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

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT HOUSTON, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3320, AFL-CIO Charging Party	Case No. DA-CA-01-0233

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 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. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 28, 2002**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
607 14th Street, NW, Suite 415
Washington, DC 20424

_____

SUSAN E. JELEN
Administrative Law Judge

Dated: September 26, 2002

Washington, DC

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

MEMORANDUM DATE: September 26, 2002

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
HOUSTON, TEXAS

Respondent

and Case No. DA-CA-01-0233

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 3320, 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

OALJ 02-63

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

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT HOUSTON, TEXAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3320, AFL-CIO Charging Party	Case No. DA-CA-01-0233

Timothy J. Hartzer, Esquire
For the Respondent

Steven B. Thoren, Esquire
For the General Counsel

Phillip Aguirri
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This case arises out of an unfair labor practice charge filed by the American Federation of Government Employees, Local 3320, AFL-CIO (Union) against the U.S. Department of Housing and Urban Development, Houston, Texas (Respondent), as well as a Complaint and Notice of Hearing issued by the Regional Director of the Dallas Region of the Federal Labor Relations Authority (FLRA). The complaint alleged that the Respondent violated section 7116(a)(1) and (2) of the

Federal Service Labor-Management Relations Statute, 5 U.S.C.

§ 7101, *et seq.* (Statute) by its conduct in failing to recommend a bargaining unit employee for a promotion because of her protected activity. The complaint also alleges that the Respondent violated section 7116(a)(1) by statements made to the bargaining unit employee.

A hearing in this matter was held in Houston, Texas on February 6, 2002. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses and file post-hearing briefs. Both the General Counsel and the Respondent submitted a timely brief.

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.

Statement of the Facts

The American Federation of Government Employees (AFGE) is the exclusive representative of a nationwide consolidated bargaining unit of Department of Housing and Urban Development (HUD) employees appropriate for collective bargaining with HUD. Local 3320 (the Union or Local 3320) is an agent of the AFGE, and represents bargaining unit employees at HUD facilities in Texas, Albuquerque, New Mexico, and Shreveport, Louisiana. (G.C. Exs. 1(b) ¶¶ 3-4; 1(j) ¶1; Tr. 26)

Raynold Richardson became the Director of Multifamily Housing in the Houston office of the Department of Housing and Urban Development in February 2000. There are two divisions in the Department; production has 15 employees and asset management has 20 employees. Richardson is the second line supervisor for employees in the Department. He reports directly to management in the Fort Worth office. (Tr. 110-112).

Phillip Aguirri has worked for HUD in the San Antonio office for 33 years. He is currently president of Local 3320, a position he occupied for about 25 years until 1997. He was again elected president of Local 3320 in October 1999. [1] Willo Wortham, who works in the Houston office, had been president of the Local from 1997 to 1999. (Tr. 15-16).

Diana Lewis has worked at the HUD Houston office for twelve years and is currently a GS-7 multifamily program

[1] Aguirri also serves as Regional Vice President for the AFGE National Council of HUD Locals. (Tr. 15)

assistant. Her immediate supervisor is Loretta Carter and since February 2000, Raynold Richardson has been her second line supervisor. She has been a member of the Union for the past four years. She was included on Aguirri's slate of officers and was elected to the position of Secretary in October 1999. This was her first elected position and she has recently been reelected to the position. (Tr. 50-51, 16, 19-20). Pursuant to the parties' collective bargaining agreement, Lewis has 15% official time. Gloria Mock has 10% official time. Gloria Mock is the principal union representative in the Houston office. There are 7 to 8 union representatives in the office, with 4 in Richardson's department. These other union representatives are apparently not entitled to official time. (Tr. 19-20)

Lewis testified that she has dealt with Richardson as a union representative on labor relations issues in the office, such as office space, grievances and EEO complaints. The procedure for using official time is set forth in the collective bargaining agreement and requires that she submits a HUD Form 25-006 prior to the time she takes the official time. Her supervisor signs off on the form. (Tr. 63) Richardson testified that he has been approving Lewis' official time since he first started as Director. [2]He testified, and Lewis did not dispute, that he has never denied any request for official time. (Tr. 112, 148)

