

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

SMALL BUSINESS ADMINISTRATION NEWARK, NEW JERSEY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3588, AFL-CIO Charging Party	Case No. BN-CA-80113

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **NOVEMBER 23, 1998**, and addressed to:

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

SAMUEL A. CHAITOVITZ
Chief Administrative Law

Judge

Dated: October 21, 1998
Washington, DC

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

MEMORANDUM
1998

DATE: October 21,

TO: THE FEDERAL LABOR RELATIONS AUTHORITY

FROM: SAMUEL A. CHAITOVITZ
CHIEF ADMINISTRATIVE LAW JUDGE

SUBJECT: SMALL BUSINESS ADMINISTRATION
NEWARK, NEW JERSEY

Respondent

and

Case No. BN-

CA-80113

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3588, 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 motions, transcripts and exhibits, and briefs filed by the parties.

Enclosures

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

SMALL BUSINESS ADMINISTRATION NEWARK, NEW JERSEY Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3588, AFL-CIO Charging Party	Case No. BN-CA-80113

Julie McCarthy, Esquire
For the General Counsel, FLRA

Mark W. Vita, Esquire
For the Respondent

Caroline Morton, President, AFGE Local 3588
For the Charging Party

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose 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. (the Statute).

Based upon an unfair labor practice charge filed and amended by the Charging Party, the American Federation of Government Employees, Local 3588, AFL-CIO, (AFGE Local 3588/Union), a Complaint and Notice of Hearing was issued on behalf of the General Counsel (GC) of the Federal Labor Relations Authority (FLRA/Authority) by the Regional Director of the Boston Regional Office. The complaint alleges that Small Business Administration (SBA), Newark, New Jersey, (SBA Newark/Respondent), violated section 7116 (a) (1), (2) and (4) of the Statute when it issued a letter of reprimand to AFGE Local 3588 President Caroline Morton, and when it issued a verbal reprimand to Martin McHenry.

Respondent SBA filed an answer denying it had violated the Statute.

A hearing was held in New York City, New York, 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. Respondent SBA and the GC of the FLRA filed timely post-hearing briefs which have been fully considered.

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

Findings of Fact

A. Background

The American Federation of Government Employees, AFL-CIO, (AFGE) is the certified exclusive representative of a nationwide consolidated unit of SBA employees appropriate for collective bargaining including employees in SBA Newark, SBA's New Jersey District Office. AFGE Local 3588 is an agent of AFGE for representing bargaining unit employees at SBA Newark. The nationwide collective bargaining agreement (CBA) between SBA and AFGE was effective January 13, 1994.

Caroline Morton has been the President of AFGE Local 3588 since July 28, 1994, has been employed at SBA Newark for 26 years, and is a Business Opportunity Specialist. At all times material Francisco Marrero has been the SBA Newark District Director and James Kocsi has been the Deputy District Director. Richard Zilg, Supervisory Business Opportunity Specialist, has, at all material time, been Morton's and McHenry's first line supervisor.

Morton, as AFGE Local 3588 President, represents 27 employees at SBA Newark in the nationwide collective bargaining unit with respect to grievances and local level collective bargaining. Morton uses her office at SBA Newark to perform union duties. SBA Newark permitted Morton to use her office telephone for union business. The computer network at SBA Newark has had electronic mail (E-mail) since 1992.

1. The Collective Bargaining Agreement

Article 12, Section 2, provides:

a. Covered Representational Activities. The Employer agrees that Union representatives shall

be authorized such official time as is reasonable and necessary for Union representation activities. Such activities shall include, but not be limited to:

- (1) discussing and investigating complaints, grievances or appeals with bargaining unit employees;
- (2) preparing grievances and appeals of bargaining unit employees;
- (3) attending meetings with supervisors and other Agency officials;
- (4) attending grievance meetings as an employee's representative or as a Union observer when the employee is not represented by a Union representative;
- (5) holding discussions initiated by the FLRA with Union Officers and Stewards and activities carried out in response to requests from the FLRA; and
- (6) preparing and participating in statutory appeals and Unfair Labor Practice charges and complaints.

b. Activities Not Covered. Official time shall not include time spent on internal Union business, including but not limited to:

- (1) attending Union meetings;
- (2) soliciting members;
- (3) collecting dues;
- (4) posting notices of union meetings;
- (5) carrying out elections; and
- (6) preparing and distributing internal Union newsletters or other such internal documents.

Article 14, Section 3, of the CBA provides:

Section 3. FTS Usage. Union officials may use

Agency telephones for FTS and local calls for labor-management relations business except as prohibited by law. Government telephone facilities and systems shall not be used for internal Union business.

Article 14, Section 5, of the CBA provides the Union reasonable bulletin space to post "material pertaining to labor-management interests or material in the nature of communication to Union members."

Article 14, Section 6, provides:

Section 6. Use of Space and Equipment. The Employer agrees to allow the Union at any local level reasonable space and equipment for representational purposes and/or official labor-management activities. Such space may, but need not be, a private office.

2. SBA's Standard Operating Procedure (SOP)

At all times material SBA's SOP have been in effect. SOP 37 35 2, Chapter 3 is entitled "Delinquency and Misconduct Situations." SOP 37 35 2, Chapter 3, paragraph 11, entitled "Types of Misconduct," and subparagraph 11r, addresses "Unauthorized use of Government property or loss or damage to Government property."

