

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

MEMORANDUM

DATE: MARCH 25, 2005

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
ELKTON, OHIO

Respondent

and

Case No. CH-CA-04-0303

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 607, AFL-CIO

Charging Party

Pursuant to Section 2423.34(b) of the Rules and Regulations 5 C.F.R. §2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcript, exhibits, and any briefs filed by the parties.

Enclosures

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

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO Charging Party	Case No. CH-CA-04-0303

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. §2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **APRIL 25, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

PAUL B. LANG
Administrative Law Judge

Dated: March 25, 2005
Washington, DC

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

DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION ELKTON, OHIO Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 607, AFL-CIO Charging Party	Case No. CH-CA-04-0303

Jaime J. Olson
For the General Counsel

Nicole Hogan
For the Respondent

Carl Halt
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On March 26, 2004, the America Federation of Government Employees, Local 607, AFL-CIO (Union) filed an unfair labor practice charge against the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Elkton, Ohio (Respondent). The Union filed an amended charge against the Respondent on April 1, 2004. On July 28, 2004, the Acting Regional Director of the Chicago Region of the Federal Labor Relations Authority (Authority) issued a Complaint and Notice of Hearing in which it was alleged that the Respondent violated §7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (Statute) by reassigning Todd M. Hayter, a member of the bargaining unit represented by the Union, from the Inmate Systems Management department (ISM) to the Correctional Services department in

retaliation for his activities as Chief Steward of the Union, including the filing of grievances against the Respondent.

A hearing was held in Cleveland, Ohio on October 20, 2004, at which the parties were present with counsel and were afforded the opportunity to present evidence and to cross examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post hearing briefs submitted by the parties.

Positions of the Parties

The General Counsel

The General Counsel contends that it has established a *prima facie* case of unlawful retaliation by the Respondent. The General Counsel further contends that the Respondent has failed to rebut the *prima facie* case and that its defenses are without merit. In support of his position the General Counsel maintains that the Respondent detailed Hayter from ISM to Correctional Services because Hayter, in his capacity as Chief Steward of the Union, had filed grievances against the Respondent. According to the General Counsel, the Respondent's improper motive for detailing Hayter is corroborated by the fact that the detail occurred shortly after the filing of the grievances.

The General Counsel maintains that the Respondent's discriminatory intent is evidenced by the actions of Constance Dixon, Hayter's supervisor at ISM, and Ralph Montalvo, the Acting Warden. Dixon began harassing Hayter after he had filed grievances against her. Montalvo detailed Hayter from ISM to Correctional Services shortly thereafter.

The General Counsel further maintains that Warden Mark A. Bezy exhibited anti-union animus when he was approached by Carl Halt, the President of the Union, regarding Hayter's detail. Bezy told Halt, "that's what Todd gets for filing all of those petty allegations" or words to that effect. The General Counsel argues that Bezy's statement amounts to an admission that Hayter was punished for filing grievances.

The General Counsel characterizes the Respondent's stated nondiscriminatory reason for detailing Hayter as pretextual and not worthy of belief. According to the General Counsel, Montalvo's stated purpose of defusing an explosive situation was pretextual inasmuch as he detailed Hayter rather than Dixon. The General Counsel asserts that

the proposition that Hayter's reassignment was intended to protect him is also pretextual and is inconsistent with admissions by both Montalvo and Bezy that they considered Hayter's allegations of harassment to be false. In addition, the Respondent's workplace violence committee found that Hayter's allegations did not rise to the level of a hostile work environment or workplace violence. Finally, Hayter stated repeatedly that he was not afraid of Dixon and did not fear for his safety.¹ According to the General Counsel, Bezy's credibility is further eroded by the inconsistency between his alleged belief that Hayter's charge against Dixon had no merit and his action in referring Hayter's charge to the Office of Internal Affairs (OIA) for an investigation.

The General Counsel also challenges the Respondent's affirmative defense that it would have detailed Hayter to Correctional Services even if he had not engaged in protected activity. As stated above, the General Counsel contends that the Respondent did not truly believe, and knew that Hayter did not contend, that there was any threat of physical violence by Dixon. Furthermore, the nine day delay in detailing Dixon out of ISM is inconsistent with the Respondent's stated rationale of concern for the integrity of the OIA investigation.

