

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

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER OKLAHOMA CITY, OKLAHOMA  Respondent  and  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2562, AFL-CIO  Charging Party	Case No. DA-CA-01-0334

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/her 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. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 15, 2002**, and addressed to:

Office of Case Control  
Federal Labor Relations Authority  
607 14th Street, N.W., Suite 415  
Washington, D.C. 20424

PAUL B. LANG  
Administrative Law Judge

Dated: September 13, 2002  
Washington, DC

UNITED STATES OF AMERICA  
**FEDERAL LABOR RELATIONS AUTHORITY**

Office of Administrative Law Judges  
WASHINGTON, D.C. 20424-0001

MEMORANDUM

DATE: September 13, 2002

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG  
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS  
VETERANS AFFAIRS MEDICAL CENTER  
OKLAHOMA CITY, OKLAHOMA

Respondent

and  
CA-01-0334

Case No. DA-

AMERICAN FEDERATION OF GOVERNMENT  
EMPLOYEES, LOCAL 2562, AFL-CIO

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations 5 C.F.R. § 2423.34(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

**FEDERAL LABOR RELATIONS AUTHORITY**  
Office of Administrative Law Judges                      OALJ 02-57  
WASHINGTON, D.C.

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER OKLAHOMA CITY, OKLAHOMA  Respondent  and  AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2562, AFL-CIO  Charging Party	Case No. DA-CA-01-0334

Stephanie R. Darr, Esquire  
For the Respondent

Charlotte A. Dye, Esquire  
Nora Hinojosa, Esquire  
For the General Counsel

Before: PAUL B. LANG  
Administrative Law Judge

**DECISION**

Statement of the Case

This case arises out of an Unfair Labor Practice charge filed by the American Federation of Government Employees, Local 2562, AFL-CIO (the Union), against the Department of Veterans Affairs, Veterans Affairs Medical Center, Oklahoma City, Oklahoma (the Respondent), on January 17, 2001, and an amended charge which was filed on June 11, 2001. By letter dated August 13, 2001, the Regional Director approved the Union's request for a partial withdrawal of the charge. On August 29, 2001, the General Counsel issued a Complaint and Notice of Hearing alleging that the Respondent violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute), by undertaking an investigation of the activities of Nathaniel Marc Greene (sometimes known as Marc Greene) in spite of the

fact that Greene's activities occurred while he was acting as a Union official. It is further alleged that the Respondent issued a proposed and final reprimand to Greene in retaliation for his activities as a Union official.

A hearing was held before the undersigned Administrative Law Judge on June 18 and 19, 2002, in Oklahoma City, Oklahoma, at which time all parties appeared with counsel and had an opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of all oral and documentary evidence presented at the hearing, the demeanor of witnesses and the post-hearing briefs submitted by the General Counsel and the Respondent.<sup>1</sup>

### **Findings of Fact**

#### Remarks by Fred Smith

Although the events which gave rise to the complaint occurred on and after September 14, 2000, they appear to have been triggered in part by an incident which was the result of a study of the effectiveness of the EEO program at the Respondent's worksite. The study was undertaken at the request of Steven J. Gentling, the Respondent's Director, after a number of allegations of racial discrimination and violence. The results of the investigation were promulgated at a series of four "Town Hall" meetings which were open to all employees. A feature of the Town Hall meetings was that employees could air their thoughts and criticism without fear of retaliation.

Each of the Town Hall meetings was attended by Fred Smith, who was Respondent's Police Chief and the head of its EEO Committee. At one of the meetings Smith publicly stated that the perceived problems were primarily within the Union and inquired as to what action the Union intended to take to solve the problems. Smith's remarks were made in the presence of Greene, who was then the Vice President of the Union, as well as Samuel Craig, the then President of the Union, and other Union representatives and members of the

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Oral argument was also received on the motion of the General Counsel that the Administrative Law Judge take official notice of a decision by the Merit Systems Protection Board. The decision concerned disciplinary action that had been taken against Greene by the Respondent based upon events which occurred subsequent to those alleged in the Complaint. The motion was denied without prejudice to the right of the General Counsel to resubmit it as part of the rebuttal. No rebuttal was offered and the motion was not resubmitted.

bargaining unit. The occurrence at the Town Meeting is significant in that it provoked an angry reaction from many of those in attendance and apparently caused hostility between Smith and Greene.

#### Greene's Use of Official Time

Pursuant to a negotiated arrangement, Greene was allowed "official time" for half of each work day during which he could perform his duties as a Union Officer. His official time was to be used during a specified period each day, but he could be absent from his workstation in the Engineering Department on Union business at other times with the permission of his supervisor.

On or before September of 2000, Greene was informally approached by two members of the bargaining unit who told him that they suspected that Smith and certain members of the Respondent's Black Affairs Committee (BAC) were attempting to arrange for the preselection of Tammie Novotny, a white nonbargaining unit employee, for a newly created position in the EEO office. At that time Novotny worked as a secretary for the EEO office on a half-time basis; the other half of her work day was in the Office of Quality Assurance.

