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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION (FCI) MCKEAN BRADFORD, PENNSYLVANIA Respondent	Case No. BN-CA-90247
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3974, AFL-CIO Charging Party	

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 **MAY 1, 2000**, and addressed to:

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

SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

Dated: March 31, 2000
Washington, DC

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

MEMORANDUM DATE: March 31, 2000

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION (FCI) MCKEAN
BRADFORD, PENNSYLVANIA

Respondent

and Case No. BN-CA-90247

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 3974, 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 transcripts, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges OALJ 00-24

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION (FCI) MCKEAN, BRADFORD, PENNSYLVANIA Respondent	Case No. BN-CA-90247
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 3947, AFL-CIO Charging Party	

Elizabeth D. Long, Esquire
For the Respondent

Lawrence L. Kuo, Esquire
Richard D. Zaiger, Esquire
For the General Counsel

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), and the Rules and Regulations of the Federal Labor Relations Authority (FLRA/Authority), 5 C.F.R. Part 2411 *et seq.*

Based upon an unfair labor practice charge filed by the American Federation of Government Employees, Local 3974 (AFGE Local 3974/Union), a complaint and notice of hearing was issued on behalf of the General Counsel (GC) of the FLRA by the Regional Director of the Boston Regional Office. The complaint alleges that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution

(FCI) McKean, Bradford, Pennsylvania (FCI McKean/Respondent) violated section 7116(a)(1) and (2) of the Statute by sending the Union's Acting President home to change his footwear and charging him with one hour of annual leave as a result, and also violated section 7116(a)(1) of the Statute by telling him that the reason for such action was the Acting President's conduct during negotiations the previous day. The Respondent filed an answer denying that it had violated the Statute.

A hearing was held in Pittsburgh, Pennsylvania on November 4, 1999, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, to introduce evidence and to argue orally. The GC of the FLRA and the Respondent filed 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, Council of Prison Locals (AFGE), is the certified exclusive representative of a nationwide unit of employees within the Federal Bureau of Prisons, including employees at FCI McKean. AFGE Local 3974 is an agent of AFGE for the purpose of representing the employees at FCI McKean. Since 1997, and at all times material to this proceeding, Richard D. Yovichin was the Union's Acting President. For 6 years prior to that, he had been the Union's Secretary-Treasurer and also served as a union steward. Among his responsibilities as the Union's President, Yovichin occasionally represents employees in meetings with management and serves as the chief negotiator during collective bargaining with the Respondent. Those who have known and worked with Yovichin for many years all describe his personality and behavior as loud, profane and excitable toward almost everybody, particularly when labor-management relations are involved. For example, Lieutenant Barbara Roy, Yovichin's immediate supervisor for more than 4 years, testified that Yovichin is a good corrections officer but that he has an explosive temper which can be directed at supervisors and fellow employees alike. Similarly, Captain Donald Reich, who is Yovichin's second-level supervisor at FCI McKean, testified that he is accustomed to seeing Yovichin react in an excitable and confrontational manner

during labor-management meetings. There is no evidence that such behavior ever has resulted in disciplinary action.

B. **The Negotiating Session on January 21, 1999**

Since November 1998, the Respondent and the Union had held 22 meetings to negotiate the terms of a local supplemental agreement covering the employees at FCI McKean, but some issues remained unresolved. Among those issues was the amount of money each correctional officer would receive as reimbursement from the Respondent to defray the expense of purchasing footwear to be worn while on duty at the facility. On January 21, 1999, the parties met to negotiate these issues with the assistance of a mediator designated by the Federal Mediation and Conciliation Service (FMCS). For the most part, the mediator met separately with representatives of management and the Union during the day-long session, engaging in what is commonly known as "shuttle diplomacy." For example, the Union's chief negotiator, Yovichin, proposed that the existing footwear reimbursement level of $45 be increased to $175, and the mediator would convey the Union's position to Respondent's negotiating team headed by Associate Warden Miner. Then the Respondent's counter-offer to increase the allowance to $100 would be conveyed by the mediator to the Union.[1] During the course of discussions on this issue, a separate matter arose "accidentally" when Associate Warden Miner raised a question about the proof of purchase that a correctional officer would need to provide when seeking reimbursement. He suggested that the employee should bring in the black footwear as well as the sales slip to verify the quality and cost of the item. When the mediator conveyed this suggestion to the Union, Yovichin replied with his customary exuberance that the employees were not required to purchase black boots in order to qualify for reimbursement, and that he wore brown boots and did not even own a pair of insulated black boots. When the mediator transmitted Yovichin's comments to Respondent's negotiators, the reply was that the color of footwear was not an issue for negotiation since it was covered by the agency's national policy as reflected in management's policy statement. After some further interchange through the mediator, the parties then dropped

