UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: August 27, 2002

TO: The Federal Labor Relations Authority

FROM: RICHARD A. PEARSON
Administrative Law Judge

SUBJECT: INTERNAL REVENUE SERVICE
COMPLIANCE SERVICE AREA 5
SMALL BUSINESS/SELF EMPLOYED
DIVISION JACKSONVILLE, FLORIDA

Respondent

and Case No. AT-CA-01-0407

NATIONAL TREASURY EMPLOYEES UNION

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

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INTERNAL REVENUE SERVICE COMPLIANCE SERVICE AREA 5 SMALL BUSINESS/SELF EMPLOYED DIVISION JACKSONVILLE, FLORIDA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. AT-CA-01-0407

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 **SEPTEMBER 30, 2002**, and addressed to:

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

RICHARD A. PEARSON
Administrative Law Judge

Dated: August 27, 2002
Washington, DC

OALJ 02-55

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges
WASHINGTON, D.C.

INTERNAL REVENUE SERVICE COMPLIANCE SERVICE AREA 5 SMALL BUSINESS/SELF EMPLOYED DIVISION JACKSONVILLE, FLORIDA Respondent	
and NATIONAL TREASURY EMPLOYEES UNION Charging Party	Case No. AT-CA-01-0407

Richard S. Jones, Esquire
For the General Counsel

Robert E. Norman, Esquire
For the Respondent

Karen M. Tanner, Esquire
For the Charging Party

Before: RICHARD A. PEARSON
Administrative Law Judge

DECISION

Statement of the Case

On March 20, 2001, the National Treasury Employees Union (the Union or Charging Party) filed an unfair labor practice charge against the Internal Revenue Service, Compliance Service Area 5, Small Business/Self Employed Division, Jacksonville, Florida (the Agency or Respondent), and on July 25, 2001, the Union amended the charge. The General Counsel of the Federal Labor Relations Authority (the Authority), by the Regional Director of the Atlanta Regional Office, issued an unfair labor practice complaint on August 31, 2001, alleging that the Respondent violated section 7116(a)(1), (2) and (4) of the Federal Service Labor-Management Relations Statute (the Statute), by failing

to select Michael Vanater for a vacant position because of his protected activities as a Union representative. The Respondent subsequently filed an answer to the complaint, denying that it committed an unfair labor practice.

A hearing was held in Tampa, Florida, on December 20, 2001. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. 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 Union, a labor organization as defined by 5 U.S.C. § 7103(a)(4), is the exclusive representative of a nationwide unit of employees in the national, regional and district offices of the Internal Revenue Service (IRS). The North Florida District Office of the IRS is headquartered in Jacksonville and has branch offices in Tampa, St. Petersburg, Orlando and other cities.[1] NTEU Chapter 87 is the Union's agent for servicing employees in the Tampa and St. Petersburg offices.

Michael (Steve) Vanater has been a revenue officer with IRS since 1984; he is currently a GS-12 revenue officer in the Collection Division and works in the Tampa office. Mr. Vanater's immediate supervisor also works in Tampa, while his branch chief works in Orlando and his third-level supervisor, the chief of the Collection Division, works in Jacksonville. During the time period relevant to this case, the chief of the Collection Division was Charles Schaefer, who died in August 2001.

Vanater and other revenue officers collect delinquent taxes from taxpayers, and Vanater's unit focused on tax collection from small businesses. They analyze financial records and meet with the taxpayers in order to resolve disputed issues in a case, discuss possible compromises, and maximize collection. In the early 1990's, IRS developed the Offer-in-Compromise (OIC) program, which assigns the collection duties to OIC specialists in cases where a settlement offer has been made. During the early stages of

[1] In late 2000, there was a reorganization within IRS, eliminating the district office and division structure. The precise lines of the new organization were not made clear on the record and are not relevant to the issues in this case. In this decision, I use the organizational names that existed prior to October 2000.

the program, all revenue officers handled such offers, and Mr. Vanater received training in this area. Subsequently, the handling of offers in compromise was shifted from revenue officers to OIC specialists. By 1999, an OIC group had been established in the St. Petersburg office, and in June 2000 Robert Budde was named as manager of this group. Approximately three OIC specialists were appointed for the group through a 1999 competitive vacancy announcement, and two more OIC specialists were appointed at the GS-12 level through a competitive vacancy announcement published in August 2000. Vanater applied for both the 1999 and 2000 positions but was not selected on either occasion. The instant case concerns his nonselection in 2000.