Smith thought that the allegation was farfetched but discussed the matter with Craig. Craig told Greene that he should investigate the allegation. It was agreed that Greene would begin his investigation by attending a previously scheduled meeting of the BAC on September 14, 2000.

The BAC is one of several special committees established by the Respondent to promote diversity.<sup>2</sup> The committee is composed of employees from all portions of the Respondent's workforce. Among its activities is the sponsorship of fund raising events to support scholarships.

At that time Greene's schedule called for him to perform his regular work assignment from 6:00 a.m. until 10:30 a.m. He would thereupon go to lunch until 11:00 a.m. and then spend from 11:00 a.m. to 3:30 p.m. on Union business.<sup>3</sup> Since the BAC meeting was scheduled to begin at

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Similar committees are devoted to matters concerning groups such as Hispanics, Asians and women.

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A different schedule was followed on the second Thursday of each pay period.

10:00 a.m. it was necessary for Greene to obtain permission to leave his workstation a half hour early.<sup>4</sup>

There is a question of fact as to the procedure by which Greene was to request unscheduled official time. According to Greene, he was to direct his request to Glen Kierstead, his immediate supervisor, either by speaking to him personally or by leaving a message on Kierstead's voice mail; the voice mail message would, in turn, trigger a message to Kierstead's electronic pager. If Kierstead did not get back to Greene, Greene could assume that his request had been approved. The Respondent, on the other hand, maintains that on September 14, 2000, the procedure required Greene to speak directly with his immediate supervisor either in-person or by telephone. If Kierstead were unavailable, then Greene was to have asked permission from Kierstead's supervisor and, if necessary, the supervisor at the next highest level. A voice mail message was not deemed a permissible means of seeking permission to take unscheduled official time. Respondent acknowledges that the procedure was subsequently changed to allow for voice mail messages, but is uncertain as to the time of the change. Furthermore, Kierstead testified that he did not receive even a voice mail message from Greene.

I have credited Greene's testimony for a number of reasons. One reason is the uncertainty of the Respondent's witnesses as to when the procedure was changed so as to allow for voice mail messages. Secondly, and most significantly, are the time and expense which the Respondent expended in attempting to respond to Greene's request for telephone records for use in his response to a proposed reprimand for, among other things, failing to properly request unscheduled official time. As shown by the Respondent's own documentary evidence, it engaged the services of an outside contractor in an attempt to retrieve the records.<sup>5</sup> When asked why the Respondent had gone to such lengths, Barbara Watkins, who was then the Associate Director of Respondent's Oklahoma City facility, testified that they wanted to provide the records to Greene if he thought he needed them to support his position in opposition to the proposed reprimand. Neither Watkins nor any other of

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It is unclear how the early departure would affect Greene's lunch schedule and whether the extra official time would be made up by additional alterations to his schedule. However, the issue is not critical to the disposition of this case.

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It was eventually determined that the telephone records for September 14 could not be retrieved because they had been corrupted.

Respondent's witnesses explained why Greene was not simply told that it made no difference whether he had left a voice mail message since that was not the proper procedure.<sup>6</sup> Furthermore, it is unlikely that Greene would have requested records which could have shown that he did not leave even a voice mail message, thus rendering moot the issue of whether he had used the proper procedure. It is significant to note that the Respondent did not see fit to initiate the records search on its own in an attempt to corroborate Kierstead's assertion that he had not received a voice mail message from Greene.<sup>7</sup>

It should be noted that Greene could have avoided the problem entirely if he had requested permission from Kierstead at the daily meeting on the morning of September 14. Kierstead would close the meeting by asking each of his subordinates if he or she had anything to bring up. This would have been a natural opportunity for Greene to have asked for unscheduled official time.

Greene was charged with absence without leave (AWOL) from 10:00 a.m. to 10:30 a.m. on September 14, 2000.

#### Greene's Remarks at or After the BAC Meeting

The BAC meeting on September 14, 2000, was scheduled to be held from 10:00 to 11:00 a.m. At some time during the proceedings Greene announced that he was present in response to allegations that BAC members were attempting to arrange for the preselection of Novotny for a full time job in the EEO Office. At one point either during or after the meeting Greene criticized one or more of the BAC members for counseling a bargaining unit employee regarding a discrimination claim. Greene declared that the Union was the exclusive representative of the bargaining unit and characterized the BAC as a "social club."

Although Greene testified that he merely informed the BAC members of the allegations, members of the committee testified that he accused committee members of trying to arrange for the preselection of Novotny. In any event,

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Respondent has not cited any documentary evidence showing the promulgation of a policy prohibiting the use of voice mail messages to request unscheduled official time.

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The finding of fact that Greene did leave a voice mail message does not rest on the presumption that Kierstead was not telling the truth. It is entirely possible that, just as the telephone record keeping system did not work, the voice mail and paging system also malfunctioned.

Greene's comments apparently disrupted the BAC meeting and caused it to adjourn at 11:00 a.m. (which was the regularly appointed time) without having completed its agenda.

#### The Aftermath of the BAC Meeting

Smith did not attend the meeting but subsequently stated that Greene had made false and "slanderous" statements which adversely affected his position as the Chief of police. Smith testified that, following the BAC meeting of September 14, African American employees would call him such names as "Uncle Tom" and "kiss ass."

