

OFFICE OF ADMINISTRATIVE LAW JUDGES WASHINGTON, D.C. 20424

SOCIAL SECURITY ADMINISTRATION .LINDA VISTA BRANCH OFFICE .SAN DIEGO,  
CALIFORNIA .Respondent . and . Case No.  
98-CA-10434 AMERICAN FEDERATION OF .GOVERNMENT EMPLOYEES, AFL-CIO .Charging Party .  
Mr. Wilson G. Schuerholz Mr. William Acosta For the Respondent Ms. Barbara Lawson For the  
Charging Party  
Lisa Lerner Miller, Esquire For the General Counsel Before: WILLIAM B. DEVANEY  
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, under the Federal Service Labor-Management Relations Statute, Chapter 71 of Title 5 of the United States Code, 5 U.S.C. § 7101, et seq.<sup>(1)</sup>, and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq., concerns two allegations: first, whether Respondent issued a memorandum critical of a Union representative because the employee exercised rights protected under the Statute, in violation of §§ 16(a)(1) and (2) of the Statute, and second, whether Respondent was required by § 14(b)(4) of the Statute to furnish certain data, in particular, personal notes of a supervisor, called "memory joggers", and the names of employees who were witnesses to the incident involving the Union representative, in violation of §§ 16(a)(1), (5) and (8) of the Statute.

This case was initiated by a charge filed on July 17, 1991 (G.C. Exh. 1(a)); the Complaint and Notice of Hearing issued on October 31, 1991 (G.C. Exh. 1(b)) and set the hearing for January 28, 1992; and by Order dated January 22, 1992, the hearing was rescheduled for March 10, 1992, pursuant to which a hearing was duly held on March 10, 1992, in San Diego, California, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, April 10, 1992, was fixed as the date for mailing post-hearing briefs which time was subsequently extended, on motion of Respondent, to which Charging Party opposed, for good cause shown, to May 15, 1992. Respondent and General Counsel each timely mailed an excellent brief, received on, or before, May 21, 1992, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

1. The American Federation of Government Employees, AFL-CIO (hereinafter, "Union") is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining, including employees at the Social Security Administration's Linda Vista Branch Office, San Diego, California (hereinafter, "Respondent").

2. Ms. Carolyn L. Hilton-Boy (hereinafter, "Ms. Boy") was appointed a Union representative in 1988 and held the position through October 1991, when her employment with Respondent was terminated, and since August 1991, has been Secretary-Treasurer of the Union (Tr. 15-16).

3. In order to obtain official time for the performance of her representational activities, Ms. Boy was required to complete a Form 75, indicating the date and time for which the official time was requested, and to submit the completed form to her supervisor for signature (Tr. 17).

4. On May 23, 1991, at approximately 0830, Ms. Boy, with a completed Form 75 in hand (G.C. Exh. 2), approached her supervisor, Ms. Sheri Kidder, to have the form signed. Ms. Kidder was engaged in a procedure known as "work sampling"<sup>(2)</sup> and Ms. Boy stated, "So, I waited until she finished with one employee, and I intercepted her in between two employees' desks so as not to interrupt." (Tr. 20-21). However, Ms. Kidder stated that Ms. Boy, in fact, interrupted her activity (Tr. 116) which was fully confirmed by Ms. Michelle Michaels, with whom Ms. Kidder was then conducting work sampling, who stated, ". . . Sheri was at my desk during work sampling, Carolyn [Ms. Boy] came up to her and wanted some paper signed right away . . . Sheri . . . was in the process of asking me what type of work I was doing, for the work sampling." (Tr. 67). In any event, there is no dispute that Ms. Kidder looked at the form (Tr. 23, 116) and told Ms. Boy ". . . she would get back to me on it." (Tr. 23, 116) or "you'll have to wait." (Tr. 67, 68).

Ms. Boy stated, "She accepted the form and glanced at it, and stuck it below her clipboard, and said she would get back to me on it." Ms. Kidder stated, ". . . I took a look at it, and two things came into play for me. Number one, I needed to get my work sampling done. Number two, the time that she had requested was 8:45, which was about, at this point in time, seven minutes away . . . I said to her, 'I'll get right back to you on this.' I took it off the top of my clipboard so I could see what I had been doing, and put it at the bottom of the clipboard, between the clipboard and my hand, and continued to question the claims representative about what she was doing." (Tr. 116).

5. There is no dispute that Ms. Boy refused to be put off and persisted in insisting that the Form 75 be signed immediately. Ms. Boy stated, ". . . I said, if she didn't have time to sign the form that I would be more than happy to take it in and ask the manager, Gary Twait, to sign it . . . She then asked me to step over here, and turned and walked away. So, I followed her, walking behind her; and she walked straight into Mr. Twait's office." (Tr. 24).