Mr. Vanater has also been active in Union affairs since at least 1993, as a steward and as vice president of Chapter 87. He has handled employee grievances, served as chief negotiating spokesman for Chapter 87, and testified at an unfair labor practice hearing prior to the events of this case. The unfair labor practice hearing involved a local memorandum of understanding, which the Union alleged had been fully agreed to by the Agency in 1996, but which Mr. Schaefer refused to sign. The hearing in that case was held in 1997, and both the administrative law judge and the Authority ruled in favor of the Agency, finding that no meeting of the minds had been reached. *Internal Revenue Service, North Florida District, Tampa Field Branch, Tampa, Florida*, 55 FLRA 222 (1999). Both Mr. Vanater and Mr. Schaefer were prominent participants on opposing sides in that case, and Mr. Budde was part of the management negotiating committee. In his role as Union steward and officer, Vanater has opposed positions taken by Mr. Budde and Mr. Schaefer. When Maria Flack took over as president of Chapter 87 in 1999, she met with Schaefer and mentioned that Vanater would be serving on a labor-management committee. According to Ms. Flack, Schaefer told her that Vanater "didn't always get along with everybody and was not, you know, considered a team player." Tr. at 33.

Joint Exhibit 1 contains the documents in the official file for the vacancy announcement. It reflects that four employees applied for the OIC specialist position: Mr. Vanater, the two employees ultimately selected (Michael Forson and Christine Mousa), and a fourth person who was also not selected. Forson and Mousa were both GS-11 OIC specialists already working in Mr. Budde's OIC group, while Vanater and the fourth applicant were GS-12 revenue officers working in other groups. The competitive process called for a Ranking Official to review the applications, determine the "best qualified" applicants, and submit the list of best qualified, in ranking order, to a Selecting Official. Thomas Weber, a first-line OIC manager in Jacksonville,

served as the Ranking Official, and Mr. Schaefer served as the Selecting Official. Mr. Weber calculated the applicants' scores based on three elements: their most recent performance appraisal, his own evaluation of the applicants' potential in four critical elements of the OIC position, and any performance awards they received in the last three years. Mr. Weber gave all the applicants the maximum score in his evaluation of their credentials; therefore, the applicants' rankings depended entirely on their scores in the other two categories. Vanater had a slightly lower performance appraisal than Mousa and Forson, but he had received awards in each of the prior three years, compared to one for Forson and none for Mousa. Therefore, Vanater's numerical score totaled 48.98, compared to 48.60 for Forson and 47.60 for Mousa. The fourth applicant was much further behind, at 44.02. All four applicants were considered "best qualified," so
that they were all eligible for selection by Mr. Schaefer, who was not required to select the highest-ranking candidate (s). Schaefer also had the option of interviewing them, but he chose not to. There is no evidence that Schaefer spoke to Vanater's or the fourth applicant's immediate supervisors concerning their qualifications for the OIC position, but Mr. Budde, the St. Petersburg OIC manager, did seek out Schaefer and "lobby" him on behalf of his subordinates, Forson and Mousa. Budde told Schaefer that Forson and Mousa "had been in the [OIC] position and demonstrated an ability to successfully complete the duties and . . . I thought they deserved it." Tr. at 193. Budde testified that he also told Schaefer that he hoped Vanater would not be selected for an OIC position. He said [*id.*]:

> One of my concerns about Steve is that I'd heard that he had a limited inventory and may have even been trying to have no inventory, and I, quite frankly, had a need for someone to work inventory if selected for the position.

When asked what he meant by this, Budde testified [*id.*]:

> It's my understanding that as a union official or in his position that he had a reduced number of cases and that I felt that if he came to the offer group that he would have the same desire to not have a full inventory.

On September 14, 2000, Ranking Official Weber certified the rankings of the best qualified applicants to Selecting Official Schaefer, who then selected Mousa and Forson for the positions on September 18, 2000. Shortly thereafter, when Vanater learned that he hadn't been selected, he asked

Union president Flack to obtain the ranking package and review it for irregularities. When Flack reviewed the package (Joint Exhibit 1), she noted that Vanater had been ranked first; this precluded Vanater from grieving the ranking process and narrowed the scope of his inquiry to Schaefer's reasons for not selecting him. As the collective bargaining agreement entitles an unsuccessful applicant from the "best qualified" list to obtain counseling, at his request, from the Selecting Official, Vanater decided to invoke this right and discuss the matter directly with Schaefer. Schaefer agreed to meet with Vanater, but after a series of conflicts and other problems repeatedly delayed the meeting, Schaefer agreed to provide Vanater with a memo outlining his reasons for not selecting Vanater. On February 14, 2001, Schaefer sent the memo by email. It offered Vanater five suggestions, "to assist you in attaining your career objectives" (G.C. Exhibit 4). Those suggestions were [*id.*]:

> Attempt to be more flexible in dealings with managers and others.
>
> Take a class or read a book on negotiation skills and demonstrate a willingness to accept compromise as a legitimate method of resolving problems.
>
> Work on improving communication skills and avoid the temptation to argue and threaten. Some managers complain you have a tendency to "twist their words".
>
> Be less aggressive in promoting your personal agenda and work to become more of a team player.
>
> Re-establish a reputation for being interested and willing to do collection work. There is a perception you rather do almost anything other than collection work.[2]

After receiving this memo, Vanater did not seek further to meet with Schaefer about the OIC selections, and the unfair labor practice charge was subsequently filed.