As a remedy the General Counsel proposes, besides the posting of a notice, an order directing the Respondent to cease and desist from its unlawful activities and to make Hayter whole for any lose of overtime pay as well as other privileges or benefits resulting from his detail to Correctional Services.

The Respondent

The Respondent maintains that the General Counsel failed to present a *prima facie* case of unlawful discrimination and that, even if the General Counsel did so, the Respondent has presented legitimate reasons for its actions and has shown that it would have taken such action even if Hayter had not engaged in protected activity.

In support of its position the Respondent asserts that it takes allegations of workplace violence very seriously. Accordingly, the Respondent took the precaution of removing

1

Although Dixon was also detailed out of ISM nine days after Hayter's detail, the General Counsel characterizes this action by the Respondent as a "mere afterthought" which invalidated the Respondent's rationale in failing to return Hayter to ISM after Dixon's departure.

both Hayter and Dixon from ISM and initiating an OIA investigation.

The Respondent further maintains that its lack of a discriminatory motive is shown by the fact that Dixon was also detailed out of ISM and by the fact that, five days after Hayter filed his grievance against Dixon, he was informed that he would be returned to ISM unless he submitted additional information to support his charge against Dixon. The Respondent decided not to return Hayter to ISM after he submitted numerous additional allegations concerning Dixon's behavior. According to the Respondent, Hayter admitted that he did not want to return to ISM. Another reason for Bezy's decision to keep both Hayter and Dixon out of ISM was that an initial investigation revealed a disparity between Hayter's allegations and information obtained from other employees concerning Dixon's behavior. Bezy then took action to initiate an investigation by OIA and he wanted to ensure that employees in ISM would not be subject to the influence of either Hayter or Dixon. Therefore, the Respondent's actions with regard to Hayter were fully justified and were not pretextual.

Finally, the Respondent maintains that it did not commit an independent violation of §7116(a)(1) of the Statute because Hayter was informed on several occasions that his detail out of ISM was not a disciplinary action. Therefore he could not have reasonably drawn a coercive inference from the assignment.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. The American Federation of Government Employees, AFL-CIO (AFGE) is a labor organization as defined in §7103(a)(4) of the Statute and is the exclusive representative of a unit of employees of the Department of Justice, Federal Bureau of Prisons which is appropriate for collective bargaining. The Union is an agent of AFGE for the representation of employees of the Respondent who are members of the bargaining unit.

At all times pertinent to this case Hayter was a member of the bargaining unit and was the Chief Steward of the Union. Hayter's position with the Respondent was as a Legal Instruments Examiner (LIE) assigned to ISM. Hayter's duties included the computation of inmates' sentences to ensure the proper release dates. Dixon was his supervisor and the Manager of ISM.

The Relationship Between Dixon and Hayter

Hayter testified that when he started in ISM he had no problems with Dixon. However, after about two years he and other employees began having problems (Tr. 107). On February 6, 2004², Dixon met with Hayter to review his performance log for October to December of 2003 (GC Ex. 4).³

Dixon informed Hayter that she had given him lower ratings on certain elements of the performance log than on his previous annual performance evaluation (GC Ex. 3) because he had made an error which had resulted in the late release of an inmate. Dixon had received an unpaid suspension because of the incident and, according to Hayter, she told him that if she was going to receive "street time" he would also have to face certain consequences. Dixon also allegedly told Hayter that he had made the error because he spent too much time on official time (7 to 10 hours a week according to Hayter) and on the Disturbance Control Team. Dixon further stated that she had no control over the Disturbance Control Team but that she would control Hayter's activities on behalf of the Union (Tr. 28-31).⁴ Hayter told Dixon that he did not agree with the evaluation.

Under Element 2 of the performance log of February 6 (GC Ex. 4) Dixon gave Hayter a grade of "Fully Successful" and indicated:

Though Mr. Hayter is very proficient at new law sentences, he needs to remember to utilize the manual for old law sentences.⁵

Under Element 3, for which Dixon also gave Hayter a grade of "Fully Successful", she indicated:

Mr. Hayters (*sic*) skills in the area of the new law are excellent, however, when it comes to old law sentences, Mr. Hayter has not had enough exposure and needs to ask questions and utilize manuals more effectively.

2

All subsequently stated dates are in 2004 unless otherwise indicated.

3

A performance log is a quarterly performance evaluation. Its significance as compared to the annual evaluation is unclear.

4

Dixon did not testify.