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[1] The parties were unable to reach agreement on the footwear reimbursement issue through this process.

the matter of footwear reimbursement altogether and went on to discuss other issues.[2]

C. The Confrontations on January 22, 1999

1. The colloquy on the compound

The next morning, Yovichin arrived at the facility about 20 minutes before the start of his 7:15 a.m. shift. Since the parties were not scheduled to continue their negotiations on January 22, Yovichin reported for work in his "nickel gray" correctional officer's uniform. He also wore a blue zip-up sweatshirt with a hood; an AFGE jacket; and a pair of brown, fur-lined, insulated, Chippewa boots. Yovichin testified that he had worn the same pair of boots to work for the past six winters during inclement weather to keep his feet warm and dry.[3] Yovichin further testified that the weather on January 22 was inclement, and that while he was assigned to work in the central tool room that day, he also anticipated that his duties would require him to be

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[2] Although one witness testified that the discussion of footwear color arose when the parties were meeting with the mediator in a joint session just after lunch, I credit the foregoing account of how the discussion of footwear color arose and who raised it. In any event, I find it immaterial to the disposition of this case how the question came up.

[3] The parties are in sharp disagreement over the color and condition of the boots that Yovichin wore to work on January 22. I credit Yovichin's testimony that he was wearing his customary boots as accurately pictured in Respondent's Exhibit 9, rather than light tan work boots with the reinforced steel toe exposed. While Yovichin can be abrasive and volatile during interactions with management, I found him to be an honest and candid individual with a thorough, detailed and consistent recollection of the events occurring on January 22. Conversely, the Respondent's witnesses were inconsistent in their testimony about the events of January 22 and thereby call into question the accuracy of their recollections concerning the color and condition of Yovichin's boots.

outdoors in the mud from time to time as well.[4] The established practice at FCI McKean was that employees, including corrections officers in uniform, were permitted to wear insulated boots of varying colors[5] to protect themselves against the elements under these circumstances.[6]

As Yovichin was leaving the Administration building with the keys to the tool room in order to start his shift, he encountered Captain Reich who was heading to his daily 7:30 a.m. meeting with Warden Bernie Ellis and Associate Warden Miner in the Administration building. As the two men neared each other in the compound, an open outdoor area between the Respondent's buildings, Reich pointed to Yovichin's footwear and declared in a loud voice that Yovichin was out of uniform. Yovichin responded that Reich was retaliating against him by making a big deal over his boots because of the discussion of footwear during negotiations the previous day. Reich repeated that Yovichin

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[4] The weather conditions in Bradford, Pennsylvania, on January 22 were in dispute at the hearing. Several of the Respondent's witnesses testified that the day was clear and dry, with just a dusting of snow on the grassy areas of the compound. The General Counsel's witnesses testified that a cold rain fell on January 22, creating muddy conditions for corrections officers whose work took them outdoors that day. The General Counsel has filed a motion requesting that I take official notice of the actual weather conditions as reflected on a detailed printout, attached to the motion, derived from an internet source, the Weather Underground. Respondent filed no opposition. Official notice of weather conditions is appropriate. *See Indian Health Service, Crownpoint Comprehensive Health Care Facility, Crownpoint, New Mexico*, 53 FLRA 1161, 1166 n.1 (1998). *See also Kelco Roofing, Inc.*, 268 NLRB 456, 461 (1983) and *Two Wheel Corp.*, 233 NLRB 81, 83 n.8 (1977). The data submitted by the General Counsel indicates, and I find, that the temperature in Bradford on January 22 between 7 and 10 a.m. was 37 degrees, and that light to heavy rain was falling.

