UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
WASHINGTON, D.C. 20424-0001

DEPARTMENT OF AGRICULTURE, U.S. FOREST SERVICE, FRENCHBURG JOB CORPS, MARIBA, KENTUCKY Respondent and NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 466 Charging Party	Case No. 4-CA-10146

Mr. Heyward Washington and
Mr. Daryle A. Parkes
For the Respondent

Sherrod G. Patterson, Esq.
For the General Counsel

Larry King, President and
Joyce Roach, Vice President
For the Charging Party

Before: JOHN H. FENTON
Chief Administrative Law Judge

DECISION ON REMAND (46 FLRA NO. 134)

Statement of the Case

The Authority remanded this case to the undersigned to determine whether supervisor Henry made a statement to alleged discriminatee Roach, as set forth in the Complaint, and if so, whether it was made in the context of an attempt by Henry to reach an accommodation between management's right to manage effectively and an employee's right to engage in protected activity on official time. In addition, I was directed, in the event I find such statement was made, to determine whether it, "its surrounding circumstances, and any other evidence offered by the General Counsel establish a prima facie case of discrimination under Letterkenny." (35 FLRA 113). If so, it of course becomes necessary to determine whether a violation of section 7116(a)(2) occurred.

The Alleged Section 7116(a)(1) Violation

The complaint alleged that Henry "stated, in essence, . . . that (Roach) was using a lot of official time and it had to affect her performance", sometime "during the rating period from January 1989 (sic) through September 1990." Roach did not testify that such a statement was ever made. Rather, she said that sometime in August or September 1990 Henry told her "something to the effect" that she was "using an awful lot of official time and (that) it was affecting (her) timeliness on getting procurement out and that kind of thing." The Authority also stated that it was necessary to determine whether that statement was made in that time-frame.

Roach was not asked and did not initially provide any context for the statement she attributed to Henry. Henry was never asked whether that specific statement was made by her, but rather denied the statement as alleged in the complaint, one I view as redolent in the circumstances with the prospect of impact not merely on performance but on performance rating.[1/] Having denied, not the precise statement attributed to her, but essentially the one set forth in the complaint, Henry perforce had no occasion to supply a context or a time.

When Roach was later examined on the statement, what she had to say must be taken either as a repudiation of her earlier statement, or as a description of an exculpating context for the statement attributed to Henry. At a point disassociated from that attribution, Roach was asked whether Henry ever commented on her work (apparently as opposed to her "performance"). She responded:

> I'm trying to think. I don't think she actually did. I don't remember her ever saying something about my work. (T. 75)

1/ It is to be noted that Roach quite obviously used the word "performance" as shorthand for performance rating or evaluation, viewing, as she did the statement she attributes to Henry as "a threat to my performance". It is equally obvious that her supervisors did the same when asked about the impact of official time usage upon Roach's "performance". Thus Henry denied making any remark about the impact of such time on performance while readily admitting there were unspecified discussions about official time and work performance (see below). Unfortunately that matter was not pursued.

She was then asked a question directly related to the specific statement attributed only 26 transcript pages earlier to Henry, to wit:

> Q. What about the amount of time it took you to get these things purchased?
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> A. No, we never discussed the time. The only time we discussed it, they had asked me if I got behind to come in and let them know if I got behind. Ms. Caswell and Ms. Henry had said, you know, if you get behind, let us know we will help you out.
>
> And a time or two I went to them and said, now look, I've got everything caught-up except requisitions. They are falling behind and they would say, well, do the best that you can do.

Thus Roach variously testified: (1) Henry made a remark she found threatening about the impact of official time on her timeliness in handling procurement duties; (2) that she (Roach) did not remember Henry ever saying something about her work (virtually unbelievable on its face); and, (3) that she and Henry never discussed the time it took to get things purchased, although on one occasion the two supervisors did discuss that subject with her, asking her to let them know if she got behind and promising help if she did. One must conclude, based solely on testimony elicited by the General Counsel, either that the statement was in fact not made, or that it was made (perhaps by Caswell, perhaps by Henry, or by both), in the context of an offer to help.