5

The inmate who was released late had apparently been sentenced under the "old law."

Hayter was given evaluations of "Excellent" in all other elements.⁶ The performance log form does not call for an overall rating.

Hayter's annual performance appraisal for the period from April 1, 2002, to March 31, 2003 (GC. Ex. 3), was also completed by Dixon. He received a grade of "Excellent" in Element 2 and "Outstanding" in Element 3. All of Hayter's other grades in that appraisal were either "Excellent" or "Outstanding"; his overall rating was "Outstanding." In her comments Dixon suggested that Hayter think about a promotion.

On or about February 10 Hayter met with Bezy to protest the performance log entry. Hayter mentioned a previous conversation during which Bezy had stated that no bargaining unit employee would be in trouble because of the late release of an inmate. Bezy confirmed that Dixon was solely responsible for the incident. Hayter then showed Bezy the performance log and stated that the evaluation had been completed late. Bezy thereupon called Lois Swiderski, the Human Resource Manager, into his office. He told Hayter that the performance log was "bullshit." Swiderski said that the performance log was irrelevant because it was issued late. Hayter left the meeting satisfied that his concerns had been addressed (Tr. 33-35).

Hayter's testimony at this point was somewhat inconsistent with the documentary evidence submitted by the General Counsel. Hayter testified that he eventually received another negative log entry. He therefore assumed that he was being targeted and filed a grievance (GC Ex. 5; Tr. 35, 26). However, the grievance, which is a letter from Halt to Bezy which Hayter identified as an attempt to achieve an informal resolution (the first step in the grievance procedure), is dated February 6 and refers only to the performance log entry of that date. The letter was stamped as received in the Warden's office at 12:38 p.m. on February 10. This is the purported date of Hayter's meeting with Bezy and it is unclear whether the grievance was

6

The grades used in evaluations are "Unsatisfactory", "Minimally Satisfactory", "Fully Satisfactory", "Excellent" and "Outstanding."

initiated before or after the meeting.⁷ Even if the meeting had been held several days prior to February 10, the only evidence of a subsequent negative performance log entry is dated February 13 (GC Ex. 7).

Hayter further testified that, after his meeting with Bezy, he was informed by coworkers that Dixon had gone through his working drawer.⁸ As a result of Dixon's search of Hayter's working drawer, he received another performance log entry of "minimally satisfactory" on February 13 (GC Ex. 7). The comments referred to the file of an inmate for whom the release date had not been computed and audited within 30 days of his entry into the facility as required. According to Hayter other LIEs informed him that Dixon had asked them if they had any overdue files and, when she was told that they did have such files, directed them to take the necessary action. To the best of Hayter's knowledge, she did not search the working drawers of the other LIEs (Tr. 39, 40). When Hayter discussed the log entry with Dixon she told him that he needed to spend more time in the office and that he was using too much official time (Tr. 42). Hayter stated that other LIEs had overdue files and, to his knowledge, never received unfavorable performance log entries. He did not elaborate as to the basis of his knowledge.

By memorandum of February 18 (GC Ex. 8) to Dixon, Hayter protested the unfavorable log entry of February 13. He alleged that Dixon did not go through the working drawers of other LIEs and that she singled him out because he was a male and a Union official. He also cited other instances of his allegedly unfair treatment by Dixon, including the allegation that other LIEs were not being held accountable for files in which sentences had not been audited within the 30 day deadline. Hayter requested that Dixon withdraw the log entry. He threatened to file a formal grievance and possibly a sexual discrimination complaint if his request were denied. Finally, Hayter stated that he would not

7

Hayter testified that the letter from Halt to Bezy was dated February 6 because that was the date of the disputed performance log entries. That testimony, and the fact that the grievance was received in the Warden's office in the middle of the day, suggests that the grievance letter was composed on February 10.

8

A working drawer is the place where LIEs keep their active files. Hayter's testimony suggests that each LIE has his or her own working drawer, but he also stated that the working drawer was a "common place" to which they all have access to files on which more than one LIE is working (Tr. 38, 39).

discuss the matter in a private meeting unless Halt was present.