[5] It is undisputed that employees have worn brown, tan, red and green boots in the past during inclement weather.

[6] Conversely, during fair weather, or when a corrections officer's duties were exclusively indoors, agency-wide policy mandated that black shoes be worn with the uniform.

was out of uniform, to which Yovichin responded, "write me up" and walked away to his post.7

Reich reported the foregoing incident to Warden Ellis at the 7:30 a.m. meeting, and the latter asked Reich what action he planned to take. Reich testified that even though he thought Yovichin was challenging his authority by wearing irregular footwear the day after a dispute arose during negotiations regarding the appropriate style and color of footwear to be worn by corrections officers, his initial reaction was to allow Yovichin to wear the boots in the tool room that day but to instruct Yovichin not to wear such boots in the future. He further testified that he changed his mind and decided to send Yovichin home to change into black shoes because of what he considered to be Yovichin's insubordinate behavior during their confrontation in the

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Yovichin testified that he was surprised at Reich's reaction to his footwear because, in November 1997, Reich had questioned him about the same pair of boots and Yovichin had said that until the institution provided the employees with foul weather gear, he was allowed to wear his own boots, to which Reich had responded, "okay, fine," and never again raised a question about Yovichin's footwear until this incident. Reich testified that he could not remember ever seeing Yovichin wear any footwear other than the low, black, oxford-style shoes prescribed by agency regulations, even during inclement weather, although he conceded that officers in his department were permitted to wear brown or other colored boots when the weather was bad. It strains credulity to believe that Reich had never seen Yovichin wearing the fur-lined brown boots that Yovichin in fact had worn during bad weather for the past six winters. I therefore credit Yovichin's testimony that Reich had questioned the appropriateness of his boots almost 2 years earlier and thereafter had let the matter drop until January 22, 1999.

compound.[8] Accordingly, he advised Warden Ellis of his intention to send Yovichin home to change, and to charge him annual leave or leave without pay for the time spent away from the facility. Warden Ellis agreed with Reich's approach, but instructed him to check with Personnel first. After the morning meeting with Warden Ellis ended, Reich went to Personnel and explained what had occurred and what Reich planned to do. According to Reich, Personnel supported his decision and, when so informed, Warden Ellis then told Reich to proceed.

2. The meeting in Reich's office

Reich then returned to his office, directed his assistant to arrange for Yovichin to be brought to his office, and asked Lieutenant Roy to be present as an observer at the meeting. A few minutes later, at around 8:30 a.m., Yovichin was relieved from his post by a lieutenant who directed him to report to Reich's office with a union representative. Yovichin went to the Union's chief steward, Jeff Labesky, and both men arrived at Reich's office a few minutes later.[9] Yovichin closed the door to Reich's office and sat down next to Reich's desk. Lt. Roy and Reich were already seated at the desk. The meeting began with Reich handing Yovichin a copy of the agency's program statement and stating that it required black shoes to be worn; advising Yovichin that he was out of uniform and

[8] I credit Reich's testimony that Yovichin reacted loudly and with gesticulations when told by Reich that he was out of uniform, arguing that the collective bargaining agreement did not preclude him from wearing brown boots. However, I do not credit Reich's further testimony that Yovichin was insubordinate by raising his voice in an open area with inmates around. There was no evidence presented that inmates were in the compound at that early hour, much less that any inmates could hear what was being discussed. Yovichin testified credibly that no inmates were in the vicinity. And Harold Provost, Respondent's senior operations lieutenant, testified that he was in the compound that morning and observed the incident from approximately 90 feet away, but could not hear what was being said.