SOP 37 52 1, Appendix 2, Table II, Item 6, provides that the appropriate penalty for a first offense for misuse of government property may range from official reprimand to a five-day suspension.

3. Procedural Notices

On October 8, 1996, the SBA issued Procedural Notice (PN) No. 9000-1017. This PN reaffirmed SBA's policy with respect to the use of the Internet, telephone system, fax machine, equipment and electronic links, and other government resources as follows:

In SBA, as in all Federal agencies, the equipment and electronic links to the Internet are Government resources. These resources are to be used only for official business; SBA expects staff to exercise appropriate judgment in using computers

and the internet . . . Information handled through these resources must be related to official SBA duties. . . .

This Procedural Notice was distributed to all employees.

On April 1, 1998, the SBA issued PN No. 9000-1046. The subject of the procedural notice was the responsible use of SBA's E-mail system. Paragraph 2 of the procedural notice provided, *inter alia*, that:

Like the Internet, Exchange E-mail is to be used only for official business . . . This restriction applies to all users of SBA computer resources, contractors as well as SBA staff. There are at least three reasons for this policy. The first is that the Agency E-mail system, like all Government computer resources and communication lines, is reserved for conducting the public's business.

This PN was issued because SBA was concerned about problems which may result when downloaded E-mail attachments are infected with viruses or are very large and tie up servers, such as the Dancing Baby or 101 Dalmatians.

B. Morton's Union Activity

1. Grievances and Unfair Labor Practice Filed by Morton

Morton filed her first grievance in November 1996. Between November 1996 and November 10, 1997, Morton filed a total of five grievances naming Kocsi, Marrero and William Boone, Economic Development Manager. All five grievances were taken through each of the three steps of the grievance procedure.

On June 9, 1997, Morton filed an unfair labor practice (ULP) charge with the FLRA, Boston Regional Office. Morton alleged that Marrero threatened an employee who had filed a grievance over her performance rating and that the Regional Administrator, Thomas Bettridge and Marrero had retaliated against Morton because of her protected activity. The unfair labor practice charge was investigated and later withdrawn.

2. Morton's Other Union Activity

When management implemented a change or did something that Morton believed was inappropriate, she acted. Kocsi believes that Morton is an effective local President and a strong advocate for employees she represents.

Morton's reacted to an April 22, 1997, E-mail notice from Kocsi that employees were only going to be allowed to take a half hour lunch. Employees at SBA Newark had been combining two fifteen minute "coffee" breaks and a thirty minute lunch period into a one hour lunch since 1971.

After receiving the E-mail, Morton requested that Kocsi negotiate the proposed change with the Union. Kocsi informed Morton that the issue was nonnegotiable and implemented the change on May 12, 1997. Morton elevated her concerns to SBA's highest level official, Administrator Aida Alvarez, questioning why the change had only been implemented in SBA Newark and requesting Alvarez's assistance in restoring the past practice. Morton continued to protest the action and between May 16, 1997 and September 11, 1997, Morton exchanged additional E-mails on the subject of lunch breaks with Alvarez, her Executive Assistant, Jenny Dominguez, and the Assistant Administrator of Human Resources, Carolyn Smith. Although Marrero was not sent copies of these E-mails, he was aware that Morton was protesting the action at a higher level.

As a result of Morton's efforts challenging the change in the lunch break, employees once again were allowed to combine coffee and lunch breaks in order to take a one hour lunch.

In September 1997, Morton also challenged Marrero's denial of a bargaining unit employee's request for a desk audit. Marrero indicated that the request was denied because the employee, Dorothy Lloyd, lacked a training course. Morton, after researching this issue, made a determination that Lloyd did not need this training course to be eligible for a promotion. On September 30, 1997, on behalf of Lloyd, Morton E-mailed Annette Martinez, Human Resources Manager, citing her research results and asking how she could appeal Marrero's denial. On November 5, 1997, Morton sent another E-mail to Martinez asking about the classification appeal process and complaining that Marrero had not signed the SF-52 for Lloyd's desk audit. Lloyd eventually received the desk audit and was promoted to a GS-12.

The record revealed that Morton also directly E-mailed Marrero on union related matters. In August 1997, Morton

E-mailed Marrero because she was concerned that external candidates were being considered and selected for positions in the New Jersey District Office, a practice which she believed conflicted with the Professional Career Development and Upward Mobility Programs. On September 11, 1997, Morton sent an E-mail entitled "cease and desist" to Martinez regarding a job announcement (JOA) sent to all employees on September 2, 1997. Both Marrero and Kocsi were forwarded the "cease and desist" E-mail.

Morton also directly E-mailed Alvarez, protesting the JOA. In the E-mail, Morton commented on Marrero and Kocsi's poor performance as managers, by stating:

Also, since our District Director arrived in 1995 and the Deputy District Director arrived in 1996, we have had nothing but problems in the New Jersey District Office. Until this time, this office never had an employee grievance. Now it appears to be a routine practice.

C. The Transit Subsidy Program and Morton's Use of E-mail

A transit subsidy is a workplace transit benefit program designed to assist employees with their transit fares to and from work. Over 77 Federal agencies participate in this program.