In August 2000 a Vacancy Announcement for Project Manager, GS-1101-09/12, was issued for three positions in Houston and two positions in San Antonio. The opening date was August 21, 2000; the closing date was September 15, 2000. (GC Ex. 2) Lewis submitted an application for the position on September 12, 2000. Four employees in the Houston office made the Best Qualified list: Diana Lewis, Fernando Castillo, Cheryl Henderson, Debbie Straitwell. Cheryl Henderson and Fernando Castillo were selected at the GS-11 position, which Lewis was not qualified for. Debbie Straitwell was selected for a GS-9 position. Lewis was also qualified for the GS-9 position, but was not selected. [3]

[2] It is unclear from the testimony whether Lewis was aware that Richardson was directly supervising her in 2000. She did testify that he changed some practices with regard to her requests for official time, but this was apparently in 2001, which is after the allegations of this complaint. Further she testified that she did understand his changes were within the bounds of the collective bargaining agreement. (Tr. 64-65, 89)

[3] Castillo and Straitwell are Union members; Aguirri was unsure whether Henderson was a Union member. (Tr. 30)

On November 3, 2000, Lewis returned from lunch and was informed by one of her co-workers that she had not been selected for the Project Manager position. Lewis went immediately to Richardson's office to discuss the selection. Only the two of them were present and the door to his office was shut. Both Lewis and Richardson agree that the meeting lasted between 30 and 45 minutes. (Tr. 90, 92, 141) There is general agreement on the content of the meeting, but not on the alleged statements made by Richardson.

According to Lewis, when she asked Richardson why she had not been selected, he informed her that he had not even recommended her for the promotion. During the discussion of the reasons that he had not recommended her, Richardson told Lewis that he could not recommend her because he could not "distinguish [her] union activities from [her] program assistant activities." (Tr. 57, 58) Richardson also told her that there were complaints about her work and that she did not have follow-through. Lewis testified that when she asked for specifics, he did not really respond. (Tr. 58) Richardson did tell Lewis that the lack of follow-through was based on an assignment when Lewis went on a management review with higher-graded employees. Apparently, the expectations of Lewis' work on that management review were not the same for Richardson and Lewis, and he believed that she had not adequately completed her work, while Lewis believed that the work in question was to be completed by the higher-graded employees. (Tr. 58, 59)

Richardson testified that he discussed issues they had previously discussed when he brought Lewis under his supervision. He discussed special assignments he had allowed her to participate in, as well as her lack of initiative and responsiveness. He mentioned he made her the lead person to archive files, but the work had never been done. He mentioned complaints from her co-workers, as well as the various times he had spoken to her about being in other work areas, supposedly doing union business without getting appropriate documentation or supervisory approval. (Tr. 144) Richardson also stated that he and Lewis discussed her lack of motivation for work and that she did not disagree with this, but told him he should have recommended her anyway based on his knowledge that she could do the work. (Tr. 144) Richardson also informed Lewis that he had recommended Debbie Straitwell for the position. (Tr. 145)

Richardson also testified to other reasons for his decision not to recommend Lewis for promotion. He claimed that Lewis had problems performing her mail distribution

responsibilities. In July 2000 Richardson sent a memo to Lewis that set out in detail the procedures for handling mail, emphasizing the importance of timely mail processing in the Multifamily Division. (Tr. 119; R. Ex 5). Lewis was aware of the memo on the mail procedures, but did not think it was necessary for him to remind her since she was aware of the procedures of her job. (Tr. 82) There had also been complaints about Lewis being in areas other than her own work area. (R. Ex. 5; R. Ex. 7)

Richardson was required to respond to complaints from the office director, George Rodriguez, about Lewis' behavior during unapproved visits to the front office. In August 2000, on one occasion, Richardson went to the front office to retrieve Lewis. (Tr. 125; R. Ex 7). Lewis did not dispute the testimony regarding these incidents and there is no evidence that she was on approved official time.

There was also evidence regarding Lewis' failure to complete a Real Estate Fundamentals course, even though she testified that she was unable to finish the course due to some representational activity that she was performing. (Tr. 87-88, 127-131) Lewis was one of four employees in the Houston office approved for a real estate fundamentals nationwide training course, which was conducted by satellite. The basic level course was scheduled for two days, September 11 and 12, 2000 and the intermediate level course was scheduled for two days, September 14 and 15, 2000. Advanced level courses were scheduled for early October 2000. The announcement for the course noted that attendance was required for the entire length of the program. All four selected employees at Houston, including Lewis, attended the basic level course and were given credit for the course. Two of the Houston employees, Jerilyn E. Carr and Deborah A. Straitwell, also attended the intermediate course on September 14 and 15, 2000 and were given credit for those courses. Diana Lewis and Stephen C. Cuellar did not attend the intermediate session and were not given credit for the intermediate course. (Tr. 87, 88; R. Ex. 8, 10)