By memorandum of February 18 (GC Ex. 9) from Halt to Bezy, the Union initiated another grievance on behalf of Hayter; the memorandum was received in the Warden's office on the same day. In the memorandum Halt stated that Dixon had searched Hayter's working drawer on February 6 and had "confiscated" some of its contents for the sole purpose of targeting Hayter. He further stated that the log entry of February 13 was "unacceptable" in the context of Article 14, Section b of the collective bargaining agreement (CBA; GC Ex. 6). The cited portion of Article 14, entitled "EMPLOYEE PERFORMANCE AND RATINGS" states:

Bargaining unit employees shall have the right to appeal their performance ratings through the negotiated grievance procedure with or without the Union. It is understood that only the Union or the Agency can pursue the matter to arbitration.

Halt also complained of the fact that Dixon did not have a SENTRY password⁹ and, therefore, could not accurately determine whether timely action had been taken. As an informal resolution the Union requested that Hayter's log entry be adjusted to a more favorable grade, that Dixon be relieved as the Inmate Systems Manager and that Hayter receive a written apology for Dixon's conduct.

The attempt at an informal resolution evidently was unsuccessful because on March 11 the Union filed a formal grievance on behalf of Hayter (GC. Ex. 10). As before, the Union alleged that Dixon was conducting "search and seizure" of the files in Hayter's working drawer and that she was targeting Hayter as "a revenge factor." Dixon's conduct was characterized as having created a hostile work environment. The Union also alleged that Dixon regularly assigned LIEs to perform ISO¹⁰ work which causes the LIEs to fall behind in their own work. The requested remedy was that Dixon be removed from ISM, that she not be allowed to supervise other bargaining unit employees, that she receive training on the Master Agreement and that she attend Anger Management Training.

9

There is no evidence as to the nature of the SENTRY system but it apparently provides a means of monitoring the status of individual inmate files.

10

The meaning of ISO was not explained, but it apparently refers to another job classification.

Hayter testified that he complained about Dixon to Bezy on a number of occasions. However, his remarks were in terms of her alleged mistreatment of all of the employees in ISM (Tr. 48).

On March 11 the Union, through Hayter, also filed a grievance on behalf of the entire local (GC Ex. 11) alleging that the Respondent had failed to pay shift differentials under certain circumstances. Neither Dixon or ISM was mentioned in the grievance and Hayter's name appears only as the representative of the grievant.

Hayter's Removal from ISM

On Saturday, March 13, Hayter received a telephone call at home from Halt and was told to call Associate Warden Aponte immediately. Hayter called Aponte and learned that he was to be transferred out of ISM although it had not yet been decided where he would be reassigned. Aponte also told Hayter that he (Hayter) would be required to testify before a workplace violence committee. According to Hayter, when he asked why he was being transferred, Aponte said, "We just like to fuck with you" (Tr. 49, 50).

On Hayter's next work day he met with the workplace violence committee. Hayter told the committee members that he did not fear for his safety and that Dixon had never struck him or threatened him physically. Hayter stated that his grievance arose out of a hostile work environment. He further stated that no one in ISM wanted to come to work and that Dixon was "targeting people" (Tr. 50, 51). Hayter also told the committee that his coworkers had told him that Dixon had not looked through their work drawers.

By memorandum of March 16 (GC Ex. 12) Montalvo, acting for Bezy, informed Hayter that, based upon Hayter's statements to the workplace violence assessment team, the reported incidents in ISM did not meet the criteria for workplace violence and did not amount to a hostile work environment. The memorandum further stated that Hayter would be returned to ISM at Noon on March 17 and that, if Hayter had additional information, he was to provide it in writing prior to the time of his scheduled return to ISM.

By memorandum of March 17 (GC Ex. 13) Hayter responded to Montalvo's memorandum of March 16. Hayter stated that, "I have never been physically assaulted by Ms. Dixon, or threatened in a physical manner by Ms. Dixon." He then enumerated the following concerns:

1. The unfavorable log entry arising out of the late release of an inmate for which Dixon had been suspended. Dixon allegedly blamed Hayter for the mistake.

2. Dixon's "constant male bashing comments and e-mails."

3. Dixon's auditing his files because he is the only male "legal tech" in the department.¹¹ Hayter commented that he did, "not deserve to be ridiculed and harassed."

4. Her adverse comments about the ethnic origins of certain employees.

5. Her searching only of his work drawer and not those of the female employees. Hayter also charged that Dixon had been "confiscating my work" and that she had prevented the release of an inmate into state custody in response to a writ.