In November 2000, about a month after the selections of Mousa and Forson to the GS-12 OIC positions took effect, IRS management solicited volunteers among the GS-11 revenue

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[2] Budde testified that prior to writing this memo, Schaefer consulted with him about what to say to Vanater about his nonselection. Budde said that while he did not help Schaefer write the memo, he did provide verbal input to Schaefer. Of the five statements made in the Schaefer memo, Budde indicated that the only one which reflected his advice to Schaefer was the suggestion to be "more flexible".

officers in the Tampa and St. Petersburg offices for temporary details as GS-11 OIC specialists (Joint Exhibit 4). Mr. Budde confirmed that in January 2001, his group was given two additional OIC specialists on details to last no longer than a year. According to Budde, his group had Grade 11 inventory that was not assigned, and he needed additional staff. Also during 2001, national management of IRS began implementing a program to centralize the handling of offers in compromise at two service centers, in Brookhaven, NY, and Memphis (Joint Exhibit 2). Although field offices such as those in St. Petersburg continue to handle a portion of the OICs, an increasing amount of such work is being diverted to Brookhaven and Memphis. Consequently, there will likely be a decreasing amount of OIC inventory in the St. Petersburg OIC group.

Discussion and Conclusions

A. Positions of the Parties

Although there is little disagreement as to the essential facts of this case, the parties draw diametrically opposite conclusions therefrom. The central question here is whether the Respondent's nonselection of Vanater for one of the two open OIC positions was based on legitimate reasons or on his protected activity. An additional issue is whether the Schaefer memo to Vanater independently violated the Statute by interfering with the right of employees to engage in union activity.

For its part, the General Counsel argues that Mr. Schaefer intentionally avoided selecting Mr. Vanater because Vanater had been a particularly vocal, "inflexible" Union advocate, one who had aggressively pursued grievances on behalf of other employees and testified against the Agency in a protracted ULP case. Arguing first that a *prima facie* case of discrimination was proven, the GC emphasizes the words of the Agency's supervisors, Budde and Schaefer, to establish that the Agency was motivated by unlawful considerations. Mr. Budde admitted at the hearing that a factor in his recommending that Vanater not be selected was Vanater's "reduced number of cases" "as a union official". Further, according to the GC, all of the suggestions made by Schaefer to help Vanater achieve his "career objectives" related to attributes that Schaefer could have knowledge only through Vanater's union activity. As a third-level supervisor who worked on the other side of the state from Vanater, Schaefer had no direct knowledge of Vanater's work habits or personality, except by virtue of Vanater's frequent union activity. The GC further argues that because

the reasons offered by the Agency for not selecting Vanater were pretextual, there is no need to consider whether the Agency would not have selected Vanater even if he had engaged in no protected activity. Finally, the GC asserts that Schaefer's February 14 email memo to Vanater was inherently coercive, in that it communicated to Vanater that his pro-union activity was harmful to "attaining [his] career objectives". *See*, *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020 (1994)(*Frenchburg Job Corps*). As a remedy, the GC seeks, among other things, Vanater's retroactive assignment to one of the OIC positions.

The Respondent, on the other hand, denies that Mr. Schaefer had any improper motives in selecting Mousa and Forson over Vanater; rather, Schaefer was simply promoting two deserving employees who had already demonstrated the ability to handle OIC work and had earned the loyalty of the manager who would be supervising them in their new positions. In other words, Schaefer's action was based on his and Budde's familiarity with and confidence in Mousa and Forson rather than an aversion to Vanater, and he would have selected those two employees regardless of Vanater's protected activity. The Respondent also denies that Schaefer had any hostility to Vanater's union activity, arguing that no prior incidents of anti-union animus were demonstrated on the record, and noting that the events of the prior ULP case occurred in 1996 and the hearing was held in 1997, thereby diminishing any causal connection between those events and the events of this case. In regard to the alleged independent violation of section 7116(a)(1), the Respondent's brief does not appear to address the appropriate factual allegation. Although paragraphs 19 and 23 of the complaint identify Schaefer's February 14 memo as the alleged independent 7116(a)(1) violation, the Respondent's brief addresses Vanater's testimony that Schaefer began to treat him coldly after he testified in the 1997 ULP hearing. Finally, if I find that the Agency unlawfully discriminated against Vanater, the Respondent argues that I should not order that Vanater be assigned to an OIC specialist position. The nationwide IRS initiative centralizing OIC work in two service centers, a program begun after the district office had posted and filled the two OIC positions in dispute here, will result in the reduction of work for OIC specialists in the St. Petersburg office. Therefore, assigning Vanater to an OIC position will only exacerbate a deteriorating situation in the St. Petersburg OIC group.

