FEDERAL LABOR RELATIONS AUTHORITY OALJ 15-62
Office of Administrative Law Judges
WASHINGTON, D.C.

DEPARTMENT OF THE AIR FORCE
LUKE AIR FORCE BASE, ARIZONA

RESPONDENT

AND

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 1547

CHARGING PARTY

Case No. DE-CA-12-0016

Sue Kilgore
For the General Counsel

Phillip G. Tidmore
Ronald Veal
For the Respondent

Harley D. Hembd
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

STATEMENT OF THE CASE

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the U.S. Code, 5 U.S.C. §§ 7101 *et seq.* (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority or FLRA), 5 C.F.R. part 2423.

On October 17, 2011, the American Federation of Government Employees, AFL-CIO, Local 1547 (the Union or Charging Party) filed an unfair labor practice charge against the Department of the Air Force, Luke Air Force Base, Arizona (Respondent or Luke AFB). After investigating the charges, the Denver Regional Director of the Authority issued a

Complaint and Notice of Hearing on August 31, 2012, alleging that the Respondent issued bargaining unit employee Christopher Gray a memorandum stating that his term appointment would not be extended and that his employment would expire effective September 30, 2011. The complaint further alleges that the Respondent terminated Gray from his position on September 30, 2011, because Gray had engaged in protected activity, and that the Respondent had violated § 7116(a)(2) of the Statute. The Respondent filed a timely Answer to the Complaint on September 19, 2012 and an Amended Answer on December 5, 2012, admitting some of the factual allegations but denying that it had committed an unfair labor practice.

A hearing was held in this matter on December 12 and 13, 2012, in Phoenix, Arizona. All parties were represented and afforded an opportunity to be heard, to introduce evidence, and to examine witnesses. The General Counsel of the FLRA (GC) and the Respondent filed post-hearing briefs, which I have fully considered.

Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

FINDINGS OF FACT

The American Federation of Government Employees (AFGE), Local 1547 (Union/Local 1547), is the exclusive collective bargaining representative of certain employees at the Department of the Air Force, Luke Air Force Base, and is a labor organization within the meaning of § 7103(a)(4) of the Statute. (GC Exs. 1(c) & (d)). The Union serves as the agent of AFGE for purposes of representing bargaining unit employees at Luke Air Force Base. (*Id.*). The Respondent is an agency within the meaning of § 7103(a)(3) of the Statute. (GC Ex. 1(c)).

The 56th Security Forces Squadron (56 SFS) is comprised of military and civilian security guards and police officers. Before 2007, the guards were employed by contractors, but in late 2007, they were converted to civil service employees. (Tr. 24). The civilian police officers and security guards serve on term appointments, which are generally established for a period of 12 or 13 months, and may be extended to a total of four years. (A. Ex. 1; Tr. 301).

Loran P. Allen started working as a police officer in the 56 SFS in September 2009. At that time, the 56 SFS employed about 68 civilian police officers. In September 2010, Allen was promoted to Chief of Police for the civilian Officers. (Tr. 202, 204.) Major Gerald C. Mulhollen, Jr. served as the Commander of the 56 SFS, beginning in July 2010.[1] (Tr. 318)

[1] Mulhollen has since been promoted to the rank of Lieutenant Colonel and currently serves as the Commander of the 30th Security Forces Squadron at Vandenberg Air Force Base, California.

In June 2010, Killijan Anderson, Squadron Supervisor of the 56 SFS, contacted Christine Mikaio in the Civilian Personnel Office, informing her that the number of civilian police officers needed to be reduced from approximately 60 to 33 no later than September 30, 2011. (A. Ex. 12; Tr. 319). Civilian Personnel advised Anderson that reductions could be achieved through attrition, allowing term appointments to expire, or a Reduction in Force, if necessary. The 56 SFS could make decisions not to renew term appointments based on employee performance, conduct, and physical limitations, if they could not achieve the target of 33 police officers through attrition. (Tr. 205, 304-06). The Respondent achieved this goal in various ways, including not renewing term appointments for four employees as of September 30, 2011. (Tr. 320).

Christopher Gray started work as a policeman at Luke AFB on September 27, 2009. On February 27, 2011, his term appointment was extended until September 30, 2011. (A. Ex. 1, 2; Tr. 149-51). His last day at Luke AFB was September 30, 2011. As a policeman, Gray did patrol work, primarily at the entry control points (gates) and the flight line. (A. Ex. 11; Tr. 123, 152-153) He worked the second, or swing, shift, from 1 pm to 10 pm, Monday through Friday. (Tr. 134, 154).

