UNITED STATES AIR FORCE ACADEMY, COLORADO SPRINGS, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1867 Charging Party	Case Nos. DE-CA-20651 DE-CA-20757 (50 FLRA 498)

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 **OCTOBER 16, 1995**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: September 12, 1995

Washington, DC

MEMORANDUM DATE: September 12, 1995

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: UNITED STATES AIR FORCE ACADEMY,
COLORADO SPRINGS, COLORADO

Respondent

and Case Nos. DE-CA-20651
DE-CA-20757
(50 FLRA 498)

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1867

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

UNITED STATES AIR FORCE ACADEMY, COLORADO SPRINGS, COLORADO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1867 Charging Party	Case Nos. DE-CA-20651 DE-CA-20757 (50 FLRA 498)

Hazel E. Hanley, Esquire
For the General Counsel

Captain William H. Kraus, Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION ON REMAND

On June 16, 1995 the Authority remanded certain aspects of the complaints in these cases to the Chief Administrative Law Judge for further action in accordance with its decision on exceptions to the decision of (now retired) Administrative Law Judge Burton S. Sternburg. The Chief Administrative Law Judge assigned the cases to me for the purpose of deciding the remanded issues.[1] These issues were identified by the Authority as necessary for resolving some of the several allegations in the complaints that the Respondent (Academy) had violated section 7116(a)(1) and (2)

[1] The Authority adopted all of Judge Sternburg's findings, conclusions, and recommended order in Case No. DE-CA-20889, which had been consolidated with these cases but is now closed. The Authority also adopted portions of Judge Sternburg's findings, conclusions, and recommended order in the remaining cases.

of the Federal Service Labor-Management Relations Statute (the Statute). The allegations included in the remand were that the Academy had restricted employee Michael Parmelee's use of official time and his access to telephones, and had issued a memorandum alleging that he had engaged in discourteous conduct, because he was engaged in union representational activities.

In response to a letter soliciting the parties' views on certain aspects of the remanded issues, and an invitation to file briefs, Counsel for the General Counsel filed a brief and Counsel for the Academy filed a document entitled *Agency's Responses to Questions Presented on Remand from the FLRA.* In my letter, I had informed the parties that I believed the entire remand should be decided on the existing record, but invited any statement of disagreement. No such statement was received. Therefore, based on the record and the parties' briefs and other statements of position, I make the following resolutions of the issues remanded.

I. RESTRICTIONS ON THE USE OF OFFICIAL TIME AND TELEPHONES

Judge Sternburg's Findings of Fact

The following findings of fact with respect to the restrictions placed on Mr. Parmelee were made by Judge Sternburg, were not excepted to, and are binding for the purposes of this remand:

> The Union is the exclusive representative of a unit of employees appropriate for collective bar-gaining at the Air Force Academy. Included in the 1,800 to 2,500 employees at the Academy represented by the Union are about 400 employees who work in Logistics Distribution, Transportation and Maintenance (LGDTM). The Union and the Respondent are parties to a collective bargaining agreement which provides in Article 6, Section B, that Union officials will be granted "reasonable time" to conduct union representational activities. Section C of the same Article provides . . .:
>
> > The supervisor will normally grant permission except when work load precludes such release. When release as requested is not possible, the immediate supervisor will inform the individual when release can probably be granted,

which will be as close to the original request as possible.

* * *

Prior to April 1992, while a machinist and union steward, Mr. Parmelee had the use of a desk and telephone. Upon being assigned to the Body Shop he was forced to share the telephones located therein with his fellow employees. The telephones were primarily for business and not reserved for the exclusive use of the Body Shop employees or their union representative. However, the employees were not restricted in the use of the telephones and they were frequently paged to receive calls from their families, doctors, etc. The telephones in the Body Shop were in an area which afforded no privacy to the user. Upon being transferred to the Body Shop Mr. Parmelee received two to five telephone calls and up to thirty messages per day. The messages were left in an open box shared by all his fellow employees in the Body Shop. Mr. Parmelee, contrary to the practice followed while he was in the Machine Shop, was allowed to return telephone messages only on his break or while at lunch. Additionally, the other employees in the Body Shop were told that they were spending too much time on the telephone and that henceforth the front office would screen their calls and determine which calls were important. The important calls would then be put in the open box described above. The aforementioned restrictions on the use of the telephones in the Body Shop by Mr. Parmelee was instituted without any prior notice or bargaining with the Union.[3/]