B. Analysis

1. The Nonselection of Vanater

The Authority explained the analytical framework for evaluating alleged violations of section 7116(a)(2) of the Statute in *Letterkenny Army Depot*, 35 FLRA 113, 118-19 (1990)(*Letterkenny*). 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. The GC must demonstrate (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 GC 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, the affirmative defense 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. The Authority has further held that the same *Letterkenny* analysis is used in resolving section 7116(a)(4) allegations. *Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780, 781 (1991).

Vanater's protected activity is well documented in the record, and the Agency denies neither the fact that he engaged in such activity nor that management officials in the district office were well aware of his activity. Vanater had personally opposed both Budde and Schaefer at various times on union-related matters. Applying the *Letterkenny* analysis, then, the first issue is whether Vanater's well-known protected activity was a motivating factor in Schaefer's failure to select Vanater as an OIC specialist.

In this regard, I credit Union president Flack's testimony that Schaefer had told her that Vanater "didn't always get along with everybody and was not . . . considered a team player." Not only was this testimony unrebutted, but it was consistent with the language used by Schaefer in his February 14, 2001 memo to Vanater. I do not attach any particular significance to testimony from either Flack or Vanater that Schaefer's attitude toward Vanater became "cold" after Vanater spoke out at an employee meeting and testified at the 1997 ULP hearing, because such inferences about another person's attitude are too subjective to be reliable. It is clear from the record, however, that Schaefer preferred working with Union officials other than Vanater, at least partly because Vanater opposed too many of

management's proposals and resisted compromising with management.

I acknowledge at the outset that the death of Mr. Schaefer prior to the hearing in this case places the Respondent in a very difficult position. As the Selecting Official, Mr. Schaefer was solely responsible for selecting Mousa and Forson over Vanater for the OIC positions, and only he could fully explain the reasons for his decision. Similarly, only he could fully explain his memo of February 14, 2001 to Vanater. Obviously, his testimony could have been instrumental in helping the Agency establish that he based his selections on legitimate, nondiscriminatory factors, and without his testimony, the Respondent's task is immensely harder. Equally obviously, though, I can only base my decision on evidence in the record.

It is often noted in discrimination cases such as this that an agency's discriminatory motive must be discerned through circumstantial evidence, because employers rarely admit or reveal such motives directly. However, this case may be an exception to that generalization, because Mr. Schaefer's February 14 memo and Mr. Budde's testimony come close to representing direct admissions of anti-union motivation. The February 14 memo is the most damaging piece of evidence to the Respondent's case, but any doubts as to the true meaning of Schaefer's words are erased by Budde's testimony that he didn't want Vanater in his group because of the reduced case load Vanater carried, as a Union official.

Looking at Schaefer's memo to Vanater (G.C. Exhibit 4), there is nothing on its face that explicitly refers to Vanater's protected activity. The suggestions which Schaefer offers to Vanater ("be more flexible"; "accept compromise"; don't "argue and threaten"; "be less aggressive"; "become more of a team player") all could possibly relate to deficiencies in Vanater's work habits and could be legitimate, nondiscriminatory reasons for not selecting Vanater. On the other hand, Schaefer's suggestions could alternatively have a sinister, discriminatory meaning, referring to undesirable qualities demonstrated by Vanater in the course of his union

activities.[3] Ms. Flack's testimony that Schaefer told her that Vanater always opposed management's proposals and wasn't a "team player" closely resembles words used by Schaefer in his memo, and it supports an inference that Schaefer was referring to Vanater's union activity in the memo.