Novotny testified that she was under a great deal of stress because of Greene's remarks. A number of employees approached her to inform her of the rumors that she was having an affair with Smith. Novotny was married at the time (her husband also was employed by Respondent) and categorically denied such an affair. Novotny also testified that Greene began appearing outside of her office and acting in a manner which caused her to feel intimidated.

On the day after the BAC meeting Novotny filed a formal complaint against Greene.<sup>8</sup> Her complaint was addressed to Gentling as the Medical Center Director and copied to the Office of Resolution Management (ORM) in Little Rock, Arkansas. The ORM is a part of the Department of Veterans Affairs which is charged with handling EEO complaints.

On October 5, 2000, Greene submitted a written response to Novotny's complaint to the ORM (Resp. Ex. 44). In his response Greene alleged that a Human Resources and Development (HR&D) Specialist had told him that Elijah Knight and Abe Kelly, both of whom were members of the BAC, had come to the HR&D office and asked for assistance to ensure Novotny's selection when the new position in the EEO office was approved. In Greene's words, he was told that the HR&D Specialist refused the request, at which time Knight and Kelly left "her" office. Greene also stated that he had been told that Pamela S. McKinney, the Equal Opportunity Manager, and Smith had visited the HR&D office on a number of occasions to create a position to match Novotny's qualifications.

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Novotny testified that she eventually terminated her employment with Respondent in order to take a better job in the private sector. She did not claim that Greene caused or contributed to her departure. Novotny later resumed her employment with Respondent but is no longer working in the EEO office.



## Greene's Request for Annual Leave on October 30, 2000

Greene's personal automobile was stolen in the latter part of October of 2000 and recovered on Saturday, October 28. On October 30 Greene requested annual leave in order to complete certain administrative details with his insurance company, presumably regarding the repair of the vehicle. On the electronic form for requesting the leave, Greene inserted under Remarks "Recovery of POV [personally owned vehicle]." When it was learned that the vehicle was actually recovered two days before, Greene was charged with falsifying a leave request.

Kierstead testified that, while he assumed that Greene was going to pick up his vehicle on October 30, his sole concern was to ensure that there was coverage in the shop. He said that he would have approved Greene's leave request even if he had told him about the insurance paperwork or said that he wanted to go fishing.

## The Investigation by Tom DuChene

On September 25, 2000, Tom DuChene, Chief, Engineering Services, undertook an investigation of certain of Greene's activities on his own initiative as he was authorized to do.<sup>9</sup> DuChene was not acting on Smith's request in conducting the investigation and Smith had no authority to direct him to do so. DuChene originally intended to limit his investigation to whether Greene had properly requested unscheduled official time on September 14 and his remarks during and after the BAC meeting. However, subsequent events led him to expand the investigation to the following additional matters:

- a) Allegations by Greene that, on September 19, 2000, Officer Tucker, a member of Respondent's police force, informed him that he had been told by Nathan Trolinger that DuChene and Trolinger were arranging for a friend of Trolinger's at Tinker Air Force Base to be hired as an electrician in Engineering Service.

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Greene's regular assignment was as Work Leader in the Grounds and Transportation Section which is in Engineering Services. Kierstead was his first-line supervisor, Mike Smith was his second-line supervisor and DuChene was his third-line supervisor.

b) The events described in Greene's memorandum of October 5 regarding statements by an HR&D Specialist regarding attempts to arrange for the preselection of Novotny.

c) An allegation by Greene during the latter part of October of 2000 that the Respondent's security cameras were being used to monitor his movements and those of Craig. Greene repeated the allegation to several members of the Respondent's police force who, in turn, reported the conversations to Smith.

d) A report by Novotny and Dr. Steven Orwig (apparently a management employee of Respondent) that, on October 19, 2000, they had observed Greene waving at a security camera and saying that he wanted to, "make it easier for them to see me."

e) A report that, on October 30, 2000, Greene had falsified a request for annual leave by inserting in the "Remarks" portion of the leave request form the statement, "Recovery of stolen POV" in spite of the fact that the vehicle had been recovered two days before.

By memorandum dated November 8, 2000, DuChene forwarded copies of his investigative files to ORM (Resp. Ex. 43-48). The investigative files include written statements from numerous employees, the most significant of which are as follows:

a) Kelly and Knight describing Greene's behavior at the BAC meeting and denying coming to the HR&D office in an attempt to promote the preselection of Novotny.<sup>10</sup>

b) Various HR&D employees denying visits from Kelly or Knight and denying ever having spoken to Greene regarding the alleged preselection of Novotny.

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It is significant to note that DuChene's investigative files contain several statements from those present at the BAC meeting, including Kelly, that Greene did not raise the preselection issue until *after* the meeting. Those statements suggest that, while Greene's comments might have been provocative, he neither disrupted the meeting nor prevented the BAC from completing its agenda.