Ms. Michaels stated that, after Ms. Kidder told Ms. Boy, "you'll have to wait", ". . . then, Carolyn insisted that she had to have it signed right away, in so many words, and Sheri again told her, 'you'd have to wait.' At that point, they were moving away from my desk. They continued moving away. I know they kept talking. I don't remember any specifics about the rest of the conversation or what finally happened to end it, or where it ended." (Tr. 67). And again, "Well, she told her once she'd have to wait and, when Carolyn persisted in trying to get this paper signed right away, Sheri again told her she'd have to wait. After that, other than knowing that they kept talking, I don't remember any of the specifics of what they said." (Tr. 68). Later she stated, ". . . once they moved away from my desk over towards the personal computer area, other than remembering that they were still talking to one another, I don't know where they ended up." (Tr. 70). (She also said, "I don't remember seeing them going in the office [Mr. Twait's office]" Tr. 70).

Ms. Kidder stated that, after she had told Ms. Boy she would get right back to her, "Carolyn continued to stand there; and I thought perhaps she hadn't heard me, so I turned to her and I said, 'Carolyn, I'll get right back to you on this.' And she became very agitated and said to me, 'Well, if you won't sign it, I'll get Gary to sign it.' . . . So, I said to Carolyn, I said, 'Let's step away. Let's walk over here.' And I headed towards the administrative aid's desk, which was outside the claims unit. I couldn't seem to get her to settle down. At one point in time, she said, again, something about, 'Well, I'll get Gary to sign it.' I said, 'Carolyn, let . . .' - - she said, 'Let's go to Gary's office.' I said, 'fine.' And we walked into the branch manager's office." (Tr. 117).

6. There is no dispute, of course, that they went to Branch Manager Twait's office. Ms. Boy stated, "In the manager's office, Sheri Kidder began to explain to the manager what had occurred out on the floor and, becoming very frustrated, I did interrupt at that point; and I explained to the manager that I needed some official time for polling, I was told that she would get back to me as far as signing the Form 75, and that I had told her that, if she didn't have time to take care of it right then, I would be happy to have him take care of the matter . . . He [manager Twait] indicated that he would allow the supervisor to get back to me regarding the 75 form . . . Well, I was very frustrated at that point, and I did point out to him that it would take a matter of seconds to sign a form, and there had already been approximately five minutes taken for these conversations, which I felt was very wasteful especially since there was work sampling to have been conducted at the time by the supervisor. . . . The conversation was concluded, and the supervisor, Sheri Kidder, returned to the floor to complete the work sampling. . . ." (Tr. 25).

Ms. Kidder stated, "I opened my mouth to explain to him [manager Twait] what the situation was. Carolyn blurted out, 'Sheri refuses to sign the 75.' I said, 'That's not what's happening here. I'm in the middle of work sampling. The request is for seven minutes away or so. I need to finish my work sampling and check the operational happenings in the SR unit, and I told her I'd get right back to her.' Gary handed me back the 75, and I went back to the unit to continue the work sampling, assuming that he would continue to try to defuse the situation because she was still quite agitated. So, I walked back with the 75 and the clipboard, and back into the unit, and started to resume the work sampling." (Tr. 117).

Mr. Twait stated, ". . . At approximately 8:40, Carolyn and Sheri came into my office. Sheri started to explain to me why they were in my office, and Carolyn interrupted Sheri and said, 'Sheri refuses to sign my 75.' And, then, Sheri started talking again and said, 'You know, that's not true. I was doing work sampling, and Carolyn came up to me, gave me the 75. I looked at it, and looked at the start time, and told her that I would get back -- right back to her after work sampling.' And Sheri continued to say that . . . Carolyn became agitated and upset and refused to leave the area where Sheri was conducting the work sampling. So, Sheri suggested that they move out of that area because they were becoming . . . a disruption to the other employees. So, they -- they moved over towards the administrative area, and Sheri was continuing to try to talk to Carolyn about it, and Carolyn said, 'If you won't sign it, then I'll have Gary sign it.' And Sheri then suggested that they both come into my office and talk over the situation. . . . Well, after Sheri related that information to me, I asked to see the 75 form and, so, Sheri handed -- handed the form to me. When I looked at the time that was requested on there, it was a two-hour period, which started at 8:45 and continued to 10:45. I looked at my watch and it was 8:40 and, so, I said to Carolyn, I said, 'It will only take Sheri a couple of minutes to finish her work sampling activity, and she'll get back to you before the time you've requested on the form.' So, I handed the 75 form back to Sheri, who then left my office; and Carolyn stayed in my office. Now, after Sheri had left, I again assured Carolyn, I said, 'She will get back to you before the time that you requested.' And, then, I continued with -- talking with Carolyn, and I said that, 'You know, we've asked you to let us know as soon as you can when you're going to need official time, and to submit the 75 at the earliest point you know you're going to need the time.' And she became very upset at me then, and said, 'Something just came up. I don't have to get your permission. I don't have to get anybody's permission'. She stormed out of my office. . .