[9] Reich testified that Yovichin arrived at his office alone and then requested union representation which Reich did not oppose. I credit Yovichin's version. It is far more likely that the summons from his post to Reich's office shortly after his confrontation with Reich in the compound would create in Yovichin's mind the reasonable fear of discipline and the need for a union representative irrespective of whether he was told by the lieutenant to bring one.

had to go home and change into appropriate black footwear;[10] and stating that if Yovichin were not back in an hour, he would be charged as AWOL. Yovichin responded angrily that the parties' master agreement superseded the program statement and did not require black shoes to be worn, and that in any event Yovichin was being unfairly discriminated against by having to go home to change his boots when others wearing non-black footwear were not also required to do so. Labesky inquired whether Yovichin could remain on his shift and report the next workday in black boots, but Reich responded that Yovichin had to leave at once. Yovichin stated that Reich was being "idiotic" about the situation,[11] and abruptly left Reich's office followed by Labesky. The meeting lasted about 5 or 10 minutes.

3. The meeting in Warden Ellis' office

Yovichin then decided to advise Associate Warden Miner of the situation. He and Labesky stopped and collected John Siffrinn, the Union's Vice-President, along the way to Miner's office. When Miner refused to see them, the group continued on to Warden Ellis's office to discuss the matter, apparently unaware that Reich previously had discussed with Ellis, at the 7:30 a.m. meeting, what action would be taken with respect to Yovichin as a result of the encounter in the compound. The three union officials walked through the open doorway into Ellis's office and closed the door. Ellis was seated at his desk; Labesky and Siffrinn sat down, but Yovichin remained standing. Yovichin related to Ellis what Reich had done-- i.e., ordered Yovichin to go home and change into black footwear and be charged with AWOL if it took longer than an hour.[12] Yovichin asked Ellis why he was

[10] It is undisputed that Reich mentioned only the color of Yovichin's boots as the basis for requiring their replacement; no mention was made either about their condition or Yovichin's behavior towards Reich in the compound earlier that morning.

[11] Reich testified that Yovichin called him an "idiot" at the meeting. Roy corroborated this. Labesky testified that the plural was used by Yovichin, presumably referring to Reich and Roy: "You people are being idiots about this situation." I find it immaterial whether Yovichin, in his agitated state, said that Reich was being an idiot or acting idiotically over the issue of Yovichin's footwear.

[12] Yovichin noted that he lived 20-25 minutes away from the facility under normal driving conditions, but that he could not be expected to complete the round trip during rush hour in the heavy rain that day.

being harassed and singled out to go home and change his shoes when many others also were not wearing black footwear. Ellis replied that he would make a tour of the facility and, if others were out of uniform, he would handle it. However, he indicated support for Reich's decision, stating that "I'm not going to have somebody discredit my Captain." At that point, Siffrinn showed Ellis that he, too, was wearing brown boots and asked whether he had to go home and change as well. Ellis replied, "No, I'm going to send Mr. Yovichin because it's on bad faith bargaining and he's the Union president."[13] The meeting ended after about 5 minutes, and Yovichin drove home to comply with Reich's order,[14] returning to the facility about an hour later wearing

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[13] Yovichin took this as a reference to the negotiating session of the day before when he strongly disagreed with Miner's comment that only black footwear was appropriate to be worn by corrections officers with their uniforms. Siffrinn, who had not been present at the negotiations, testified that Ellis referred to the previous day's bargaining session in responding to Siffrinn's question, but that he (Siffrinn) did not understand the reference. Labesky, a member of the Union's negotiating team, testified that he was surprised when Ellis told Siffrinn that Yovichin was being singled out for conformity with the black shoe policy because of his bad faith bargaining over the boot allotment issue the previous day. Ellis denied having linked Reich's decision to send Yovichin home to the latter's role in the negotiations. I discredit Ellis's denial, not only because all 3 employees present at the meeting confirmed the remark, but also because Ellis was inconsistent in his recollections about the events occurring on January 22. For example, Ellis testified that he was told by Reich at their 7:30 a.m. meeting that Reich had no intention of sending Yovichin home to change his footwear, but changed his mind as a result of Yovichin's insubordinate behavior at the 8:30 a.m. meeting attended by Labesky. Yet Reich credibly testified that Ellis was told at the 7:30 a.m. meeting of the plan to send Yovichin home, and that Ellis agreed with the plan as long as Personnel was consulted and did not object.

[14] Yovichin testified credibly that he remembers it was raining heavily as he drove home to change his footwear, because his windshield wipers had stopped working and required replacement.

unlined black boots that he had never worn to work before.[15] Thus, Yovichin became the first and only employee at FCI McKean ever sent home to change footwear.