On September 5, 1997, Phillip Frate, President, National Council of AFGE Locals, informed Morton and other Local Presidents and Council members, that a transit subsidy program had been negotiated by the Union and the Activity at the national level, but funding was still in progress. On October 23, 1997, Frate called Morton and informed her that he and Alvarez were trying to determine how much funding would be needed for the transit subsidy program and Alvarez wanted a survey conducted for this purpose. On the same day, Morton sent an E-mail to all employees at the New Jersey District Office, on the subject of transit subsidies. The E-mail read as follows:

Great news!! The Union has successfully negotiated transit subsidies for SBA employees using public transportation (i.e. buses, trains, subways) and car pools to commute to work. However, in order to determine the budget needed for reimbursement, we need to know how many employees are interested in participating. If you are interested, please inform me by C.O.B. October 27, 1997.

Morton did not ask permission before sending the above quoted E-mail. SBA Newark did not have a policy against sending district-wide E-mail, nor had SBA Newark informed employees that they had to seek permission before sending district-wide E-mails. In the past, Morton had sent five or six district-wide E-mails, including one on summer dress attire.¹

On October 23, 1997, Morton did not notice anything unusual happening in the office. Neither Marrero, Kocsi or Zilg spoke to her about the E-mail she sent.

On the morning of October 24, 1997, Morton was informed by a Union representative, Evelyn Prentice, that although the transit subsidy program had been negotiated, Alvarez had not yet signed it. After speaking with Ms. Prentice, at 8:12 a.m. Morton sent a district-wide E-mail, stating that employees were to receive an official notice about transit subsidy from Central Office, and asked employees to disregard her E-mail of October 23, 1997. On March 9, 1998, the Assistant Administrator for Human Resources, Carolyn Smith, E-mailed all SBA employees, explaining that transit subsidies may soon become available to employees and requesting that they complete a transit subsidy survey form.²

D. Morton Receives Letter of Reprimand on November 10, 1997

Marrero did not direct anyone to conduct an investigation into Morton's actions, nor did he or any other management official speak to her before issuing her a letter of reprimand on November 10, 1997. Since Marrero became District Director in October 1994, Morton was the

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Morton was not disciplined or counseled for sending this E-mail. At the time, Kocsi was aware that Morton sent the E-mail to the entire office, but felt that it was an appropriate use of SBA Newark's E-mail. Initially, Marrero testified that he knew about the summer dress policy E-mails when they were sent. Marrero then testified that he "missed as to who sent it." Marrero testified that this was improper use of the E-mail. Marrero and Kocsi appear to have different interpretations of what is the proper use of E-mail.

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Marrero acknowledged that Smith's survey was "pretty much what Morton announced" and that the transit subsidy program is still not finalized.

first employee to be disciplined for improper use of E-mail.³ Kocsi never asked Morton why she sent the E-mails.

On November 10, 1997, Kocsi issued Morton a letter of reprimand for misuse of government property based on the E-mails of October 23 and 24, 1997. This was the first time that Kocsi or any other member of management raised the subject of the E-mails with Morton.

The letter of reprimand advised Morton that she was charged with misuse of government property, the E-mail system. The letter provided, in part:

Specifically, on Thursday, October 23, 1997, you authored an E-mail to all employees of the New Jersey District Office. Your E-mail announced that the Union had successfully negotiated transit subsidies for SBA employees using public transportation. The E-mail solicited input from district office employees so that budget requirements for reimbursement could be determined. The E-mail instructed employees to contact you by October 27, 1997 if they were interested in participating.

On October 24, 1997 you authored another E-mail to all district office employees instructing them to disregard your E-mail of October 23, 1997 because you had been informed by Central Office that all employees would receive an official notice and survey from Central Office in the near future.

This letter went on to say that Kocsi had considered all the relevant factors including, that she communicated misinformation to the entire district office staff regarding the transit subsidy which was being developed at headquarters, that she caused two disruptions in the workplace by requesting employees advise her of their interest by E-mail and then retracting her message the next day and that neither she nor any employee can make the determination to send district wide E-mails. Then after

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Kocsi testified that another employee, Howard LeForbe, was disciplined for conduct which arose out of use of agency equipment. Specifically, LeForbe was playing solitaire on the computer and reading books at his work station. However, before Kocsi resorted to disciplinary action, LeForbe, unlike Morton, was counseled about his behavior "a number of times."

citing PN No. 9000-1046, Kocsi stated, "It is not appropriate for you as an employee or as the Union President" to send district-wide E-mail. "Approval to do so must be obtained from the "District Director or myself." Kocsi also wrote that there were, to his knowledge, no mitigating circumstances.

Morton was shocked. She has worked for SBA Newark for 26 years and had never been disciplined. The letter of reprimand stated that Morton's offense was "serious for several reasons," including that she had communicated misinformation, disrupted the office, sent a district-wide E-mail without approval, and used E-mail for nonofficial purposes.

Regarding the disruption referred to in the letter of reprimand, Marrero testified that his secretary was "disrupted" because she asked him what the transit subsidy was about. No one approached Kocsi to complain about the E-mail. Kocsi claimed that he viewed Morton's E-mail as an "improper, premature announcement, something that was equivalent to internal union business, not business of the agency."

When Frate learned that Morton had been disciplined, he called Kocsi. Kocsi testified that Frate did not "justify" Morton's actions to him, but Frate did tell him that the discipline was inappropriate and explained that the transit subsidies were pending.