Lewis testified that she did not complete the course because she was engaged in union activities, preparing for a regional labor management relations conference in Fort Worth. The evidence does not reflect whether she was on approved official time during this time period, when the

conference was scheduled and whether she was present at the conference. (Tr. 88) [4]

Richardson admitted that he did not recommend Lewis for one of the positions set forth in the vacancy announcement. He denied, however, that he based his recommendation on Lewis' protected activity. (Tr. 144, 145; R. Ex. 11) The selecting official was located in the Fort Worth Regional Office and asked Richardson for his recommendation. Richardson did not review the applications prior to making his recommendations. (Tr. 137-139)

Discussion

General Counsel's Position

Counsel for the General Counsel contends that the Respondent, through Raynold Richardson, Director, Multi-Family Housing, HUD, Houston, Texas, made statements that were coercive and interfered with employees' rights under section 7102 by telling employee Diana Lewis words to the effect that one of the reasons he had not recommended her for promotion was because he could not tell the difference between her performance of her regular duties and her Union duties. Section 7102 of the Statute provides that employees have the right to join, form, or assist a labor organization, without the fear of penalty or reprisal. Section 7116(a)(1) makes it an unfair labor practice for any representative of management to interfere with, restrain, or coerce employees from exercising the rights under section 7102. It is a fundamental right under the Statute for employees to serve as Union representatives and use official time, in accordance with any negotiated agreements.

The Authority adopted a test for discrimination cases in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*) and has consistently followed that test. *Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 49 FLRA 1522 (1994); *Department of the Air Force, Grissom Air Force Base, Indiana*, 51 FLRA 7 (1995). The first part of the test is whether the alleged discriminatee was engaged in protected activity and that management was aware of that activity. *Letterkenny*, 35 FLRA at 118. The General

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[4] The two courses were scheduled the same week, 2 days each, for a total of 32 hours. Lewis was entitled to 15% official time, which would be six hours in a one-week period. There is no evidence she was granted additional official time during this period.

Counsel asserts that there is no dispute that Lewis was a Union representative and had engaged in representational activity and the Respondent was therefore aware of her Union activities. Richardson had dealt with Lewis in her capacity as a Union representative on numerous occasions.

The next part of the Authority's *Letterkenny* test is whether the employee's protected activity was a motivating factor for the action taken. The Authority has found that statements made *after* an action taken by management regarding an employee's engaging in protected activity do not constitute an attempt at reasonable accommodation, and can be evidence of the illegal motivating factor. *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah,* 35 FLRA 891 at 898 (1990)(*Hill Air Force Base)*. The General Counsel argues that Lewis sought from Richardson some understanding of why she had not been selected. While Richardson was very forthcoming with reasons for his decision not to recommend her, he candidly admitted that he considered Lewis' protected activity in his decision. As the Authority found in *Department of the Treasury, United States Customs Service, Region IV, Miami, Florida,* 19 FLRA 956 (1985), linking an employee's opportunity for promotion to consideration of protected activity violates the Statute. In *Letterkenny*, the Authority found that cancellation of a selection register violated the Statute when it was established that the sole reason for cancelling the selection register was the employee's engaging in protected activity, and that the respondent had not established that it would have taken the same action in the absence of the protected activity.

Respondent's Position

Respondent asserts that Richardson flatly denied that he told Lewis that he did not recommend her for the position because of her union activities and further asserts that his testimony is more credible than hers, noting that Richardson's detailed written recollection of the discussion was submitted into evidence. (R. Ex. 11) Richardson did discuss with Lewis her performance deficiencies and why she was not recommended or selected for the position in question.

Respondent submits that the General Counsel did not make the requisite prima facie showing beyond establishing that Lewis was a union officer and engaged in protected activity. The Respondent had numerous legitimate and non-discriminatory reasons to recommend the selection of another individual over Lewis and the General Counsel did not demonstrate by a preponderance of the evidence that Lewis'

union position was the motivating factor rather than other legitimate reasons.

Respondent also asserts that it demonstrated by a preponderance of the evidence that it had legitimate, non-discriminatory reasons for the decision to not recommend Lewis for promotion, and that is would have taken the same action regardless of Lewis' union activities.