Gray received a yearly performance rating on June 8, 2010, from his supervisor Randy Miller. On the nine performance factors, he received the high ratings with seven "9s" (outstanding) and two "8s" (above fully successful) He was also given a performance award. (GC Ex. 12; Tr. 124). On June 12, 2011, he received his annual rating from Donald Tirpak and again received seven "9s" and two "8s." Allen signed the appraisal as Reviewer on May 2. There were no issues with Gray's performance and he received an award. He was described as a "superb performer" and that he "significantly contributed to 56 SFS being named Best Medium Security Forces Unit in Air Force." The narrative also described him as "extremely effective in executing daily tasks/productive during work time; excellent time management skills; exceeds standards". (GC Ex. 13; Tr. 125-26).

Gray is a member of AFGE 1547 and sought the Union's assistance on occasion, primarily taking his concerns to Union President Harley Hembd. (Tr. 127). After Chief Allen was named Chief, he started making changes. One issue related to when officers were required to wear the bulletproof vest, which was part of the overall uniform. Under the previous administration, the officers were not required to wear the vest when it was over 90 degrees. (Tr. 127-28, 131-32). This issue was resolved by July 2011. (Tr. 34, 35). In February 2011, the Union raised the issue relating to post briefings, which is a military tradition in which an officer stands at attention and reports a narrative of post limits, weapons, communications, threats, etc. (Tr. 129, 165-66). In the past post briefings were only required for the top four military personnel, the base commander, support group commander, assistant commander, and command chief master sergeant. (Tr. 128). Chief Allen wanted the officers to give the post briefings to everyone. (Tr. 129, 165-66). The issue was eventually resolved. Other issues concerned drinking water on the swing shift, the military playing basketball and taking physical time and leaving civilians without backup.

Gray raised his concerns about the various changes with the Union president. At one point, Chief Allen addressed the guard mount and briefed everyone on the new changes to post briefings and call in procedures and uniforms. (Tr. 130). Gray, in the presence of Tirpak and Michael Cameron, another police officer, later approached Allen and asked about the post briefings for civilian employees. Allen told them they were just going to have to do it. Allen also said, "Let me ask you a question. Do you like working here? Do you like your job?" Gray asked if Allen was threatening him. (Tr. 131). Allen said no, that's not what I mean. Cameron told Gray to talk to the Union about it. (Tr. 131). Allen said you don't work for the Union, you work for me. (Tr. 119).

In January 2011, Allen was also interested in making changes to the sick leave policy and who should be contacted regarding requests for unscheduled leave. Before, an officer would call in and talk to whatever supervisor answered the phone. The supervisor would then pass on the request. (Tr. 34). Allen wanted the officers to call their supervisor on their particular shift. Gray did not think the policy made sense since he thought management would want as much advance notice as possible. (Tr. 134). Gray went to the Union on this issue and Hembd discussed with management, but the issue was not resolved. (GC Ex. 2; Tr. 135).

Allen was also interested in creating an alternative work schedule (AWS), particularly in four ten-hour days. Gray was against the use of AWS since he thought it might affect his weekends; other employees were both for and against it. Apparently a memo from Allen indicated that the Union was in favor of AWS. Gray complained to the Union and was told that the Union was not on board with the concept of AWS. AWS had not been placed in effect when Gray left in September 2011. (Tr. 53, 133, 163).

On Friday, March 4, Gray and other officers were told that they had to pick up their mobility gear no later than March 8. This was turnout gear, which came in a big bag with a gas mask, flak vest, bulletproof vest, interceptor vest, chemical warfare gear, and boots. It was to be obtained from Base Mobility, which was closed on Saturday and Sunday. Gray went on Monday, on his own time before his shift began. The warehouse was closed and he could not get in. Gray was annoyed because he had come in on his own time. He reported to management that he couldn't get in and they told him the door was supposed to be open. (Tr. 135-37).

Gray tried again the next day (March 8). The door was open but they wouldn't wait on him because he did not have an appointment. Gray was upset since he had come in to obtain his gear and had missed a personal doctor's appointment. (Tr. 137-38). After going to Base Mobility, Gray then went to a clothing store, which is located between the Commissary and the Base Exchange. As a civilian, Gray was not authorized to use the base exchange, but had purchased things before. (Tr. 174). On that particular day, the store would not allow him to purchase sunglasses. (Tr. 352-53, 356-57, 361-62). Gray did not report to work, but instead went home because he was upset. He called the day shift supervisor and told him he was not in the right frame of mind. The supervisor said he would pass it along. When he was a home, Gray got a call from Miller. Tirpak was not in that day. Gray explained to Miller what had happened and that he needed time off. Miller told him that he needed to

come into work. Gray told Miller that he couldn't come in today and that he was not up to it. Miller told him he would be charged with AWOL. (Tr. 139-40). Gray was charged with AWOL and served a one-day suspension. (Jt. Ex. 1).

