

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

MEMORANDUM

DATE: November 30, 2006

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOREST SERVICE
WOLF CREEK JOB CORPS
GLIDE, OREGON

Respondent

and

Case No. SF-CA-06-0103

JEFF LOGAN, An Individual

Charging Party

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

Enclosures

UNITED STATES OF AMERICA
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U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE WOLF CREEK JOB CORPS GLIDE, OREGON Respondent	
and JEFF LOGAN, An Individual Charging Party	Case No. SF-CA-06-0103

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

Any such exceptions must be filed on or before **JANUARY 2, 2007**, and addressed to:

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

SUSAN E. JELEN
Administrative Law Judge

Dated: November 30, 2006
Washington, DC

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

U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE WOLF CREEK JOB CORPS GLIDE, OREGON <p style="text-align: center;">Respondent</p>	
and JEFF LOGAN, An Individual <p style="text-align: center;">Charging Party</p>	Case No. SF-CA-06-0103

Stefanie Arthur, Esq.
For the General Counsel

Jo-Marie Lisa
For the Respondent

Jeff Logan
For the Charging Party

Before: SUSAN E. JELEN
Administrative Law Judge

DECISION

Statement of the Case

This is an unfair labor practice proceeding under the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§7101-7135 (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority), 5 C.F.R. part 2423.

On November 23, 2005, Jeff Logan, An Individual, filed an unfair labor practice charge in this matter against the U.S. Department of Agriculture, Forest Service, Wolf Creek Job Corps, Glide, Oregon (Respondent or Wolf Creek). (G.C. Ex. 1(a)) On June 15, 2006, the Regional Director of the San Francisco Region of the Authority issued a Complaint and Notice of Hearing, which alleged that the Respondent violated section 7116(a)(1) and (2) of the Statute by issuing a fourteen calendar day suspension against Logan, in retaliation for his protected union activity. (G.C. Ex. 1

(b)) On July 6, 2006, the Respondent filed an answer to the complaint in which it admitted certain allegations while denying the substantive allegations of the complaint. (G.C. Ex. 1(c))

A hearing was held in Roseburg, Oregon on August 17 and 18, 2006, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The General Counsel (GC) and the Respondent have filed timely post-hearing briefs which I have fully considered.¹

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions and recommendations.

Statement of the Facts

The Respondent is an agency under 5 U.S.C. §7103(a)(3). The National Federation of Federal Employees (NFFE) is a labor organization under 5 U.S.C. §7103(a)(4) and is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining with the USDA Forest Service. NFFE Local 2079 is an agent of NFFE for representing employees at the Respondent. (G.C. Ex. 1(b); 1(c))

The Wolf Creek Job Corps is located in Glide, Oregon, and is a training and education program for disadvantaged youth, ages 16 to 24. The program is managed through the Department of Labor. Wolf Creek is one of the Job Corps centers that are part of the Forest Service. (Tr. 21) Lyle Burmeister is the Wolf Creek Center Director; Barry McQuiston is the Residential Living Manager, in charge of the Residential Living Program. (Tr. 22, 166-167, 209) Connie Battles is a Recreation Specialist and reports to McQuiston. (Tr. 167, 209, 258) Two other Residential Supervisors, David Berger and Barry Hasty, also report to McQuiston. (Tr. 22)

There are approximately 240 students at Wolf Creek. (Tr. 65) These students live in ten lodges or dormitories at the Wolf Creek Center. (Tr. 21) Leader Residential Advisors (GS-7) and Residential Advisors (GS-5) are assigned to the center lodges and work swing shifts (3:30 p.m. to

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The GC filed an unopposed Motion To Correct Transcript. The Motion is granted in part and the transcript is corrected as noted in Appendix.

11:30 p.m. and 4:00 p.m. to midnight). (Tr. 22) There are also two night shift personnel on duty each night.

Jeff Logan (Logan) is the Lead Night Shift and works ten hours a day, four days a week. His schedule is from 11 p.m. to 9 a.m., Thursday through Sunday. (Tr. 22) There are two other night shift staff and Logan works two shifts with one and two shifts with the other. There are no supervisors on duty during the night shift. (Tr. 23) The primary duties of the night shift includes security, counting students to make sure they are all present, doing rounds, making reports and waking students in the morning as needed. The night shift staff also do inspections at the end of each shift. (Tr. 24)

Battles has been Logan's supervisor since 2000. She works the swing shift, and there is little interaction between the two of them prior to her leaving work and his beginning work. Most of their communications are by e-mail. (Tr. 25-26)