* * *

On the morning of April 13, 1992 Supervisor Hogeboom informed Mr. Parmelee that his official time for conducting union representational activities was being capped at 12 hours per pay period. According to the testimony of Mr. Stephen Fuhrmann, who at the time was Chief of Labor and Employee Relations, it was he who determined that Mr. Parmelee's use of official time should be capped at 12 hours per pay period. He reached this

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3/ According to Sergeant Gendron who imposed the restriction on the use of the telephone by Mr. Parmelee, he did so in response to Mr. Fay Hogeboom's action in restricting Mr. Parmelee[’s] use of Official Time to 12 hours per pay period . . . . (This footnote excerpt is part of Judge Sternburg’s Findings of Fact.)

conclusion after reviewing the official time records for approximately 15 to 20 pay periods and discovering that the average steward utilized approximately four hours of official time per pay period. Inasmuch as Mr. Parmelee was "a skilled, enthusiastic, and popular steward", he reasoned that three times the amount of official time used by other stewards was a reasonable amount of time to allow Mr. Parmelee. No restrictions were put on any other steward with respect to the use of official time. Mr. Fuhrmann was of the further opinion that the Union was not distributing its work load properly among its stewards because it recognized that in Mr. Parmelee they had a "superstar". According to Mr. Fuhrmann his investigation into the use of official time by union stewards indicated that Mr. Parmelee had used anywhere from 14 to 72 hours of official time during an 80-hour pay period. Admittedly, the Union was not given any advanced notice of the change which according to Mr. Fuhrmann, was his interpretation of what should be considered a "reasonable" amount of official time within the meaning of Article 6 of the collective bargaining agreement.

According to Sgt. Gendron, the restrictions put on Mr. Parmelee's use of official time for union representational activities impacted on the use of the telephone in the Body Shop. Following imposi-tion of the 12-hour restriction he noticed that there was a marked increase in the use of the telephones in the Body Shop by Mr. Parmelee. Inasmuch as Mr. Parmelee was tying up the telephone for periods of 30 to 40 minutes on union business, the restrictions on the use of the telephone where imposed upon him.

Further according to Sgt. Gendron, at the time that Mr. Parmelee was transferred to the Body Shop, the Body Shop had a backlog of some 1200

> hours of work due to its annual reconditioning of the snow removal equipment which was to be finished by a specified date. Inasmuch as Mr. Parmelee's services were needed to complete the reconditioning by the specified date, Respondent imposed the 12-hour per pay period restriction on [him]. The restriction was lifted after a period of two and one-half to three months when the reconditioning was completed. At the time that the restriction on the use of official time was imposed upon Mr. Parmelee he was not told that [it] was only temporary.
>
> With respect to the specified date referred to above, the record indicates that the time limits for completing the reconditioning of the snow removal equipment [were] not tied to weather expectations but rather to the date of the annual "snow parade".

Issues Included in Remand Concerning these Restrictions

The Authority, while remanding the undecided section 7116(a)(1) and (2) allegations concerning these restrictions for plenary consideration, identified certain specific issues it considered to be essential for resolution of the merits. First, it remanded the issue of whether or how the restric-tions on Parmelee's use of official time affected his conditions of employment. Second, it remanded the issue of whether the restrictions placed on Parmelee's use of telephones differed, in scope or timing, from restrictions placed on other employees or whether, on any other basis, the restrictions constituted unlawful discrimination. Finally, the Authority indicated that the Judge to whom the cases are remanded should address the appropriate framework for resolving these allegations, responding to the Academy's argument that the framework set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny)* does not apply where, as here, the alleged violation results from a restriction on protected activity itself.

The manner in which these essential issues are resolved will determine what, if any, further dispositive issues remain. I shall address first the underlying legal issues remanded: the effect of the restrictions on Parmelee's "conditions of employment" and the applicability of the *Letterkenny* framework.

Effect of the Restrictions on "Conditions of Employment"

As the Authority acknowledged in explaining the necessity for a remand, a finding of an unfair labor practice under section 7116(a)(2) of the Statute requires that the alleged discrimination has affected the employee's "conditions of employment." The Academy argues that the restrictions on Parmelee's use of official time and telephones affected only the interests of the Union and those of Parmelee in his representative capacity, not any conditions relating to his status as an employee. It is the validity of this distinction that must be addressed.

