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

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER AUGUSTA, GEORGIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 217, AFL-CIO Charging Party	Case No. AT-CA-01-0678

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/her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **AUGUST 12, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, N.W., Suite 415
Washington, D.C. 20424

PAUL B. LANG
Administrative Law Judge

Dated: July 10, 2002
Washington, DC

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: July 10, 2002

TO: The Federal Labor Relations Authority

FROM: PAUL B. LANG
Administrative Law Judge

SUBJECT: DEPARTMENT OF VETERANS AFFAIRS
VETERANS AFFAIRS MEDICAL CENTER
AUGUSTA, GEORGIA
Respondent

and Case No. AT-CA-01-0678

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 217, 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

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 02-48
WASHINGTON, D.C.

DEPARTMENT OF VETERANS AFFAIRS VETERANS AFFAIRS MEDICAL CENTER AUGUSTA, GEORGIA Respondent and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 217, AFL-CIO Charging Party	Case No. AT-CA-01-0678

Charles T. Bell, Jr., Esquire
For the Respondent

Paige A. Sanderson, Esquire
For the General Counsel

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an Unfair Labor Practice charge filed on July 19, 2001, by the American Federation of Government Employees, Local 217, AFL-CIO (the Union), against the Department of Veterans Affairs, Veterans Affairs Medical Center, Augusta, Georgia (the Respondent). On October 19, 2001, the General Counsel issued a Complaint and Notice of Hearing alleging that the Respondent violated §7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), by issuing a counseling memorandum and by terminating the employment of Craig O. Standley, a probationary employee, in retaliation for his stated willingness to provide a written statement in support of a grievance submitted by the Union on behalf of another member of the bargaining unit. The Respondent filed an Answer denying the alleged violations and a hearing was held in Augusta, Georgia on February 26, 2002. This Decision is

based upon consideration of all oral and documentary evidence presented at the hearing, including the demeanor of witnesses, and of the post-hearing briefs submitted by the General Counsel and the Respondent.

Positions of the Parties

General Counsel

The General Counsel maintains that on April 23, 2001, Willie Downs, who was Standley's second-line supervisor, was informed by James Bartlett, President of the Union, that Standley had expressed his willingness to submit a written statement in support of a grievance which had been filed on behalf of Leroy Glover.

The next day Standley received a memorandum from Bobby Jones, Jr., his first-line supervisor, counseling him on abuse of sick leave; the memorandum was dated April 23, 2001. Jones cited four instances of the use of sick leave taken in conjunction with weekends on which Standley had days off. Jones stated that, if the pattern of abuse continued, he would recommend the termination of Standley's employment because of unsatisfactory attendance.[1] On July 20, 2001, Standley was terminated at the recommendation of Jones.

It is the position of the General Counsel that there is a *prima facie* case of retaliation as defined in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990)(*Letterkenny*), inasmuch as Standley was engaging in protected activity which was the motivating factor in the issuance of the counseling memorandum and in his termination. Furthermore, the Respondent has failed to meet its burden of proving that the adverse personnel actions against Standley were justified and would have been taken regardless of his protected activity.

The General Counsel argues that the alleged problems with Standley's work performance are pretextual in view of the fact that, on April 10, 2001, Jones gave Standley a rating of "Satisfactory" in all categories for the period

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[1] There is no evidence that Downs or any other management representative reviewed or was made aware of the memorandum.

from April 1, 2000, to March 31, 2001.[2] The alleged abuse of sick leave was also pretextual in view of the fact that Standley had informed Jones that he had a written medical excuse for the sick leave he had taken on April 23, 2001, and that his absence for three hours on January 18, 2001, was because of a dental appointment. The General Counsel also relies on the proximity between the time Downs (and presumably Jones) learned of Standley's willingness to support Glover and the issuance of the counseling memorandum to Standley.

Respondent

The Respondent disputes the proposition that the General Counsel has established a *prima facie* case. It notes that Standley did not actually submit a written statement in support of Glover's grievance, but concedes that his stated intention to do so would arguably fall within the protection of the Statute. Moreover, the Respondent denies that any of its management representatives knew of Standley's intended action prior to a scheduled meeting between Bartlett and Downs on April 25, 2001.

Respondent further denies that Bartlett and Downs met at all on April 23 and, in support of that position, relies on Downs' testimony as well as notations on calendars maintained for him by clerical employees at two separate locations. Bartlett's testimony that he had an impromptu meeting with Downs on April 23 was prompted by the realization that the viability of an unfair labor practice charge would depend on the supposition that the Respondent's knowledge of the protected activity preceded the adverse employment action. The importance of a finding that the meeting between Bartlett and Downs preceded the issuance of the memorandum is enhanced by the absence of evidence of any other protected activity by Standley. However, even if it were determined that Bartlett and Downs did meet on April 23, the closeness in time between Standley's alleged protected activity and the memorandum from Jones is not conclusive proof of retaliation. The date of the meeting is even less significant with regard to Jones' recommendation of June 21, 2001, that Standley be terminated and the approval of that recommendation on July 2, 2001.