NFFE Local 2079 represents bargaining unit employees on both the Umpqua National Forest and the Wolf Creek Job Corps, and has a Vice President for each. (Tr. 27-28) Logan has been an employee at Wolf Creek for over 19 years. He became a steward sometime in 2004; he became the Acting Vice President for NFFE Local 2079 for Wolf Creek in September 2004,² after the then Vice President, Mark Howard, was removed from his position as a duty cook. (Tr. 28)

Logan's Protected Activity

After he became Acting Vice President, Logan began representing various employees at Wolf Creek on behalf of NFFE Local 2079. Logan served as Vice President until September 2005. (Tr. 354)

As a steward, Logan began representing Jeffery N. Goforth, Welding Training Leader, on his Notice of Proposed Removal. Logan's activities included filing requests for information in August and September, and assisting with the response to the notice of proposed removal. (G.C. Ex. 3; Tr. 31) In October, he represented another employee, Teresa Tucker, a Residential Advisor, in a grievance regarding an unhealthy work environment. Logan also made a written request that the Respondent deal with him as Tucker's Union representative, rather than calling her directly at home on her concerns. (G.C. Ex. 4; Tr. 32-33)

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All dates are in 2004 unless specifically stated otherwise.

On November 4, 15, and 18, Logan filed unfair labor practice (ULP) charges against the Respondent with the San Francisco Region of the Authority. These charges, one concerning official time and two concerning requests for information, were withdrawn. (G.C. Ex. 5; Tr. 34-35)

On October 21, Logan made an information request to Burmeister, regarding a GS-5 vacancy. (G.C. Ex. 6; Tr. 36) On the same date, October 21, Logan filed a prenotification of intent to file a ULP charge with Burmeister. This ULP concerned the Respondent failing to provide information requested by the Union on a timely basis. (G.C. Ex. 7; Tr. 36-37) Also, on October 21, Logan, as Union Vice President, made a request for information to the Respondent regarding an issue involving Logan and documentation for sick leave. Logan later made a second request for this information. (G.C. Ex. 8b; Tr. 37)

On November 15, Logan filed a step 3 grievance on an issue related to potential violence with students. This involved the night staff's responsibility for waking certain students in the early hours for work duties and was an ongoing concern for Logan due to inaccurate information regarding which students to waken. (G.C. Ex. 9; Tr. 38-39)

On November 21, Logan filed a grievance regarding the Respondent's failure to furnish him written documentation on a sick leave request. (G.C. Ex. 10; Tr. 43) On December 13, he made a request for information on a GS-9 vacancy announcement. (G.C. Ex. 11; Tr. 45)

Logan also represented bargaining unit employees in proceedings before the Merit Systems Protection Board (MSPB). He participated in a mediation that ended with a settlement in January 2005 (G.C. Ex. 12; Tr. 46-47) and discovery and settlement in the Mark Howard case. (G.C. Exs. 13, 14, 15, 16; Tr. 48-51)

Logan used official time during the period that he was a steward and Acting Vice President for NFFE Local 2079. Although Logan voiced some concerns about official time, there was no evidence that he was denied requested official time.

Notice of Proposed Suspension

On March 18, 2005, Barry McQuiston issued Logan a Notice of Proposed Suspension for fourteen (14) calendar days. The Notice stated that the reasons for this action were Failure to Follow Instructions and Discourteous and Disrespectful Behavior Towards Your Supervisor. (G.C.

Ex. 23) The Notice contained two specifications in support of Charge 1, Failure to Follow Instructions: renewal of the PCMS card and duplication of center keys. In support of Charge 2, Discourteous and Disrespectful Behavior Towards Your Supervisor, the Notice listed three specifications: renewal of the PCMS or Purchase card, duplication of center keys, and training-CPR class. (G.C. Ex. 23)

PCMS Card

All GS-7 employees, primarily Residential Advisors, are required to have a PCMS card. (Tr. 274) A PCMS card is a government issued credit card and is used for emergency purchases at the facility. Logan had been issued a PCMS card by the Respondent. (Tr. 59, 103-104)

On October 20, Amy Chapman, the purchasing agent in charge of the credit cards, sent Logan and other employees an e-mail concerning the PCMS card. The e-mail read:

Due to another round reductions to this program and your low volume of transactions, I am recommending that we close your account. Please discuss this with your supervisor and provide any feed back if you disagree with this recommendation. I am requesting a response by 10-25-04. If no response is received, it will be determined that you agree with closing the account. Please give me a call if you have questions.