6. Dixon's assigning him 562 inmates while the female employees were given substantially smaller case loads. According to Hayter, "Once the inequality was questioned, the AISM [apparently a supervisor or management official] changed the caseloads to make it fair and equitable."

7. Her telling him that he had no friends in the Bureau of Prisons and that he needed to get "happy pills" so that he could become, "more controllable and less argumentative."

8. "Her anti-government standpoints."

9. Dixon's statement of her religious beliefs and declaration that those who did not agree were wrong.

10. Insensitive comments about the stepsister of Hayter's wife who had been raped and murdered.

11. "Her obvious spitefulness of those of us who have children and care about our children."

12. Her disparaging comments about Puerto Ricans.

In the memorandum Hayter again alleged that Dixon had created a hostile work environment for him and others. He further alleged that Dixon targeted anyone who questioned her or proved her to be wrong. In support of that

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Respondent's Exhibits 1, which includes an affidavit from a male employee, indicates that this was not true.

allegation, Hayter referred to an incident in which Dixon "lashed out" at the mail room staff. He concluded with the statement that many other employees in ISM had told him that they agreed that Dixon had created a hostile work environment.

By letter of March 18 (GC Ex. 14) from Montalvo, on behalf of Bezy, Hayter was informed that, effective immediately, he would be assigned to Correctional Services until further notice. He was directed to contact the Captain or the Operations Lieutenant for his assignments and was further informed that his duty hours would be unchanged. Hayter acknowledged receipt of the letter on the same date but indicated that he was not in agreement with the reassignment.

On cross-examination Hayter acknowledged that he submitted the memorandum of March 17 because he did not want to go back to ISM (Tr. 109, 110). In response to my questions, Hayter stated that he never indicated to anyone in authority whether he wanted to return to ISM. He did, however, testify that he indicated that he could not continue to work in ISM if Dixon was going to continue to "hound" him. Hayter also testified that he was somewhat relieved at no longer being in contact with Dixon. He later learned that there was to be an SIS¹² investigation and that Dixon was to be removed from ISM. At that point he expected to return to ISM, but his return did not occur until about four months later (Tr. 110-112). There is no evidence as to whether Dixon eventually returned to ISM.

On redirect examination Hayter testified that, even if Dixon had not been removed, he would have been willing to return to ISM if she no longer harassed him (Tr. 114, 115). There is no evidence that either Hayter or the Union communicated this position to the Respondent.

Montalvo testified that, since Bezy was away from the institution when Hayter submitted his grievance, he was serving as Acting Warden. When Montalvo became aware of the grievance he called a meeting with Hayter and a Union representative (presumably Halt) during which he discussed Hayter's allegations and stated that he would look into it. Montalvo directed Hayter to report to the Union office rather than returning to ISM. According to Montalvo, he was particularly concerned with the allegation of a hostile environment and felt that, for safety's sake, he should

12

Montalvo later testified that SIS is an abbreviation for Special Investigating Session and that an SIS investigation could be ordered by the Warden (Tr. 144).

refer the grievance to a threat assessment team. The team was composed of a Human Resources manager, a psychologist, another staff member, a Correctional Service supervisor and Montalvo himself. The purpose of the team was to determine whether the allegations described a situation which met the criteria for a hostile work environment; neither Hayter nor anyone else was interviewed by the team.¹³

Montalvo further testified that, after the threat assessment team had determined that Hayter's allegations did not describe a hostile work environment, he called Hayter and the Union representative back into his office and informed them of the findings of the team. Montalvo also informed Hayter that he would be returned to ISM unless he provided additional information. Hayter and the Union representative returned to Montalvo's office the next day and delivered a memorandum with additional information in support of Hayter's allegations of a hostile work environment (GC Ex. 13). According to Montalvo, Hayter also stated that he felt that he would be in danger if he returned to ISM. At that point, Montalvo decided to reassign Hayter to Correctional Services (Tr. 127-131).

After Montalvo had given Hayter the memorandum regarding his transfer out of ISM (GC Ex. 14) Hayter said that he did not agree with the transfer because he had done nothing wrong. Montalvo told Hayter that he was not being transferred because of wrongdoing but because of the nature of his allegations and the fact that he felt threatened. Montalvo also told Hayter that his reassignment was temporary and would remain in effect at least until the Warden returned or until the completion of an investigation (Tr. 137).