2
It is interesting to note that the General Counsel also cites Standley's testimony to the effect that Jones began criticizing his work performance in September of 2000 which was within the reporting period for which Jones gave Standley a "Satisfactory" rating.

According to the Respondent, the General Counsel's position is further compromised by the lack of evidence that, at the time of Jones' memorandum concerning the abuse of sick leave, he knew of Standley's willingness to support Glover. Similarly, there is no evidence that any of the Respondent's other decision-makers knew of Standley's assistance to the Union at the time that they approved Jones' recommendation that he be terminated.

Finally, Respondent argues that, even if the General Counsel had presented a *prima facie* case, it has been effectively rebutted by evidence of Standley's abuse of sick leave, hostile attitude and unsatisfactory work performance. Although Jones gave Standley a "Satisfactory" rating for the reporting period ending on March 31, 2001, he had already begun to exhibit the behavior that eventually led to his termination. All of that behavior preceded the meeting between Bartlett and Downs. Thus, Standley's termination was justified and would have occurred regardless of his protected activity. That proposition is not diminished by the fact that Standley and certain other employees received a monetary award because of their performance on a specific occasion.

Findings of Fact

Glover's grievance arose out of a meeting that he had with Jones, who was his and Standley's first-line supervisor. Glover met with Jones at Bartlett's suggestion in an attempt to informally resolve any problems that Jones might have had with Glover's work performance. Glover subsequently received a proposed admonishment from Jones for using inappropriate language at the meeting.[3] The admonishment was later approved by Downs.

It is undisputed that Bartlett had a meeting with Downs in an attempt to reach an informal settlement of Glover's grievance. During the course of the meeting Bartlett told Downs that a number of employees had corroborated Glover's contention that Jones had been harassing them, but that only Standley was willing to submit a written statement if

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3 Glover had reportedly lost his temper and began using profanity. When Jones ordered Glover out of his office, Glover allegedly stated, "You ain't nothing but a god-damned racist."

necessary.[4] Bartlett also told Downs that the other employees refused to submit written statements for fear of retaliation and that he would prefer to leave Standley out of the grievance if possible. Downs stated that he would look into the matter.

There is a question of fact as to when the meeting occurred. Bartlett testified that he had an impromptu meeting with Downs on April 23, 2001, while Downs testified that the meeting took place on April 25 as previously scheduled. The difference in testimony is significant because the Respondent cannot be found to have retaliated against Standley on April 23 or 24 for protected activity it first became aware of on April 25.

Although the evidence as to the date of the meeting is not absolutely definitive, I have credited the testimony of Downs that he did not meet with Bartlett on April 23 and did not learn of Standley's intention to support Glover's grievance until April 25. There are a number of reasons for this conclusion. In the first place Downs' schedule on April 23 would have left him with very little time to meet with Bartlett. Downs' routine called for him to spend Monday mornings (April 23, 2001, fell on a Monday)

reviewing the events of the prior weekend and participating in conference calls. Furthermore, on April 23 Downs attended an Environmental Care Committee meeting from 1:00 p.m. to 4:00 p.m.[5] Bartlett's opportunity to attend a meeting on the morning of April 23 was reduced by the fact that he had applied for annual leave from 9:45 a.m. to 11:45 a.m. on that day.[6]

4
Standley had not witnessed the incident between Glover and Jones. Presumably, it was the Union's position that Glover had been provoked because of the harassment by Jones, thus justifying his outburst or at least mitigating its significance.

5
Downs testified that this meeting was not on his calendar because he was not a member of the committee. His supervisor invited him to attend shortly before the meeting began.

6
Bartlett testified that he only used some of that leave and did not leave the facility at 9:45. He did not explain why he did not amend his leave request to correspond to his actual time of departure.