The record, sketchy as it is, permits in my judgment quite a different conclusion. As noted, Henry denied making any statement linking Roach's "performance" (rating as I read her) to official time usage. However, when asked what discussions she had with Roach "regarding her use of official time as far as her work performance went", she replied:

> We had very few discussions on it other than the few times it was denied and I asked that requisitions be finalized before she used official time. (T. 268)

It is clear then, that there was some discussion about the need for Roach to move requisitions more quickly along their administrative route before seeking additional official time. Henry did, in fact, refuse to approve official time requests on at least a few occasions. And the colloquy which follows the above quote, concerning whether Henry had said that the "use of a lot of official time . . . was going to affect or that it did affect (Roach's) performance" demon-

strates beyond doubt that Henry received the question as one relating to performance rating.

In sum, Henry denied using the words alleged in the complaint, with their reference to the impact of official time usage on performance, was never precisely asked whether she said such usage was affecting Roach's timeliness in getting procurement out, and acknowledged that there were discussions about official time when it was denied in which the denial was coupled with a request that requisitions be finalized first. I find it a virtual certainty in the circumstances that a statement much like that which Roach attributes to Henry was uttered in connection with the latter's refusal to grant yet more official time. Indeed it is difficult to envision a discussion concerning such a refusal which would not involve a reference to the impact of such time as justification for the refusal, where the refusal obviously incorporated a "request" (or requirement) that Roach defer further use of official time until she was more current in the handling of her requisition work. Whether the words attributed to Henry were ever expressed in such form, the thought they expressed inhered, or was clearly implied by the requirement that official time usage be postponed while Roach caught up with her work. There is little chance they were not expressed in a form approximating Roach's version, which was itself an approximation.

Re-examination of this record, and particularly Roach's October 15 memo, explaining her refusal to sign her appraisal, reinforces the grave doubt concerning the accuracy or reliability of her testimony about what was said to her and in what circumstances. The same kinds of contradictions attach to her testimony about her work performance.

The complaint alleged, as did her October 15 memo and what she had to say to Henry in connection with her performance evaluation, that she accomplished basically the same amount of work in the 1989-1990 rating period as she had the year before.[2/] Although the Authority noted that Respondent did not dispute this claim, and arguably has already concluded that it is the fact, her own testimony on direct was that she in fact did 17% less work. And the numbers she supplied (however accurate her effort to measure production), indicate

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2/ This was the bedrock of her case, it being inexplicable to her, except by reference to personal animosity or union activity, that she could receive a lower rating after having done the same amount of work in substantially less time. This allegation of the complaint would, if true, strengthen the claim of discrimination. Yet, as will be seen, it is not even supported by her own testimony.

a drop of 20%. Similar misgivings apply with respect to the evidence respecting her use of official time, and particularly her claim that, on each occasion when her supervisors allegedly remarked about the impact of official time usage on her work, she reminded them that it could not be used against her. That claim was also advanced in her October 15 memo, and curiously was not repeated in her testimony. It would seem critical to an inquiry of this kind to set forth a context in which her supervisors supposedly repeatedly ignored her warning that their remarks were beyond the pale. Nor does it seem likely that one who allegedly filed some 30 unfair labor practice charges and grievances, including some on behalf of herself, would have failed to seek a remedy for repeated violation of her right to have her performance evaluation unaffected by her protected activity.

There is yet another respect in which the reliability of Roach's testimony, if not, in fact, her veracity, is brought into question. Focusing once again on her October 15 memo, one notes her claim that she received no assistance from the time that Henry became her supervisor in late April. While not repeated so categorically in her testimony, she did testify that on several occasions her supervisors reneged on their promise to help if she got behind. Yet she never denied their specific testimony that they prioritized her requisition work, that they arranged to have her requisitions typed and they provided filing assistance. Nor did she deny the testimony that she had refused proffered assistance, was reluctant to accept filing help and was less than forthcoming when asked about the duration of official time.[3/] In the circumstances, her claim that she received no help is quite unbelievable.

I cover this ground concerning matters surrounding the statement at issue in order to provide the Authority with a full accounting of my method in making the credibility resolution required by the remand. I did not find demeanor helpful. However, re-examination of the record convinces me that, on the many issues as to which there is disagreement, Roach demonstrates something less than due care in getting thing's right, or perhaps an incapacity to get them straight.