The Authority's analysis of whether a matter concerns a condition of employment is the same for purposes of unfair labor practice proceedings as for negotiability disputes. *Veterans Administration Medical Center, Leavenworth, Kansas*, 40 FLRA 592, 597 (1991) (*VAMC Leavenworth*). In deciding whether a matter involves a condition of employment of bargaining unit employees, the Authority considers whether: (1) the matter pertains to bargaining unit employees; and (2) the record establishes that there is a direct connection between the matter and the work situation or employment relationship of bargaining unit employees. *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986) (*Antilles*). In several decisions beginning with *American Federation of Government Employees, AFL-CIO, Local 3006 and The Adjutant General, State of Idaho, Boise, Idaho*, 34 FLRA 816, 819-20 (1990), the Authority adopted a gloss placed on the second part of its *Antilles* test by the United States Court of Appeals for the District of Columbia Circuit to the effect that a matter concerns a condition of employment if it has "a direct effect on the work relationship[.]" Under the terms of the remand in the instant cases, the second part of the *Antilles* test must be adapted to the situation presented here, by focusing on the connection between the restrictions placed on employee Parmelee and Parmelee's own conditions of employment, and by analyzing that connection consistent with Authority precedent.

Although the Authority requires demonstration of a direct effect on the work relationship (or the "work situation"), the necessary connection may be established without showing an effect on employees' ability to perform their work or that the matter in issue is a means or method of performing work. *U.S. Department of Health and Human Services, Social Security Administration, Region X, Seattle, Washington*, 37 FLRA 880, 888 (1990) (*SSA Region X)*. The Authority found a direct connection between the matter at issue in *SSA Region X*--the providing of subscriptions to the *Federal Times* to the SSA Region X branch offices where employees could read copies in their break rooms--and the

employees' conditions of employment. That connection was that the employees read the publication as a source of information on "matters directly relevant to Federal employment and to the employees' status as Federal employees." *Id.* at 887-88. *See also* the Authority's summary description of its *SSA Region X* decision in *VAMC Leavenworth* at 598. *SSA Region X* also indicates that there is no requirement that the matter at issue involve the employees' use of duty time. *SSA Region X* at 889-90.

SSA Region X could be read to mean that employees' ability to inform themselves about Federal employment is, in itself, a condition of employment. Alternatively, it could be read to mean that the "direct" connection between the matter at issue and the employees' work relationship must be **linear** but need not also be **immediate**. Thus, in *U.S. Department of the Treasury, Internal Revenue Service, Ogden Service Center, Ogden, Utah and National Treasury Employees Union, Chapter 67*, 42 FLRA 1034 (1991) (*IRS Ogden*), the Authority affirmed an arbitrator's finding that the agency discriminated against employees, within the meaning of section 7116(a)(1) of the Statute, when it disparately prohibited them from assisting their union in fundraising activities on agency property. The Authority found a sufficient connection between the prohibited activity and "conditions of employment" in the fact that the prohibitied activity was protected by section 7102 and was thus a matter that "concerns conditions of employment." *Id.* at 1052, 1054. *Cf. U.S. Department of Health and Human Services, Social Security Administration and Social Security Administration, Field Operations, Region II*, 38 FLRA 193 (1990) (*SSA Field Operations*) (providing union president with a typewriter and partitions to enclose the union's office space were conditions of employment).

Under either of these alternative rationales, restriction of Parmelee's use of official time for protected union activities affected his conditions of employment. Under the same reasoning, since the restriction on his use of telephones undoubtedly affected his ability to conduct union activities, that restriction also affected his conditions of employment.

Apart from this line of analysis, the restrictions on Parmelee's use of official time directly affected his work situation in that it changed the division of his duty time between work assigned by the Academy and work (authorized by the Statute) on behalf of the exclusive representative. Moreover, Judge Sternburg's findings of fact support an inference that the Academy had a past practice of permitting Parmelee unlimited use of official time for appropriate

union activities; his conclusion that the Academy violated sections 7116(a)(1) and (5) of the Statute by imposing the restrictions is based on ultimate findings consistent with such an inference. *See* 50 FLRA 498, 516-17. In this connection, it is immaterial that the practice had previously been applied to Parmelee in the Machine Shop and the restrictions were imposed only after he had been reassigned to the Body Shop. *SSA Field Operations* at 195-97. The Authority considers the fact that employees have engaged in an agency-sanctioned activity, to the extent that its availability has become a past practice, in determining whether a direct connection with the work situation of the employees involved has been established. In a close case, the existence of a past practice can be determinative. *American Federation of Government Employees, Local 1766 and U.S. Department of the Navy, Marine Corps Combat Development Command, Marine Corps Base, Quantico, Virginia*, 49 FLRA 534, 540 (1994).