The evidence as to calendar notations is not helpful. Downs had two calendars, each of which was maintained at his Uptown and Downtown offices[7] by two different clerical employees. Each of those calendars (one was in computer format with electronic notations, the other was a desk calendar with handwritten entries) showed no meetings for April 23 and a meeting with the Union concerning Glover at 11:00 a.m. on April 25. The absence of a notation of a meeting with Bartlett on April 23 is not inconsistent with the proposition that Bartlett made an unannounced appearance at Downs' office. Conversely, the only evidence which the General Counsel presented in support of Bartlett's testimony was his calendar for April 23 on which he had written a notation concerning a meeting with Bartlett about Glover. The notation does not indicate a time and can reasonably be construed as a reminder to attempt either to meet with Bartlett on that date or to schedule a meeting with him.[8]

On April 30, 2001, Downs submitted a report of contact to Timothy R. Martin.[9] In the report Downs described in detail his meeting with Bartlett and Glover which was reported as having occurred on April 25. The report contains only a cursory reference to Standley, thus suggesting that his input was not considered to be of great importance.

Even if Bartlett and Downs had met on April 23, such a meeting would no more than raise the possibility that Jones was aware of Standley's intention to support Glover's grievance at the time he issued the memorandum to Standley

[7] The Respondent has two separate facilities in Augusta.

[8] I am unpersuaded by the General Counsel's hypothesis that the notation of Downs' calendar for April 25 refers to a follow-up meeting that had been scheduled during a meeting on April 23. While that is certainly possible, it is equally possible that the April 25 meeting was scheduled by Bartlett either by telephone or in-person through one of Downs' secretaries; the scheduling could have been accomplished at any time. I am also unpersuaded by the argument that Downs would not have spoken to Jones about the incident with Glover prior to April 25 if there had not been a meeting on April 23. It would have been natural for Downs to confer with Jones in preparation for the April 25 meeting since Downs knew that Bartlett wished to discuss Glover's grievance.

[9] Martin's position is unclear, but he apparently was involved in the processing of Glover's grievance because Downs informed him that he supported the admonishment.

unless I were to accept the supposition that Downs provided the information to Jones almost immediately after he received it from Bartlett on April 23. That is by no means a foregone conclusion. I credit Downs' testimony that he did not inform Jones about Standley's intention to support Glover because it is logical that he would not do so. Downs' main concern was with the merits of Glover's grievance. Therefore, he had no reason to inform Jones, his subordinate, of Standley's activity. If he had been inclined to inform anyone, such information would more likely have been directed to those above him in the chain of command who would have reviewed the grievance at later steps.

Downs admitted the possibility that he might have spoken of Standley's intentions to Mary Sigmon, who was then his supervisor, but further stated that he was unlikely to have done so at that time because of difficulties over the loss of Tom Nowlan who had been his immediate supervisor. Moreover, I accept Downs' assertion that he was not particularly concerned with Standley's purported intention to support Glover because he did not consider it to be of particular importance. That assertion is borne out by the absence of evidence that Standley ever actually submitted a written statement and by the fact that Standley was not a witness to the meeting between Glover and Jones. Standley was only expected to support Glover's accusation of harassment. The fact that Standley did not submit the statement further erodes the proposition that Downs retaliated against him and makes it significantly less likely that Jones or any other management representative retaliated against Standley with regard to his termination.[10]

By memorandum dated June 21, 2001, to the Chief, Human Resource Management Department, Jones recommended that Standley be terminated prior to the completion of his probationary period. The memorandum was routed up the chain of command through Downs and two other management representatives, each of whom affixed their initials, presumably indicating their agreement with Jones' recommendation. The following reasons were given for the recommendation:

10
The process which culminated in Standley's termination occurred after it had become apparent that he had not submitted a written statement in support of Glover.

- During the last six months of his probationary period (January 18 through June 18, 2001)[11] Standley had used 70 hours of sick leave, 40 of which were in conjunction with days off within a period of four months. Jones had issued a "letter" to Standley on April 24, 2001, concerning the abuse of sick leave.[12] Upon receipt of the letter Standley told Jones that he was looking for another job and was not going to worry about it.

b. On June 6, 2001, Jones spoke to Standley about his attitude and about his poor work performance (Standley was considered to be considerably slower than his fellow workers in completing assigned tasks). Standley stated that things were not going to change in the shop and that they were going to "pop" soon. He refused to give examples of the perceived problems and stated that, while he could get along with people, no one was going to "get in his face."

c. A few minutes after the incident described above, Standley told Jones that things in the shop were not worth worrying about because someone could kill you and never get caught. Another employee had previously reported that Standley had told him that someone was going to get hurt if "things did not change."

By memorandum dated July 2, 2001, Dorothy R. Caldrer, Chief, Human Resource Management Department, informed Standley that he would be terminated effective July 20, 2001, because his "performance, attendance, and general traits of character" were unsatisfactory. The memorandum essentially restated the reasons set forth in Jones' memorandum of June 21.