On November 13, 1997, Morton wrote a letter to Marrero explaining why she sent the E-mails on October 23 and 24, 1997, and requesting that he review the matter and rescind the discipline. In the letter, Morton wrote: "It was my understanding from the Union Council that this [successful negotiation] is what had occurred. . . . I also was asked by the Council President to take a survey of employees interested." Morton further recounted that she had received an E-mail from Evelyn Prentice, at SBA's Headquarters, who had indicated that Headquarters would be sending out a survey, so Morton sent a retraction on October 24, 1997. Kocsi was given a copy of Morton's letter and he recalled reading that Morton had based her actions on what she was told by Union Council. Kocsi admitted that the facts surrounding the incident would be relevant, but, he nevertheless had failed to investigate why Morton sent the E-mail.

E. Martin McHenry, a Contract Negotiator, Sends a District-wide E-mail About Purchasing Business Cards and is Disciplined for Misuse of the Agency's E-mail System

On December 1, 1997, Morton hand-delivered copies of the unfair labor practice charge, Case No. BN-CA-80113, to Kocsi and Marrero.

The next day, December 2, 1997, Martin McHenry, a Contract Negotiator, sent a district-wide E-mail, stating:

For those who I have not asked, I am coordinating an effort in obtaining business cards. The cost is \$13.94 per 500 cards. Please let me know if you are interested as soon as possible.

Five minutes after he sent the E-mail, McHenry's supervisor, Richard Zilg, called him into his office and asked him if he knew what was going on with Morton and stated that she was having problems with Management. On December 5, 1997, Zilg verbally reprimanded McHenry for using the E-mail for "nonbusiness purposes."

According to Kocsi's testimony, if McHenry had approached Kocsi about the E-mail, he would have advised him not to send it because it was personal business. Kocsi testified further that he has a business card, he uses it all the time, and it is "necessary when meeting the public . . ." and "When you go out and meet the public, invariably people say, can I have your business card in case I have to contact you. . . ."

Marrero, however, testified that if McHenry had approached him before sending the E-mail, he would have approved it and told McHenry to "go ahead, do it."

Approximately sixteen employees ordered business cards with McHenry, including his supervisor, Zilg.

On November 18, 1997, Brenda McCoy, the Administrative Officer, sent a district-wide E-mail informing employees about payment for the annual Christmas Luncheon. Soon after McHenry sent his E-mail, Morton overheard a telephone conversation between Zilg and Kocsi, during which Zilg stated that he was not going to discipline McHenry unless McCoy was also disciplined for sending out the Christmas Luncheon E-mail.⁴ Although McCoy sent the E-mail on November 18, 1997, Kocsi did not speak to McCoy about her E-mail

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Kocsi testified that he did not recall this telephone conversation with Zilg.

until after he disciplined Morton and McHenry.⁵ Kocsi merely informed McCoy of what had happened to Morton and McHenry and told her to ask permission before sending such an E-mail. McCoy was not disciplined. According to Kocsi's testimony, absent Marrero's permission to have the Christmas Luncheon, McCoy's E-mail would have been inappropriate because it is not agency business.

F. The Use of E-mail at SBA Newark

1. Use of E-mail by Morton in Her Capacity as President of AFGE Local 3588

SBA Newark allowed Morton to use E-mail for legitimate labor-management relations issues and representational purposes. Morton regularly exchanged E-mail with Kocsi, Marrero, and other management officials on union-related matters.

Approximately once a month, Morton E-mailed. Alvarez, Administrator of the SBA, about issues in SBA Newark. Morton also E-mailed bargaining unit employees about labor-management relations issues and representational issues. Likewise, Morton and Phillip Frate, President, National Council of AFGE Locals, regularly exchanged E-mail.

Prior to November 10, 1997, Morton was not aware of any restrictions with regard to sending E-mail to employees at the SBA Newark. Before November 10, 1997, the SBA had never disciplined any employee for misuse of the E-mail system or any similar offense. Employees receive between twenty to twenty five E-mails per week.

2. Employees and Supervisors, Use of E-mail for Nonofficial Purposes

It is undisputed that supervisors regularly used E-mail for nonofficial business. For example, in September 1997, Albert Gensch, Finance Manager, exchanged E-mails with individuals outside the agency on subjects including fishing trips, German beer and sausages, commuting, and wills and beneficiaries. Another supervisor, William Boone, Economic Development Manager, sent Valentine's Day and Holiday Greetings via E-mail to individuals outside the agency.

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Kocsi originally testified that he spoke to McCoy before McHenry was disciplined, but then he testified that he could "not recall the exact time that I had the conversation" and "Maybe Brenda [McCoy] is mistaken. Maybe I am mistaken."

Boone also sent a graphic of Santa Claus and his reindeers to eleven employees.⁶

Employees in the bargaining unit also used the E-mail system to send and receive personal E-mails. Employees sent E-mails to all employees on subjects like birthdays, baby showers, food drives, holiday greetings, death announcements, and birth announcements.

The computer system at SBA Newark is setup so that it automatically forwards E-mail sent to Marrero to Kocsi. Kocsi has "full knowledge" of every E-mail Marrero receives.⁷

According to Marrero, employees are only allowed to use the E-mail for official business and these rules concerning E-mail apply equally to members of management and bargaining unit employees. Kocsi testified that, with regard to misuse of E-mail, supervisors are subject to "the same discipline, if not more severe, because a manager should be even more accountable to the agency rules and regulations than an employee.