." (Tr. 167-169).

7. Nor is there any dispute that after leaving Mr. Twait's office Ms. Boy proceeded to where Ms. Kidder had resumed her work sampling and pulled the Form 75 from Ms. Kidder's hand and changed the times to 0840 (beginning) and 1040 (ending) (G.C. Exh. 2). Ms. Boy admitted she pulled the form from Ms. Kidder's hand (Tr. 38) after first asserting a more gentle retrieval (Tr. 26). Ms. Kidder stated, ". . . Carolyn rushed up to the side of me and -- and grabbed the 75 out of where I had it in between the back of the clipboard and my hand, and said, 'Well, I'll just change the time', and put it down on the desk and changed the time from 8:45 to read 8:40 and, then, threw it back on the top of the clipboard that I had in my hand and stormed off to her desk." (Tr. 118).

Mr. Twait stated that after Ms. Boy stormed out of his office, ". . . I got up to follow her out of the office, and she went up to where Sheri was taking work sampling from another employee in the unit, and I saw her grab the 75 from -- from Sheri, and take it and put it down on the employee's desk and -- and write on it and, then she just tossed it back at Sheri and, then, took off for her desk, which is in another part of the office." (Tr. 169). Mr. Twait stated that Ms. Boy was, ". . . very agitated and -- and angry. I mean, she was very loud when she was in the office just with me. Then, she was, like, storming out of my office and rushing up to Sheri, and she didn't -- she didn't say anything to Sheri. She just grabbed it from her and -- and -- took it and I don't know at that point if she -- if she said any words to Sheri or not, but I just saw her grab the form and -- and take it, place it down on the desk and write something on it and, then, toss it back to her and, then, take off." (Tr. 169-170). Mr. Twait also said that Ms. Boy had a history in the office of rude and disruptive behavior (Tr. 171) and he followed her out because he, ". . . felt that she did have potential for violent behavior." (Tr. 172).

Ms. Kathleen M. Ring, in May 1991, a claims representative (KR on G.C. Exh. 2; Tr. 158) described Ms. Boy's behavior as violent (Tr. 155, 160) stating, ". . . Well, I -- I would consider that violent when someone uses that, to me, aggressive behavior in -- in grabbing something from another person that they're not offering." (Tr. 163). When asked if she had considered herself in any personal danger, Ms. Ring responded, ". . . I gave that a lot of thought, and I -- I felt, at times, yes, I was -- I was concerned about -- about my safety and also the safety of my coworkers, very concerned about that . . . Because the behavior that has been displayed by Carolyn Boy is not rational, and people that are irrational, you can't -- they don't behave in the manner that you would expect and, so, you have to almost brace yourself for the unexpected." (Tr. 163).<sup>(3)</sup>

8. Ms. Boy sought to project a sense of urgency to the polling for which she wanted the official time, but the record showed nothing that might have required immediate action. Thus, Ms. Boy at the outset of her testimony stated that she became aware of the presence of state disability employees in the office, "right after 8:30" on May 23 (Tr. 18-19) when she saw them in Mr. Twait's office (Tr. 43), then conceded that they were not in Mr. Twait's office when she and Ms. Kidder entered and further conceded that she might have seen them on another morning (Tr. 43). Ms. Michaels stated that there were no state disability (DDS) employees present on the morning of May 23 (Tr. 74), and, in fact, that they were not coming until the afternoon (Tr. 74). Ms. Michaels further stated that sometime before May 23, the Office Manager, at a staff meeting in the lunchroom, had explained that DDS employees would sit in on our interviews to learn how we took disability claims. Ms. Michaels said she did not know whether everyone attended this staff meeting, but that, certainly, most were present as the lunchroom was fairly full (Tr. 73). DDS is a California agency contracted to make the medical decision on Social Security claims (Tr. 75), and the objective of their sitting in on interviews and SS employees visiting their office was that, by each party, i.e. DDS and SS, understanding what the other party does, disability claims processing would be improved (Tr. 72-73).