In light of the above factors, if the ambiguous phrases in Schaefer's memo are to be interpreted favorably to the Agency, the Agency must show that Vanater had demonstrated traits such as inflexibility or unwillingness to compromise or threatening managers in the course of his duties as a revenue officer, rather than in the course of his duties as a Union officer. On the contrary, however, the record reflects that Vanater was a highly-rated GS-12 revenue officer, and nothing in his appraisal or other records (see Joint Exhibit 1) suggests that Vanater's supervisors had criticized his past work for such behavior. For instance, when Ranking Official Weber evaluated Vanater's potential for the OIC position in four critical elements, he rated Vanater as having "excellent potential" in all four areas, citing, among other things, his experience as a revenue officer and prior training and experience doing OIC work ("Individual Rating Form Bargaining Unit Positions," Joint Exhibit 1). If Vanater had a work history of arguing excessively or needing to improve his "communication skills," as Schaefer indicated in his memo, then these problems should have been cited by Mr. Weber in the fourth critical element ("Communications") that he evaluated. Again, however, the Rating Official found Vanater to have "excellent potential" in this critical element and cited no deficiencies whatever. Similarly, when Vanater's immediate supervisor completed his appraisal of Vanater's work in January 2000, he stated:

> One of your strengths is your ability to communicate in a professional and courteous manner with our customers. The skills . . . allow you to

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[3] Words and phrases such as "inflexible" and "not a team player" can be euphemisms for undesirable protected activity, and they have been cited, in the appropriate factual context, as indicators of unlawful motivation. *See, United States Department of Defense, Department of the Air Force, Headquarters 47th Flying Training Wing (ATC), Laughlin Air Force Base, Texas*, 18 FLRA 142, 161 (1985)(*Laughlin AFB*); *U.S. Department of the Navy, Naval Weapons Station Earle, Colts Neck, New Jersey*, Case No. 2-CA-90201 (1990), ALJ Decision Reports, No. 93 (August 30, 1990)(no exceptions filed), slip op. at 13.

> break through barriers that would otherwise prohibit resolution. . . Additionally, you treat an internal customer with the same respect as you do your external customers.

("Performance Appraisal," Joint Exhibit 1.) None of these comments offers even the barest support for the "suggestions" that Schaefer made to Vanater in explaining why Vanater was not selected for an OIC position.

What was the source of Schaefer's opinion that Vanater needed to improve himself in so many areas? Schaefer's opinion was apparently not shared by Vanater's immediate supervisor, nor was it shared by OIC Group Manager Weber. Mr. Schaefer's words are particularly suspect because he was Vanater's third-level supervisor, working in Jacksonville while Vanater was in Tampa. Therefore, it is highly unlikely that he observed Vanater's work as a revenue officer closely enough to make the detailed suggestions he did;[4] the record evidence suggests that the only occasions Schaefer had in which to observe Vanater were those occasions when Vanater was acting as a Union official, and it is precisely those occasions that Vanater would be most likely to demonstrate traits such as "inflexibility," "twisting words," and "aggressiveness in promoting your personal agenda." The record in this case therefore leaves me no choice but to conclude that the Selecting Official's unfavorable opinion of Vanater was based almost entirely on their encounters while Vanater was engaged in protected activity, and further that the negative attributes which Schaefer saw in Vanater were inconsistent with the attributes seen by those managers who supervised Vanater's work as a revenue officer.

Then there is the matter of Budde's "lobbying" on behalf of Mousa and Forson, and against Vanater. Unlike the words in Schaefer's memo, which could be interpreted either favorably or unfavorably, Mr. Budde himself explained at the hearing what he meant when he told Schaefer that Vanater "had a limited inventory and may have even been trying to have no inventory." He testified that "as a union official . . . [Vanater] had a reduced number of cases and that I felt that if he came to the offer group that he would

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[4] If Mr. Schaefer came to these conclusions after consulting with Vanater's first- and second-level managers (as he did with Mr. Budde), those supervisors were available for the Respondent to call as witnesses at the hearing. The fact that no supervisor except Budde was called by the Respondent leads me to infer that they had nothing to say that would help the Agency's case.

have the same desire to not have a full inventory." Tr. at 193. There is no lawful explanation of these words. Although Budde probably believed that he was within his rights to avoid hiring a Union officer who spent part of his work day on labor-management matters rather than handling OIC cases, such an action violates section 7116(a)(2) of the Statute.