- c) Security technicians and police officers denying the receipt of instructions to monitor the movements of Craig and Greene.
- d) Novotny describing allegedly slanderous statements and harassment by Greene.
- e) McKinney denying efforts by herself and Smith to secure a promotion for Novotny or to have her assigned to the EEO Office on a full time basis. McKinney further stated that Novotny had received EEO training which was relevant to her role as a secretary. Novotny traveled to the training site in a government vehicle with McKinney, thus incurring no additional expense. Novotny's request for additional EEO training was denied on the grounds that it would not have been cost effective. Novotny was instrumental in setting up the training at the EEO retreat at Roman Nose State Park. McKinney confirmed the fact that a full time support position for the EEO Office was under consideration.<sup>11</sup>
- f) Smith stating that he was informed that Greene was questioning his integrity and denying that he was trying to groom Novotny for a promotion. Smith also stated that Greene had created a hostile environment for him by spreading falsehoods and questioning his integrity.
- g) Tucker denying that he ever had a conversation with Greene concerning statements by Trolinger about a friend of Trolinger's being given special consideration for a job as an electrician.
- h) Jan Elmore and Bonnie Wade (presumably employees of the Respondent) stating that, on September 19, 2000, Tucker told Trolinger and them that he hoped to "change uniforms" soon because he had applied for a job as an electrician.

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Smith testified that he was at the retreat and that Tammie Novotny also attended. McKinney testified that a full time secretary for the EEO Office was one of many suggestions that came out of the retreat. DuChene's investigative files contain a statement by Kelly that he and Knight had informed Greene that, at the Roman Nose retreat, Smith had recommended that, "the secretary become full time (EEO) versus being shared between two services." (Resp. Ex. 46 at 7)

Trolinger then stated that Wylie<sup>12</sup> had an interview with Tom (presumably DuChene) and that, as a joke, he had asked DuChene to give Wylie a hard time. The purpose of the interview was not stated.

i) Another statement from Smith describing a conversation with Trolinger who informed him that Greene had told him that Tucker had stated that Trolinger's friend had been selected for a job at Engineering Service. Trolinger stated that he knew nothing about the selection and did not know the person who had been hired. Tucker later told Smith that he had not made the statement as alleged by Greene. Smith cautioned Tucker about making false statements that would damage his credibility as a police officer. Tucker stated that he thought that the selection process for Engineering Service was unreasonable and announced his intention to lodge complaints with the Union and EEO.<sup>13</sup> Smith told him that he had the right to do so.

By letter date December 29, 2000 (Resp. Ex. 16), DuChene notified Greene of a proposed reprimand for the following stated reasons:

a) Failure to request official time while attending BAC meeting on September 14, 2000, in violation of Article X of the local collective bargaining agreement entitled Union

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There is no evidence as to the identity of Wylie, but it is possible that someone assumed, whether or not correctly, that he or she was the friend of Trolinger's at Tinker Air Force Base.

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The investigative file contains a note by DuChene stating that Trolinger had told him that he did not know Rickey Suiter or Lawrence Bertalasio [possibly candidates for the electrician job]. Trolinger also stated that Greene had informed him that everything regarding the electrician vacancy had been worked out.

Representation.<sup>14</sup> It is significant to note that DuChene indicated that Greene was out of his work area, "*in order to act as a Union representative at the Black Affairs Committee meeting.*" (emphasis supplied).

b) Absence without leave from 10:00 a.m. to 10:30 a.m. on September 14, 2000.

c) Statements during the course of the BAC meeting on September 14, 2000, accusing committee members and Smith of attempting to secure the preselection of Novotny as an administrative assistant in the EEO Office.

d) The statement of September 19, 2000, to Trolinger regarding Tucker's statement to Greene about an agreement between Trolinger and DuChene to procure the electrician job for one of Trolinger's friends.

e) Greene's letter of October 5, 2000, to ORM regarding his alleged conversation with a HR&D Specialist concerning efforts by Knight and Kelly to facilitate Novotny's preselection.

f) Statements to various police officers that Smith had ordered him to be monitored.

g) Falsification of annual leave request on October 30, 2000.

DuChene characterized all of Greene's actions as "conduct prejudicial to the government" in violation of

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Article X of the local collective bargaining agreement (Resp. Ex. 7 at 11) deals with such subjects as the appointment of Union stewards and the allocation of official time. Although Article X supports the proposition that Union representatives must obtain permission from their supervisors to leave their workstations at unscheduled times, there is no mention of the specific means by which they are to do so.

5 C.F.R. § 735.203.<sup>15</sup> According to DuChene, each of Greene's oral and written statements set forth in the proposed reprimand were, "slanderous and defamatory about other VA personnel and officials." DuChene further indicated that Greene had created a hostile environment in violation of Article 16, entitled "Employee Rights", of the master collective bargaining agreement (G.C. Ex. 2).<sup>16</sup> Finally, DuChene noted that Greene had received two prior suspensions in 1999 for disrespectful conduct and stated that he would take Greene's disciplinary record into consideration in determining the action to be taken if the reprimand were to become final.

On February 8, 2001, Greene submitted a memorandum to DuChene denying each of the stated grounds for the proposed reprimand. Greene stated that he had followed the established past practice in using Kierstead's voice mail to request unscheduled official time on September 14, 2000. Greene further stated that his allegedly improper statements were made while he was conducting Union business. With regard to the allegedly falsified leave request, Greene asserted that annual leave is an entitlement and that he was not required to justify its use.