For all of these reasons, I conclude that the restrictions placed on Parmelee affected his conditions of employment.[2]

Applicability of the *Letterkenny* Framework

The Authority announced in *Letterkenny* that the analytical framework it applied there was to be applied in all cases of alleged section 7116(a)(2) discrimination. *Id.* at 117-18. Nevertheless, the Academy argues here that the *Letterkenny* analysis should not be applied because the alleged discrimination did not affect a condition of employment, and because the fact that the action taken was aimed explicitly at the employee's union activity "renders . . . meaningless" its opportunity to rebut a *prima facie* showing, since such rebuttal requires it to establish that the same action would have been taken in the absence of protected activity.

My conclusion that the restrictions did affect the employee's conditions of employment disposes of the first part of the Academy's argument. *IRS Ogden* reinforces that disposition and, further, disposes of the ultimate question of *Letterkenny's* applicability. The Authority applied *Letterkenny* in *IRS Ogden*, where the alleged violation of section 7116(a)(2) was the agency's discriminatory

[2] I therefore find it unnecessary to address the General Counsel's argument that a direct connection was established because the restriction on use of official time led to "counseling entries" and, subsequently, a letter of reprimand.

prohibition of a form of union activity. In affirming the arbitrator's finding of section 7116(a)(2) discrimination, the Authority noted that the arbitrator did not specifically apply the *Letterkenny* framework. The Authority found, however, that the arbitrator's determinations "are consistent with the requirements of *Letterkenny*." *Id.* at 1053. Further, the Authority specifically reaffirmed that "whether an agency's action violates section 7116(a)(2) of the Statute is determined by application of the factors set forth in *Letterkenny*." *Id.* at 1054.

Application of the *Letterkenny* factors does not, as the Academy fears, prevent it from rebutting a *prima facie* showing of discrimination. It may successfully rebut a *prima facie* showing by establishing that its action, taken for a legitimate reason, would have been taken whether or not the activity it restricted was protected activity, for even activity that is otherwise protected may be prohibited to avoid disruption of an agency's operation or in other unusual circumstances. *See, e.g., U.S. Department of Justice, Immigration and Naturalization Service, United States Border Patrol, San Diego Sector, San Diego, California*, 38 FLRA 701, 712-18 (1990) *enforcement denied as to other matters*, Case No. 91-70162 (9th Cir. June 22, 1992); *Department of Health and Human Services, Social Security Administration, Southeastern Program Service Center*, 21 FLRA 748, 751-52 (1986). I therefore conclude that a *Letterkenny* defense can be established by showing that the "legitimate justification" for prohibiting a protected activity would have operated to prohibit unprotected activity having a comparable adverse effect, and that it was not the protected nature of the activity that motivated the prohibition.

Additional Findings, Discussion, and Conclusions Regarding the Restrictions on the Use of Official Time and Telephones

Judge Sternburg's findings of fact include all the essential elements of a *prima facie* showing under *Letterkenny* with respect to the restrictions on Parmelee's use of official time. Thus, (1) the action was taken against Parmelee, an employee who was engaged in protected activity, and (2), by the admission of the Academy's

witnesses, such activity was a motivating factor in its treatment of Parmelee.[3]

With respect to the restriction on telephone use, Judge Sternburg's findings also include all of the essential elements of a *prima facie* showing. As he found, the restriction was imposed by Sgt. Gendron, who admitted that he imposed it in response to the marked increase in Parmelee's use of the telephone for union business following his being restricted in the use of official time.[4] It is therefore clear that Parmelee's union activities were a motivating factor in the restriction on his telephone use.[5]

The focus shifts, then, to the question of whether the Academy has rebutted the *prima facie* showing, with respect to the limitation on use of either official time or the telephone. The Academy's *Letterkenny* justification for limiting Parmelee's hours for a period of approximately three months is that in the period leading up to the limitation, Parmelee was using an amount of official time that was unreasonable in light of the immediate production needs of the Body Shop. However, in finding that the Academy had not made an adequate showing to justify the

[3] I have previously concluded that this treatment was in connection with Parmelee's conditions of employment. I requested the parties' comments as to whether the action taken was "against" Parmelee within the meaning of section 7116(a)(2) or whether it was solely against the Union. *See Department of the Navy, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 10 FLRA 604, 605-06 (1982) (*Portsmouth*). Based on the Academy's response, and on further reflection, I conclude that action affecting an employee's conditions of employment should be deemed to have been taken "against" him without respect to the agency's intent. (In *Portsmouth*, decided prior to such decisions as *SSA Region X* and *IRS Ogden*, the Authority had not addressed the issue of whether the action affected any employee's conditions of employment.)