On April 5, 2011, Gray received a Notice of Proposed Suspension, relating to the March 8 incident. Next to his signature, he drew a "smiley" face, which was apparently his attempt to lighten the mood. (Jt. Ex. 1; Tr. 170, 218). With Hembd's assistance, he prepared a written response, recounting the events of March 8. He requested that, because no disciplinary action had ever been taken against him in the past, the penalty be mitigated to a letter of counseling or letter of reprimand. (Jt. Ex. 2; Tr. 141). Allen issued a Decision to Suspend Gray for one day. He repeated the accounts Miller and Gonzalez had prepared after their conversations with Gray on March 8 and observed that the log at the warehouse did not show entries for Gray. (Jt. Ex. 3).

The Union filed a grievance on Gray's behalf on May 12, 2011. (GC Ex. 5; Tr. 43). Hembd also filed an information request on May 10, seeking post assignments, time cards, and leave requests submitted for March 8. (GC Ex. 6). On May 26, Abrusci denied the grievance and the Union's request for differing remedies. (GC Ex. 8). The grievance was not resolved until Gray's term ended and he was no longer employed at Luke AFB. The Agency agreed that Gray's one-day suspension would not be used as precedent in subsequent cases. (Tr. 47-48).

On May 17, Gray called the supervisor's number to request sick leave. Chief Allen answered the phone and told Gray that he needed to follow the leave procedures and speak with his shift supervisor. Allen refused to authorize the sick leave and also said that Gray could contact the Union. (Tr. 141-43). Gray spoke with Hembd, who sent an email message to Allen the same day, reminding Allen that, as Police Chief, he did have the authority to approve sick leave. Allen responded that he was not Gray's supervisor and was not Gray's leave approving official and that Gray was not relieved of the responsibility to contact his shift supervisor. Allen also informed Hembd that Gray's leave request had been approved by Tirpak. (Jt. Ex. 4; Tr. 49, 51, 143, 176).

On July 19, Gray's vehicle broke down while he was running errands before his shift began. He called AAA for a tow and called work to request the day off. He spoke to Gonzalez, who said he would pass the request along. Tirpak seemed understanding. But Allen later called Gray and told him that he needed to come to work. Gray explained about his car. Allen told him that he didn't care how Gray got to work; that he should come to work or would be charged AWOL. (Tr. 143). Gray got his vehicle repaired and reported to work about 2 hours late. (Tr. 145). Tirpak gave him a brief counseling and Gray went to his post; Tirpak did not charge Gray any leave for that day. (Tr. 145). Gray did call the Union and Hembd advised to just do the best he could.

On August 31, Gray was called into Miller's office and told the agency was terminating his term appointment. Miller did not give him any explanation and said he couldn't talk about it. (Tr. 146-47; Jt. Ex. 5). During out-processing, Allen told the employees whose term appointments were not renewed that their services and skills were no longer needed for the 56 SFS.

Gray and Officer Wade met with Mulhollen about the decision not to renew their term appointments. Mulhollen told them that he felt bad for them, but that it wasn't his decision. He did not give any concrete reason why their appointments were not renewed. (Tr. 147-48).

Starting in June 2011, employees began hearing rumors that manning for 56 SFS was going to be reduced. (Tr. 180) Employees were encouraged by their supervisors to look for other work. Gray applied with the Arizona Department of Corrections. (Tr. 181, 352).

With regard to the reduction in manning of the 56 SFS, Major Mulhollen made the final decision on what term appointments would not be renewed. (Tr. 205). In the end, four positions were not extended. Mulhollen received recommendations from the two supervisors on the day shift and the two supervisors on the swing shift. (Tr. 206). Mendez and Davis were not renewed on the day shift; Gray and Wade were not renewed on the swing shift. (Tr. 214). Allen testified that he discussed the reduction in manning with the supervisors, got their recommendations, and took that information to Mulhollen. (Tr. 214). He denied that the union activity of the officers was ever discussed during this process. With Gray, Allen testified that he considered the suspension and various performance and conduct issues. Allen testified that Gray had made some irrational statements and that he didn't feel like he could trust him as a police officer. (Tr. 215).