Discussion and Conclusions of Law

The GC contends that the Respondent FCI McKean, violated section 7116(a)(1) and (2) of the Statute by sending Union President Yovichin home to change his footwear and charging him an hour of leave for the time it took him to do so, based on Yovichin's protected activity during contract negotiations the previous day. The GC further contends that the Respondent independently violated section 7116(a)(1) of the Statute when Warden Ellis told Yovichin, in the presence of employees/Union representatives Labesky and Siffrinn, that the reason for his being sent home was his bad faith bargaining the day before.

Section 7116(a)(2) of the Statute makes it an unfair labor practice for an agency to "encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" In *Letterkenny Army Depot*, 35 FLRA 113 (1990)(*Letterkenny*), the Authority set forth the analytical framework for resolving alleged violations of section 7116(a)(2) of the Statute. Under *Letterkenny*, the General Counsel at all times has the overall burden of establishing by a preponderance of the evidence that: (1) the employee against whom the allegedly discriminatory action was taken had been engaged in protected activity under the Statute; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, or other conditions of employment. If the General Counsel meets this burden, then the respondent may establish by a preponderance of the evidence, as an affirmative defense, that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the employee's protected activity. *See U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 712 (1999); *Department of the Air Force, Warner Robins Air Logistics Center, Warner Robins Air Force Base, Georgia*, 52 FLRA 602, 605 (1996). For the reasons set forth below, I find that the General Counsel has established a *prima facie* case that Respondent violated section 7116(a)(2) of the Statute as alleged in the

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15 Yovichin was charged with an hour of annual leave for the time spent complying with Reich's order, but that leave was later restored to his account. Yovichin also was proposed for a suspension as a result of his purported insubordination toward Captain Reich on January 22, but no such action was ever taken against him.

complaint. I further find that the Respondent has failed to establish as an affirmative defense that its action was justified and would have been taken regardless of union activity.

C. **The General Counsel's Prima Facie Case**

It is undisputed, and I find, that Yovichin was engaged in protected activity within the meaning of the Statute on January 21, 1999, when he participated as the Union's chief negotiator in collective bargaining on the issue of footwear allotments to corrections officers with the assistance of an FMCS mediator. I further find, and it is uncontested, that Yovichin's forceful rejoinder during negotiations to Associate Warden Miner's suggestion that only black footwear could be worn by corrections officers similarly constituted protected activity. There is no suggestion that such protected activity lost its protection due to Yovichin's intemperate language or aggressive demeanor in responding to Associate Warden Miner's comments. Accordingly, if a factor in Respondent's decision to send Yovichin home to change his boots the next morning was his position during negotiations that brown footwear could be worn by corrections officers with their uniforms, the General Counsel has established a *prima facie* case of discrimination.

I conclude that the General Counsel has established that Yovichin's treatment by Captain Reich was motivated at least in part by the comments Yovichin made during negotiations the previous afternoon. Thus, no witness could recall any other corrections officer ever having been sent home in the past to change footwear for any reason. Yovichin was sent home for this purpose the morning after his heated comments about the appropriate color of corrections officers' footwear during the previous afternoon's bargaining session. The close proximity between Yovichin's protected activity and the Respondent's challenged actions, while not alone dispositive, is probative of the motivation underlying the decision to send Yovichin home to change footwear. *See U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts*, 51 FLRA 1520, 1528 (1996); *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1033 (1994)(*Forest Service*).

The inference that Yovichin's protected activity was a factor underlying the Respondent's actions is reinforced by the testimony of Captain Reich, the management official who

decided that Yovichin had to go home to change his boots.[16] Thus, Reich testified that when he first encountered Yovichin in the compound early in the morning on January 22, 1999, and saw that Yovichin was wearing brown insulated work boots with his nickel gray corrections officer uniform, Reich immediately thought that Yovichin was trying to challenge his authority to require only black shoes to be worn with the uniform in order to underscore the Union's position as expressed during the previous afternoon's negotiating session that brown boots also were acceptable. Accordingly, Reich decided to make an issue of Yovichin's being out of uniform as the two men approached each other, knowing (based on years of direct experience) that Yovichin would react emotionally to Reich's provocation.