Logan responded on October 21, stating "YES! This account has been nothing but trouble. I will give my card to Connie Battles the next time I see her. Thank You!" (G.C. Ex. 24) Logan testified that he was glad to get rid of the card. (Tr. 59-60) Chapman responded on October 21, stating "You don't need to give your card to Connie, just cut it up and send it to me in a blue envelope. Do you have any outstanding transactions?" (G.C. Ex. 24; Tr. 59-60)

On October 21, Battles met with Logan regarding his year-end performance review. In preparation of the meeting, she had requested that he have all of his receipts for any purchases on the PCMS card. Toward the end of the meeting, Battles turned to this item on her agenda and asked Logan for his PCMS records. He got up and left the room, returning a few minutes later with his receipts, which he had forgotten to bring to the meeting. He also returned with his PCMS card and a pair of scissors, stood before Battles, cut up his PCMS card, and then sat down. (Tr. 60, 278, 280, 281) Battles asked him what he was doing, and he explained that he was cutting up the card like Amy Chapman

had told him to. (Tr. 61, 63-64, 280) Logan was surprised that Battles did not know about his e-mails with Amy Chapman, since Sandra Brown, the administrative officer who runs the purchase program for the Job Corps Center, had been included in the e-mails. (Tr. 64) Battles then continued the meeting, looking at Logan's receipts for the PCMS card. (Tr. 64-65) The meeting concluded. (Tr. 65)

Logan did not discuss the PCMS card with Battles prior to cutting up the card and Battles was not aware of the e-mails from Chapman relating to the PCMS card until after her meeting with Logan. (Tr. 278) Battles was surprised by Logan's actions, and thought it was an awkward situation. (Tr. 278)

Logan admits that he was directed to sign for a new PCMS card. (Tr. 113, 286-287) When Battles again directed him to renew his PCMS card, he told her that he did not feel safe having a card, due to his personal situation. (Tr. 288) Logan did not want the responsibility of the PCMS card and mentioned his financial difficulties and security concerns at that time. (Tr. 114, 116) He was not aware that he could have secured the PCMS card at the center. (Tr. 115)

Logan admits that he did not submit the application for the new PCMS card as requested. (Tr. 118, 288-289) He also did not have an active PCMS card by the time the notice of suspension issued on March 18, 2005. He had submitted his application, however, it took a long time to get the PCMS card from wherever it came from. (Tr. 119) As noted in his response to the notice of proposed suspension, he had completed this task by the time of submission. (G.C. Ex. 24, Tr. 119) Logan currently has a PCMS card, which he uses for purchases. (Tr. 146)

Battles admits that she did not speak to Logan about the card cutting incident, claiming she was too scared to talk with Jeff. (Tr. 312) She also claims that she prepared an incident report, but there is no evidence that such a report exists. (Tr. 312, 332) Battles did make notes of her October 21 meeting with Logan on November 1, however, these notes do not mention Logan's action regarding cutting up the PCMS card or Battles' response to his actions. (G.C. Ex. 27; Tr. 189-190)

Duplication of Keys

There are approximately 240 students at Wolf Creek and each is assigned a closet or locker for personal items. Each student has a key and duplicate keys are maintained by

the staff, in case a student misplaces his/her own key. The extra set of keys is supposed to be kept in the Corpsmen Activity Center (CAC) office in a key cabinet, but there has been a problem with maintaining control. (Tr. 65-66) Students would come to the night staff on a regular basis, almost every day. 40% of the keys would not match. (Tr. 141)

On September 29, Battles sent an email to Logan regarding the key assignment: "I talked to staff and was informed that there should be an original set of keys for the dorms in the cabinet. Please start making sure that there is at least one/two keys for each locker in the cabinet. If you do not have a set for a particular dorm, please send me a note and I will talk to the staff in charge of the dorm." (G.C. Ex. 23, Attachment B3; Tr. 67, 291) Logan had the discretion to have the other night staff assist him. (Tr. 120)

Logan wanted to ensure that the master keys actually matched the correct lockers and sent the following email to Battles, McQuiston and Hasty on October 4: "What I was expecting was that all the staff would check their master set and make sure that all the keys were the right one. As you know, some of the masters do not match the locks or lockers. I do not think that cutting keys that do not work for that locker is a good way to spend the time and money. Let me know when this happens and I will start cutting keys." (G. C. Ex. 23, Attachment B2)

Battles responded on October 26: "I checked with Barry Hasty to inquire about the duplicate keys. He stated that it has not happened yet. At this point I am directing you to please make sure that 2 keys are made for every locker and placed in the key storage area by no later than Monday, November 15th." (G.C. Ex. 23, Attachment B2; Tr. 68)