DISCUSSION AND CONCLUSIONS

Preliminary Matters

The General Counsel renews its objection to the inclusion in the record of Agency Exhibit 3. This is memorandum from Donald Tirpak, supervisor, to Chief Allen, dated August 1, 2011, and relates to the issue of extending the temporary appointments, and specifically discusses Gray and Wade, the two employees from the swing shift whose appointments were not renewed. (A. Ex. 3 is similar to a memo from Rolando Gonzalez (A. Ex. 4)). The GC objects to A. Ex. 3 on the grounds that the Respondent failed to disclose this document at any time during the investigation of the charge, prehearing disclosure or the prehearing conference. The document was not produced until the afternoon of Friday, December 7, just two days before the start of the hearing. Further, the Respondent failed to call Tirpak as a witness, with no explanation, and afford the GC an opportunity to cross examine him.

The GC requests that I strike A. Ex. 3 from the record, as a sanction against the Respondent for failing to produce the documents in its amended prehearing disclosure in a timely manner, as required by 5 CFR § 2423.24. *See U.S. Dep't of HUD*, 56 FLRA 592, 596 (2000), in which the Authority concluded that the respondent's covered by defense was not

timely raised and was waived, and also granted the GC motion to strike, as a sanction against the respondent, pursuant to § 2423.24, for not raising the defense at any time prior to the filing of its post-hearing brief.

In the alternative, the GC argues, that in the absence of the testimony of Tirpak, Agency Exhibit 3 should be striken from the record as hearsay, or that I grant no weight to the exhibit.

Further, the GC requests that I draw an adverse inference based on the Respondent's failure to call Tirpak, Gray's first level supervisor, to testify at the hearing. The Authority has found that it is reasonable to draw an adverse inference "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party ... regarding any factual question on which the witness is likely to have knowledge." *IRS, Phila. Serv. Ctr.*, 54 FLRA 674, 682 (1998) (quoting *Int'l Automated Machs., Inc.*, 284 NLRB 1122, 1123 (1987). The Respondent argues that Tirpak was equally available to both parties and could have been called by the GC. However, the GC argues that, although Tirpak has retired from 56 SFS, he was a supervisor and, as observed in IRS, where it can reasonably be assumed that the witness would be favorably disposed toward management, an adverse inference is warranted even if the witness was technically, equally available to be called by either party. (*Id* at 682).

Section 2423.23 of the Authority's Rules and Regulations sets forth the procedure for prehearing disclosure. Copies of documents are to be furnished at least 14 days prior to the hearing. With regard to Agency Exhibits 3 and 4, the Respondent did not furnish these documents until the Friday before the hearing, which started on Wednesday, December 12, 2012. The Respondent gave no specific reason for the delay. After discussion at the hearing, pursuant to § 2423.31(b), I overruled the GC's objections to the documents on the grounds that they were relevant to the proceeding, noting the Respondent's failure to furnish the documents in a timely manner was not an acceptable practice but that the rules of evidence shall not be strictly followed in this process. At this time, I again overrule the GC's objection to the inclusion of Agency Exhibit 3 for the same reasons. As at the hearing, I note that Tirpak was not called to testify, so I have no specific testimony regarding the creation of Agency Exhibit 3. I decline, however, to grant the GC's request that, in the absence of the testimony of Tirpak, I strike Agency Exhibit 3 from the record as hearsay or that I grant no weight to the document.

I also decline to find an adverse inference with regard to the Respondent's failure to call Tirpak as a witness. At the time of the hearing, Tirpak was retired from the Respondent, but was still living in the Phoenix area. In my view, either party had the opportunity to subpoena and to call Tirpak as a witness and an adverse inference is therefore not appropriate. If, however, Tirpak had still been an employee of the Respondent, such an adverse inference might have been appropriate.

POSITIONS OF THE PARTIES

General Counsel

The General Counsel asserts that the Respondent violated § 7116(a)(1) and (2) of the Statute by failing to extend the term employment of Police Office Christopher Gray.

Throughout 2011, Gray engaged in a significant amount of protected activity, which was known to his supervisors. Gray and Hembd both testified that, when Allen became the Chief of Police, Gray made frequent trips and phone calls to the Union. Many of Gray's inquiries concerned the LMA and other agreements between the Union and 56 SFS management. Hembd assisted Gray by addressing a number of issues with the Respondent, including the dispute over wearing bullet-proof vests at temperatures over 90 degrees in June 2011, and the disagreement over post briefings in February 2011. In addition, beginning in December 2010, Hembd challenged Allen's call-in procedures for sick leave as non-compliant with the parties' Labor Management Agreement. When Allen sought to implement an AWS schedule, he was delayed in doing so by Hembd's refusal to agree to a schedule that was not voluntary. On a personal level, on March 8, May 17, and July 19, Gray contacted Hembd and received his assistance when he had disputes with Allen about his leave requests. When, on April 5, Tirpak issued a proposal to suspend Gray for a day, Hembd worked with him to prepare a response. Hembd filed a grievance on Gray's behalf when the decision to suspend was issued.