G. The Statute

Section 7116(a) of the Statute provides, in relevant part:

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency--

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in

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Marrero testified that the E-mails he produced pursuant to a subpoena duces tecum were not all of the E-mails that were generated from April 1, 1997 to December 31, 1997, (the requested period) and that he is "sure there were a lot of E-mails back then that might have been received and deleted."

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Because of this automatic forwarding of the E-mails and the general circumstances of this relatively small district office, I do not credit Kocsi's testimony that he did not recall ever receiving any E-mail invitations about baby showers, birthdays, holiday greetings or things of that nature.

connection with hiring, tenure, promotion, or other conditions of employment;

* * *

(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter[.]

* * *

Discussions and Conclusions of Law

The GC of the FLRA alleges that SBA Newark violated section 7116(a)(1), (2) and (4) of the Statute by issuing a written reprimand to Morton and by verbally admonishing McHenry.

In *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*), the Authority addressed the analytical framework for alleged violations of section 7116(a)(2) of the Statute. The same analytical framework was applied to alleged violations of section 7116(a)(4) in *Federal Emergency Management Agency*, 52 FLRA 486 (1996). The Authority affirmed that in such cases the General Counsel bears the burden of proving, by a preponderance of the evidence, that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connections with hiring, tenure, promotion, or other conditions of employment. See *Letterkenny*, 35 FLRA at 118. Once a *prima facie* case is established, a respondent will not be found to have violated section 7116(a)(2) only if it can demonstrate by a preponderance of the evidence that there was a legitimate justification for its actions and the same action would have been taken in the absence of the protected activity. *Department of Health and Human Services, Regional Personnel Office, Seattle, Washington*, 47 FLRA 1338, 1342 (1993). The General Counsel may also seek to establish that the proffered reasons are pretextual.

A. Caroline Morton

1. Morton's Protected Activity

It is undisputed that Morton was very actively engaged in protected activity on behalf of AFGE Local 3588 and Marrero and Kocsi had knowledge of her activity. In the year leading up to her discipline, Morton filed a total of five grievances and one ULP charge in June 1997. The

supervisors named in the grievances were Marrero and Kocsi and the ULP charge filed in June 1997, named Marrero and Regional Administrator Thomas Bettridge. In addition to the grievances and ULP charge, Morton openly criticized Kocsi and Marrero's shortening of employees' lunch hour, their denial of a desk audit and lack of support for career-development programs. When she was dissatisfied with Kocsi and Marrero's response to her protests, Morton was quick to elevate her concerns to Administrator Alvarez and often sought to have Alvarez override their decisions. Management clearly was aware of Morton's protected activity. In some instances, Marrero and Kocsi were forwarded E-mails that Morton sent directly to Human Resources about problems in SBA Newark, and at other times, Marrero was contacted and informed that Morton was protesting his actions at a higher level. Morton's efforts at challenging management were often successful. For example, during the time period involved in the events of this case, from mid to late 1997, Morton succeeded in restoring employee lunch breaks to one hour and in obtaining a desk audit, which led to a promotion to a GS-12, for a bargaining unit employee and she specifically criticized Marrero and Kocsi in E-mails she sent to Alvarez.

2. SBA Newark Issued the Letter of Reprimand Because Morton Had Engaged in Protected Activity

Discriminatory motivation needed to establish a violation of section 7116(a)(2) of the Statute may be demonstrated by circumstantial, as well as direct, evidence. *See Department of the Treasury, United States Customs Service, Region IV, Miami, Florida*, 19 FLRA 956, 970 (1985).

The two E-mail messages for which Morton was disciplined were E-mail messages she was sending in her capacity as AFGE Local 3588 President about the status of collective bargaining at the national level concerning the transit subsidy. Clearly this communication is activity on behalf of the union and is protected.

Further, the record clearly establishes that up until November 10, 1997, SBA Newark permitted Morton to use E-mail for labor-relations and representational purposes. However, starting in about June 1997 Morton became increasingly vocal in her objections to Kocsi and Marrero's actions including unfavorable references to Morton and Kocsi in E-mails to their superiors. Then, without warning or any investigation, SBA Newark issued Morton the official letter of reprimand. This suspicious timing raises an inference of discriminatory motivation on the part of SBA Newark.

a. Disparate Treatment

Bargaining unit employees and supervisors had used the E-mail system for personal nonofficial purposes without suffering any discipline.⁸ In this regard Marrero admitted that he had received and was aware of such nonofficial business E-mails and Kocsi's testimony that he was unaware of any such messages is discredited. In this regard, I note that Kocsi received all copies of E-mails sent to Marrero. Further, noting the relatively small size of SBA Newark, I conclude that Marrero and Kocsi were well aware that both employees and supervisors used the E-mail extensively for personal, nonofficial purposes and no one was disciplined until Morton.

This disparate treatment of Morton, the union activist, with respect to her use of E-mail on union business as compared to all other employees and supervisors who used E-mail for nonofficial business is persuasive evidence of discriminatory motivation on the part of SBA Newark.⁹

Similarly LeForbe was disciplined for misuse of agency equipment only after he had been counseled a number of times by his first line supervisor. Morton, who was engaged in protected activity, was never warned or counseled that SBA Newark thought her conduct was improper. The first she knew about it was the receipt of her discipline. Again she was treated differently than the employee who had not engaged in protected activity. This is yet another example of disparate treatment that is persuasive evidence of discriminatory motivation on the part of SBA Newark. Also, the failure of SBA Newark to discipline McCoy for use of the E-mail for nonofficial business purposes was another example of disparate treatment. Finally, even McHenry, an alleged discriminatee, was given a lesser punishment, the verbal admonishment, for the same alleged offense as Morton-- another example of disparate treatment that is persuasive evidence of discriminatory motivation.