Logan responded to this e-mail on October 28, with copies to McQuiston, Grady McMahan and Lyle Burmeister. Battles also forwarded the message to McQuiston, Berger and Hasty the same day. "Connie, please see the message in your drawer. You could have at least responded to my last message and not just threatened me with a direction. I have a valid concern about not wasting time and money on making keys that do not work. I responded to your message with an earnest attempt to communicate and all you can do is threaten in your response. Since there are only around 12 of the blanks that we need to cut the right keys, it is absurd that you expect us to make keys without any blanks. You should have checked this out and made sure we were set up before you treated me with such disrespect and issued a

direction without any way of it being completed. I am fully behind the project of getting all the keys made and in order. There is a huge problem about keys being kept in the lodge offices and not in the key room as they are supposed to be. If the whole of the residential section got behind the key issue it might just be a little easier to get a student a key when it is needed. As it is now, it is hit or miss when looking for a certain key. Since it is so urgent to have the right keys made, why is it not so urgent to make sure the right master keys are in the key room also. All of the night staff will do their best to get the keys made, but your insistence that the keys be made by November 15th, knowing that I am going to be on leave for a whole week of that time, is just plain harassment. I will cut any keys that you want without caring if they really work or not once the materials that are necessary to successfully complete the task are provided. Your disrespect and lack of understanding is appalling." (G.C. Ex. 23, Attachment B1; Tr. 67-68, 70-71)

Logan denies that he ever told Battles that he would not make duplicates of the keys. (Tr. 68) She never told him that all of the keys were 100% accurate. (Tr. 68) Battles sent him a message directing him to duplicate the keys; Logan and Kathy Harris started cutting keys. They only had a few blanks and did not have enough raw materials. (Tr. 68) Logan got in touch with Berger, and got more key blanks. (Tr. 71, 123-124)

Logan and Harris used every key blank available. (Tr. 71) They cut all the keys they could, but were not finished by November 15, leaving ½ of one dorm and a part of another dorm not completed. (Tr. 71-72, 124, 153-154, 293, 315)

Training - CPR Class

All Wolf Creek employees are required to be certified in first aid and CPR. In the October 21 meeting, Battles reminded Logan that his CPR certification would expire in November and that he would need to be recertified. (G.C. Ex. 27; Tr. 127) Although the Respondent gives training classes at Wolf Creek, it is sometimes difficult for Logan to attend at the site. Logan found a CPR class with the Red Cross in Roseburg on November 20. (Tr. 77, 78) Logan filled out a training request for himself and Kathy Harris, another night shift employee, and turned them in to Battles. (Tr. 137) A few days before the scheduled training, Battles sent an e-mail, asking about the class. Both Logan and Harris assumed that they were scheduled for the class, however, when they went to the class, it had been canceled.

(Tr. 137-138) Neither Logan nor Harris had been notified of the cancellation. (Tr. 156-157) On November 21, Logan sent an e-mail to Battles, informing her that the class had been canceled and asking if she had scheduled them for the class. (G.C. Ex. 23, Attachment C2) Battles responded that she had intended him to take the class and instructed him to find another class for the two of them. (G.C. Ex. 23, Attachment C3) He and Harris eventually took a CPR class from the Red Cross in January 2005, which Logan had arranged. (Tr. 137, 157)

Letter of Expectations and Direction

Following these incidents with Logan, Battles worked with Linda Breach, the Human Resources Officer for the Umpqua National Forest who was handling the Center's employee and labor relations, in preparing a Letter of Expectations and Direction to be issued by Battles to Logan. (G.C. Ex. 33; Tr. 320) The draft letter, dated December 20, 2004, from Battles to Logan, begins:

This letter provides documentation to you of specific situations that are of concern to me related to your behavior and communications. It is intended to clarify my expectations of you for completing assignments I have given you and my expectations for professional communications. . . .

The letter then identifies several incidents which had occurred during the prior two months, each of which includes a statement of Battles' expectations as to how Logan should handle such a situation in the future. Three of the four situations identified in this letter are the identical incidents cited as grounds for the proposed fourteen calendar day suspension issued to Logan in March 2005. These situations include Logan cutting up the PCMS card and the subsequent efforts to get him to renew his card, the assignment regarding the duplication of keys, and his failure to take the initiative regarding the CPR training class. (G.C. Ex. 33; Tr. 319-321) This Letter of Expectations was never issued.