Montalvo also testified that on March 19 he had a telephone conversation with Margaret Connors, the Regional Human Resources Manager at the Regional Office of the Bureau of Prisons in Philadelphia. When Montalvo informed Connors that he had reassigned Hayter she directed him to remove Dixon from ISM. Montalvo thereupon informed Dixon that she was to report to the Warden's office on Monday for reassignment¹⁴ (Tr. 132, 133). The Warden returned on

13

This testimony is inconsistent both with Hayter's testimony that he spoke with the team and with Montalvo's memorandum of March 15 (GC Ex. 12). Although the issue is not crucial, the weight of the evidence is that Hayter was interviewed by the team.

14

I have taken official notice that March 19, 2004, fell on a Friday.

Monday and reassigned Dixon to the Satellite Load, which is another facility on the grounds.

Montalvo testified that he had kept Bezy informed of the situation by telephone. On the day of Bezy's return Montalvo met with him, brought him up to date and gave him all of the paperwork. Montalvo did not recall whether he told Bezy that Hayter did not want to leave ISM, but he did tell Bezy that he had transferred Hayter temporarily and that he had informed Dixon that she was going to be moved out of ISM (Tr. 154, 155).

Bezy testified that he had been out of town when Hayter submitted his grievance. However, he received a number of telephone calls from Montalvo who informed him that the grievance raised the possibility of workplace violence. Bezy thereupon told Montalvo to convene a workplace violence committee in accordance with his policy in such situations (Tr. 162).

Upon his return to the institution Bezy issued a memorandum to Dixon regarding her transfer. He decided to keep both Hayter and Dixon out of ISM and initiated a referral to the Office of Internal Affairs (OIA) which would conduct an investigation. According to Bezy he was not sure at that point what was going on in ISM (Tr. 163, 164). There was no change to Hayter's hours of work, job classification or rate of pay.¹⁵

Bezy later became aware that ISM was falling behind in its work because two employees were absent from the department. Therefore, on April 28 he issued letters to Hayter and Dixon (Resp. Ex. 3) changing their work assignments. As of April 29 Hayter was to report to Correctional Services from 6:00 a.m. to 8:00 a.m. and to the Business Office from 8:00 a.m. to 4:00 p.m. While in the Business Office he would be performing his LIE duties. There was to be no change in Hayter's work schedule. In a separate letter to Dixon, Bezy directed her to report to the extra office in the Warden's area from 8:00 a.m. to 12:00 p.m. in order to complete sentence computations, a function performed by ISM employees. She was to report to G-Unit as Unit Manager from 12:00 p.m. to 4:30 p.m. There was to be no change in Dixon's work schedule.

When Bezy returned to the institution he saw affidavits that had been taken from three ISM employees by Timothy J. Montgomery, the SIS Lieutenant who had been assigned to

15

The only monetary loss alleged by the General Counsel is a loss of overtime.

investigate Hayter's allegations (Resp. Ex. 1). The pertinent portions of the affidavits are as follows:¹⁶

Pamela Steiner: She never observed Dixon treat male staff members differently from females, nor did she make intentional "male bashing" remarks. Steiner stated that she heard Dixon make discriminatory remarks that she characterized as "mean and vindictive." Steiner also stated that Dixon went through her file drawer. According to Steiner, Dixon was a poor supervisor who lacked communication skills.

Nadine Schuller: She has personally observed Dixon going through the file drawers of all LIEs and removing items from the drawers to take to her office. Schuller never witnessed Dixon threatening anyone with negative log entries. Schuller stated that Dixon lacked communication skills. She also expressed the opinion that Hayter should not have been taken out of the department if he did not request the transfer. According to Schuller, Hayter's removal created the impression that, if an employee complains, he will be "singled out".

Theodore Schmitt: He has not observed Dixon treating male staff members differently from females. His impression of Dixon was that she was abrasive to all staff members and does not communicate well.

Upon review of the affidavits, Bezy concluded that they did not fully support Hayter's allegations. Bezy thereupon decided to keep both Hayter and Dixon out of ISM until OIA, which is based in Washington, DC, completed an investigation (Tr. 166, 173).¹⁷ Bezy further testified that his decision to keep Hayter out of ISM was influenced by an e-mail from Hayter to Steiner (Resp. Ex. 4)¹⁸ which was brought to Bezy's attention by Steiner and her husband, who is also an employee of the Respondent. Steiner informed Hayter that she believed that the e-mail was threatening to her.