[4] In its brief to Judge Sternburg, the Academy asserted that "the evidence offered on this point indicates that the phone use limit regarding Parm[e]lee is so inextricably interwoven with the limit of 12 hours official time that the two are multiplicious."

[5] Union activities are, of course, presumptively protected activities. The Academy has not contested the protected status of Parmelee's telephone use as it relates to this allegation.

unilateral nature of its action, Judge Sternburg concluded that:

> To the extent that Respondent's representatives have attempted to justify such action on the fact that the Body Shop had a backlog of some 1200 hours of work due to its annual reconditioning of snow removal equipment, I find such defense to be without merit. The time limit imposed upon the Body Shop for completion of the reconditioning was not tied into any expected snow storm, but rather to a scheduled parade where the snow removal equipment was to be on display. Moreover, the record indicates that the Body Shop always had a backlog of work. Finally, there was no showing that the deadline for the completion of the reconditioning of the snow equipment could not have been met without the full participation of [Parmelee].

The Authority adopted Judge Sternburg's findings and conclusions as to the portions of the complaints in Case Nos. DE-CA-20651 and DE-CA-20757 relating to the unilateral imposition of restrictions on Parmelee's official time and telephone access. The findings and conclusions leading to Judge Sternburg's ultimate findings with respect to those matters appear, by necessary implication, to be included among those adopted by the Authority and therefore are binding for purposes of this remand. In any event, I find it appropriate to defer in this respect to the trier of fact, who has had a superior opportunity to evaluate the testimony leading to these conclusions. These findings and conclusions inescapably lead to the further conclusion that the Academy's asserted business justification is a weak one at best. Other facts persuade me that even if it has established the **existence** of a legitimate justification, the Academy has not sustained the second part of the required *Letterkenny* rebuttal.

Stephen Fuhrmann, Chief of the Academy's Labor and Employee Relations Division at the time of these events, advised the management officials who were concerned about Parmelee's use of official time that a limitation to 12 hours per pay period was reasonable. In explaining why he thought a limitation on Parmelee was justified, Fuhrmann testified that, in his view, the union was not distributing the workload properly among the stewards because Parmelee was a "superstar" steward. Part of Fuhrmann's motivation, he testified, was that (Tr. 296):

> We had never in the history of the Academy had a steward with this surge of volume. It was--my effort in this was to keep the practice where it was; to stop this before it became a past practice that needed to be fixed.

In view of the weakness of the business justification, this admission that the limitation had a labor relations motivation leaves me unpersuaded that the Academy would have restricted a previously permitted activity that (1) was not union activity and (2) had a comparable effect on the Academy's production needs. I therefore conclude that the restriction violated section 7116(a)(1) and (2) of the Statute.

Regarding the restriction on telephone use, it might be sufficient to note again that the Academy argued before Judge Sternburg that "the phone use limit . . . is inextricably interwoven with the limit of 12 hours official time," and therefore to conclude that the violation with respect to one unavoidably involves the other. However, the Authority specifically separated the issues and, implicitly, requested findings on "whether the restrictions placed on Parmelee's use of telephones differed, in scope or timing, from restrictions placed on other employees or whether, on any other basis, the restrictions constituted unlawful discrimination."

The consensus among witnesses of the General Counsel and the Academy is that similar restrictions were placed on telephone use by Parmelee and his fellow employees. Nor has the General Counsel ever argued that the restriction placed on Parmelee's telephone use was different in scope or timing. Rather, the General Counsel presented Parmelee's testimony that the restriction, as implemented, affected his fellow employees, and that they blamed him for it (Tr. 110-13). The General Counsel's theory of this violation before Judge Sternburg was that the Academy restricted all of the employees' telephone use because of Parmelee's use of the telephone for union business. *Post-Hearing Brief of Counsel for the General Counsel* 31.

As Judge Sternburg found, Sgt. Gendron imposed the restriction on Parmelee because "Parmelee was tying up the telephone for periods of 30 to 40 minutes on union business." While the reason other employees were similarly restricted was not specifically litigated, Parmelee testified that the restriction was "abruptly" imposed on the employees in the "LGDTM" unit, including himself.