DuChene gave Greene an opportunity to submit an additional response after having been informed that the

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The cited regulation, issued by the Office of Personnel Management (OPM), states that:

An employee shall not engage in criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, or other conduct prejudicial to the Government.

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The wording of Article 16 is, for the most part, concerned with the obligations of the employer (identified as "Management") in its treatment of employees. Although DuChene did not elaborate on the portion of this Article that Greene is alleged to have violated, he presumably was referring to the language of Section 1 that, "Management will endeavor to establish working conditions which will be conducive to enhancing and improving employee morale and efficiency." DuChene might also have been referring to Section 1C which states that:

No employee will be subjected to intimidation, coercion, harassment, or unreasonable working conditions as reprisal nor will an employee be used as an example to threaten other employees.

telephone records requested by Greene could not be retrieved. Greene declined to supplement his original response.

By letter dated May 15, 2001 (Resp. Ex. 33), DuChene informed Green that he had decided to issue the proposed reprimand. The reasons were as stated in his letter of December 26, 2000.

## **Discussion and Analysis**

### The Scope of Protected Activity

The concept of protected activity is derived from section 7102 of the Statute which reads, in pertinent part:

*Each employee shall have the right to . . . assist any labor organization . . . freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. (Emphasis supplied.)*

The scope of protected activity under section 7102 includes, but is not limited to, the right to act as a representative of a labor organization. Furthermore, the clear language of the Statute indicates that it is not limited to the activities of union officers or of employees whose absence from work has been authorized.

The protection of the Statute is not unlimited. The Authority has long held that section 7102 does not prohibit discipline of union representatives when they are not acting on behalf of the union or when they are engaged in "flagrant misconduct." *U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and AFGE Local 916*, 34 FLRA 385, 388 (1990). In evaluating allegations of flagrant misconduct the Authority has adopted a test whereby the leeway allowed employees in exercising their statutory rights is balanced against the employer's right to maintain order and respect for its supervisory staff.

The outcome of the Authority's evaluation of allegedly flagrant misconduct is dependent upon the facts of each individual case. *See, Department of Defense, Defense Mapping Agency Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 81 (1985). In *U.S. Department of Veterans Affairs Medical Center, Jamaica Plain, Massachusetts*, 50 FLRA 583, 587 (1995), the Authority held that a letter from a police officer accusing the acting police chief of mismanagement and cronyism, and threatening to publicize those accusations, did not reach the level of flagrant

misconduct.<sup>17</sup> In support of its conclusion the Authority cited the holding in *Dreiser & Krump Mfg. Co., Inc. v. NLRB*, 544 F.2d 320, 329 (7<sup>th</sup> Cir. 1976), in which it was stated that protected activity remains protected unless it is found to be, "so violent or of such serious character as to render the employee unfit for further service." In *Federal Aviation Administration, Honolulu, Hawaii*, 53 FLRA 1762, 1772 (1998), it was recognized that statements made on behalf of a union do not fall outside of the protection of the Statute merely because they are offensive. Such statements are grounds for discipline only when they are blatantly offensive (such as racial epithets) or made with a reckless disregard for the truth.

It is against all of the above legal standards that Greene's conduct as described in the reprimand and the actions of the Respondent must be measured.

#### The BAC Meeting on September 14, 2000

In its post-hearing brief the Respondent argues that Greene could not have been acting as a Union officer in the absence of approved official time and that he could not have been engaged in protected activity when he was not acting as a Union officer. Each of those premises is invalid. There is nothing in the language of the Statute or in Authority precedent, and nothing cited by the Respondent, to remotely suggest that Greene could not have been engaged in protected activity even if he had been absent without leave on September 14, 2000.<sup>18</sup> Furthermore, even if Greene had not signed in to the BAC meeting as a Union representative, his remarks during and after the meeting, whether or not imprudent or disruptive, were clearly related to an issue that was of interest to bargaining unit members rather than merely a private concern.

Greene's actions at or after the BAC meeting, even when viewed in the most unfavorable light, did not constitute flagrant misconduct. It is not alleged that he made threatening statements or gestures or that he used overtly insulting or obscene language. His characterization of the

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In the cited case it was alleged that the action of the union representative undermined the status and authority of the police chief. The similarity to the allegations in this case is obvious.

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A perhaps unintended corollary to the Respondent's argument is that Greene would have been in a protected status between 10:30 a.m. and 11:00 a.m. when he was on "his own time".



BAC as a "social club", while certainly insensitive and inappropriate, was not outside commonly recognized limits of expression. It was, at the most, an uncharitable reference to the fact that the committee sponsors events for the funding of scholarships.

Nothing that Greene said or did at the BAC hearing can be fairly described as insubordinate since he did not disobey lawful instructions or challenge the authority of the Respondent's management representatives. Finally, his statements did not arise out of a reckless disregard for the truth. Greene's investigation, including his actions at and after the BAC meeting, arose out of a misunderstanding of events that occurred at the Roman Nose retreat and the fact that Novotny had received EEO training. Evidence submitted by the Respondent indicates that Smith and Novotny were present at the retreat. The Respondent's evidence also shows that Smith suggested, or at least supported, the provision of full time administrative support for the EEO Office, a function which Novotny was performing on a part time basis. Therefore, Greene's investigation was justified in spite of the fact that the initial allegations of preselection turned out to have been mistaken and were not pursued by the Union.