¹⁶

The affidavits were not admitted into evidence for the truth of their contents, but as proof of the information that was given to Bezy upon his return to the institution.

¹⁷

There is no evidence as to when the OIA investigation was completed, its findings or its effect on Hayter's eventual return to ISM.

¹⁸

The handwritten notation, "Pamela Steiner is another LIE in the ISM Department" was apparently put there by the Human Resource Manager.

Bezy denied telling Halt that Hayter had been removed from ISM because of the filing of "petty" allegations. In any event, the resolution of this factual issue is not crucial to the ultimate issue of unlawful retaliation and discrimination.

Upon consideration of all of the above evidence, I find as a fact that Hayter's removal from ISM was partly the result of his submission of a grievance against Dixon as well as of the nature of his allegations. I also find as a fact that the Respondent was justified in removing Hayter from the ISM by virtue of the nature of his allegations and that the action would have been taken even if Hayter had not been engaged in protected activity. Montalvo's testimony indicates that, although he did not think that Hayter's allegations suggested work place violence, he did not want to run the risk of leaving Hayter in what Hayter himself described as a hostile work environment before the allegations had been reviewed by a threat assessment team. The threat assessment team was convened promptly and made its findings without undue delay. Montalvo was prepared to return Hayter to ISM shortly after the team had found that there was no threat of violence. Rather than return to ISM, Hayter submitted a detailed memorandum with additional allegations and acknowledged at the hearing that he did not want to return to ISM at that time.

While I do not consider Hayter's testimony to be an admission that his allegations against Dixon were exaggerated or otherwise without merit, it is clear that Hayter did not want to return to ISM as long as Dixon was still there. Hayter's testimony that he would have been willing to return so long as Dixon altered her behavior appears to have been an afterthought which was never communicated to any responsible representative of the Respondent. Furthermore, the submission of the additional allegations justified Montalvo's decision not to return Hayter to ISM at that time. Even though Hayter informed Montalvo that he was not concerned for his physical safety, the nature of his allegations and his conversations with Montalvo made it clear that, if Hayter's allegations were true, Dixon was guilty of serious misconduct against Hayter and that the most prudent course of action was to remove Hayter from ISM at least until the situation in the department could be clarified.

The affidavits obtained by the SIS Lieutenant cast some doubt on Hayter's allegations that Dixon was singling him out. However, each of the affidavits also referred to problems with Dixon's performance as a supervisor. At the very least, the affidavits provided a rational basis for

Bezy's decision to keep both Hayter and Dixon out of ISM. There is no evidence to suggest that Bezy's alleged reliance on the affidavits was a pretext to cover discriminatory action against Hayter.

Discussion and Analysis

The Controlling Law

The law governing the order of proof in a case of alleged discrimination in violation of §7116(a)(2) of the Statute is well established. In *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*) the Authority held that the General Counsel must show by a preponderance of the evidence that the employee against whom the allegedly adverse action was taken was engaged in protected activity and that the protected activity was a motivating factor, not necessarily the sole motivating factor, in connection with the agency's treatment of the employee with regard to hiring, tenure, promotion or other conditions of employment. Once the General Counsel makes a *prima facie* case, the agency will not be held to have committed an unfair labor practice if it can show by a preponderance of the evidence that its action was justified and that it would have taken the same action even in the absence of the employee's protected activity. In determining whether the General Counsel has made a *prima facie* case consideration is to be given to the record as a whole, *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000) (*Warner Robins*).

The General Counsel Has Presented a *Prima Facie* Case

It is undisputed that Hayter was transferred out of ISM because he filed a grievance against Dixon. The Respondent's contention that the transfer was not the result of anti-union animus, while perhaps true, is beside the point. Regardless of the Respondent's intent, the fact remains that Hayter was transferred out of ISM shortly after initiating the grievance. The Authority has adopted an objective standard in determining whether an agency's action is coercive. Because Hayter's transfer could have been expected to at least create the perception among employees that he was being penalized for filing a grievance, the Respondent's motives are of no consequence, *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994).