Allen and other supervisors in the 56 SFS were well aware of Gray's protected activity, and the GC asserts that Allen's denial that he was not aware of Gray's protected activity, with the exception of the grievance should not be credited. The GC argues that the evidence reflects that Allen was well aware that if Gray had a concern about a policy or a working condition, that he would take that concern to the Union.

The GC further asserts that Allen's statements demonstrate that Gray's protected activity was a motivating factor in the decision not to renew his term appointment. Both Cameron and Gray gave unrebutted testimony about an encounter Gray had with Allen in April 2011, in Cameron's and Tirpak's presence. Gray questioned why civilian police officers had to give post briefings, especially when the union was addressing that issue and the practice had been that post briefings were required for only a limited number of officers. Allen responded that Gray worked for Allen, not for Harley. He then asked if Gray liked his job, in a way that any reasonable employee in Gray's positon would perceive as a threat. Cameron sensed the tension in the atmosphere and suggested that Gray take this matter to the Union, which Gray said he would do. Finally, during a closed-door managers' meeting, Gray overheard a voice that sounded like Allen's refer to him as Harley's little pet. Allen did not deny making such a statement. A finding of unlawful motivation can be based on, among other things, statements made by management officials that demonstrate hostility to protected activity. *See U.S. Dep't of Va, Golden Gate Nat'l Cemetery, San Bruno, Cal.*, 59 FLRA 956, 959 (2004) (deciding that a foreman made an inappropriate comment that the chief steward's union activity had some relationship to the fact that the chief steward was not selected for a

promotion, thus establishing unlawful motivation); *EEOC, San Diego Area, San Diego, Cal.*, 48 FLRA 1098, 1108 (1993) (finding a motivating factor based on threatening statements made by a supervisor, timing, and changes in the way an employee's work was reviewed and critiqued).

The GC asserts that it has established a prima facie case of discrimination in accordance with *Letterkenny*, 35 FLRA at 119, and that the Respondent has failed to show that it had a legitimate justification for ending Gray's term as a police officer and that the Respondent's motivations were, instead, pretextual. Respondent attempts to rebut this prima facie case of discrimination by arguing that Gray lacked candor and was untrustworthy; Gray used excessive amounts of unscheduled leave and lacked dependability; and the 56 SFS needed to reduce its staffing. The evidence shows that none of these amounts to a legitimate justification for that decision. *See Army Depot Letterkenny*, 35 FLRA 113 (1990) (*Letterkenny*); *U.S. Dep't of Def., U.S. Air Force, 325th Fighter Wing, Tyndall AFB*, 66 FLRA 256, 266 (2011) (*Tyndall*); *Dept. of the Air Force, Ogden Air Logistics Ctr., Hill AFB, Utah*, 35 FLRA 891, 900 (1990) (finding that the Respondent failed to establish a legitimate justification for its decision to lower the performance appraisal of a Union official because, among other things, the Respondent failed to supports its assertion that the employee had not maintained his level of performance from the prior year). Where a respondent attempts to assert a lawful motivation for taking action against an employee, but the motivation if found to be without basis, their rationale will be determined to be pretextual and their action against the employee discriminatory. *U.S. Dep't of Commerce, NOAA, Nat'l Ocean Serv. Coast & Geodetic Survey, Aeronautical Charting Div., Wash., D.C.*, 54 FLRA 987, 1011 (1998) (finding that the agency's reasons for a reprimand, that the employee was neglecting his duties, was unsupported by the evidence, which demonstrated instead that the agency was motivated by his union activities); *Letterkenny*, 35 FLRA at 124 (finding that the Respondent's reasons for making a change in procedure for selecting lead guards were not supported by the facts and that, therefore, the respondent's reasons were pretextual).

The GC points out that none of these reasons for failure to renew the appointment were offered to Gray at any time in the process. Mulhollen's memorandum said only that his term would expire on September 30, 2011. Miller delivered the memorandum, and told Gray he couldn't talk about it. On one of Gray's last days at 56 SFS, Allen said simply that Gray's services were no longer needed. Mulhollen told Gray that the Squadron needed to make serious cuts and "there was no harm, no foul."