Novotny's distress over the rumors of her preselection, while unfortunate, cannot be blamed on Greene. They were, at the most, a side effect of his investigation. Indeed, the Respondent was in the best position to have stopped the rumors by a simple announcement stating that they were not true and informing employees of the recommendation arising out of the Roman Nose Retreat. The rumors of Novotny's affair with Smith and the expressions of hostility towards Smith were the products of a general atmosphere of distrust and animosity at Respondent's worksite, a condition for which the Union might well have been at least partially responsible. That condition was identified in the report of the investigation of the Respondent's EEO program. Smith's own remarks at the Town Hall meeting, even if well intentioned, probably exacerbated the problem and could have been expected to provoke a negative reaction from bargaining unit employees.

In his letter of reprimand to Greene, DuChene cited three authorities in support of his contention that Greene had acted improperly in each of the instances enumerated in the letter. They were: a portion of the local collective bargaining agreement with regard to the alleged unauthorized absence, as well as 5 C.F.R. § 735.203 and a portion of the master collective bargaining agreement (G.C. Ex. 2) with regard to all of the enumerated instances. Although the

Respondent has not addressed those citations in its post hearing brief, it has at least impliedly ratified DuChene's rationale. Therefore, it is appropriate to briefly examine each of the sources cited by DuChene.

As stated (supra note 14), Article X of the local collective bargaining agreement does no more than support the uncontested proposition that Greene needed supervisory approval to leave his workstation at 10:00 a.m. on September 14, 2000. The contractual language adds nothing to the Respondent's position inasmuch as it does not establish the mechanism by which such approval is to be obtained. The Respondent produced no evidence that there had been a written directive which prohibited the use of voice mail to obtain approval for unscheduled official time, nor, indeed, was there evidence of a written directive which later allowed for the use of voice mail.

5 C.F.R. § 735.203 is simply a statement of principle regarding the general obligations of employees (supra note 15). Even if one were to accept the farfetched proposition that OPM is empowered to diminish the scope of protection afforded Federal employees under the Statute or to contravene Authority doctrine regarding flagrant misconduct, it defies the imagination to suppose that it intended to do so.

Article 16 of the Master Agreement is entitled "Employee Rights." A reasonable reading of the article leaves little doubt that it is intended only to define the obligations of the Respondent in dealing with the Union and with individual employees. It provides no basis for action by the Respondent against an employee, let alone a representative of the Union. Certainly, neither the Master Agreement nor any other collective bargaining agreement may validly be used to vindicate the rights of non-members of the bargaining unit such as Novotny and Smith. If Greene acted improperly in his capacity as a Union officer other than in committing flagrant misconduct, it is for the members of the bargaining unit either to vote him out of office or to institute proceedings against him in accordance with the Union's constitution and bylaws.

#### Greene's Letter of October 5, 2000

Greene's letter of October 5, 2000, to ORM (Resp. Ex. 46 at 20) is, for the most part, a statement of Greene's version of events concerning his investigation of allegations regarding the intended preselection of Novotny. The letter also sets forth Greene's response to Novotny's charge of harassment and the charge that DuChene's

investigation of his activities was instigated by Smith and constitutes unlawful reprisal as well as a violation of the collective bargaining agreement.

The only portion of the letter cited in DuChene's reprimand is Greene's statement that an unnamed HR&D Specialist told him that Knight and Kelly had asked her for help with Novotny's preselection. Greene based his refusal to name the informant on the fact that she is not a member of the bargaining unit and therefore not protected under the collective bargaining agreement.

Greene did not present the actions of Knight and Kelly as fact, but only as something that he had been told. DuChene's inclusion of Greene's letter as one of the reasons for the reprimand was apparently based upon the denials of Knight and Kelly and, especially, on the denials by various employees in the HR&D Office that they had spoken to Greene. Those denials are insufficient reasons for characterizing Greene's letter as flagrant misconduct. While it may never be known whether Greene was telling the truth, it is also to be expected that the HR&D employees would have denied having spoken to Greene if for no other reason than fear of reprisal. Stated otherwise, they would have been reluctant to become involved in what obviously was a major dispute between the Union and the Respondent.

While Greene's comments about Kelly and Knight apparently became known throughout the Respondent's workforce, there is no evidence that Greene himself was the cause. Therefore, DuChene's accusations of harassment and the creation of a hostile work environment appear to be excessive.

#### Greene's Statement of September 19, 2000 to Trolinger

As with Greene's statement concerning his contact with an unidentified HR&D Specialist, it may never be known whether he was telling the truth about his conversation with Tucker concerning the effort to get the electrician job for Trolinger's friend. DuChene's investigative file contains a Report of Contact by Smith (Resp. Ex. 45 at 9) stating that on September 21, 2000, he called Tucker into his office and questioned him about his conversation with Greene. Tucker denied that such a conversation occurred, but stated that he thought that the selection process in Engineering Service was unreasonable and that he planned to take formal action. Smith advised Tucker that he was within his rights to do so but cautioned him against making "unfounded and defamatory" statements which would damage his credibility as a police officer. On September 29, 2000, Tucker provided a

written statement to DuChene that he did "not recall" having such a conversation with Greene (Resp. Ex. 45 at 6).