9. Ms. Kidder made it clear that before approving the Form 75 she had to "check the operational happenings in the SR unit" (Tr. 117) which meant seeing that the front counter would be covered when the office opened to the public at 9:00 a.m. inasmuch as, ". . . one of Carolyn's [Boy's] important component's of her job is to work the front counter and to help the public when they come in . . . So, not knowing right off the top of my head at that particular point in time who was scheduled to be up front, there were operational needs that I needed to check before I could just . . . say, "Okay, two hours right now is just fine.'" (Tr. 119; see, also, Tr. 149-150).<sup>(4)</sup>

After completing the work sampling and checking on front counter coverage, Ms. Kidder, sometime before 9:00 a.m. signed the Form 75 and gave it to Ms. Boy (Tr. 121). Ms. Boy said that the Form 75 had been left on her desk while she was away (Tr. 27); however, I do not credit her testimony that the Form 75 was left on her desk in her absence. She also insisted that she returned to her desk, "to official duties . . . official agency duties" (Tr. 40-41); but I find, based on the entire record, that she did not return to official agency duties. Rather, she called for Ms. Sandy Matthis, President of the Union, talked to Ms. Barbara Lawson, Chief Steward, then talked to Ms. Matthis, and then, as she stated, began her polling at about 8:45 or 8:50 a.m. The time sequence alone precludes Ms. Boy having returned "to official duties"; Ms. Boy's testimony in other regards, e.g., presence of DDS employees on May 23, etc., was discredited; and I found Ms. Kidder to have been a wholly credible witness.

10. On June 12, 1991, Ms. Kidder issued a memorandum to Ms. Boy, entitled, "Rude and Disruptive Conduct" which reviewed the events of the morning of May 23, 1991, and concluded as follows,

"I had just begun questioning an employee when you rushed up to me, grabbed the SSA-75 from my hand and yelled that you were changing the start time to 8:40. After altering the form, you shoved it back at me and stormed off to your desk.

"Within minutes, the Branch Manager received a telephone call from Mrs. Sandra Matthis, AFGE local president, asking what the problem was with your official time request. He assured Mrs. Matthis that there was no problem with your request, contrary to what you had told her, but that there was a problem with your conduct.

"Your rudeness to co-workers and the disruption you caused in the office are not the first instances of this type of misconduct. Carolyn, this type of behavior will not be tolerated." (G.C. Exh. 4).

11. By letter dated June 14, 1991, the Union made an information request, pursuant to § 14 of the Statute, for, inter alia,

"1. The names of employees who had startled looks upon their faces during the incident of May 23, 1991,

"2. Any memory joggers relied upon in composing the memo entitled 'Rude and Disruptive Conduct',

. . ." (G.C. Exh. 8)

The remainder of the request, numbers 3-14, concern questions or data not in issue herein.

12. After she had authorized the official time, and had given the approved Form 75 to Ms. Boy, which would have been, by Ms. Boy's reckoning not later than 8:50 a.m., Ms. Kidder returned to her desk and "made some notes about the incident" (Tr. 120). These notes, also referred to as "memory joggers" (Tr. 142, 146), were Ms. Kidder's personal notes (Tr. 94) which, as was her custom, she kept in a brown folder in the front of her desk (Tr. 147). Periodically, such notes were thrown away (Tr. 147). Ms. Kidder used these notes in preparing her memorandum of June 12, 1991, to Ms. Boy (paragraph 10, above); Ms. Kidder had the notes when she prepared her response to the Union's information request on June 26, 1991, (Tr. 134)<sup>(5)</sup>, infra; but, shortly after writing her response, the notes were thrown away (Tr. 134, 147).

13. By memorandum dated June 26, 1991,<sup>(6)</sup> Ms. Kidder responded to the Union's information request, as material herein, as follows:

"1. [The request for the names of employees] Several Title II CRs.

2. My memory joggers are notes to myself. The memo entitled 'Rude and

Disruptive Conduct' accurately describes the event . . ." (G.C. Exh. 9).

Respondent responded to each request, numbers 3-14, none of which is in issue herein.

14. Rather than discuss Respondent's June 26, 1991, response with Ms. Kidder, Ms. Lawson, who had made the information request and to whom Ms. Kidder had responded, contacted Mr. John Olexi on July 9 (Tr. 93) and Mr. Olexi on July 11, 1991, told Ms. Lawson, ". . . that the memory joggers were the private, personal property of Supervisor Kidder; that they existed, but that I could not have them." (Tr. 94).

Ms. Lawson said that she had forgotten to ask about the names of the claims representatives; but on July 15 she remembered to ask him and, ". . . He said he wouldn't tell me." (Tr. 94).