The GC asserts that the reasons set forth by the Respondent at the hearing should be rejected. With regard to Gray's alleged lack of candor and trustworthiness, the GC alleges that Allen only conducted a cursory investigation of the March 8 incident. Only at the hearing did Allen attempt to articulate all of the ways that indicated to him that Gray's response showed a lack of candor. And the GC asserts that the evidence shows that Allen's claims of lack of candor are largely unsubstantiated. Other unsubstantiated accusations involved Gray's use of a smiley face when he signed for his proposed suspension; the May 17 request for leave; information related to Gray's application for work at the Arizona Department of Corrections; and the July 19 truck incident. The GC asserts that throughout 2011, Allen repeatedly chose to interpret the Gray's statements or the particular

circumstances in such a way as to conclude that Gray was not being candid with him and could therefore not be trusted. Lack of candor was the central reason he offered that Gray's term should not be renewed. Allen was determined to find these asserted flaws in Gray's character, suggesting not just that Allen lacked a legitimate justification for deciding that Gray's term should be ended, but that his claimed justification was pretextual.

The GC notes that Gray received two annual appraisals, both demonstrating that his work was highly regarded. His June 2011 appraisal, received after disciplinary action had been taken against him, was by Tirpak, who gave him seven 9s, the highest rating, and two 8s. Tirpak raised no concerns about Gray's work or his behavior. The appraisals cast doubt on the Respondent's determination that Gray was not a good fit for the 56 SFS, particularly that he was unreliable and untrustworthy.

The GC also questions the actual need to reduce staffing to 33 by September 2011. Hembd claimed 56 SFS had already reduced its staffing to 28 by June 2011. But by September 31, four officers' terms, including Gray's, were not renewed. Even before they left, the Air Force Personnel Center issued a job announcement for new term police officers. Several were hired over the next couple of months, and to date, 56 SFS has 33 term police officer positions. The GC asserts that, while there may have been a need to at one time to reduce staffing, the evidence indicates that the cutting had been done by June 2011, when only 28 civilian employees remained. The evidence fails to support the Respondent's position that Gray's non-renewal was motivated by a necessity to reduce staffing.

Finally, the GC argues that the Respondent engaged in disparate treatment by allowing Officers Gomes and Guillot to remain with the 56 SFS, despite having far more serious disciplinary taken against them than Gray. Gray received a one day suspension for being AWOL. In May, Guillot was arrested for driving "under the extreme influence" of alcohol. His license was suspended for six months and he was confined for 15 days. At the 56 SFS, he received a 10 day suspension and lost base driving privileges for a year and had to be placed in a non-driving position and could not take patrol assignments. Nonetheless, his term was renewed. Although he was a Union steward, he was inactive and did not pursue any action against the agency for the suspension. Gomes not only served a five day and ten day suspension in 2009, he had one of the poorest attendance records in the SFS in 2011. The GC argues that comparing Gray's one day suspension with Guillot's ten day suspension and with Gomes' record undercuts the Respondent's stated legitimate reasons for ending Gray's term and supports the conclusion that these reasons are pretextual. Allen testified that Guillot had been "rehabilitated" and that he continued to perform satisfactorily and had no further discipline problems. Even if this were true, it does not explain why Gray, who performed far better than satisfactorily and also had no further discipline problems, could not also have been considered rehabilitated. It suggests that the Respondent had another reason for ending Gray's term.

Respondent

The Respondent notes that the Agency has chosen to hire the 56 SFS police officers as term appointments under 5 C.F. R. § 316.301(a). An agency may make a term appointment for a period of more than 1 year but not more than 4 years to positions where the need for an employee's services is not permanent. There is nothing in the law that mandated the Agency to extend term appointments past the original not to exceed (NTE) date. *AFGE, Local 1917*, 62 FLRA 354 (2008) demonstrates that the person with the appropriate authority has full discretion to either extend or not extend a term appointment. Mulhollen had the authority in this matter and he exercised that authority when he decided not to extend certain employees', including Gray's, term appointments.

The Respondent argues that the GC failed to prove Gray's protected activity was a motivating factor in the decision to terminate him and therefore failed to meet the burden of proof in this matter. The Respondent's witnesses, Allen, Abrusci and Mulhollen, each testified that union activity played no role in the decisions not to renew the term appointments and was never a subject matter during their discussions on how to eventually get down to the 33 authorized police officer positions. (Tr. 214, 307-8, 310, 332). While the Respondent was of course aware of the grievances that had been filed, including the ones concerning Gray and Gomes, such activity had no bearing on the decision to renew or not to renew. Gray's term was not renewed, while Gomes' term was renewed. Further, Allen accepted recommendations from his subordinate supervisors as to whom they felt should not be extended. Tirpak recommended not retaining Gray and Wade. (A. Ex. 3; Tr. 211). Gonzalez and Boland, recommended that Mendes and Davis not be renewed. (A. Ex. 4; Tr. 213). Neither of these exhibits mentions union activity, only performance and/or conduct related issues.