Analysis

Section 7116(a)(2) of the Statute provides that it is an unfair labor practice for an agency "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" Under the analytical framework set forth in *Letterkenny*, *supra*, in determining whether the Respondent violated section 7116(a)(2) of the Statute, the General Counsel must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and that consideration of such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. If the General Counsel makes this required *prima facie* showing, the respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and the same action would have been taken even in the absence of the consideration of protected activity.

In this matter Diana Lewis has been the Union's Secretary since October 1999 and has engaged in protected activity in that capacity. The Respondent, through Richardson, has been aware of her activities and has approved official time requests on her behalf. Richardson has also dealt directly with Lewis in her capacity as the Union Secretary. It is clear from the evidence that Lewis was engaged in protected activity under section 7102 of the Statute and that the Respondent was aware of her activity, thus meeting the first prong of the *Letterkenny* analysis.

I do not find, however, that the General Counsel has met the second prong of the *Letterkenny* analysis. Specifically, I do not find that Lewis' protected activity played a motivating role in the decision not to recommend her for the promotion to Project Manager. In that regard, the General Counsel primarily relies on the alleged section 7116(a)(1) statement by Richardson to Lewis in their November 3, 2000 discussion. I do not find Lewis' version of that conversation credible - her rendition of the conversation was vague and self-serving. She complained

that Richardson was unresponsive to her questions about why she was not recommended, when clearly he discussed several work related deficiencies, including her unresponsiveness and problems with mail delivery. The fact that he also indicated that she did not always follow the correct procedures for requesting official time and had been told to leave areas where she was not authorized to be present, did not establish that her protected activity was a motivating factor in the decision not to recommend Lewis for the position. 5

I do not find that Richardson told Lewis that he could not distinguish her Union activities from her program assistant activities. I do not find that any of the statements that Richardson made to Lewis during the course of their conversation on November 2, 2000 tended to coerce or intimidate her or that she could reasonably have drawn a coercive inference from those statements. *Hill Air Force Base, Utah,* 35 FLRA 891, 895-96. See also *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994).

Even assuming the General Counsel met the second prong of the *Letterkenny* analysis, the Respondent set forth sufficient evidence to show that it would have made the same decision regardless of Lewis' protected activity. In the three months prior to the job announcement and recommendation, Richardson was forced to send a memo regarding the importance of mail delivery and respond to complaints about her being in an unauthorized area without prior approval. Lewis apparently did not recognize these issues as deficiencies that reflected on the quality of her work. Further the failure to complete the training, when the selected employee did complete such training, bolsters the Respondent's defense. I find Lewis' defense that she did not complete the training because she was engaged in protected activity unsupported by the record evidence. In

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I note that during the hearing a great deal of testimony was elicited from Union President Aguirri regarding the climate of labor relations at the Houston office. Aguirri works in San Antonio and spends a limited amount of time in the Houston office. At the most he has only had four or five face to face meetings with Richardson and only one telephone conversation. Most of their communications have been by e-mail and occurred in March 2000, immediately after Richardson was named Director. (R. Ex. 1). However, Lewis was not directly involved in these exchanges and there is no evidence that any of the e-mail exchanges had any effect or impact on the working relationship between Richardson and Lewis.

view of the fact that the selected employee received glowing recommendations from her supervisor, Respondent's actions in selecting Straitwell rather than Lewis did not violate the Statute.

I conclude that the Respondent's actions did not violate section 7116(a)(1) and (2) as alleged. I therefore recommend dismissal of the complaint in this case.

It is therefore recommended that the Authority adopt the following order:

ORDER

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

Issued, Washington, DC, September 26, 2002.

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SUSAN E. JELEN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. DA-CA-01-0233 were sent to the following parties:

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CERTIFIED MAIL:	**CERTIFIED NOS:**
Steven B. Thoren, Esq. Counsel for the General Counsel Federal Labor Relations Authority 1244 Speer Boulevard, Suite 100 Denver, CO 80204-3581	7000 1670 0000 1175 1716
Timothy J. Hartzer, Esq. Dept. of HUD 625 Silver Avenue, SW, Suite 100 Albuquerque, NM 87102	7000 1670 0000 1175 1723
Phillip Aguirri, President AFGE, Local 3320 800 Dolorosa, Room 306 San Antonio, TX 78207	7000 1670 0000 1175 1730

REGULAR MAIL

National President
American Federation of Government
Employees, AFL-CIO
80 F Street, NW
Washington, DC 20001

Issued: September 26, 2002
Washington, D.C.