Notice of Suspension and Final Decision

Logan received the notice of suspension in March 2005. On May 7, 2005, Logan submitted his response to the proposed suspension. He presented his explanation of the events cited in the proposal, documentation to support his explanation and/or justify his actions, as well as arguments against issuance of such severe discipline. (G.C. Ex. 24; Tr. 83-84) Logan's response also included a statement from

Social Services Assistant, Kathy Harris, a co-worker who also had been involved in duplicating the Center keys and taking the CPR class. She offered an explanation of the problems encountered with the key duplication assignment, as well as the CPR class. She even attempted to explain a situation, titled "hilarious", which she considered a misunderstanding between Logan and Battles.³

The decision letter was issued on August 15, 2005, by Lyle Burmeister, Center Director. (G.C. Ex. 25; Tr. 84) The two charges, Failure to Follow Instructions and Discourteous and Disrespectful Behavior Towards Your Supervisor, remained the same, although one of the specifications in support of the second charge, training - CPR class, was dropped from the final decision without any explanation. (G.C. Ex. 25; Tr. 195) The length of the suspension also remained at fourteen calendar days. (G.C. Ex. 25)

Logan served his suspension from August 21 through September 3, for a total of 80 hours. (Tr. 85)⁴ Logan expressed that he was really shocked by receiving the notice of suspension. He had no discipline prior to the suspension and had not been counseled in any way. He acknowledged receiving the July 2000 Letter of Warning regarding use of language, but denies making the statements in the letter. He did not file a grievance over the matter, since the letter did not give any such instructions. Although he was not a Union representative at the time, he did use the negotiated grievance procedure whenever necessary and thought he was issued the letter because he had engaged in protected activity. (R. Ex. 1; Tr. 91-94) Logan also acknowledged receiving the July 31, 2003 Letter of Warning, with the March 3, 2003 memo. He was not a Union official at the time of this letter, but he did file a grievance which went to step 3. (R. Ex. 2; Tr. 94, 99-100) Although the Respondent apparently considers these letters of warning notification to Logan of improper language, they were not

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I find Harris' testimony completely credible. The evidence reflects that she and Logan were acquaintances and coworkers when she wrote the statement in support of his response on the proposed suspension. Although they have since developed a personal relationship, and she has left Wolf Creek, her testimony was sincere, consistent and straight-forward.

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The GC seems to argue that the Respondent timed Logan's fourteen day suspension during a period of time in which the Department of Labor was conducting an evaluation of the Wolf Creek Job Corps Center. There is no evidence to support such speculation and I find the actual dates of Logan's suspension to be of no particular significance.

referenced in the notice of suspension or the suspension decision. (Tr. 98)

Positions of the Parties

General Counsel

Counsel for the General Counsel (GC) submits that the preponderance of credible evidence adduced at the hearing establishes that the suspension was issued to Jeff Logan because of his protected Union activities. The Respondent has failed to offer any credible explanation for its issuance of a fourteen calendar day suspension to Logan, an employee with no prior discipline and whose conduct had been condoned for years. The GC submits that the reasons offered by the Respondent for its decision to impose the suspension on Logan are without support and are revealed to be pretextual. Thus, until he received the proposal in March 2005, Logan was not counseled about any of the conduct included in the proposal or even informed that discipline was being considered for his conduct. Logan was not asked for any explanation or input prior to issuance of the proposal, although the parties' collective bargaining specifically requires an inquiry prior to issuance of discipline.

Logan submitted his response to the proposal but the final decision by Center Director Lyle Burmeister, issued on August 5, 2005, sustaining the fourteen day suspension, ignores explanatory and/or exculpatory information provided by Logan, and mischaracterizes other information included in the response. Evidence in the record, such as the failure of Logan's second level supervisor Barry McQuiston or Center Director Burmeister to have counseled Logan concerning the incidents in the suspension prior to issuance of the proposal, belie the alleged severity of the incidents cited in the suspension. Most telling, the Respondent has failed to explain how a Letter of Expectations and Direction which was prepared in December 2004 to be issued to Logan by supervisor Connie Battles, became, virtually without change, a Notice of Proposed Suspension for fourteen calendar days in March 2005 and a final Decision to issue the fourteen calendar day suspension in August 2005.

The GC submits that whether Logan engaged in any or all of the conduct set forth in the proposal and sustained in the final decision, the Respondent has been unable to establish that it would have issued the suspension even if Logan had not engaged in protected activity. *Letterykenny Army Depot, 35 FLRA 113 (1990) (Letterkenny); United States*

*Department of Labor, Employment and Training Administration,
San Francisco, California, 43 FLRA 1036, 1063 (1992).*

Respondent

The Respondent takes the position that the General Counsel has failed to submit the requisite evidence at the hearing to meet the standard of evidence and burden of proof required in this type of case. The Respondent asserts that the issuance of the Notice of Proposed Suspension letter and the subsequent Decision were in response to Logan's misconduct and were not based on his protected Union activity.