3/ Thus, I credited Caswell's testimony that she twice asked Roach how many representational cases she had, and how long they would take, and received "I don't know" as an answer. I credited Caswell's testimony that she talked to Roach several times about her apparent stress, asked whether she needed help and was assured by Roach that she "was OK and would work it out." I also found that the only time Roach asked for help concerned her filing and that she was hesitant about accepting student help.

Her testimony about precisely what kinds of words she and Henry exchanged, if any, concerning her work or performance is full of contradictions made manifest in her direct examination. I conclude she is an unreliable witness, and would credit Caswell or Henry where their stories conflict.

The remand notes, with respect to the alleged section 7116(a)(1) violation, that I should determine "whether Henry's statement, if made as alleged, was made in the context of an attempt by Henry to reach . . . an accommodation," and further notes that I was "not prevented from considering Respondent's defense in this regard."[4/] As noted above, no direct evidence about the context of the statement at issue was directly offered by Roach, and the supervisors offered none, having simply denied that they uttered words about "performance", as reflected in the complaint. Upon re-examination of the record I conclude that Henry did say "words to the effect" to Roach that she was using official time at a rate which was affecting her ability to get her procurement work done in timely fashion. The version given by Roach and the one provided by Henry converge convincingly to support a finding that there was such a discussion. They differ in that Henry said she refused to authorize official time until more requisitions were finalized, while Roach said there was talk of timeliness in connection with an offer of help made either by Henry or by Caswell or perhaps by both.

The wording of the remand can be read as indicating that, if either version of the statement (as alleged in the complaint or as related by Roach) is found to have been made, unaccompanied by an attempt to reach an accommodation, it was violative of section 7116(a)(1). I accept the version offered by Roach, i.e. a remark linking official time usage to a lack of timeliness in getting her work done, made in the benign context of an offer of assistance made by either or both of her supervisors. And I am convinced that words making the same link were uttered by Henry in explanation of her refusal to approve several official time requests. There is no

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4/ In the original decision I was troubled by the fact that the section 7116(a)(2) violation, as pleaded and as described on opening statement, sounded in retaliation rather than what I perceived as a failure of accommodation (see footnote 6, page 9). At page 14, I said that evidence of accommodation was elicited "in part for the obvious reason that it is relevant to the question whether the supervisors made remarks that were coercive." Hence I did not feel I was prevented from examining such defense.

evidence that such words were contemporaneously accompanied by offers of assistance.[5/]

I know of no reason why a supervisor risks a finding that she intimidates or coerces a subordinate when she refuses to approve a request for official time on the express ground that the employee is already behind in the timely completion of certain work because of official time usage, and that no more will be made available pending completion of certain tasks. Such an implication is always present, whether or not expressed. I see no threat of a low performance rating in such an explanation, or any link whatever. Whether the refusal is unreasonable in all the circumstances is a matter neither presented nor explored in this proceeding. Here the question is whether the statement explaining the disapproval somehow imported considerations about the negative impact of representation activity pursuant to section 7131 upon the eventual performance appraisal. If it does then any explanation of a decision not to grant official time, whether reasonable or not, is fraught with peril.

The cases relied upon by the General Counsel involve the use of words which explicitly suggest that a lowered evaluation or some form of discipline will flow from the use of what management regards as excessive official time.[6/]

Scott Air Force Base[7/] in my judgment threw highly helpful light on cases of this kind. There, supervisors asked the

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5/ Based on my appraisal of Roach's reliability, I give little weight to her testimony that the remark at issue was made in August or September, even though there is no other statement about its timing. I think it likely such conversations occurred in June or early July, when Roach's problems were surfacing and most serious. She thereafter showed improvement. In addition, I note that Roach did not even know when her appraisal year ended, guessing November, when in fact it was September.

6/ For example, Ogden Air Logistics Center, 35 FLRA 891, involved an absolutely unambiguous statement, during discussion of a reduced appraisal, that the lower rating was made because the employee "was frequently absent on union activities and, therefore, could not be depended on or assigned to critical plating operations. . . ." That is a far cry from what occurred here.