It is impossible to assess Tucker's credibility since he did not testify at the hearing. However, his denial of the conversation with Greene could have been the result of a feeling of intimidation, whether or not justified, based upon his conversation with Smith. Tucker could also have been reluctant to confront DuChene, for whom he hoped to eventually work, with regard to allegations of preselection involving DuChene himself.

To his credit, DuChene included in his investigative file the written statement from Elmore and Wade regarding their conversation on September 19, 2000, (prior to Tucker's statements to Smith and DuChene) with Tucker and Trolinger concerning Wylie being interviewed by DuChene. Greene might have heard of this incident and assumed that a preselection was being planned.

Greene's actions regarding this matter may be viewed in different ways. On the one hand he might have been acting responsibly in going directly to Trolinger. On the other hand he might have been trying to "stir the pot" for improper motives. In any event, the issue of preselection for the electrician job was put to rest soon after. Greene's actions may well have been excessively confrontational, but they did not amount to flagrant misconduct.

#### Greene's Statements Concerning Electronic Monitoring

Greene's allegation that he and Craig were being monitored by video cameras at Smith's orders was farfetched and suspect. It is highly likely that Greene was motivated, at least in part, by personal animosity. It is also likely that Greene was angered by the theft of his automobile from one of Respondent's parking lots that was supposedly under surveillance by police officers who ultimately reported to Smith. Greene wanted to upset Smith and he obviously succeeded. However, his conversations with police officers about electronic monitoring of himself and Craig was protected activity inasmuch the allegation, if true, would almost certainly have uncovered the commission of an unfair labor practice in the absence of highly unusual circumstances.

As with Greene's other allegations, it is impossible to determine if he was actually informed by a security

technician of the purported monitoring.<sup>19</sup> However, Greene's questioning of security personnel cannot fairly be characterized as being so defamatory to Smith or disruptive of Respondent's operations as to reach the level of flagrant misconduct.

#### Alleged Falsification of Annual Leave Request

Although Greene was not acting in his capacity as a Union officer when he requested annual leave, he was still entitled to be free of "penalty or reprisal" for Union activity within the meaning of section 7102 of the Statute. Greene had an absolute right to use his accrued annual leave subject only to the Respondent's legitimate concern over adequate staffing in his absence. He need not have put anything in the Remarks section of the leave request form; that portion of the form is intended to be used only for special leave such as for military service or jury duty.

The transparency of the rationale for the charge of falsification and the timing of the charge raises the natural inference that the Respondent was "out to get" Greene in retaliation for his protected activities as set forth above. Indeed, the inclusion of this charge on DuChene's letter of reprimand taints the whole process and calls the Respondent's motives into question.

#### DuChene's Investigation

As stated above, union officials are not immune from discipline even when acting in the course of their duties. Although the Statute does not prohibit an employer from investigating the official activities of a union officer, it may only do so when it has a legitimate basis to suspect that the officer has committed flagrant misconduct. In this case DuChene, and through him the Respondent, had no such justification.

Taken at its worst, Greene's conduct was imprudent and provocative, perhaps intentionally so. His activities were undoubtedly disruptive, primarily to management personnel, and he may well have intended that effect. He over-reacted to every rumor of improper conduct by management representatives and seemed inclined to stir up controversy. Furthermore, his motives for such actions are suspect and were of questionable value to the bargaining unit. However, Greene's conduct fell short of the Authority's well-

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Greene refused to identify the source of his information. Each of the police officers and security technicians interviewed by DuChene denied having received orders to monitor the movements of Craig or Greene.

established parameters for findings of flagrant misconduct. Greene's actions did not evidence the disloyalty to the Respondent or have the destructive effect on discipline as were found in such cases as *United States Forces Korea/Eighth United States Army*, 17 FLRA 718, 728 (1985), (letter to foreign newspaper containing derogatory and defamatory statements about U.S. government officials) and *Veterans Administration, Washington D.C. and Veterans Administration Medical Center, Cincinnati, Ohio*, 26 FLRA 114 (1987), *aff'd sub nom. American Federation of Government Employees, Local 2031 v. FLRA*, 878 F.2d 460 (D.C. Cir. 1989) (use of racial epithets and racial stereotyping in disparaging a manager).

More importantly, it was or should have been evident to the Respondent before the commencement of DuChene's investigation that Greene had not committed flagrant misconduct. The continuation of the investigation in the absence of evidence of such misconduct could reasonable be expected to have had a coercive effect, if not on Greene himself, then on the members of the bargaining unit who were undoubtedly aware of it. It is of no consequence whether the Respondent acted on a good faith belief that Greene's actions amounted to flagrant misconduct. The language of section 7102 and 7116(a) of the Statute is not confined to the wilful acts of employers.