The Respondent also asserts that the 2000 Letter of Warning and the 2003 Letter of Warning clearly placed Logan on notice that his discourteous and disrespectful behavior toward management at Wolf Creek was unacceptable. With the 2003 Letter of Warning, Logan was also put on notice concerning his resistance to following management instructions. The Respondent asserts that the basis for the issuance of the 2003 Letter of Warning (Discourteous and Disrespectful Language Toward Management and Failure To Follow Instructions) were the same as in the March 2005 Proposed Notice of Suspension. Also, the two letters of warning, which were informal disciplinary actions, demonstrate the willingness of the Respondent to encourage Logan to correct his misconduct and do not demonstrate any anti-union motivation.

The Respondent further asserts that there was no evidence of anti-union motivation on the part of any of the management staff, *i.e.*, Battles, McQuiston or Burmeister. And the former Union President, Laurene Stewart, testified that the Respondent had a good relationship with the Union and that she was always treated with respect. (Tr. 340)

In conclusion, the Respondent argues that the issuance of the suspension was not based on Logan's protected activity. Even assuming that the GC has met its *prima facie* case, the reasons offered by Wolf Creek for Logan's suspension were not pretextual, and it would have taken the same action against Logan in the absence of his protected activity. Therefore, the Respondent asserts that the General Counsel has failed to meet her burden of proof, and the complaint in this matter should be dismissed.

Issue

Whether or not the Respondent violated section 7116(a) (1) and (2) of the Statute by issuing employee Jeff Logan a

fourteen calendar day suspension because he had engaged in activity protected by the Statute?

Analysis and Conclusion

In *Letterkenny*, the Authority established an analytic framework for evaluating alleged discrimination violations of the Statute. The General Counsel bears the burden of establishing a *prima facie* case by showing that: (1) the employee against whom the alleged discriminatory action was taken was engaged in activity protected by the Statute; and (2) such protected activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. *Id.* at 118. As part of its *prima facie* case, the GC may seek to establish that the Respondent's asserted reasons for taking the allegedly discriminatory action are pretextual. *Id.* at 122-123. The record as a whole may be considered in determining whether the GC has established a *prima facie* case of discrimination. *United States Department of Justice, Federal Bureau of Prisons, U.S. Penitentiary (Administrative Maximum), Florence, Colorado*, 60 FLRA 752, 757 (2005).

If the GC establishes a *prima facie* case, the burden shifts to the Respondent to rebut the *prima facie* case by establishing that there was a legitimate justification for its actions and the same action would have been taken even in the absence of the protected activity. *Letterkenny* at 118.

The evidence in this case establishes that Logan was engaged in protected activity and that the Respondent had knowledge of that activity. Upon becoming the Acting Vice President and then the Vice President for the Union, Logan continuously engaged in representational activities, including making information requests under the Statute, responding to proposed disciplinary actions, filing unfair labor practice charges, and representing employees before the MSPB. Most of his interactions were with the Center Director, Lyle Burmeister, although his first and second level supervisors were aware of his use of official time.

The more difficult question is whether consideration of Logan's protected activity was a motivating factor in the decision to suspend him for fourteen days. The Respondent's witnesses all deny that they have ever made any anti-union statements, and the General Counsel has not asserted any such conduct in the complaint. The GC does assert that Center Director Lyle Burmeister was annoyed by Logan's union activities, citing to Burmeister's complaints to Union

President Stewart about Logan's barrage of information requests and filing of grievances. (Tr. 342)

The GC also asserts that Burmeister's comments in his final decision on the suspension focused on Logan's protected activity to the exclusion of other considerations. In that regard, Burmeister limited his comments to Logan's concerns regarding his use of official time and the failure to bargain over the new key assignment, and did not consider other reasons and evidence offered by Logan. The GC notes that the Authority has recognized that a Respondent's preoccupation with an employee's union activity may be evidence of animus. *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, D.C.*, 54 FLRA 987 (1998).

Further, the GC argues that the type of alleged misconduct included in the suspension was similar to conduct that the Respondent had tolerated for many years and it was only when Logan became active in the Union and engaged in extensive protected activity that the Respondent chose to discipline him for such conduct. The GC asserts that the evidence that an employer has tolerated or condoned similar conduct in the past warrants the inference that the Respondent's explanation for the current discipline is pretextual. See *Indian Health Service, Crow Hospital, Crow Agency, Montana*, 57 FLRA 109 (2001).