The Respondent has emphasized that Hayter was transferred because of the substance of his allegations against Dixon, rather than because he exercised his right to file a grievance. That may be so, but, for the purpose of determining whether the General Counsel has presented a *prima facie* case, the distinction is academic. The weight of the evidence is that Hayter was transferred because he filed a grievance.¹⁹ The most that can be said for the Respondent's argument is that it establishes that the filing of the grievance was not the only reason for Hayter's transfer. The evidence indicates that this is a classic "mixed motive" case as is described in *Letterkenny*. The fact that the Respondent had motives other than the filing of the grievance allows for the possibility that the Respondent can establish the affirmative defense that its action was justified and that the transfer would have occurred regardless of Hayter's protected activity.

Hayter's Transfer Was Justified and Would Have Occurred In the Absence of His Protected Activity

Hayter's grievance against Dixon raised serious issues concerning Dixon's treatment of Hayter and of other employees assigned to ISM. The term "hostile work environment", as used by Hayter, covers a wide range of misconduct including the possibility of violence. That possibility justified Hayter's removal from ISM at least until the threat assessment team had made its report. Once

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The exercise of a right under a collective bargaining agreement, such as the submission of a grievance, has long been recognized as a protected activity, *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1039 (1992).

the threat assessment team had determined that there was no danger of work place violence, Montalvo was prepared to return Hayter to ISM. Although in Hayter's memorandum to Montalvo of March 17 (GC Ex. 13) he made it clear that he had never been physically assaulted or threatened by Dixon, he greatly enlarged his allegations and repeatedly emphasized that Dixon had created a hostile work environment which Hayter himself testified he could no longer tolerate (Tr. 111). The affidavits obtained by the SIS Lieutenant did not fully support Hayter's grievance but they did indicate that there might have been serious problems in ISM. In light of that fact, Bezy was amply justified in requesting an OIA investigation and in keeping Hayter out of ISM at least until the investigation had been completed.

The justification for Hayter's removal did not end when Dixon was also removed. Both Dixon, as the ISM Manager, and Hayter, as the Chief Steward, were in positions of authority. Therefore, their continued presence in the department could well have had an intimidating effect on other employees which would have interfered with the OIA investigation.

Contrary to the General Counsel's position, the evidence does not support the proposition that the Respondent's stated reasons for Hayter's removal were pretextual. Even if it were assumed that Dixon's treatment of Hayter was at least partially motivated by his protected activity,²⁰ Dixon had no hand in Hayter's transfer out of ISM. Bezy's remark to Halt about Hayter's "petty allegations" were as likely to have been a reference to the substance of his allegations as to the fact that he was exercising a protected right.

In arguing that the Respondent's stated reasons for removing Hayter were pretextual, the General Counsel is, in effect, maintaining that the Respondent took Hayter's allegations too seriously, especially since Bezy entertained doubts as to the merits of the grievance. If the Respondent had not removed Hayter, he and the Union could well have maintained that Hayter's allegations had been ignored because of his protected activity and position as Chief Steward. Obviously, Hayter would have preferred to have Dixon immediately removed from ISM while he remained in place. Such an expectation is unreasonable; the General Counsel has presented no justification for the proposition

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It seems far more likely that Dixon's actions were motivated by her resentment over having been suspended because of the late release of an inmate. Dixon clearly blamed Hayter for the incident.

that the Respondent should have immediately credited Hayter's serious allegations against his supervisor rather than having taken temporary action until the completion of the investigation.

The General Counsel's contention that Dixon's removal was an afterthought is similarly unpersuasive. Montalvo presented unchallenged testimony that Connor ordered Dixon's removal as soon as she became aware of Hayter's grievance. While it may be argued that Dixon should have been transferred earlier, the nine day "delay" between Hayter's removal and that of Dixon is not excessive and does not support an inference of a pretext.

The proximity in time between the filing of Hayter's grievance and his removal does no more than create an inference of discrimination which is sufficient to support the proposition that the General Counsel presented a *prima facie* case, *Warner Robins*, 55 FLRA at 1205. However, the Respondent has effectively rebutted any presumption of unlawful discrimination in view of the fact that the clear weight of the evidence indicates that Hayter's removal from ISM was justified and that it would have occurred even in the absence of Hayter's protected activity and position with the Union.

For the foregoing reasons I have concluded that the Respondent did not commit an unfair labor practice in violation of §7116(a)(1) and (2) of the Statute by transferring Hayter out of ISM. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

IT IS HEREBY ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, March 25, 2005

PAUL B. LANG
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION**, issued by PAUL B. LANG, Administrative Law Judge, in Case No. CH-CA-04-0303, were sent to the following parties:

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