Even in the absence of disparate treatment, I have previously found that Judge Sternburg's findings establish a *prima facie* showing of discrimination, and this finding holds whether the restriction was placed on other employees for a legitimate reason or in order to mask the discrimination against Parmelee. The Academy, while continuing to insist that *Letterkenny* is inapplicable, but that "discriminatory intent could be more effectively tested using the standard found in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973)," offers no specific argument to support a finding that it has rebutted the *prima facie* showing under *Letterkenny.* Instead, in support of its argument that *Letterkenny* should not apply, the Academy represents "that the restriction was not placed solely upon Mr. Parmelee, nor was the action taken **solely** because of him, but was simply a legitimate and necessary business decision in utilizing limited assets." *Agency's Responses to Questions Presented on Remand from the FLRA* 7 (emphasis added). This representation, if taken at face value, is insufficient to satisfy the second, sometimes referred to as the "but for" factor, part of the *Letterkenny* standard for rebuttal. Nor does the evidence establish that the same drastic action **would** have been taken if Parmelee's "tying up" of the phones had been unrelated to his union activity. Therefore, I conclude that the alleged discrim-ination against Parmelee in limiting his telephone use was indeed discrimination in violation of section 7116(a)(1) and (2).

II. THE DISCOURTEOUS CONDUCT MEMORANDUM

Judge Sternburg's Findings of Fact

> According to the credited testimony of Mr. Parmelee (footnote omitted), when he was orally informed by Mr. Hogeboom on April 13, 1992 that his official time for conducting union representational activities was being capped at 12 hours per pay period, Mr. Parmelee proceeded to inform him that he was in violation of two articles of the collective bargaining agreement and various provisions of the Statute. The quoting of the portions of the collective bargaining agreement and the Statute appeared to anger Mr. Hogeboom. Thereafter during the period between April 13 and 15, 1992, Mr. Hogeboom issued a number of memos and 971 file entries to Mr. Parmelee for alleged discourteous conduct and misuse of official time.

In one memorandum Mr. Hogeboom accused Mr. Parmelee of discourteous conduct by (1) telling Ms. Debbie Huber, a staffing specialist in the Civilian Personnel Office[5/], that due to the fact that he had a 12-hour limitation with respect to the use of official time that he could not come to her office to sign certain papers, (2) by stating to Mr. Hogeboom, "you mean I am allowed to have telephone calls" when Mr. Hogeboom informed him that he had a telephone call, (3) by asking Mr. Hogeboom if he could go to the bathroom, and (4) telephoning Mr. Hogeboom to confirm the proper spelling of Mr. Hogeboom's name for use in a possible grievance and/or unfair labor practice charge.

* * *

The counseling memoranda described above resulted in a number of form 971 entries being inserted in Mr. Parmelee's informal personal file.

5/ This action by Mr. Parmelee resulted in a telephone call to Mr. Hogeboom wherein Civilian Personnel inquired the reason for Mr. Hogeboom's refusal to allow Mr. Parmelee to come to the Civilian Personnel Office to sign certain papers. Mr. Hogeboom, who had not refused permission for Mr. Parmelee to go to the Civilian Personnel Office was irritated by Mr. Parmelee's action. (This footnote is part of Judge Sternburg's Findings of Fact.)

* * *

Mr. Parmelee acknowledges that the incidents described in the above mentioned memoranda did occur but denies that he was discourteous or insubordi-nate. Other than the testimony of Sgt. Gendron as to what Mr. Hogeboom related to him about the incidents, Mr. Parmelee's testimony stands uncontradicted by any direct evidence.

* * *

> With respect to informing Civilian Personnel that he was not allowed to come down to sign papers, Mr. Parmelee attributes his action in this regard to the fact that he had already used up his allotted 12 hours of official time per pay period and was of the opinion that he would be violating the restriction if he left his work to go to the Civilian Personnel Office. With respect to asking Mr. Hogeboom whether he could go to the bathroom and/or receive telephone calls at work, Mr. Parmelee testified that both questions were due to the fact that Mr. Hogeboom had been watching him closely and he did not know what he was allowed to do. Finally, with respect to calling Mr. Hogeboom for the correct spelling of his name, Mr. Parmelee testified that he resented the fact that his name was often misspelled and he did not want to misspell Mr. Hogeboom's name on a[n] unfair labor practice charge that he was preparing. At the time, Mr. Hogeboom was not aware of the fact that he was named in a unfair labor practice charge being prepared by Mr. Parmelee.

