, prior notice of and the opportunity to be represented at any formal discussion.

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 Federal Service Labor-Management Relations Statute.

WE WILL provide prior notice to the Union and an opportunity to be represented at any formal discussion.

(Activity)

Date: _____ 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 of the Federal Labor Relations Authority, Boston Region, whose address is:

99 Summer Street, Suite 1500, Boston, Massachusetts
02110-1200, and whose telephone number is: (617) 424-5730.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. BN-CA-60151, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Gary J. Lieberman, Esquire
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200

Mr. Todd Boucher
Labor Relations Specialist
U.S. Department of Justice
Immigration and Naturalization Service
Eastern Regional Office
70 Kimball Avenue
So. Burlington, VT 05403-6813

Georgy Sirota, Steward
American Federation of Government
Employees, Local No. 1917
Immigration & Naturalization Service
P.O. Box 684
Church Street Station
New York, NY 10008-0684

REGULAR MAIL:

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Dated: February 25, 1997
Washington, DC