The GC also argues that the Respondent's delay in issuing the suspension is further evidence that the reasons offered for issuing the suspension are pretextual. See *U.S. Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California*, 38 FLRA 567, 581 (1990), in which the ALJ found, among other things, that Respondent's delay in issuing discipline for several weeks, without any indication to the employee of its intent to do so, provides evidence of Respondent's discriminatory intent. *State Plaza, Inc., a wholly owned subsidiary of RB Associates, Incl., d/b/a State Plaza Hotel*, 347 NLRB No. 70, 2006 NLRB Lexis 309 (July 31, 2006) (Delay between alleged misconduct and termination found to be evidence of discriminatory motive.) The GC asserts that the Respondent has not explained why it took until March 2005 to issue the proposed suspension for Logan for conduct that allegedly occurred in September-November 2004.

The Respondent asserts that there is no evidence of anti-Union motivation on the part of any of its managers and that Logan was suspended for his conduct rather than for his

protected activity. The Respondent denies that the reasons offered for Logan's suspension were pretextual.

As noted above, the record as a whole may be considered in determining whether the GC has established a *prima facie* case of discrimination. In that regard the final decision to suspend Logan was based on the two incidents regarding the PCMS card and the duplication of keys. The third incident, relating to the scheduling of a CPR class for recertification, was dropped from the final decision.

The evidence regarding the PCMS card establishes that Logan cut up his card after he received correspondence from Amy Chapman regarding terminating his account. While it is clear that Battles was unaware of this correspondence and was startled by Logan's dramatic cutting of the card, I do not find that the evidence supports Battles' subsequent testimony that she was scared of Logan as a result of this incident. She did not mention the incident with the PCMS card in her notes of the October 21 meeting (G.C. Ex. 27) and the Respondent presented no documentation that Battles reported the incident as threatening or that Logan was counseled by anyone from management regarding this type of conduct. Battles' testimony in this regard was not supported by documentary evidence and was not credible. I do not doubt that Logan could be a difficult employee to supervise, but both Logan and Battles share responsibility for the communications issues between the two of them.

The PCMS card incident, however, does not just concern cutting up the PCMS card, but also Logan's subsequent failure to reapply for the PCMS card despite the direct orders of his supervisor. Logan's explanations for not wanting a PCMS card, not getting the application form, and not understanding the necessity of signing the form, are not sufficient to justify his failure to follow the instructions of his supervisor.

With regard to the cutting keys issue, the evidence reflects that Logan did not actually object to the ultimate goal of the key cutting, but felt that there was not enough of an effort to resolve the problems regarding the keys. It is apparent, however, that while Logan resisted the order, eventually, with the assistance of Kathy Harris, most of the keys had been duplicated by November 15.

The Respondent bases its fourteen day suspension on these two incidents. In defending its actions, however, the Respondent fails to offer an adequate explanation of several overlaying issues. The Respondent does not explain how the initial Letter of Expectations and Direction that Battles

was drafting in December 2004 became a fourteen day suspension, or why it took an additional three months to issue the Notice of Proposed Suspension. The Respondent fails to explain why Logan was not counseled on any of these incidents prior to receiving a fourteen day suspension. The Respondent fails to explain why Logan was not offered the opportunity to present his position in any preliminary investigation prior to the notice of suspension. The Respondent fails to explain why these particular examples of Logan's behavior were significant to require a suspension when similar conduct had been condoned for years. And finally the Respondent fails to explain, and in fact, made no attempt to explain why a fourteen day suspension was considered an appropriate penalty for Logan's conduct, when he had never been disciplined in his prior 19 years of service.

Therefore, based on the totality of the evidence before me, I find that the Respondent's reasons for suspending Logan for fourteen days were pretextual and he was actually disciplined in retaliation for his protected activity. I therefore find that the GC has established a *prima facie* case of discrimination.

The Respondent argues that it has established that there was legitimate justification for its actions and that the same action would have been taken even in the absence of Logan's protected activity. *Letterkenny* at 118. The Respondent asserts that the evidence shows that Logan engaged in a pattern of misconduct over a period of several months, including failing to secure an active PCMS card, his conduct with regard to the duplication of the Center keys, his delay in completing a CPR course, and his disrespectful and discourteous behavior towards his supervisor, including his menacing behavior in the October 21 meeting. Therefore, the Respondent argues that it had legitimate justification for the fourteen day suspension and that this same action would have taken place even in the absence of his protected activity.

In my view, Logan can be a difficult employee, his communication skills are questionable and his judgment sometimes flawed. The evidence, however, also establishes that he is a long-time employee who holds a responsible position on the night shift. Over the years, the Respondent has condoned his behavior, and until this suspension, had only issued two non-disciplinary letters of warning; both involving profane language (R. Ex. 1, July 10, 2000 and R. Ex. 2, July 31, 2003). Prior to the issuance of the notice of suspension, Logan had not been counseled about his behavior regarding any of these incidents. Further, I do

not find the evidence supports the Respondent's position that Logan engaged in menacing or threatening behavior at the October 21 meeting.