The Respondent was required to reduce manning in the 56 SFS from approximately 68 positions to 33 by September 30, 2011. (Tr. 205, 303; A. Ex. 12). This reduction played a major part in the decision to renew or not renew term appointments. Attrition, reduction in force and letting the NTE dates expire were all options in order to achieve the targeted 33 positions. Also performance and conduct issues could be used in the determination regarding extensions of appointments. (Tr. 305-06). Furthermore, once the unit had achieved their reduction to 33 positions, it is well within Mulhollen's right to not renew appointments based upon legitimate non-discriminatory reasons such as poor conduct or performance issues.

The Respondent further argues that the GC brought up irrelevant issues, such as posting job announcement for new term police officers before Gray had left. (Tr. 18). Allen testified that the job announcement referred to in Joint Exhibit 6 was for Officer Ramirez and other police officers, who were on active duty military and whose positions could not be filled until they finished their military job or they resigned. These postings had nothing to do with police officers who terms expired on September 30, 2011. (Tr. 290-91). With regard to Gray's performance appraisals, the Respondent noted that the final decision on the one day suspension was not made until after the rating period ended, and thus could not be considered in the appraisal.

The Respondent asserts that it proved its assertion that management made their decision to not renew Gray based upon conduct related issues. Specifically the Respondent referenced the March 9 incident of failing to report to work and the subsequent charge of AWOL and the one day suspension for the AWOL. Allen credibly testified about Gray's failure to report to work as instructed, and the subsequent question regarding his trustworthiness as a police officer.

In conclusion the Respondent asserts that the evidence showed that the decision for Gray's non-renewal was not about just one issue. Rather the amount of leave usage, unscheduled leave, lack of candor issues, unreliability, untruthfulness, lack of integrity – all were taken into consideration. Essentially the Respondent had lost confidence in the Gray's ability to do his job as an Air Force police officer.

ANALYSIS

Section 7116(a)(2) of the Statute makes it an unfair labor practice to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. In *Letterkenny*, 35 FLRA at 119, the Authority explained the analytical framework for evaluating such allegations. The General Counsel bears the burden in all such cases of establishing by a preponderance of the evidence that an unfair labor practice has been committed. By demonstrating: (1) that the employee against whom allegedly discriminatory action was taken was engaged in protected activity; and (2) that such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion or other conditions of employment. If the General Counsel does so, it has established a prima facie case of unlawful discrimination. The Respondent can, in turn, rebut the prima facie case by establishing, by a preponderance of the evidence that: (1) there was a legitimate justification for its actions; and (2) the same action would have been taken in the absence of protected activity. (*Id.*) If the Respondent fails to establish, by a preponderance of the evidence, that it had a legitimate reason for its action, the Respondent will be found to have committed and unfair labor practice. *See U.S. Dep't of the Air Force, Aerospace Maint. & Regeneration Ctr., Davis Monthan AFB, Tucson, Ariz.*, 58 FLRA 636, 637 (2003) (finding that the Respondent failed to prove by a preponderance of the evidence that it had a legitimate reason for issuing a letter of reprimand to a Union official, thus committing an unfair labor practice).

It is well established that an employee's right to file and process grievances under a collective bargaining agreement is protected activity within the meaning of the § 7102 of the Statute. *See EEOC*, 24 FLRA 851(1986), affirmed sub nom. *Martinez v. FLRA*, 833 F.2d 1051 (D.C. Cir 1987). It is also clear that to discriminate with regard to tenure or other conditions of employment because the employee has utilized the grievance procedure violates § 7116(a)(1) and (2) of the Statute. *See U.S. Customs Serv., Wash., D.C.*, 24 FLRA 773 (1986). The Authority has also held that the assertion by an individual employee of a right set forth in a collective bargaining agreement is protected under § 7102 of the Statute. *See U.S. DOL, Emp. & Training Admin., S.F., Cal.*, 43 FLRA 1036, 1039-40 (1982) (observing that an employee's assertion of a right emanating from a collective bargaining agreement assists that union that negotiated the agreement and is protected by § 7102); *U.S. Dep't of*

the Treasury, U.S. Customs Serv., Miami, Fla., 58 FLRA 712, 717 (2003) (finding that employee was engaged in protected activity when he called his union steward to ask about overtime assignments); *see also Indian Health Serv., Crow Hosp., Crow Agency, Mont.*, 57 FLRA 109, 125 (2001) (seeking union assistance, pursuing grievances, and having union deal with employer on their behalf constituted protected activity by employees).