The Authority has often stated that "conflicts . . . can be expected" between an employee's entitlement to official time and an agency's need to manage its work effectively, "and when such conflicts arise, the parties must recognize the need for and seek a reasonable accommodation." *Department of the Air Force, Scott Air Force Base, Illinois*, 20 FLRA 761, 764 (1985)(*Scott AFB*). In the context of the *Scott AFB* case, this meant that a supervisor could lawfully tell an employee that he was spending too much time on union work and too little time on his job duties. But in *Veterans Administration, Washington, D.C. and Veterans Administration Medical Center and Regional Office, Sioux Falls, South Dakota*, 23 FLRA 123 (1986), a supervisor could not ask a union steward applying for another position how much time he spent on union activities and hypothetical questions as to how he would resolve conflicts between work and union responsibilities. As the Authority noted in the latter case, *Scott AFB* involved "a specific ongoing conflict", while the *VA* case involved merely a hypothetical conflict; by questioning the employee before an actual conflict arises, the agency interfered with the employee's protected rights "by communicating that time spent engaging in protected activity could adversely affect his chance for future job selection." 23 FLRA at 124. Even more relevant to the instant case is *American Federation of Government Employees, Local 3446 and U.S. Department of Health and Human Services, Social Security Administration*, 43 FLRA 467 (1991), where the Authority upheld an arbitrator's ruling that the agency improperly considered an employee's union activities in selecting a different employee for a vacant position. It explained (43 FLRA at 475):

> Although management's needs and requirements regarding the performance of assigned work must be recognized and accommodated, official time may not be a factor in personnel actions unless an agency can show that the use of official time will interfere with the accomplishment of its work.

The conversation between Budde and Schaefer demonstrates no attempt at accommodating Vanater's right to use official time with the work requirements of the OIC

group, but rather an automatic assumption on Budde's part that Vanater's "limited inventory" made him an undesirable selection. Even more troubling is Budde's apparent leap of logic in suspecting that Vanater "may have even been trying to have no inventory," in other words suspecting that Vanater wanted to abuse his official time to the extent of avoiding any work whatsoever. This unsubstantiated suspicion closely parallels the statement in Schaefer's memo (also unsubstantiated) that "[t]here is a perception you rather do almost anything other than collection work." In short, without demonstrating that Vanater's protected activity had previously caused any actual conflict with his revenue officer work, Budde had decided that Vanater's "limited inventory" rendered him unacceptable for the OIC group, and Schaefer seems to have harbored a similar prejudice that is otherwise unexplained.

In light of these facts and findings, I conclude without a trace of doubt that Vanater's protected activity was a motivating factor in the Respondent's decision not to select him as an OIC specialist. The next question is whether the Respondent rebutted the General Counsel's *prima facie* case by showing that it had a legitimate reason for taking its action and that it would have taken the same action even if Vanater had engaged in no protected activity.

The Agency justified its selection of Forson and Mousa essentially by arguing that they were better qualified candidates than Vanater, since they had already worked as OIC specialists in Budde's group, and Budde lobbied on their behalf because they had worked for him and he had found them "deserving." It is certainly not unusual for supervisors to "lobby" on behalf of employees they have supervised, and so there is some superficial legitimacy to this argument. But as already noted, Budde himself undermined the persuasiveness of this rationale by his admission that he not only lobbied for Mousa and Forson, but he also lobbied against Vanater, expressly because of Vanater's Union activity. Moreover, Vanater also had experience as an OIC specialist, albeit several years previously, thus negating at least part of the other two employees' purported advantage. It therefore becomes difficult, if not impossible, to distinguish Budde's legitimate feelings from his discriminatory ones.

Perhaps the biggest obstacle in the Respondent's path in rebutting my finding of unlawful motivation is the fact that Vanater was rated first among the four applicants. While Mr. Schaefer, as Selecting Official, was not bound to select the highest-rated applicants, his bypassing of the

top applicant for two lower-rated employees requires substantial affirmative evidence in order to convince me that Vanater's protected activity didn't poison Schaefer's decision. The Agency has not met this burden. The mere fact that Forson and Mousa had already worked for Budde simply doesn't amount to a rebuttal of Vanater's higher rating, especially since the rating system was established by the Agency specifically for the purpose of ranking the applicants.

Another factor weighing against the Agency is that while Schaefer allowed Budde to "lobby" on behalf of "his" people, he didn't seek similar input from Vanater's supervisor or the other candidate's supervisor. Although there was no direct testimony to that effect, this inference is warranted by the fact that the Respondent could have called those supervisors to testify and did not. Budde's lobbying had the effect of "stacking the deck" in favor of Forson and Mousa and gave them an unfair advantage. If Schaefer sought out similar input from the other two supervisors, such testimony certainly might have helped the Agency establish its affirmative defense, and there was no evidence on the record that those supervisors were unavailable. Not only did Schaefer's conversation with Budde give Mousa and Forson an unfair advantage over the other applicants, but Budde abused the opportunity by poisoning Schaefer with his own unlawful prejudice against Vanater's "limited inventory," i.e., Vanater's use of official time.