15. Ms. Kidder had been a Union representative from 1982 to about 1986 (Tr. 111, 112) and considers herself "very pro-Union" (Tr. 112). She had never denied Ms. Boy use of official time (Tr. 111), as Ms. Boy admitted (Tr. 40), and had never delayed Ms. Boy's use of official time although on one or two occasions she had asked Ms. Boy whether, because of operational considerations, she could wait until later in the afternoon when there would be less traffic in the reception area (Tr. 111). Ms. Michaels and Ms. Ring testified that they had never heard Ms. Kidder or Mr. Twait say anything that was anti-union in nature (Tr. 80, 156-157).

### Conclusions

#### 1. The alleged 16(a)(1) and (2) violation

##### (a) Protected Activity Not A Motivating Factor.

The Complaint alleges that Respondent issued the June 12, 1991, memorandum to Ms. Boy critical of her conduct because she exercised rights protected under the Statute. For reasons set forth hereinafter, I find that the memorandum of June 12, 1991, was issued solely because of Ms. Boy's conduct on May 23, 1991; and that Ms. Boy's engagement in protected activity was not a motivating factor.

Plainly, Ms. Boy acted irresponsibly and irrationally on May 23, 1991, and created a disruptive incident in the work area.<sup>(7)</sup> Without going into all details, the record, in brief, shows that at about 0830 on May 23, 1991, Ms. Boy presented a request for official time to her supervisor, Ms. Kidder, for approval. The request was for official time for two hours beginning at 0845. Ms. Kidder was then, as Ms. Boy well knew, engaged in work sampling and, after looking at the request, Ms. Kidder told Ms. Boy she would get right back to her. Work sampling, a timed activity to ascertain what the employees throughout the Agency are doing at a particular time, requires only a very few minutes to complete (Tr. 118-119, 168), and, but for Ms. Boy's interruption, would have been completed and Ms. Kidder could have attended to Ms. Boy's request well before 0845, the time requested. But Ms. Boy impetuously demanded that her request be acted upon immediately; could not be calmed by Ms. Kidder; proceeded to the Branch Manager's office where, she conceded, she interrupted Ms. Kidder and asserted to the Branch Manager, Mr. Twait, that "Sheri refuses to sign the 75", which was not true<sup>(8)</sup>; when Ms. Kidder left Ms. Twait's office to resume her work sampling, Ms. Boy remained momentarily in Mr. Twait's office and continued to talk to him in a loud voice, then stormed out of his office, rushed to where Ms. Kidder was conducting her work sampling and violently pulled the Form 75 from Ms. Kidder's hand, wrote on the form and threw it back at Ms. Kidder.

Although Ms. Michaels did not remember Ms. Boy shouting, she said Ms. Boy's voice was in the high range of normal (Tr. 68), said Ms. Boy "bustled up", "I mean she was walking faster than . . . a normal pace" (Tr. 79), and she said Ms. Boy's voice sounded like there was a sense of urgency (Tr. 80). The incident clearly disrupted Ms. Michaels' work (Tr. 80). Ms. Ring described Ms. Boy's behavior as violent (Tr. 155, 160) and loud (Tr. 161). Mr. Twait said Ms. Boy was agitated and angry and had been very loud when she was in the office with him alone (Tr. 169) and that he felt she had a potential for violent behavior (Tr. 172).

As Ms. Kidder credibly stated, such conduct demanded that it be addressed without regard to whether the employee had been seeking official time, or leave, or otherwise (Tr. 127-128), i.e., that the cause of the employee coming to her was immaterial, it was the behavior of Ms. Boy which was unacceptable and necessary to address. The record is devoid of evidence of union animus. To the contrary, the record shows that Ms. Kidder had been a Union representative and considered herself very pro-union; Ms. Boy had never been denied official time; and Ms. Boy's request for official time on this occasion was timely approved. Accordingly, I conclude that Ms. Boy's protected activity, i.e., requesting official time, was not a motivating factor in the issuance of Ms. Kidder's June 12, 1991, memorandum; rather, that her unwarranted conduct was the sole reason for the memorandum which was directed wholly to "Your rudeness to co-workers and the disruption you caused in the office. . . ." (G.C. Exh. 4). As Respondent did not issue the memorandum of June 12, 1991, because Ms. Boy exercised rights protected under the Statute, the issuance of the memorandum did not violate § 16(a)(1) or (2) of the Statute. United States Department of Interior, Office of the Secretary, U.S. Government Comptroller for the Virgin Island, 11 FLRA 521, 531-532 (1983).