I further find that Reich had no legitimate basis for challenging Yovichin's footwear on the day in question. Thus, Reich and other management witnesses admitted that employees at FCI McKean, including corrections officers under Reich's supervision, were entitled to wear insulated boots in a variety of colors rather than the standard low-cut black shoes when local weather conditions were inclement and their duties might expose them to the elements. Reich claimed that the weather on January 22, 1999, was clear and dry. I have taken official notice that it was raining, sometimes heavily, at FCI McKean on the morning in question, with temperatures not much above freezing, and I have credited Yovichin's undisputed testimony that his duties in the tool room and his other responsibilities throughout the day would likely expose him to the wet, cold and muddy conditions existing outdoors. Under these circumstances, I conclude that Reich's stated reason for stopping Yovichin over his footwear was pretextual.

My conclusion in this regard is buttressed by other facts as well. Thus, I have credited Yovichin's testimony that he was wearing the same brown, insulated Chippewa work boots on January 22, 1999, that he had worn for the past six winters at FCI McKean, without a challenge from Reich since 1997. I also have rejected Reich's assertion that he could not recall ever seeing Yovichin wear brown boots with his

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[16] The Authority has held that, in determining whether a *prima facie* case of discrimination is established under the *Letterkenny* analytical framework, it is appropriate to look beyond the General Counsel's evidence and consider the record as a whole. *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000); *Internal Revenue Service, North Atlantic Region, Brookhaven Service Center, Holtsville, New York*, 53 FLRA 732, 746-48 (1997).

uniform prior to the morning in question. However, even if Yovichin had been wearing tan (rather than brown) boots which were in poor condition on January 22, the outcome here would be the same. As previously found, employees had worn boots in many colors (including tan) during inclement weather without challenge, so the specific color of Yovichin's boots that day could not have justified Reich in sending Yovichin home to change footwear. Moreover, no employees had been sent home in the past due to the poor condition of their footwear. Indeed, Reich never mentioned the poor condition of Yovichin's boots at any time that morning as a reason for sending him home to change. Rather, Reich himself testified that Yovichin would not have been ordered to go home and change if it had not been for his attitude in responding to Reich's challenge that morning. Yet Reich never told Yovichin at any point that morning (either in the compound or later in Reich's office) that his allegedly insubordinate behavior was the reason for sending him home to change footwear.[17] The foregoing discussion convinces me that the Respondent's shifting reasons for sending Yovichin home--his non-compliance with the agency's footwear policy, the poor condition of his boots, his allegedly insubordinate behavior--are pretexts intended to hide the real and unlawful reason for its action, Yovichin's protected activity during the parties' negotiations. *See Department of Housing and Urban Development, Pennsylvania State Office, Philadelphia, Pennsylvania*, 53 FLRA 1635, 1653-54 (1998), *quoting St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

Finally, I find it significant, and refreshingly candid, that Warden Ellis revealed the true reason for

[17] While it is not within my province to determine whether the Respondent was reasonable in sending Yovichin home to change footwear as discipline for his alleged insubordination, it is my responsibility to decide whether at least one of the reasons for the Respondent's actions was unlawful. To the extent that the explanation given for the action taken appears to be non-responsive to the alleged infraction, it gives rise to an inference of unlawful motivation. Here, it makes no sense to send Yovichin home to change footwear in response to his alleged insubordination toward Reich. It does make sense to take such action if the true motivation is to bring Yovichin into compliance with the agency's regulations. Yet, Reich disclaims this as his motivation. Furthermore, I note that Yovichin's behavior towards Reich on January 22 was under consideration independently as the basis for discipline in the nature of a suspension, although management ultimately decided to take no such disciplinary action against him.