7/ 20 FLRA 761, a decision following a remand from the United States Court of Appeals for the District of Columbia reported at 770 F.2d 1223 (1985).

union president to postpone upcoming negotiations in order to free up time for an important audit. He later presented a time schedule to his supervisor for the ensuing days, showing 100% of his time would be devoted to representational functions. After some discussion of the "fairness" of the president spending all of his time on representation and, of course, none at all on the audit, the second-line supervisor was provoked to remark that if the president did not start to do some work for him he would take disciplinary measures. On the following day the second-line supervisor again said he was not satisfied with the amount of work being done, requested that contract negotiations be postponed (with the understanding that make-up time would be provided later) and repeated that he would take disciplinary action if the president did not pull his share.

In this case the Authority originally adopted without discussion the Judge's conclusion that the supervisors' comments were not, in all the circumstances, violative of section 7116(a)(1), as well as his finding that a lowered evaluation was not discriminatory. On appeal, the Court remanded the case on the ground the adopted findings did not support the conclusion that the threatened disciplinary action was based solely on the president's work performance during the time he was actually on the job.

Then Circuit Judge Scalia remanded on the ground that it was possible that other valid bases existed for sustaining the ALJ's judgment. He said,

> While the base could not lawfully threaten disciplinary action against an employee for spending authorized time--even if an unreasonable amount of time had been authorized--on union activities, it assuredly *could* refuse to authorize an unreasonable amount of time. In the context of the present case, the complaints about excessive time spent by Denton on union duties in the past and the accompanying threats of disciplinary action if that continued might conceivably be interpreted as the equivalent of notice that future requests for authorization of unreasonable time would be denied, and that the expenditure of unauthorized time would be punished. We deem it inappropriate, therefore, to conclude at this stage that the agency was wrong in finding no violation of the Act; but hold only that it was assuredly not right for the reasons stated.

The Authority on remand constructed a rationale for reaching the same result. In doing so it noted that, where conflicts arise between employee's entitlement to official

time for representational duties under section 7131 and managements' entitlement under section 7106 to manage effectively and efficiently, "the parties must recognize the need for and seek a reasonable accommodation" (emphasis mine). It noted also that an exclusive representative cannot claim "it is entitled to negotiate or administer a contract provision regarding the allocation of official time for representational functions by a particular employee without regard to management's needs and requirements regarding the performance of its assigned work." I quote this language because it underscores the mutual obligation of the parties in dealing with the unavoidable tension between the two rights, and the clear corollary that discussion about the impact of official time on duties is absolutely essential if an accommodation is to be reached. The question here is not whether the denial of official time was reasonable in the circumstances, but whether the statement that the use of further official time was being disapproved because such use was already preventing timely processing of requisitions, carried with it a threat of negative career consequences for Roach. It seems to me plain that no such inference can properly be drawn from such an observation, one which is unavoidable if any explanation is offered for a refusal to grant a request for more time. This is not a case, as the Authority put it in Ogden Air Logistics Center, (35 FLRA 891, 898), where the words used by a supervisor, in explaining a lowered performance appraisal, "drew a direct connection between protected activity and (the employee's) chance to earn a higher performance appraisal." (Underscoring mine.) Those words were that the low rating was based upon frequent absence on union activities. There is here a total lack of any such evidence, i.e. no words were used in a way suggesting that protected representational activity would adversely affect rating. If it is appropriate to infer such a message from the kind of expression here involved, then any discussion concerning the impact of such activity on one's job would be unlawful absent a proffer of help or a disclaimer.

The Alleged Section 7116(a)(2) Violation

In Letterkenny the Authority set forth the analytical framework to be applied in section 7116(a)(2) cases. After noting that the burden of proof always rests with the General Counsel, it said that that office "must establish that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) 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." It then added that "(i)f the

General Counsel fails to make the required prima facie showing[8/], the case ends without further inquiry."

There is no evidence that Roach's protected activity was a motivating factor in the decision of her new supervisor to give her a lower rating than her former supervisor had. One could as easily surmise that she received her first and only superior rating from that former supervisor because the two were very close friends and because that supervisor, Roach's predecessor as Union steward, was additionally motivated by considerations of solidarity.