Discussion and Analysis

<u>The Evidentiary Standard</u>

Each of the parties has correctly cited *Letterkenny supra*, as establishing the order of proof in a case involving alleged wrongful retaliation. In *Letterkenny* and its progeny the Authority has stated that the General Counsel has the burden of proof in establishing a *prima facie* case by showing that the effected employee had been

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11
The stated time period was actually five months.

12
Apparently Jones was referring to his memorandum of April 23, 2001. It is undisputed that Standley received this communication on the following day.

engaged in activity which is protected by the Statute and that an adverse personnel action was motivated, wholly or in part, by the protected activity. If the General Counsel fails to meet its burden of proof, there need be no further inquiry. If, however, the General Counsel presents a *prima facie* case, the burden then shifts to the agency to prove by a preponderance of the evidence that the personnel action was justified and that it would have taken the same action in the absence of the protected activity. *Letterkenny*, 35 FLRA at 118. The Authority has also made it clear that, in determining whether the General Counsel has presented a *prima facie* case, the Administrative Law Judge is to consider 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).

<u>Protected Activity</u>

The Respondent does not go so far as to deny that Standley was engaged in protected activity, but stops short of conceding the point in its admission that his activity was "arguably" protected. Contrary to the Respondent's equivocal position, there can be no legitimate doubt that Standley was exercising his right to "assist any labor organization" within the meaning of §7102 of the Statute. It is of no legal significance to this issue that, for whatever reason, Standley did not follow through in his stated intention to submit a written statement in support of the Union's position on behalf of Glover. Action by one employee in support of another, whether limited or vigorous in nature, is at the essence of protected activity.

<u>Respondent's Motivation</u>

For the reasons stated above, I find as a fact that the Respondent was not aware of Standley's protected activity at the time Jones issued his memorandum regarding the abuse of sick leave. Even if that were not so, the Respondent has correctly stated that, although closeness in time between an employment decision and protected activity may support an inference of illegal motivation, it is not conclusive proof of a violation of the Statute. *See U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts*, 51 FLRA 1520, 1528 (1996).

In this case, the alleged proximity in time (assuming that I had credited the testimony to that effect) was the *only* evidence in support of the alleged unlawful retaliation. On the other hand, Standley testified that Jones had criticized his work as early as September 2000.

There was no evidence of an anti-union animus by any of the Respondent’s representatives, although there was perhaps an indirect implication that Jones might have harbored some resentment after Bartlett had deposed his father as president of the Union. However, the lack of evidence that Standley was active in Union affairs, and the fact that Jones had previously spoken to Standley about his work and his use of sick leave, renders any suggestion of general anti-union animus strictly conjectural.

Regardless of when Bartlett and Downs met to discuss Glover, it was Standley’s termination rather than the memorandum of April 23, 2001, which triggered the unfair labor practice charge and the Complaint. Standley and the Union first learned of the proposed termination on or after June 21, 2001, when almost two months had elapsed since the meeting at which Downs learned of Standley’s protected activity.

The General Counsel’s reliance on *United States Department of Interior, Office of the Secretary, U.S. Government Comptroller for the Virgin Islands*, 11 FLRA 521 (1983), is misplaced. To be sure, the decision contains language to the effect that, when an agency takes adverse personnel action against an employee who is known to have engaged in protected activity, there is a “suspicion, or presumption, that the action was motivated by the employee’s protected activity” *Id.* at 532. However, on the same page, it also states that the presumption is rebuttable, that the existence of protected activity alone is not enough to establish a violation of the Statute and that the General Counsel bears the burden of proof in establishing a *prima facie* case.

As stated above, I have determined that the General Counsel has failed to present a *prima facie* case. Therefore, it is not necessary to make a detailed analysis of the evidence presented by each of the parties with regard to the merits of the adverse personnel actions taken against Standley. However, a careful review of that evidence indicates that, while reasonable minds may differ as to whether the actions against Standley were appropriate, the

Respondent’s rationale for those actions was not pretextual.[13]

In view of the foregoing, I find that the Respondent did not violate §7116(a)(1) and (2) of the Statute and recommend that the Authority adopt the following Order:

ORDER

It is Ordered that the Complaint be, and hereby, is dismissed.

Issued, Washington, DC, July 10, 2002.

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PAUL B. LANG
Administrative Law Judge

[13] The finding of no pretextuality is not inconsistent with the “Satisfactory” performance rating that Standley had received from Jones. The only two allowable ratings were “Successful” and “Unacceptable.” Jones plausibly testified that he wanted to give Standley the benefit of the doubt. Furthermore, Standley’s unsatisfactory behavior mostly occurred after the initial reporting period.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by PAUL B. LANG, Administrative Law Judge, in Case No. AT-CA-01-0678, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS**:

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____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: JULY 10, 2002
WASHINGTON, DC