#### DuChene's Reprimand of Greene

DuChene based his reprimand of Greene on all of the incidents described above. Therefore, the reprimand must stand or fall as a whole. Under other circumstances DuChene might have been entitled to believe Kierstead's statement that Greene was not authorized to request unscheduled official time by voice mail. However, the evidence shows that DuChene's finding as to the official time incident of September 14, 2000, and the prior decision to charge Greene with 30 minutes of AWOL were motivated by a reaction to his protected activity at the BAC meeting. Similarly, the entire reprimand is tainted by the fabricated charge of falsifying a leave request.

#### **The Remedy**

The General Counsel has proposed that the Authority order the Respondent to refrain from various activities, including the monitoring of the activities of Greene and other employees. Such a remedy would be overly broad in view of the absence of evidence that such monitoring ever occurred. Therefore, the General Counsel's proposed remedy; will be modified accordingly.

In view of the foregoing, I find that the Respondent violated section 7116(a)(1) of the Statute by commencing and continuing its investigation of Greene. Furthermore, the Respondent violated section 7116(a)(1) and (2) by issuing Greene a proposed letter of reprimand on December 29, 2000, as well as section 7116(a)(1), (2) and (4) by issuing Greene a final letter of reprimand on May 15, 2001.

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

#### **ORDER**

IT IS HEREBY ORDERED that, pursuant to section 2423.41 (c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of Veterans Affairs, Veterans Affairs Medical Center, Oklahoma City, Oklahoma, shall:

1. Cease and desist from:

(a) Subjecting Nathaniel Marc Greene or any other bargaining unit employee to discrimination, coercion, restraint or interference for engaging in protected activity on behalf of the American Federation of Government Employees, Local 2562, AFL-CIO, or for cooperating with or assisting the Union.

(b) Reprimanding or disciplining Nathaniel Marc Green for his activities on behalf of the American Federation of Government Employees, Local 2562, AFL-CIO.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind, revoke and withdraw from all official and unofficial records and documents all material pertaining to the proposed reprimand of Greene dated December 29, 2000, and the final reprimand dated May 15, 2001, such records and documents to include those arising out of the investigation which led to the proposed and final reprimands.

(b) Restore to Nathaniel Marc Greene any right or privilege which he may have lost as a result of the aforesaid reprimands.

(c) Fully compensate Nathaniel Marc Greene for any leave, with or without pay, charged to him as a result of his protected activities on behalf of the American Federation of Government Employees, Local 2562, AFL-CIO, on September 14, 2000.

(d) Post at its Oklahoma City, Oklahoma, facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 2562, AFL-CIO are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Director, Veterans Affairs Medical Center, Oklahoma City, Oklahoma, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(e) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Dallas Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, September 13, 2002.

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PAUL B. LANG  
Administrative Law Judge



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

The Federal Labor Relations Authority has found that the Department of Veterans Affairs, Veterans Affairs Medical Center, Oklahoma City, Oklahoma, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT subject Nathaniel Marc Green or any other bargaining unit employee to discrimination, coercion, restraint or interference for engaging in protected activities on behalf of the American Federation of Government Employees, Local 2562, AFL-CIO, or for cooperating with or assisting the Union.

WE WILL NOT reprimand or discipline Nathaniel Marc Green for his protected activities on behalf of the American Federation of Government Employees, Local 2562, AFL-CIO.

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 rescind, revoke and withdraw from all official and unofficial records and documents all material pertaining to the proposed reprimand of Nathaniel Marc Greene dated December 29, 2000, and the final letter of reprimand dated May 15, 2001, such records and documents to include those pertaining to the investigation which led to the proposed and final letters of reprimand.

WE WILL restore to Nathaniel Marc Greene any right or privilege which he may have lost as a result of the reprimands.

WE WILL fully compensate Greene for any leave, with or

without pay, charged to him as a result of his protected activities on behalf of the American Federation of Government Employees, Local 2562, AFL-CIO, on September 14, 2000.

\_\_\_\_\_  
(Respondent/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, Dallas Regional Office, Federal Labor Relations Authority, whose address is: 525 Griffin Street, Suite 926, Dallas, TX 75202 and whose telephone number is: (214)767-4996.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. DA-CA-01-0334, were sent to the following parties:

**CERTIFIED MAIL & RETURN RECEIPT**

**CERTIFIED NOS:**

Charlotte A. Dye, Esquire  
7000-1670-0000-1175-6506  
Nora Hinojosa, Esquire  
Federal Labor Relations Authority  
525 Griffin Street, Suite 926  
Dallas, TX 75202

Stephanie R. Darr, Esquire  
7000-1670-0000-1175-6513  
Department of Veterans Affairs  
VAMC, Regional Counsel Office  
921 NE 13<sup>th</sup> Street  
Oklahoma City, OK 73104

N. Marc Greene, President  
7000-1670-0000-1175-6520  
AFGE, Local 2562  
c/o Department of Veterans Affairs  
921 NE 13<sup>th</sup> Street  
Oklahoma City, OK 73104

**REGULAR MAIL:**

Bobby Harnage, National President  
AFGE, AFL-CIO  
80 "F" Street, N.W.  
Washington, D.C. 20001

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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: SEPTEMBER 13, 2002

WASHINGTON, DC