In an effort to lend credence to the asserted violation, General Counsel has sought to "float" two red herrings. First, that Ms. Boy had an urgent need for immediate official time. However, the record wholly destroyed any claim of urgency. At the outset, Ms. Boy presented the request at about 0830 for official time to begin at 0845. Moreover, the urgency claimed by Ms. Boy - the presence, at that time, of DDS employees in the office - did not exist. Second, that Respondent unreasonably delayed approving Ms. Boy's request for official time. But there was no unreasonable delay. The request was approved and was delivered to Ms. Boy before she left to begin her polling, at about 0845 to 0850 by her recollection, and any delay beyond 0845, the time originally requested, if any, was attributable wholly to Ms. Boy's irrational conduct. The record firmly establishes that Ms. Kidder acted promptly and responsibly in approving the request, and delivering it to Ms. Boy, immediately after completion of her work sampling, which Ms. Boy had interrupted, and after checking front desk coverage during the period of Ms. Boy's requested absence.

(b) Respondent Would Have Taken The Same Action.

If, contrary to my conclusion that protected activity was not a motivating factor, it were deemed that Ms. Boy's protected activity was a motivating factor, nevertheless, I conclude that Respondent's issuance of the June 12, 1991, memorandum did not violate § 16(a)(1) or (2) of the Statute because the preponderance of evidence adduced at the hearing establishes that Respondent would have taken the same action in the absence of Ms. Boy's protected activity. Internal Revenue Service, Washington, D.C., 6 FLRA 96 (1981); Letterkenny Army Depot, 35 FLRA 113 (1990).

(c) Ms. Boy's Behavior Constituted Flagrant Misconduct.

Alternatively, I conclude that Ms. Boy's conduct on May 23, 1991, in creating a disruptive incident in the workplace, as the result of which the Branch Manager felt she had a potential for violent behavior and an employee, present when she violently pulled a paper from her supervisor's grasp, was concerned about her safety and the safety of her co-workers because of Ms. Boy's irrational behavior, constituted flagrant misconduct which was beyond the ambit of protected activity and, accordingly, the issuance of the June 12, 1991, memorandum addressing that conduct did not violate § 16(a)(1) or (2) of the Statute. Defense Logistics Agency, Defense Depot Tracy, Tracy California, 16 FLRA 703 (1984).



Accordingly, the portions of the Complaint alleging a § 16(a)(1) and (2) violation should be dismissed.

2. Alleged failure to supply data

Paragraph 14 of the Complaint states, and Respondent admitted, that,

". . . Union requested that Respondent furnish information consisting of memory joggers . . . and the names of employees who were witnesses to the incident." (G.C. Exh. 1(b), Par 14; 1(c) [Answer]).

Because the nature of the two data requests is different and the obligation under § 14(b)(4) to supply each is different, the requests will be treated separately.

(a) "Memory Joggers".

Ms. Kidder made personal notes about the May 23, 1991, incident which she used in preparing her June 12, 1991, memorandum. These notes were jotted down on a pad of paper and kept in a brown folder in Ms. Kidder's desk. She referred to her notes when writing a memorandum or to talk to an employee and when a note had served its purpose, here, when she had written the memorandum of June 12, it was her practice to throw it out and in accordance with that practice, shortly after writing her reply of June 26, 1991, her notes, a/k/a memory joggers, concerning the May 23 incident were thrown away. Ms. Kidder's notes were not kept pursuant to any instruction, were not part of any system of records of Respondent, were for her personal use and were disposed of as she saw fit. Because they were not data normally maintained by Respondent in the regular course of business, § 14(b)(4) did not require their production for, in truth, they were not Respondent's records but the personal, private property of Ms. Kidder. Accordingly, because the notes were not normally maintained by Respondent in the regular course of business, Respondent did not violate §§ 16(a)(1), (5) or (8) of the Statute by its refusal to furnish them.

I am aware of, and have given careful consideration to the Authority's decision, in Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, New Bedford District Office, New Bedford, Massachusetts, (hereinafter, "SSA, New Bedford") 37 FLRA 1277 (1990), which found that data, also referred to as "memory joggers", were normally maintained in the regular course of business; and I find that case and that determination wholly distinguishable from the present case. Thus, in SSA, New Bedford, the Authority noted,

". . . Respondent's District Manager made a notation on his calendar log regarding what transpired at the awards ceremony . . . the District Manager requested that the Branch Manager and Operations Supervisor prepare and furnish him with their written recollection of

the events which occurred at the awards ceremony. Further, the Respondent acknowledges that the notes from the Branch Manager and the Operations Supervisor were maintained by the Respondent's District Manager." (37 FLRA at 1284-1285).