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Except for McHenry, who will be discussed below.

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This disparate treatment is evidence of discriminatory motivation. Since such disparate treatment is present in this case, I need not decide whether such disparate treatment is necessary to establish a violation. See *American Federation of Government Employees, AFL-CIO, et al.*, 51 FLRA 1427, 1439 (1996), or whether it is just one kind of evidence that may be considered, if presented. The Authority clarified its position in *305th Air Mobility Wing, McGuire Air Force Base, New Jersey*, 54 FLRA No. 108, slip op. at 3 n.2 (1998).

b. Pretext

This inference of illegal motivation is further strengthened by the fact that the asserted reasons for the discipline outlined in the letter of reprimand do not withstand scrutiny.

The first reason upon which SBA Newark relied, in part, was a nonexistent prohibition against sending district-wide E-mail, stating: ". . . neither you or any other employee can unilaterally make the determination to send district-wide E-mail . . ." and "It is not appropriate for you, as an employee or as the Union President, to send district-wide E-mail. Approval to do so must be obtained from the Director or myself." Despite his reliance on this policy in the letter of reprimand, Kocsi testified that there was no policy against sending district-wide E-mail. Morton, McCoy and McHenry also had no knowledge of such "policy." The second reason relied on was PN No. 9000-1046, published in April 1997, but this PN does not prohibit the use of E-mail for a legitimate purpose. The PN is a warning to employees about downloading attachments because of viruses and fears of "bogging down" the server. In this regard Morton's E-mail messages were business related. The third reason relied upon was disruption in the workplace caused by the E-mail in question. The record revealed no evidence of any true disruption in the workplace, except for a few inquiries about transit subsidies, a workplace benefit. It should be noted that SBA sent out essentially the same information as Morton five months later. Finally, the offense of "miscommunication of information" is inaccurate given the fact that Morton immediately retracted the E-mail and that the Administrator just had not given final approval to the transit subsidy policy.

In light of foregoing, I conclude the reasons given in the letter of reprimand were pretexts to conceal the discriminatory motivation for the discipline issued to Morton.

c. SBA Newark Had No Rule Limiting Nonofficial Use of E-mail

Although Marrero and Kocsi claim that there was a rule against the use of E-mail for nonofficial purposes, I conclude that no such rule existed or was enforced on SBA Newark.

Thus, as discussed above the employees and supervisors at SBA Newark widely used E-mail for nonofficial purposes,

with the knowledge of Marrero and Kocsi, and no one, until Morton, was either disciplined for this conduct, nor is there any evidence that employees and supervisors had been warned to refrain from this conduct or told that this conduct was forbidden. Further PN No. 9000-1046, although expressed in terms of limiting the use of E-mail for official use, was clearly aimed at downloading large files that used up storage space and fear of viruses. Exactly what E-mail usage would be considered official business was not defined in the PN and, apparently, until Morton's transmissions, it was loosely construed and applied in SBA Newark. There is no evidence in the record establishing that SBA Newark was operating improperly in its application of this PN prior to the disciplining of Morton.

Accordingly, I conclude that SBA Newark had no rule or practice limiting the use of E-mail to official business, in the sense that employees and supervisors were not permitted to send personal messages on the E-mail. Further, I conclude, using E-mail to advise employees and supervisors about the status of bargaining at the national level over the transit subsidy could reasonably be construed by Morton as official business. In this regard I note Marrero provided the district office with virtually the same information some five months later.

However, even if SBA Newark had a valid rule prohibiting the use of E-mail for nonofficial business, it can not apply that rule in a discriminatory way. Thus, although employees and supervisors used E-mail for nonofficial business and Marrero and Kocsi knew this, until November 10, 1997, the rule was only applied to Morton's union activity when she was disciplined. Although a union may not have a statutory right to use E-mail and an employer can uniformly enforce a rule prohibiting the use of E-mail by employees for all nonofficial purposes, if the employer permits the use of E-mail for personal messages, it cannot discriminate against Morton and the AFGE Local 3588 for posting union messages. Cf. *Eaton Technologies, Inc.*, 322 NLRB 848 (1997) (*ETI*). Such discriminatory application of the rule constitutes a violation of section 7116(a)(1) and (2) of the Statute.

d. The Collective Bargaining Agreement (CBA)

SBA Newark points to CBA Article 14, Section 3, which provides that government telephone facilities shall not be used for internal union business and Article 14, Section 5 which provides AFGE Local 3588 with bulletin board space for material in the nature of communication to union members. Finally SBA Newark points to Article 14, Section 6 which

provides that SBA Newark will allow AFGE Local 3588 reasonable space and equipment for representational purposes and/or official labor-management activities.

SBA Newark argues the CBA limits the use to which the union can put agency space and equipment. Thus, it argues that AFGE Local 3588 can use agency space and telephone equipment only for representational purposes and/or official labor management activities.

SBA Newark argues that the use of the E-mail was a breach of the CBA and does not constitute protected activity. SBA Newark then cites *Federal Election Commission*, 20 FLRA 20 (1985), arguing that because an agency has discretion to control access to bulletin boards, it has even a greater interest in controlling access and use of E-mail, which is far more central to the agency's operation than is access to bulletin boards. However, it must be noted that an agency cannot discriminatorily limit a union's use of a bulletin board if it lets other employees post nonunion notices. See, *Id.* at 21 and *ETI*, 322 NLRB at 848.

The CBA does not, by its terms prohibit the use of the E-mail for the purposes Morton used it. The CBA provides in Article 14, Section 6 that SBA Newark will provide AFGE Local 3588 space and equipment to be used for "representational purposes and/or official labor management activities." Article 14, Section 3 provides that union officials may use the agency telephones for FTS and local calls for labor-management relations business, except as prohibited by law.

Morton was advising all of the employees in the unit, as well as supervisors and managers, of the status of national negotiations and about a condition of employment. Although "labor management activities" and "labor management relations business" are not defined in the CBA, I conclude that advising the employees of SBA Newark of the status of national bargaining and about the conditions of employment being negotiated would reasonably be included within the phrases "labor management activities" and "labor-management relations business." In this regard I reject the argument that this was merely internal union business. Similarly, with respect to the use of official time for representation purposes, as set forth in Article 12, Section 2a., the E-mail communications in question do not fall within the examples of representation activities, which are not all inclusive. However the E-mail does not fit within the

examples of internal union business set forth in Article 12, Section 2b.10

Thus, I find the CBA is silent on the use of official time for sending the E-mail in question, but does permit the use of agency equipment, space and telephones for this activity. Accordingly, the use of the E-mail by Morton did not constitute a violation of the CBA.11

In this regard, it must be noted that the letter of reprimand did not refer to or rely on any breach of the CBA by Morton.

Accordingly, I conclude that Morton's use of the E-mail did not violate the terms of the CBA, or the manner in which the CBA was administered in SBA Newark. Thus the CBA does not justify SBA Newark's letter of reprimand to Morton. This reliance on the CBA again is just a pretext on the part of SBA Newark to conceal its discriminatory motivation.

3. SBA Newark Violated Section 7116(a) (1) (2) and (4) of the Statute

In light of the foregoing I conclude that Morton was issued the November 10 letter of reprimand because she had engaged in conduct protected by section 7102. Accordingly, by issuing this letter SBA Newark violated section 7116(a) (1) and (2) of the Statute. Further, since one part of Morton's protected activity for which Morton was disciplined consisted of filing an unfair labor practice charge in June of 1997, I conclude SBA Newark also violated section 7116(a) (1) and (4) of the Statute.

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Section 7131 of the Statute prohibits conducting internal union business, such as solicitation of membership, elections of union officials and collection of dues, on official time. This definition of internal union business is narrowly construed and relates to the internal structure of the union. See, *National Association of Government Employees, SEIU, AFL-CIO and Veterans Administration Medical Center, Brockton/West Roxbury, MA*, 23 FLRA 542, 543-44 (1986). Thus the E-mails of October 23 and 24, 1997, did not constitute internal union business within the meaning of the Statute.

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If I am incorrect in this regard, I note that in the past SBA Newark was aware that Morton used the E-mail to communicate with management and union officials about conditions of employment and it took no action. Thus in SBA Newark any such prohibition was ignored and modified by this past practice.

B. Martin McHenry

1. Protected Activity and Motivation

The record fails to establish that McHenry was engaged in any activity on behalf of AFGE Local 3588 or was actively engaged in any activity protected by section 7102 of the Statute.

The record herein establishes that the E-mail for which McHenry was punished involved a matter that was closely related to work and helped employees perform their jobs. No official of SBA Newark had advised employees that they could not use the E-mail for non "official" purposes or that permission had to be received to send a district wide E-mail. Further, use of the E-mail by employees and supervisors for nonofficial purposes, prior to Morton's situation, had been wide spread and no employee had been punished.

Morton's E-mail was sent on December 2, 1997, the day after Morton had delivered the unfair labor practice charge in this case to Kocsi and Marrero. Immediately after he sent the E-mail, his supervisor called him in and said that Morton was having problems with management over the use of E-mail. On December 5, 1997, the supervisor reprimanded McHenry for using the E-mail for nonbusiness purposes.¹² Such timing is significant in determining the motivation for an action. *U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts*, 51 FLRA 1520, 1528 (1996) and *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020 (1994).

In light of the lack of any expressed policy against using the E-mail for nonbusiness purposes and the timing of the discipline against McHenry in relation to the filing of the unfair labor practice charge by Morton in this case, I conclude that McHenry was reprimanded by SBA Newark in an attempt to conceal its discriminatory action against Morton. McHenry was being used as a "cover." He was reprimanded so that SBA Newark could contend they did have a policy against the use of E-mail for nonbusiness purposes, when there, in fact, had been no such policy.

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McHenry's supervisor Zilg was not called as a witness and thus did not explain his statement to McHenry about Morton or to explain the reprimand. Accordingly, I draw an adverse inference from this failure. *United States Department of Justice, Immigration and Naturalization Service*, 51 FLRA 914, 925 (1996).

2. Reprimand Violated Section 7116(a) (1) and (2) of the Statute, but Not Section 7116(a) (4)

McHenry was disciplined not because he engaged in protected activity, but, rather, as a cover to attempt to conceal SBA Newark's discriminatory action against Morton because she had engaged in conduct protected by section 7102 of the Statute. In such a circumstance, I conclude that a *Letterkenny* analysis is not appropriate for determining if the verbal reprimand of McHenry constituted a violation of section 7116(a) (1) and (2) of the Statute.

Section 7116(a) (2) of the Statute does not, by its own terms, require that a discriminatee be engaged in protected activity. Rather, it proscribes discrimination in conditions of employment against an employee where the result is to encourage or discourage membership in any labor organization. Discriminating against an employee, where the purpose is to conceal unlawful discrimination against another employee because that employee had engaged in protected activity on behalf of a labor organization would, necessarily, have the effect of discouraging membership and support for the labor organization.

In light of the foregoing, I conclude that SBA Newark violated section 7116(a) (1) and (2) of the Statute when it issued the verbal reprimand to McHenry for the purpose of concealing its unlawful discrimination against Morton.

Section 7116(a) (4) of the Statute prohibits discriminating against an employee because the employee filed a complaint. The record fails to establish that McHenry had engaged in any of the conduct set forth in this section of the Statute. Thus the reprimand of McHenry was not motivated by his having engaged in any activity protected by section 7116(a) (4) of the Statute.¹³ Accordingly, I conclude SBA Newark did not violate section 7116(a) (4) of the Statute when it issued the reprimand to McHenry.

C. Remedy

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Although Morton had filed an unfair labor practice charge in this case and such charge was the proximate cause of the reprimand to McHenry, section 7116(a) (4) of the Statute requires, in order for the McHenry's reprimand to constitute a violation of this section, McHenry must be the person who engages in the protected conduct.

Having concluded that Respondent violated section 7116 (a) (1), 2) and(4) of the Statute with respect to the letter of reprimand issued to Morton and section 7116(a) (1) and (2) with respect to the verbal reprimand issued to McHenry, I recommend the Authority adopt the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Small Business Administration, New Jersey District Office, Newark, New Jersey, shall:

1. Cease and desist from:

(a) Discriminating against employees through written or verbal reprimands or other disciplinary action because they or other employees engage in protected activities on behalf of the union.

(b) Discriminating against employees through written reprimands because they file a complaint, affidavit, or petition, or have given any information under the Statute.

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

2. Take the following affirmative action designed and found necessary to effectuate the policies of the Statute:

(a) Rescind the letter of reprimand issued to Caroline Morton on November 10, 1997 and expunge all records of it from her personnel records and advise her in writing that such action has been taken and that the counseling will not be used against her in any way.

(b) Rescind the oral admonishment issued to Martin McHenry on or about December 5, 1997, and expunge all records of it from his file and advise him in writing that such action has been taken and that the counseling will not be used against him in any way.

(c) Post at its facilities in Newark, New Jersey, where bargaining unit employees represented by the American Federation of Government Employees, Local 3588, are located, copies of the attached notice on forms to be furnished by the Federal Labor Relations Authority at the Small Business

Administration's New Jersey District Office. Upon receipt of such forms, they shall be signed by the District 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 section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Boston Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, October 21, 1998.

—

Judge

SAMUEL A. CHAITOVITZ
Chief Administrative Law

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Small Business Administration, New Jersey District Office, Newark, New Jersey, has violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

We hereby Notify our employees that:

WE WILL NOT discriminate against Caroline Morton by issuing her a letter of reprimand because she engaged in protected activity on behalf of the American Federation of Government Employees, Local 3588, AFL-CIO, or because she filed an unfair labor practice charge.

WE WILL NOT discriminate against Martin McHenry by giving him a verbal admonishment because Caroline Morton engaged in protected activity on behalf of the American Federation of Government Employees, Local 3588, AFL-CIO.

WE WILL NOT discriminate against other employees in the bargaining unit because of their or Caroline Morton's protected activity on behalf of the American Federation of Government Employees, Local 3588, AFL-CIO.

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

WE WILL rescind the letter of reprimand issued to Caroline Morton and expunge all records of it from her personnel records and advise her in writing that such action has been taken and that the counseling will not be used against her in any way.

WE WILL rescind the verbal admonishment issued to Martin McHenry and expunge all records of it from his personnel records and advise him in writing that such action has been taken and that the counseling will not be used against him in any way.

—
Administration

Small Business

Newark, New Jersey

Dated: _____

By: _____

District director

New jersey district office

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, Boston Regional Office, Federal Labor Relations Authority, whose address is: 99 Summer Street, Suite 1500, Boston, MA 02110, and whose telephone number is: (617) 424-5730.

CERTIFICATE OF SERVICE

I certify that copies of this **DECISION** issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case No. BN-CA-80113, were sent to the following parties:

CERTIFIED MAIL AND RETURN RECEIPT

CERTIFIED NOS:

Julie McCarthy, Esquire
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110

P168-059-601

Mark Vita, Esquire
SBA, 7th Flr.
633 17th Street
Denver, CO 80202

P168-059-602

Caroline Morton, President
AFGE, Local 3588
2 Gateway Center, 4th Flr.
Newark, NJ 07102

P168-059-603

REGULAR MAIL:

Bobby Harnage, President
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CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: OCTOBER 21, 1998
WASHINGTON, DC