Finally, not only was the consideration of Vanater's "limited inventory" a pretext for unlawful discrimination, but it made no sense in the context of this case. When Schaefer selected Mousa and Forson for the GS-12 positions, the net result was that Budde's group had the same number of OIC specialists as it had previously. If Vanater had been selected, Budde would have had an additional employee, even if that additional employee worked less than a full load of cases because of official time. Thus Budde's group could have handled more work if Vanater had been selected than it was able to handle with the selection of Forson and Mousa. The fact that the Agency ultimately sought to correct this deficiency by detailing two GS-11's to the group only highlights the counter-productiveness of Budde and Schaefer's rationale. It appears that rather than selecting the two best-qualified applicants, Schaefer went to great lengths to avoid selecting the highest-rated applicant without any convincing justification.

I therefore conclude that if Schaefer had been unaware of Vanater's protected activity, he would have selected

Vanater as one of the two OIC specialists in September 2000. The Respondent discriminated against Vanater based on his protected activity, and it thereby violated sections 7116(a)(1), (2) and (4) of the Statute.

2. The Independent Violation of Section 7116(a)(1)

The General Counsel alleges that Schaefer's February 14 memo to Vanater, in and of itself, violated the Statute, and I agree. As the Authority stated in *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 895-96 (1990):

> The standard . . . is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement.

In reiterating the above holding, the Authority explained in *Frenchburg Job Corps*, 49 FLRA at 1034 (1994), "[T]he standard is not based on the subjective perceptions of the employee or on the intent of the employer."

I have already analyzed the Schaefer memo in the previous section of this decision, and many of those same considerations are applicable here. If the memo were read by someone unfamiliar with the circumstances and participants in this case, Mr. Schaefer's "suggestions" to assist Vanater "in attaining your career objectives" might be viewed as neutral and unthreatening. But the facts and circumstances of each case must be considered, even though the subjective motives of the speaker and listener are not determinative. In the facts of this case, as noted in the previous section, Mr. Schaefer had little or no direct work interaction with Mr. Vanater, and there is no indication that he had any significant knowledge of how Vanater performed his revenue officer duties, other than the information available in Vanater's application file. And despite the fact that Vanater's file contained only praise about his work abilities, Schaefer's memo cites weaknesses about Vanater that Schaefer could only have obtained by observing Vanater's work as a Union officer. In these circumstances, the references to "flexibility", "compromise" and "being less aggressive" take on a distinctly threatening meaning. They can only refer to Vanater's protected activity, and the message of the memo is "be less aggressive in your Union duties and you'll attain your career objectives." I therefore conclude that the memo violated section 7116(a)(1) of the Statute.

C. The Appropriate Remedy

In addition to the traditional cease-and-desist order and posting of a notice, the General Counsel urges that a make-whole remedy is appropriate in this case, and specifically that Vanater be retroactively assigned as an OIC specialist. The Respondent opposes the latter remedy, because Vanater's addition to the OIC group would conflict with the IRS's nationwide reduction of OIC work in its field offices.

The Authority has explained the objectives of an unfair labor practice remedy as follows: "We believe that remedies for unfair labor practices under the Statute should, like those under the NLRA, be 'designed to recreate the conditions and relationships that would have been had there been no unfair labor practice.'" *United States Department of Justice, Bureau of Prisons, Safford, Arizona*, 35 FLRA 431, 444-45 (1990), quoting *Local 60, United Brotherhood of Carpenters & Joiners v. NLRB*, 365 U.S. 651, 657 (1961). In *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7, 13 (1995), the Authority applied this principle to cases of unlawful discrimination, stating:

> The Authority will order a make-whole remedy where there is discrimination in connection with conditions of employment based on unlawful consideration of protected union activity and the respondent has not shown that it would have taken the same action in the absence of such consideration.

Pursuant to the standard set forth in *Grissom*, I have already concluded that Mr. Vanater's nonselection for a GS-12 OIC specialist position was unlawfully based on his protected activity and that the Agency would otherwise have selected him for that position. Therefore a make-whole remedy is clearly appropriate; moreover, the only way that Vanater can be made whole is to retroactively assign him to the position he sought. Indeed, the Authority has often ordered the retroactive promotion of discriminatees in just such cases. *U.S. Department of Agriculture, Forest Service, Chattahoochee-Oconee National Forests, Gainesville, Georgia*, 45 FLRA 1310, 1311 (1992); *Department of the Army, Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina*, 43 FLRA 1414, 1418 (1992)(*Fort*

Bragg); *Letterkenny*, 35 FLRA at 127-28.[5] The only reason suggested here against that remedy is the post-ULP implementation by the IRS of a national program that will likely reduce the Agency's need for OIC specialists in the St. Petersburg and other field offices. In other words, would I be making Vanater "whole" by placing him onto a boat that is leaking water?