Accordingly, the Authority held, ". . . that the 'memory joggers' were notes prepared by the supervisors, in their official capacity, for the purpose of making a contemporaneous record "and" were normally maintained by the Respondent in the regular course of business within the meaning of section 7114(b)(4) of the Statute." (37 FLRA at 1285). In actuality, the so called notes or "memory joggers", were, more properly, reports prepared by the Branch Manager and the Operations Supervisor at the direction of the District Manager; were received and maintained by the Respondent in the regular course of business; and the District Manager's notation was made on a record maintained in the regular course of business. Significantly, the Authority did not make any reference whatever to any personal note, or "memory jogger", that either the Branch Manager or the Operations Supervisor may have made and used in making their written reports to the District Manager. Here, of course, Ms. Kidder's notes were wholly personal reminders to herself for her assistance in preparing the memorandum of June 12, 1991. The memorandum was the equivalent of the reports in SSA, New Bedford, not Ms. Kidder's personal notes, which were not data maintained by Respondent in the regular course of business. U.S. Food and Drug Administration and U.S. Food and Drug Administration, Region VII, Kansas City, Missouri, 19 FLRA 555, 557 (1985).

Moreover, Ms. Kidder's personal notes were not "necessary" within the meaning of § 14(b)(4)(B) of the Statute. Ms. Kidder set forth her recollection of the May 23, 1991, incident in her memorandum of June 12, 1991. The May 23, 1991, incident concerned Ms. Boy's conduct. If she disagreed with Ms. Kidder's statement of her conduct, resolution was dependent on the testimony of other witnesses because Ms. Kidder had responded that, "The memo . . . accurately describes the event." (G.C. Exh. 9, Par. 2) and Ms. Kidder's notes not only were not necessary but would not have assisted in resolving disagreement between Ms. Kidder and Ms. Boy any more than Ms. Boy's own notes (G.C. Exh. 10). Although Ms. Kidder's notes may have been interesting, or useful, they certainly were not necessary within the meaning of § 14(b)(4)(B). United States Department of Justice, Bureau of Prisons, Allenwood Federal Prison Camp, Montgomery, Pennsylvania v. FLRA, et al., 988 F.2d 1267, 1270, 1271 (D.C. Cir. 1993). Accordingly, because the personal notes were not data normally maintained by Respondent in the regular course of business within its meaning of 14(b)(4)(A) and because the personal notes were not "necessary" within the meaning of 14(b)(4)(B), Respondent's failure to furnish them did not violate §§ 16(a)(1), (5) or (8) of the Statute.

(b) Names of Witnesses

Unlike the Complaint, which states that the Union on June 14, 1991, "requested that Respondent furnish . . . the names of employees who were witnesses to the incident" (G.C. Exh. 1(b), Par. 14), the Union on June 14, 1991, actually requested only, "The names of employees who had startled looks upon their faces during the incident. . . ." (G.C. Exh. 8; see, also, Tr. 92, 94, 95); nevertheless, Respondent admitted the allegations of Paragraph 14 (G.C. Exh. 1(c), Par. 14). Accordingly, in view of Respondent's admission the request will be treated as for the names of witness to the May 23, 1991, incident.

In its response of June 26, 1991, to the Union's request, Respondent had replied:

"1. Several Title II CRs." (G.C. Exh. 9).

On July 15, 1991, Respondent told the Union it wouldn't tell it the names of the claims representatives who witnessed the May 23, 1991, incident (Tr. 94).

Disclosure of names of employees who are witnesses to an event certainly is not prohibited by law, does not constitute guidance, advice, counsel, or training within the meaning of § 14(b)(4)(C), and is patently necessary in connection with any grievance, or related proceeding, relating to the event. Respondent violated §§ 16(a)(1), (5) and (8) of the Statute by refusing to furnish the names of employees who were witnesses to the May 23, 1991, incident.

Having found that Respondent violated §§ 16(a)(1), (5) and (8) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to § 18(a)(7) of the Statute, 5 U.S.C. § 7118(a)(7), and § 2423.29 of the Regulations, 5 C.F.R.

§ 2423.29, it is hereby ordered that the Social Security Administration's Linda Vista Branch Office, San Diego, California, shall:

1. Cease and desist from:

(a) Failing and refusing to furnish the American Federation of Government Employees, AFL-CIO, the exclusive representative of its employees, with requested names of employees witness to events concerning bargaining unit employees.<sup>(9)</sup>

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

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

(a) Upon request, furnish the American Federation of Government Employees, AFL-CIO, the names of employees witness to events concerning bargaining unit employees.