In this matter, the evidence clearly reflects that Christopher Gray was engaged in protected activity. He contacted the Union regarding various issues regarding working conditions at the 56 SFS, including wearing bullet proof vests, alternative work schedules, and post briefings. Further, after receiving a proposed suspension for being AWOL, the Union assisted him in preparing a response and in the processing of a grievance he filed. The grievance was eventually resolved, but not until after Gray no longer worked for the Respondent.

Having met the first requirement found in Letterkenny, the more difficult question is whether such activity was a motivating factor in the Agency's decision not to renew his temporary appointment as a police officer. After a thorough review of the evidence, I find that the General Counsel has not met this burden and has failed to establish a prima facie case of discrimination. *Letterkenny*, 35 FLRA at 119.

With regard to Gray's protected activity, the record shows that he complained to Hembd about various issues and that Hembd, as the Union president, then dealt with Allen and other management representatives on these issues. Gray appears to have contacted Hembd when he was away from headquarters. Hembd's testimony that Gray contacted him in front of his supervisors (Tr. 37) was not supported by Gray himself, and I find it unreliable. In that regard, I note that, at the hearing, the Respondent's representative had just made an objection to a document, stating that there was no notice that the Agency was aware Gray was the one talking to Hembd. (Tr. 35). When his testimony resumed, Hembd included the above information. It is clear that Gray did file a grievance over his one day suspension and that the Union represented him. However, the evidence also reflects that at least one other employee filed grievances over disciplinary action and their appointments were renewed.

The Respondent's primary problem with Gray is rooted in the March 8 incident, in which Gray became frustrated trying to obtain required gear and then even more frustrated when he was not allowed to buy sunglasses at a store he was not authorized as a civilian employee to use. As a result, he felt he was unable to come to work (even though he was already on base) and called in for unscheduled leave. His supervisor informed him that he should come to work and that he would be charged AWOL if he did not. Gray did not come to work, was charged AWOL, and later given a one day suspension. In my view, the Respondent has established that it was that one bad day that influenced the Respondent's view of Gray as a police officer rather than his protected activity. And everything after that, no matter how small, continued to justify that view to the Respondent.

I am aware of the meeting with Gray, Allen, Cameron and Tirpak and Allen's statements asking Gray if he liked his job and that Gray worked for him and not the Union, but I do not find such sufficient to establish such animus to find that the non-renewal was in retaliation for Gray's protected activity.

I am also aware that Gray received very high performance reviews, including the one for the period ending March 30, 2011. The evidence clearly reflects that Gray's performance as a police officer was never a problem; he was never counselled or disciplined in any way for such performance. The GC dwelt at great length on Gray's last performance review and that it did not contain any comments regarding the March 8 incident. It is clear, however, that the proposed suspension was served on Gray on April 5, the final suspension letter on May 5, and the grievance was filed on May 12. These dates are all outside the rating period and could not have legitimately been considered in the appraisal. Therefore, I find the appraisals not particularly relevant to the ultimate decision regarding the non-renewal.

Further, even if I was to find that the GC has established a prima facie case of discrimination, I would also find that the Respondent met its burden of showing that there was a legitimate justification for its actions and that the same action would have been taken in the absence of protected activity. In that regard, the catalyst in the decision not to renew some of the temporary appointments is directly related to the mandate that 56 SFS received to lower its manning to 33 police officers. This reduction in manning was achieved primarily through attrition, retirement, and finally the non-renewal of four or six appointments. While the GC and the Union question the need for the reduction in manning, I see nothing in the record to indicate that this was somehow a fabricated personnel action or that the Air Force could have ignored the mandate.

The recommendations received from the supervisors regarding which employees should not be renewed focused primarily on the employees' attitudes, which is consistent with Allen's testimony regarding the reasons for selecting the four employees, including Gray, for non-renewal over other employees. Looking at the record as a whole, I find that the Respondent followed a reasonable decision-making process and showed that it had legitimate justification for its actions and that those actions would have been taken, and that Gray would have been included in the group whose term appointments were not renewed, even without his protected activity.

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CONCLUSION

I conclude that the Respondent did not violate § 7116(a)(1) and (2) of the Statute by not renewing the term appointment of Christopher Gray in retaliation for his protected activity.

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

ORDER

It is ordered that the complaint be, and hereby is, dismissed.

Issued, Washington, D.C., September 30, 2015

Susan E. Jelen

SUSAN E. JELEN
Administrative Law Judge