Litigation History and Remand of this Allegation

The General Counsel argued before Judge Sternburg that the alleged discourteous conduct by Parmelee occurred in the course of his protected union activities, and urged the judge to apply a "flagrant misconduct" standard to resolve the lawfulness of the disciplinary memorandum. *Post-Hearing Brief of Counsel for the General Counsel* 36-39. Judge Sternburg found this standard to be inapplicable. He found that Parmelee engaged in this conduct while performing his duties as an employee, not in the course of a grievance or collective bargaining meeting. Applying the premise that "[a] supervisor is under no obligation to tolerate remarks and/or actions which are designed to arouse his anger[,]" Judge Sternburg concluded that the "discourteous conduct" entries were justified and did not violate the Statute.

On exceptions by the General Counsel, the Authority noted that, under *Letterkenny*, a violation may be found to occur even if the discipline is based on conduct or remarks that did not occur during the time an employee is engaged in protected activity. As in an ordinary *Letterkenny* case, a disciplinary memorandum may be found unlawful if, the Authority noted, "it is based on an employee's other or previous-occurring protected activity and if those other activities were a motivating factor in the Respondent's issuance of the memo." In addition, the usual *Letterkenny* defenses would be available. 50 FLRA 498, 502. The

Authority did not, however, question Judge Sternburg's rejection of the General Counsels's contention that the alleged discourteous conduct (1) occurred in the course of Parmelee's union activities and (2) should be evaluated under a "flagrant misconduct" standard.

Discussion and Conclusions

The General Counsel continues to argue that Parmelee's conduct should be viewed as arising out his union activities and that the Academy's right to discipline him for such conduct is limited accordingly. I do not read the Authority's remand as preserving that theory of the section 7116(a)(1) and (2) allegation. Rather, it is my understanding that the Authority remanded this portion of the complaint for an exploration of, and conclusions based on, "the connection, if any, between **other** protected activity and the Respondent's issuance of the memorandum." *Id.* (Emphasis added.)

As evidence that the memorandum was motivated by Parmelee's union activities, the General Counsel cites the fact that the memorandum, which reviews the events in which Hogeboom and Parmelee interacted on April 13, begins by noting their 7 a.m. meeting at which Hogeboom told Parmelee that his "Union activities would be limited to 12 hours per pay period." In the General Counsel's view, this shows that the "underlying conflict between Parmelee and Hogeboom" was the unlawful restriction, and that, consequently, "all of Parmelee's responses to Hogeboom on April 13 after 7:00 a.m. must be viewed within the context of a steward reacting to an ongoing unfair labor practice." *Counsel for the General Counsel's Brief in Support of the General Counsel's Exceptions to the Decision of the Administrative Law Judge* 15-16 (*Exceptions Brief*) (incorporated by reference in *Counsel for the General Counsel's Brief on the Authority's Remand of 50 FLRA No. 68*). The General Counsel sees further evidence of a connection in the fact that the memorandum identifies the discourteous conduct as having occurred "after you were counselled concerning your Union activities [.]" Finally, the General Counsel asserts that by implication Judge Sternburg credited Parmelee's testimony that, although the incidents described in the memorandum occurred, he was not discourteous and that he had other reasons for each of his actions. This, argues the General Counsel, shows that Judge Sternburg could not justifiably have concluded that Parmelee's conduct was "designed to arouse [Hogeboom's] anger" or was "derogatory and insulting." *Exceptions Brief* 18-22, quoting Judge Sternburg, 50 FLRA at 517.

None of this relates more than tangentially to the question of motivation that this remand is about. No one disputes that the alleged discourteous conduct grew out of Parmelee's dissatisfaction with Hogeboom's restriction of his union activities. Further, for purposes of this remand I will assume that Judge Sternburg credited Parmelee's **belief** that he was not discourteous but had sufficient reasons for his actions. It is, however, Hogeboom's motivation, not Parmelee's state of mind, that is at issue here. The General Counsel addresses that issue by stating that, "[g]iven the hostile relationship of these parties, Hogeboom more likely than not issued all the subsequent disciplinary actions against Parmelee in retaliation for Parmelee's 'writing him up' at the Union office at 11:30 a.m. on April 13, 1993." *Exceptions Brief* 18 n.6.[6]

Mr. Hogeboom had retired from Federal service approximately a year before the hearing, was apparently no longer in the vicinity of the Academy, and was not called to testify. The General Counsel has not requested, and I see no warrant in the circumstances, that an adverse inference be drawn from the Academy's failure to call him. The Academy presented the testimony of three witnesses as to Hogeboom's reaction to Parmelee's alleged discourteous conduct. I shall not attempt to make an independent evaluation of the credibility of that testimony, although it was uncontradicted and the witnesses were available for cross-examination on the content of their conversations with Hogeboom. Instead, I find in Judge Sternburg's conclusions the path to resolving this issue.