Respondent's decision to send Yovichin home to change footwear when facing the three angry Union representatives in his office who were there to challenge Reich's announced order. By his own account, Ellis is a manager who dislikes confrontation and prefers to let his subordinates carry out the daily routine of the institution. When Ellis was confronted unexpectedly by Yovichin, Labesky and Siffrinn in his office and forced to defend the decision of his Captain, Reich, to send Yovichin home to change his brown boots, and then was caught off guard by Siffrinn's inquiry whether he, too, would be required to go home and change his brown boots, Ellis responded that only Yovichin would be so required because he, as Union President, had bargained in bad faith the previous day. This surprising but understandable admission under the circumstances is highly probative of the Respondent's true motivation in dealing with Yovichin in the manner it did, and provides an independent basis for finding that the Respondent unlawfully discriminated against him in violation of section 7116(a)(1) and (2) of the Statute, as alleged in the complaint.

D. **Respondent's Affirmative Defense is Rejected**

Having examined and discussed the entire record in finding that the General Counsel carried the burden of proving a *prima facie* case of unlawful discrimination, I have anticipated and rejected the Respondent's assertion that it had a legitimate reason for sending Yovichin home to change his footwear and that it would have taken the same action even if Yovichin had not engaged in protected collective bargaining activity the previous day. Thus, I have found that in wearing brown boots to work on January 22, 1999, an inclement day in the local area, Yovichin was conforming with the established practice at FCI McKean and gave the Respondent no cause to single him out for treatment that no other employee at that facility had ever experienced.

In addition, I have rejected the assertion that Yovichin was sent home because of his insubordinate behavior towards Captain Reich. First, of course, Reich never mentioned that he was sending Yovichin home for that reason. Rather, the one and only reason announced by Reich repeatedly was that Yovichin was out of uniform. Second, the Respondent has not established that Yovichin's behavior was in fact insubordinate under the circumstances. Thus, Reich provoked Yovichin by challenging him in the compound without justification, knowing from past experience that Yovichin would react defensively. In examining the record, I find nothing objectionable in Yovichin's defending his right to wear the same brown boots he had worn for the past

six winters at the facility with Reich's acquiescence.[18] While Yovichin predictably became loud and excited, there was no evidence that any inmate had overheard the exchange. Moreover, Yovichin exercised good sense in ending the conversation with the invitation that Reich could write him up if necessary. I will not discuss the events that transpired later in Reich's office, because Reich admittedly informed Ellis at the earlier 7:30 a.m. executive meeting that he had decided to send Yovichin home to change his footwear on the basis of their confrontation in the compound. In any event, I have found that Reich declared Yovichin to be out of uniform and directed him to go home and change his footwear at the 8:30 a.m. meeting before Yovichin gave Reich any further reason to find Yovichin insubordinate. Yovichin's behavior at the second meeting clearly was a reaction to Reich's announcement that Yovichin would be required to go home and change. Thus, Yovichin's behavior at the second meeting could not have contributed to Reich's decision to send Yovichin home.

Accordingly, I conclude that the General Counsel has established that the Respondent violated section 7116(a)(1) and (2) of the Statute.

E. **Respondent Independently Violated Section 7116(a)(1)**

As found above, Warden Ellis stated to Union President Yovichin, Union Vice-President Siffrinn, and Chief Steward Labesky, that the reason Yovichin was being sent home to change his footwear was because of his bad faith bargaining as the Union's chief negotiator the previous day on the related subject of footwear allotments. It was at those negotiations when Yovichin reacted forcefully to Associate Warden Miner's statement that only black shoes could be reimbursed. I find that Warden Ellis' statement would tend to coerce an employee in the exercise of rights protected by

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[18] In defending himself, Yovichin may not have been engaged in "concerted" activity but, contrary to the Respondent's assertion, concerted activity is neither mentioned in nor required under the Statute. In any event, Yovichin's self-defense against Reich on January 22 is not the protected activity at issue. Rather, it is Yovichin's participation in negotiations on behalf of the entire bargaining unit the previous day which constitutes the protected activity herein.

the Statute. *Forest Service,* 49 FLRA at 1034.[19] Accordingly, I conclude that by such statement the Respondent independently violated section 7116(a)(1) of the Statute.

F. **The Remedy**

Having found the foregoing violations of the Statute, I shall order the Respondent to take the following actions as requested by the General Counsel.[20]

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. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution (FCI) McKean, Bradford, Pennsylvania, shall:

1. Cease and desist from:

(a) Discriminating against Richard D. