

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

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164, AFL-CIO Respondent	
and CARYN CAISSE, an Individual Charging Party	Case No. BN-CO-80553

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 **JULY 12, 1999**, and addressed to:

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

GARVIN LEE OLIVER
Administrative Law Judge

Dated: June 10, 1999
Washington, DC

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

MEMORANDUM
1999

DATE: June 10,

TO: The Federal Labor Relations Authority

FROM: GARVIN LEE OLIVER
Administrative Law Judge

SUBJECT: AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 1164, AFL-CIO

Respondent

CO-80553

and

Case No. BN-

CARYN CAISSE, an Individual

Charging Party

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

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 99-31
WASHINGTON, D.C.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1164, AFL-CIO Respondent	
and CARYN CAISSE, an Individual Charging Party	Case No. BN-CO-80553

Andrew F. Krall
William Ross
Representatives of the Respondent

Caryn Caisse
Pro Se

Lawrence L. Kuo
Gary J. Lieberman
Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER
Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that Respondent (AFGE, Local 1164/Union) violated section 7116(b) (1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. § 7116(b) (1) and (2), and independently violated section 7116(b) (1), when the Union's president, Andrew Krall, wrote a letter to Salem District Office, Social Security Administration (SSA), requesting that the district director investigate and take remedial action against the Charging Party (Caryn Caisse). The complaint alleges that the Union wrote the letter because Caisse was not a member of the Union and the Union believed that Caisse had made derogatory comments regarding the Union and/or officials of the Union.

The Union's answer admitted the jurisdictional allegations of the complaint and that the Union wrote such a letter, but denied that it was for reasons that violated the Statute.

For the reasons explained below, I conclude that a preponderance of the evidence does not support the alleged violations and recommend that the complaint be dismissed.

A hearing was held on April 5, 1999, in Boston, Massachusetts. The parties were represented and afforded a full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. The Union and the General Counsel filed helpful briefs. Based on the entire record, including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

A. *SSA, the Union, and the Charging Party*

SSA Salem District Office, Salem, Massachusetts, provides services to the public pursuant to various SSA programs. It is staffed by two management officials, an operations supervisor and a district manager, and approximately fifteen non-management employees, including service representatives, claims representatives, and an administrative support staff.

AFGE, AFL-CIO, is the exclusive representative of a nationwide consolidated unit of employees appropriate for collective bargaining at SSA. AFGE, Local 1164, is an agent of AFGE for the purpose of representing SSA employees, including service representatives, in the six New England states, including bargaining unit employees at the Salem District Office.

Andrew Krall has been the Union's president since May 1994. He is employed as a claims representative in the SSA's Worcester District Office, which is located approximately 80 to 90 miles away from SSA's Salem District Office.

William Ross is a teleservice contact representative at SSA's Boston teleservice center. He has been the Union's area two vice president since November 1993.

William H. Thoms, Jr., a SSA claims representative, is the Union's steward at the Salem District Office. Mr. Thoms has held this position for about the last five or six years and spends about ten to fifteen percent of his duty time in his capacity as the Union's steward.

The Charging Party, Caryn Caisse, is an employee under 5 U.S.C. § 7103(a)(2) and a member of the bargaining unit represented by the Union. Ms. Caisse has been employed as a service representative for about four years and has been employed with SSA for almost 12 years.

B. The Union Distributes Information Concerning Workflow Changes to its Members at the Salem District Office

On May 26, 1998, Mr. Thoms sent an electronic mail (e-mail) message to Union members only entitled, "Poll re proposed workflow changes." Thoms did not send Union members a copy of management's proposed changes, which he had received, but he summarized the proposed changes in his message and asked members to comment on various options he laid out or to propose their own solutions so that he could bargain with management.

Thoms did not provide a copy of this message to Ms. Caisse. Ms. Caisse has never been a member of the Union nor has she ever paid dues to the Union. In July 1998, Ms. Caisse was the only bargaining unit employee at the Salem district office who was not a member of the Union.

Ms. Caisse and Mr. Thoms were not personal friends. They were distant and cool on a personal basis and dealt with one another professionally on a strictly business-like basis.

Ms. Caisse found out about Mr. Thoms's e-mail message by being shown a copy by another service representative. The next day, Ms. Caisse contacted Mr. Thoms to request a copy of the workflow change and to be included in receiving future changes.

Mr. Thoms understood from Ms. Caisse's request that she was dissatisfied about not being included in his e-mail poll of Union members. Thoms told Ms. Caisse that, if she wanted input into the Union's position, she should join the Union. He said if she had a problem with the way the change was implemented by management, he would represent her if she wanted to file a grievance. Ms. Caisse informed Mr. Thoms that she did not wish to join the Union and did not wish to file a grievance.

Later that day, Mr. Thoms sent an e-mail message to Mr. Krall, with a copy to Ms. Caisse, regarding his conversation with Ms. Caisse and asked Mr. Krall if the statements he had made to Ms. Caisse were correct. Mr. Thoms's message, titled "Protest by non-member," described Ms. Caisse as a "Non-member [service representative] Caryn Caisse, (former clerical in the [area director's] office and [administrative assistant] in the Boston [district office])."

The following day, Ms. Caisse asked Mr. Thoms whether Mr. Krall had informed him if he were correct. Mr. Thoms told Ms. Caisse that, according to Mr. Krall, Ms. Caisse did not have the right to receive the polls under the duty of fair representation. Ms. Caisse replied that she did not wish to be polled but only wanted to know about changes in her workflow. Mr. Thoms further discussed the duty of fair representation and stated that if she wanted to get the mailings, she knew what to do; that before Ms. Caisse came to the office it was one hundred percent union and he would like to see it that way again.¹

C. Collective Bargaining Agreement and SSA Annual Personal Reminders Re Courtesy

Article 3, Section 2A of the 1996 Collective Bargaining Agreement provides, in pertinent part:

The parties agree that in the interest of maintaining a congenial work environment, both supervisors and employees will deal with each other in a professional manner and with courtesy, dignity, and respect.

Section B of the 1997 SSA Annual Personnel Reminders provides, in pertinent part:

You are responsible for observing the requirements of courtesy and consideration while dealing with

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The complaint does not allege that the Union violated the Statute by not including the Charging Party in its polling about work flow changes. The General Counsel points out that this evidence shows that the Union's President, Mr. Krall, was on notice of the Charging Party's status as a non-member.

Mr. Krall acknowledged that he knew of Ms. Caisse "since the polling incident in May of 1998."

coworkers or serving the public and must conduct yourself with propriety.

D. Proposed Suspension of Thoms

On July 10, 1998, Mr. Thoms' suspension for two days was proposed for, among other things, writing an e-mail message to the staff which contained "rude and discourteous remarks regarding the District Manager" which "not only embarrassed the Manager but also caused a disruption in the office by upsetting the staff." The notice stated that this conduct violated the courtesy provisions of "Section B of the Annual Personnel Reminders booklet." The notice also stated that Supervisor Rice, in considering the proposed suspension, "considered the fact that, despite several discussions, [Thoms'] continue[s] to be rude and discourteous to management."

On July 13, 1998, Union vice president William Ross, as Thoms' representative, requested the materials used as the basis for the proposed action. Included in the package he received were two documents which indicated to Ross that Ms. Caisse was one of the employees who had expressed the view to management that Thoms' e-mail comments concerning the district manager were not personally approved of and were offensive.

The same day that Ross received the material he contacted both Thoms and Krall to advise them of the agency's basis for the proposed suspension, including the apparent comments by Caisse.²

E. Another Protest by Ms. Caisse

After another polling of Union members by Thoms in late June 1998, Caisse contacted Union vice president Ross in the Boston teleservice center sometime around July 13 or 14, 1998, and requested to file a grievance against Thoms for harassment for not including her in the polling in the office. Ross explained that there was no provision for filing a grievance between employees, but she could file a grievance against management if she wished.

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Ms. Caisse testified that, in a conversation with management about Thoms' e-mail comments concerning the district manager, she did express the view that she did not personally approve of Thoms' comments and thought they were offensive, but she did not suggest that Thoms should be disciplined or state that she was angry with Thoms because of the message.

Ross was aware of Caisse's previous complaint to Thoms so he advised Thoms to avoid Caisse and not come in direct confrontation with her.

F. *The July 21, 1998, Conversation*

On July 21, 1998, Ms. Caisse was at her desk conversing with coworkers Denise Putnam and Tracy Clothey, who were also at their desks a few feet away. During this conversation, Ms. Caisse, Ms. Putnam, and Ms. Clothey were discussing the suicide of Dennis Wilson, a SSA employee of the Brookline, Massachusetts Office. While Ms. Caisse, Ms. Putnam, and Ms. Clothey were engaged in this conversation, Mr. Thoms walked by.

Ms. Caisse incorporated Mr. Thoms into the conversation and asked Mr. Thoms if he knew Dennis Wilson. Mr. Thoms asked whether Wilson was one of the Beach Boys, a reference to the musical group. Ms. Caisse answered "No," and explained that Mr. Wilson was a claims representative who had committed suicide by jumping off the roof of the Brookline SSA office building.

Thoms said, "Why should I know him?" Caisse replied, "Well, I thought you might know of him because he was a loudmouth [or big mouth] who worked with Bill Ross [Union vice president] and I thought the union might know of him."³

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Thoms testified that Caisse used the words "union loudmouth or union big mouth" to describe Wilson. Ms. Caisse denied that she used these words, but did say Wilson "could be loud and obnoxious." Clothey testified that Caisse's words were, "I thought you might know of him because he is a loudmouth and I thought the union might know of him." Clothey testified that Caisse said "loudmouth or big mouth or something like that" and Thoms seemed offended when he heard "union" and "loudmouth" or "big mouth."

I find from the composite testimony, and particularly that of Clothey, that the words "union" and "loudmouth" or "big mouth" were not used together by Caisse in referring to Wilson, but were used in the same sentence. Given the guarded relations between Caisse and Thoms, I conclude that Thoms could have reasonably gained the impression that the words were used together as a derogatory reference to him and the deceased, or as stated in the Union's letter set forth below, "went on to suggest that Bill should know the deceased because he had worked with Bill Ross and was a 'union loud mouth'."

Mr. Thoms replied to Ms. Caisse, "Why, should I go and jump off a building now too?".⁴Thoms then left the area and the conversation ended.

Later that day both Caisse and Thoms discussed their versions of the conversation with Supervisor Rice.

Thoms reported the incident by e-mail to Union president Krall who was out of town at the time. Upon return and after reviewing the message, Krall contacted Thoms and offered to send a letter to District Manager Stone.

G. *Krall's July 27, 1998, Letter to District Manager Stone*

On July 27, 1998, Union president Krall wrote to District Manager Stone, in pertinent part:

I'm sure you're aware of the tragic death of Dennis Wilson, an SSA employee in the Brookline office. Unfortunately, it seems that one Salem employee chose to try and disgrace Dennis' memory and the union with a highly rude, inflammatory comment. Shortly after learning of the tragedy, she approached Bill Thoms, advised him that the person had committed suicide, then went on to suggest that Bill should know the deceased because he had worked with Bill Ross and was a "union big mouth."

You recently proposed to suspend Bill Thoms for two days for much less provocative and damaging actions. I expect you to promptly investigate this matter and initiate remedial action. If you fail to do so and report back to me by August 5, 1998, I will assume you condone those hideous slurs and initiate appropriate action of my own.

Krall sent copies of the letter to SSA regional commissioner and area director and also to Union officials,

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Mr. Thoms could not recall making any comment to this effect. He claimed that he "mumbled something about how I was sorry for him and his family and immediately left the area."

including Thoms, but he did not send it to Caisse or other bargaining unit employees in Salem.

On the morning of July 29, 1998, Ms. Caisse's first-line supervisor, Elaine Rice, spoke with Caisse and showed her the letter from the Union. After Caisse described her recollection of the conversation, she asked Rice what was her understanding of "remedial action." Rice explained that it could be disciplinary action, possibly including a suspension or placing something in Caisse's personnel file, but no decision had been made, and she just wanted Caisse's side of the story. Later, Caisse obtained a copy of the letter and shared it with other unit employees.

By letter dated August 3, 1998, District Manager Stone replied to Mr. Krall's July 27, 1998, letter. The letter stated, in pertinent part:

I am responding to your letter dated July 27, 1998, regarding an alleged incident in the Salem Social Security office. Upon investigation of the matter, your stated version of events could not be verified. While we have concluded no action can be taken based upon your allegations, let me assure you that rude or discourteous behavior by any employee in the Salem office is not condoned. (Resp. Exh. 6.)

Mr. Krall was not satisfied with Ms. Stone's response and filed a grievance against SSA on August 5, 1998.⁵

Discussion and Conclusions

As noted, the unfair labor practice complaint alleges that the Union violated section 7116(b)(1) and (2) of the Statute, and independently violated section 7116(b)(1), when Union president Andrew Krall wrote the Salem district office, requesting that the district director investigate and take remedial action against Caryn Caisse. The complaint alleges that the Union wrote the letter because Caisse was not a member of the Union and the Union believed that Caisse had made derogatory comments regarding the Union and/or officials of the Union.

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The grievance seeks remedies including a new and complete investigation of Ms. Caisse's statements concerning Wilson. The grievance is pending arbitration.

The record reflects that the Union requested SSA to investigate and take remedial action because "it seems one Salem employee [Ms. Caisse] chose to disgrace Dennis' [an employee who committed suicide] memory and the union with a highly rude and inflammatory comment" by stating to Union steward Bill Thoms that he should know the person "because he had worked with Bill Ross [Union vice president] and was a 'union big mouth'." The Union stated that if SSA "fail [ed] to do so and report back to me by August 5, 1998, I will assume you condone those hideous slurs and initiate appropriate action of my own."

Section 7102 of the Statute guarantees to each employee of the Federal Government the right, freely and without fear of penalty or reprisal, to form, join, or assist a labor organization, or to refrain from any such activity, and to be protected in the exercise of such right. Section 7102 of the Statute protects an employee's right to speak out for or against a union. *American Federation of Government Employees, Local 3475, AFL-CIO*, 45 FLRA 537, 549 (1992) (*AFGE, Local 3475*); *Overseas Education Association*, 11 FLRA 377 (1983) (*OEA*).

A labor organization's interference with section 7102 rights is an unfair labor practice under section 7116(b)(1), and an effort to have a bargaining unit employee disciplined because the employee engaged in such protected activity violates section 7116(b)(1) and (2) of the Statute. *AFGE, Local 3475* (union violated Statute by attempting to have agency discipline an employee for misuse of government time and equipment where union representatives were involved in the same unauthorized use and the real motivation was employee's protected activity of criticizing union officers); *OEA* (union violated Statute by requesting agency to discipline an employee for improper use of equipment where practice permitted other employees to so use the equipment and real motivation was the employee's distribution of an open letter critical of the local president). Cf. *Sheet Metal Workers International Association, Local 97*, 7 FLRA 799 (1982) (union attempt to have agency discipline an employee with a long record of anti-union activity for an assault upon a union steward did not violate the Statute; union was reacting to threats to health and safety, disruption of work, and justifiable alarm that agency was not taking appropriate action).

A. *The Respondent Did Not Violate Section 7116(b)(1)*

As the Authority stated in *American Federation of Government Employees, Local 987, Warner Robins, Georgia*, 35 FLRA 720, 724 (1990):

The standard for determining whether a union's statement violates section 7116 (b) (1) of the Statute is an objective one. The question is whether, under the circumstances, employees could reasonably have drawn a coercive inference from the statement. See *Federal Employees Metal Trades Council, AFL-CIO, and International Association of Bridge, Structural and Ornamental Iron Workers, Local 745, AFL-CIO, Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 12 FLRA 276, 296 (1983) (*Federal Employees Metal Trades Council*). As in cases involving a violation of section 7116(a) (1) of the Statute, the standard for a section 7116 (b) (1) violation is not based on the subjective perceptions of the employee or on the intent of the speaker. See *Department of the Army Headquarters, Washington, D.C. and U.S. Army Field Artillery Center and Fort Sill, Fort Sill, Oklahoma*, 29 FLRA 1110, 1124 (1987).

Considering the objective facts and circumstances, a preponderance of the evidence does not demonstrate that Ms. Caisse could reasonably infer that the Union was threatening or coercing her in the exercise of her protected right to criticize the Union and refrain from membership in it.

The Union's July 27, 1998, letter addressed Ms. Caisse's remarks on July 21, 1998. It was written in light of Mr. Thoms' proposed discipline for rude and discourteous remarks, which allegedly violated the courtesy provisions of the Annual Personnel Reminders booklet. The Union alleged that Thoms' remarks were "much less provocative and damaging" than Ms. Caisse's and asked for an investigation and remedial action. The request can reasonably be interpreted as a request for SSA to take disciplinary action against Ms. Caisse under the courtesy provisions if justified by the circumstances. Given Mr. Thoms' proposed discipline and the reasonably perceived nature of the Ms. Caisse's remarks regarding the deceased employee and Mr. Thoms, this was a legitimate request. It, in effect, asked for evenhanded application of the courtesy provisions by management.

Surprisingly, in view of their distant relationship, Ms. Caisse had initiated the conversation with Mr. Thoms, and her comments to him were reasonably perceived as a "rude, inflammatory comment" about Thoms and the deceased employee, thus resulting in such a request by the Union. The requested investigation and the resulting inquiry by management of Ms. Caisse did not constitute an improper inquiry or interference with her protected rights. She was merely asked for her recollection of the conversation, "her side of the story," and assured that no decision had been made concerning "remedial action." It is apparent that both the Union and management saw the inquiry as relating to SSA's courtesy provisions as management advised the Union, upon completion of its investigation, that "[w]hile we have concluded no action can be taken based upon your allegations, let me assure you that rude or discourteous behavior by any employee in the Salem office is not condoned."

The Union's statement, that it would "initiate appropriate action" if SSA failed to do so, also did not constitute interference with Ms. Caisse's rights under the Statute. The Union's statement cannot be interpreted as a threat by the Union to take "inappropriate" action against Ms. Caisse, and the Union did proceed to take what is "appropriate action" under its collective bargaining agreement by filing a grievance against management following its receipt of management's response.

B. *The Respondent Did Not Violate Section 7116(b) (2)*

"In order to find that a union has violated section 7116(b) (2) of the Statute, the record must show that the union caused or attempted to cause an agency to discriminate in connection with an employee's hiring, tenure, promotion, or other conditions of employment." *American Federation of Government Employees, Local 1931, AFL-CIO, Naval Weapons Station Concord, Concord, California*, 34 FLRA 480, 488 (1990).

The framework of *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*) applies in cases of alleged discrimination by a labor organization. *American Federation of Government Employees, Local 1345, Fort Carson, Colorado*, 53 FLRA 1789 (1998). Under the *Letterkenny* framework, the General Counsel must initially establish that the employee was engaged in protected activity and that the activity was a motivating factor in the treatment of the employee. Thereafter, a respondent may seek to establish an affirmative defense that there was a legitimate justification for its action and that the same actions would

have been taken even in the absence of the protected activity. *Federal Emergency Management Agency*, 52 FLRA 486, 490 n.2 (1996).

Applying the *Letterkenny* framework, I conclude that although Ms. Caisse was engaged in protected activity by exercising her right to refrain from joining the Union, which was known to the Union, and was reasonably perceived by the Union to have made a derogatory reference to Union members or officials, which was also protected activity, the General Counsel did not establish that this activity was a motivating factor in the Union's treatment of her. Further, the Union established that there was a legitimate justification for its action.⁶

As noted above, the reasonably perceived nature of Ms. Caisse's remarks regarding the deceased employee and Mr. Thoms prompted the Union's legitimate request for a management investigation to ensure evenhanded application of the courtesy provisions in light of the recent proposed disciplining of Mr. Thoms for a violation of these same provisions. As set forth above, the request for an investigation and the resulting inquiry by management of Ms. Caisse concerning her comments does not support a finding that the Union caused or attempted to cause SSA to take any action adverse to Ms. Caisse's conditions of employment because she exercised rights protected by the Statute. The inquiry did not change or affect any of Caisse's employment conditions.⁷

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Mr. Kröll testified that he wrote the letter to: (1) protect Thoms since Ms. Caisse had supplied information used in Thoms' proposed suspension for discourteous conduct and may have made the statement to further provoke him; (2) to request evenhanded application of the courtesy provisions by the district manager; and (3) to protest the inappropriate reference to the employee who committed suicide. Based on the record as a whole and the information that Mr. Kröll had received, I conclude that it is inherently probable that the event occurred in the manner described and credit his testimony.

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Consistent with section 7102, an employee engaged in otherwise protected activity could only be disciplined by an agency for remarks or actions that exceeded the boundaries of protected activity such as flagrant misconduct. *Department of Defense, Defense Mapping Agency, Aerospace Center, St. Louis, Missouri*, 17 FLRA 71, 80-83 (1985) (collecting cases). Ms. Caisse's remarks concerning the deceased employee could, of course, be separately considered under the agency's applicable courtesy provisions.

It is concluded that a preponderance of the evidence does not establish that the Union violated section 7116(b) (1) and (2), and independently violated section 7116(b) (1), when the Union's president, Andrew Krall, wrote the July 27, 1998, letter to Salem District Office, SSA.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, June 10, 1999.

GARVIN LEE OLIVER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by GARVIN LEE OLIVER, Administrative Law Judge, in Case No. BN-CO-80553, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

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DATED: JUNE 10, 1999
WASHINGTON, DC