I don't believe that such speculation is appropriate in this case, or based on the evidence of record. The Agency official who testified at the hearing could only speculate as to what will happen to the employees in his OIC group, and I will not rule out a make-whole remedy that is otherwise appropriate, based on speculation. More pertinently, when an employee was unlawfully denied a position he deserved, the Authority orders that the employee be placed in that position and leaves questions about placement of other selected employees up to the agency. *See, e.g.*, *Fort Bragg*, 43 FLRA at 1418 n.2; *Letterkenny*, 35 FLRA at 128 n.*; *Laughlin AFB*, *supra*, 18 FLRA at 143 n.3. Similarly here, it is appropriate that Vanater be given the opportunity to take the OIC position he applied for; I do not address what the Agency must do regarding the other employees selected, or what might occur if the work of the OIC group declines.

Finally, the notice to employees should be posted at the Respondent's facilities in northern Florida. The unfair labor practices in this case were committed at the level of the manager of the Collection Division of the district office in Jacksonville, and employees in a similar area should be notified of this decision, despite the fact that the IRS has reorganized its structure and changed the lines of accountability of employees in the various northern Florida offices.

Based on the above findings and conclusions, I conclude that the Respondent violated § 7116(a)(1), (2) and (4) of the Statute, as alleged, and I recommend that the Authority issue the following Order:

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5 In those cases where retroactive promotion was not considered appropriate, there was no finding that the discrimination against the employee had directly prevented him from being promoted. *See*, *American Federation of Government Employee, Local 3553, AFL-CIO and Veterans Administration Medical Center, New Orleans, Louisiana*, 18 FLRA 486 (1985); *American Federation of Government Employees, Local 2811 and U.S. Government District Office, Social Security Administration, St. Paul, Minnesota*, 7 FLRA 618 (1982).

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute (the Statute), it is hereby ordered that the Internal Revenue Service, Compliance Area 5, Small Business/Self Employed Division, Jacksonville, Florida, shall:

1. Cease and desist from:

(a) Discriminating against Michael S. Vanater in connection with hiring, tenure, promotion or other conditions of employment because Vanater engaged in activities protected under section 7102 of the Statute;

(b) Informing employees that their performance of union representation duties will hinder their opportunities for promotions or reassignments;

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

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

(a) Place Michael S. Vanater into the position of Offer in Compromise Specialist, GS-12, retroactive to October 8, 2000;

(b) Remove and expunge Charles Schaefer's email message of February 14, 2001, from all agency records, including Vanater's personnel file;

(c) Post at its facilities located throughout northern Florida, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Area Director, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered by any other material.

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

Issued, Washington, DC, August 27, 2002.

_____

RICHARD A. PEARSON
Administrative Law Judge

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

The Federal Labor Relations Authority has found that the Internal Revenue Service, Compliance Area 5, Small Business/ Self Employed Division, Jacksonville, Florida, violated the Federal Service Labor-Management Relations Statute (the Statute), and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against our employees in connection with hiring, tenure, promotion or other conditions of employment because they engage in activities protected under section 7102 of the Statute.

WE WILL NOT state or imply to employees that their performance of union representation duties will hinder their opportunities for promotions or reassignments.

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

WE WILL reassign Michael S. Vanater to the position of Offer in Compromise Specialist, GS-12, retroactive to October 8, 2000.

WE WILL remove and expunge from all agency records, including Vanater's personnel file, an email message to Vanater dated February 14, 2001.

Date:_____By:_____
(Signature) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Atlanta Region, Federal Labor Relations Authority, whose address is Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, NE, Atlanta, GA 30303, and whose telephone number is (404) 331-5300.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by RICHARD A. PEARSON, Administrative Law Judge, in Case No. AT-CA-01-0407, were sent to the following parties in the manner indicated:

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

Richard S. Jones 7000 1670 0000 1174 9911
Counsel for the General Counsel
Federal Labor Relations Authority
Marquis Two Tower, Suite 701
285 Peachtree Center Avenue
Atlanta, GA 30303-1270

Robert E. Norman 7000 1670 0000 1174 9928
Agency Representative
Office of Chief Counsel
Internal Revenue Services
401 W. Peachtree Street, NW, Suite 2110
Atlanta, GA 30308

Karen Tanner 7000 1670 0000 1174 9935
Attorney
National Treasury Employees Union
2801 Buford Highway, Suite 430
Atlanta, GA 30329

REGULAR MAIL

National President
National Treasury Employees Union
901 E Street, NW, Suite 600
Washington, DC 20004-2037

Dated: August 27, 2002
Washington, DC