Judge Sternburg found, in partial agreement with the General Counsel's retaliation argument, that Hogeboom caused another "971 entry" to be placed in Parmelee's file in retaliation for Parmelee's earlier participation in union activities. Specifically, Judge Sternburg found that Hogeboom was motivated by his "irritat[ion] with Mr. Parmelee's actions in accusing him of violating various provisions of the Statute and collective bargaining agreement . . . ." 50 FLRA at 518. This affirmative finding persuades me that Judge Sternburg was well aware that the issue with respect to the counseling entries was Hogeboom's motivation. Yet, with respect to the "discourteous conduct" entry, he stated that the entries: "were justified and not violative of the Statute[,]"

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6 This refers to the final incident documented in the "discourteous conduct" memorandum: "At about 1130 I received a call. You were at the other end. You said you called to ask the spelling of my name so you can get it right this time."

explaining that "[a] supervisor is under no obligation to tolerate remarks and/or actions which are designed to arouse his anger."

Consistent with Judge Sternburg's findings, I conclude that Hogeboom was justified in viewing Parmelee's remarks and actions as discourteous toward him, the employee's supervisor. I further find, as implied by Judge Sternburg's failure to find a retaliatory motivation in this instance, that there is insufficient basis for an inference that Hogeboom was motivated by Parmelee's union activities. I find Parmelee's admitted conduct to be sufficiently inflammatory to explain Hogeboom's response without seeking out hidden motives, notwithstanding the mutual hostility that engendered Parmelee's conduct. I also believe that if Hogeboom had been inclined to retaliate against Parmelee for his union activities, it is likely that he would have either imposed or recommended a more drastic disciplinary action than a counseling memorandum. Finally, were Parmelee's union activities sufficient reason to draw an inference of unlawful motivation in the circumstances presented here, the same inference would be required in the case of virtually any discipline he might have received during this time period.

I conclude that the General Counsel's contention that Hogeboom "more likely than not" had a retaliatory motivation is little more than speculation, and that a *prima facie* showing under *Letterkenny* has not been established. I shall therefore recommend that this allegation be dismissed.

In order to remedy the additional violations found in this decision and to fulfill the terms of the remand, I recommend that the Authority issue the following order.

ORDER

Pursuant to section 2423.29 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-
Management Relations Statute, the United States Air Force Academy, shall:

1. Cease and desist from:

(a) Discriminating against Michael Parmelee by limiting his access to telephones and restricting his official time to 12 hours per pay period in retaliation for his participation in activities protected by the Statute.

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

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

(a) Expunge from Michael Parmelee's personnel file the memoranda addressing his use of official times.

(b) Post at the United States Air Force Academy, Colorado Springs, Colorado, 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 Superintendent of the United States Air Force Academy 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.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director, Denver 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 herewith.

The allegation that the Respondent further violated the Statute by issuing a "discourteous conduct" memorandum is dismissed.

Issued, Washington, D.C., September 12, 1995

_____
JESSE ETELSON
Administrative Law Judge

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY EMPLOYEES THAT:

WE WILL NOT discriminate against Michael Parmelee by limiting his access to telephones and restricting his official time to 12 hours per pay period in retaliation for his participation in activities protected by the Statute.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights assured them by the Statute.

WE WILL expunge from Michael Parmelee's personnel file the memoranda addressing his use of official time.

_____
(Activity)

Dated:_____ 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 its provisions, they may communicate directly with the Regional Director, Denver Regional Office, Federal Labor Relations Authority, whose address is: 1244 Speer Boulevard, Suite 100, Denver, CO 80204, and whose telephone is (303) 844-5224.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by JESSE ETELSON, Administrative Law Judge, in Case Nos. DE-CA-20651 and DE-CA-20757 were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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Dated: September 12, 1995
Washington, DC