Based on the above, although the Respondent may have had a basis for some type of discipline as a result of Logan's behavior, it has failed to explain the severity of the fourteen days suspension, particularly in view of its elimination of one of the specifications (Training - CPR class) in support of the discipline. Under these circumstances, I find that the Respondent has failed to demonstrate that it had legitimate justification for the fourteen day suspension and that it would have taken the same action even in the absence of Logan's protected activity.

Having concluded that the Respondent violated section 7116(a)(1) and (2) of the Statute, I recommend the Authority issue the following Order:

ORDER

Pursuant to §2423.41(c) of the Rules and Regulations of the Authority and §7118 of the Federal Service Labor-Management Relations Statute (Statute), it is hereby ordered that the U.S. Department of Agriculture, Forest Service, Wolf Creek Job Corps, Glide, Oregon, shall:

1. Cease and desist from:

(a) Discriminating against Jeff Logan, or any other employee, by issuing the employee a 14-calendar day suspension because of the exercise of protected rights assured them by section 7102 of the Statute.

(b) Interfering with, restraining or coercing its employees in the exercise of their rights assured by the Statute.

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

(a) Rescind the August 5, 2005, Final Decision to Suspend issued to Jeff Logan and expunge all references thereto from our records.

(b) Make Jeff Logan whole for all pay and benefits lost as a result of the 14-day suspension, with interest, in accordance with the Back Pay Act, 5 U.S.C. §5596.

(c) Post at its facilities, where bargaining unit employees are located, copies of the attached Notice on forms to be furnished by the Authority. Upon receipt of such forms they shall be signed by the Center Director, and 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 §2423.41(e) of the Rules and Regulations of the Authority, notify the Regional Director of the San Francisco 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.

Issued, Washington, DC, November 30, 2006

SUSAN E. JELEN
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 U.S. Department of Agriculture, Forest Service, Wolf Creek Job Corps, Glide, Oregon, violated the Federal Service Labor-Management Relations Statute (Statute) and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate against Jeff Logan, or any other employee, because of the exercise of protected rights assured them by section 7102 of the Statute, which includes the right to serve as a union representative.

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

WE WILL rescind the August 5, 2005, Final Decision to Suspend issued to Jeff Logan and expunge all references thereto from our records and **WE WILL** make Mr. Logan whole for all pay and benefits lost as a result of the 14-day suspension, with interest, in accordance with the Back Pay Act, 5 U.S.C. §5596.

U.S. Department of Agriculture
Forest Service
Wolf Creek Job Corps
Glide, Oregon

Dated: _____ By: _____
(Signature) (Warden)

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 its provisions, they may communicate directly with the Regional Director, San Francisco Regional Office, whose address is: Federal Labor Relations Authority,

901 Market Street, Suite 220, San Francisco, California
94103-1791, and whose telephone number is: 415-356-5000.

APPENDIX

<u>Page:</u>	<u>Line</u>	<u>Change</u>
22:20		GS-17 to GS-07
24:7		"whose" to "who's"
24:25		"workers school" to "work or school"
29:15		"Phillis" to "Edie"
36:11		"for the master agreement" to "under the master agreement"
43:5		"Denying rent" to "requiring"
44:23		Insert "National" between "the" and "field office"
45:25-46:1		Delete as unintelligible and garbled "And I think this may be the-we're going to hear, based on my investigation. It's not too bad."
96:15		Insert "has" between "Mr. Logan" and "seen"
193:20		"remediation" to "mediation"
226:2		"hate" to "have"
228:11		"Ms. Arthur" to "Ms. Lisa"
238:5		"Ms. Lisa" to "Ms. Arthur"
238:18		"of" to "or"
239:7-8		"Then it contracted references and inquiries that is to be conducted to issuance of disciplinary action" to "The contract references inquiries are to be conducted prior to issuance of disciplinary actions."
244:25		"did he ever talk to you" to "did you ever talk to him?"
337:1		"Lorraine" to "Laurene"

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. SF-CA-06-0103, were sent to the following parties:

—

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Stefanie Arthur, Esq.

7004 2510 0004 2351

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Federal Labor Relations Authority
901 Market Street, Suite 220
San Francisco, CA 94103-1791

REGULAR MAIL:

Jo-Marie Lisa
Agency Representative
USDA Forest Service
Job Corps National Field Office
P.O. Box 25105
Building #20, Room D2119
Lakewood, CO 80225-0105

Jeff Logan
P.O. Box 361
Idleyld Park, OR 97447

DATED: November 30, 2006

Washington, DC