(b) Post at its facilities, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Branch Manager 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 insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, 5 C.F.R. § 2423.30, notify the Regional Director of the San Francisco Region, Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, California 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

FURTHER ORDERED, that all other allegations of the Complaint, including the alleged § 16(a)(1) and (2), 5 U.S.C. § 7116(a)(1) and (2), violation and the request for "memory joggers", be, and same are hereby, dismissed.

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WILLIAM B. DEVANEY

Administrative Law Judge

Dated: July 19, 1993

Washington, DC

NOTICE TO ALL EMPLOYEES

AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY

AND TO EFFECTUATE THE POLICIES OF THE

FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

WE NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT fail or refuse to provide to the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employees, the names of employees witness to events concerning bargaining unit employees.

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 Federal Service Labor-Management Relations Statute.

WE WILL, upon request, furnish the American Federation of Government Employees, AFL-CIO, the exclusive representative of our employee, with the names of employees witness to events concerning bargaining unit employees.

\_\_\_\_\_

(Activity)

Dated: \_\_\_\_\_ By: \_\_\_\_\_

(Signature)

(Title)

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

If employees have any questions concerning this Notice or compliance with its provision, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Region, whose address is: Suite 220, 901 Market Street, San Francisco, California 94103, and whose telephone number is: (415) 744-4000.

1. For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., Section 7116(a)(2) will be referred to, simply, as "§ 16(a)(2)".
2. This is a timed activity, performed at random intervals across the nation, to determine what work each employee is performing at that particular moment in the workday (Tr. 21, 135, 136).
3. Ms. Ring stated that after Ms. Boy grabbed the piece of paper from Ms. Kidder's hand she then went to Mr. Twait's office (Tr. 155, 156, 160). As this is contrary to all other testimony, I do not credit her testimony in this regard; however, her testimony concerning Ms. Boy's behavior was convincing, was consistent with the testimony of Ms. Michaels (Tr. 80), was confirmed by the testimony of Ms. Kidder and

Mr. Twait and is fully credited.

General Counsel's statement in her Brief, at n.3, p. 4, that Ms. Ring, ". . . did not identify that employee as Michelle Michaels" is correct; but not for the reason General Counsel implies. She did not identify Michelle Michaels for the reason that she said the "grabbing" incident occurred at the desk of "MF" (Tr. 158) not at the desk of "MM" (Michelle Michaels).

General Counsel's statement in her Brief, at n.4, p. 4, that, "Ring offered no testimony on any aspect of this conversation." (i.e., Ms. Boy's initial confrontation with Ms. Kidder), although technically correct, is so, because neither General Counsel nor Respondent asked. By the same token, Ms. Michaels, called by General Counsel, "offered no testimony" on the "grabbing" incident for the reason that she was not asked. I do not profess to know why each counsel avoided inquiring of these two witness concerning a second incident which each witness could have observed because of their proximity; but it would be wholly improper to fault either witness.

4. Ms. Boy did not recall whether she had been scheduled to be at the front desk at 9:00 a.m. on May 23, but conceded that if she had been, Respondent would have had to get someone else to replace her (Tr. 39-40).

5. Later, during cross examination, she was asked if they were in her possession on June 14 and Ms. Kidder answered, "No, I don't think so." (Tr. 146); however, she then stated, when asked when they were "tossed out", "My best guess is shortly after I wrote this memo. Barring that, it would have been 4th of July week, probably. I was getting ready to go on vacation, to leave the office, to report to a new assignment

. . . ." (Tr. 147). It would appear that Ms. Kidder was confused about the June 14 date, which was the date of the information request, and her memorandum of June 26, 1991, in response. In any event, I find, as Ms. Kidder stated, that she had the notes on June 26, 1991.

6. Respondent asked, and received, additional time to respond (Tr. 91, 132).

7. Except as noted, I credit the testimony of Ms. Michaels, Ms. Ring, Ms. Kidder and Mr. Twait concerning Ms. Boy's conduct on May 23, 1991, because I found their testimony credible. On the other hand, Ms. Boy was prone to confuse reality, was evasive, was discredited and was not a convincing or credible witness as to her conduct and actions.

8. Ms. Boy stated that Ms. Kidder told her she would get back to her on the request. Nevertheless she told Mr. Twait that Ms. Kidder would not sign the request form and later falsely represented to Ms. Lawson (Tr. 89) and to Ms. Matthis (G.C. Exh. 4) that she was having difficulty obtaining official time.

9. Inasmuch as the identity of the employees who witnessed the incident of May 23, 1991, has already been fully explored, and those immediately involved have testified herein, the Union's request of June 14, 1991, for names of those employees has been rendered moot.