There is here an absolute absence of any unlawful statements or of any statements suggesting hostility to the Union or towards Roach based on her Union activity. That absence is perhaps amplified by the highly questionable nature of much of the "evidence" marshalled to support that claim. Thus it is asserted that refusals to grant official time, discussion within management of the "reasonableness" of Roach's use of official time, and headquarter's interest in its use are evidence of animus. Yet it is indisputable that management has a legitimate interest in that subject, indeed an obligation to monitor it,[9/] and its right to deny it in appropriate circumstances is incontestable. One would be surprised if management, faced with grievances or charges concerning that issue, failed to examine and discuss it.

It is similarly argued that the Center attempted to thwart Roach's representational activities by refusing to grant such time, that it did not do so until her grievances/ charges forced it to do so, and that the "concurrence of Roach's increased Union activity, the Center's concern about the increase and the decision to lower her performance rating warrants an inference of discriminatory motive." There is, however, no evidence concerning the spread of official time usage during the course of the year, none that there was any illegitimate concern about the increase, and clearly no reason to attach untoward meaning to the timing of the appraisal, a matter mandated by law.

Union President King's testimony that "the number, the type and the severity of the grievances (filed at the Center)

8/ Defined as "sufficient evidence . . . to get plaintiff past . . . a motion to dismiss".

9/ SSA, Baltimore, 18 FLRA 55, 67, a case used by the Authority in its Letterkenny decision as an example of a failure to establish a prima facie case because of the absence of evidence of discrimination.

was equal to none throughout the Forest Service" cannot demonstrate animus any more convincingly that it can prove that the most "severe" grievances in the nationwide forest system occurred at Daniel Boone. It is an expression of opinion about grievances which may indicate sour labor relations, or tough, rigid, personnel policies and contract interpretation. It manifestly cannot be given weight in deciding whether violations of law occurred here. Nor can I appropriately give weight to the testimony that the Center Director intended to have King arrested. There is no indication that any such conduct was based on his position as Union President. And, curiously, the charge alleging such conduct was violative of this Statute sits alone as an exhibit, there being no indication of any finding that a violation in fact occurred. In the absence of such evidence, the matter is devoid of evidentiary value.

Lastly, I feel compelled to comment on an inexplicit effort to show animus through reference to charges/grievances and settlements. Such documents were introduced solely to establish that Roach was engaged in such forms of protected activity. The precise nature of such matters is entirely irrelevant, yet the documents are described in detail, there being no apparent purpose except to suggest that Respondent has a history of disregard for the law. Such documents were not introduced (T. 69) and, of course, may not be used for such purpose.

Ultimate Conclusions

Having found that there is no evidence of Union animus in this record, no finding can be made that it was a motivating factor in the decision to lower Roach's performance rating unless one can be predicated upon the absence of any legitimate basis for the rating. That is to say, an appraisal so clearly unfair and unjustified as to be inexplicable in the absence (as Roach noted) of personal animosity or hidden hostility to the Union.[10/] I think the original decision adequately covers this point. I would add only that, given the fact that Roach encountered difficulties in the latter

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10/ In this connection, it is perhaps worth noting that Lesch rated Roach "Fully Successful" for the 1987-1988 rating year. The following year Roach received a "Superior" rating based solely upon elevation of her performance in the noncritical element (Procurement Reports and Files) from "meets" to "exceeds." It would appear to this non-personnelist that she barely made it into "Superior." The respects in which Henry and Lesch disagreed about critical elements performance did not themselves suffice to make a difference in category.

part of her rating year with, inter alia, timely handling of requisitions, prompting the need to prioritize her work, this record will not support the conclusion that a finding that she performed in a "fully successful" fashion was a clearly unreasonable one. Hence examination of this facet of the case does not permit a reasonable inference that the rating was tainted by her Union office or activities. In the circumstances, the General Counsel has failed to establish a prima facie case of discrimination, and "the case ends without further inquiry" under the teaching of Letterkenny.

Accordingly, I recommend that the Complaint in Case No. 4-CA-10146 be, and hereby is, dismissed in its entirety.

Issued, Washington, DC, June 29, 1993

John H. Fenton

JOHN H. FENTON
Chief Administrative Law Judge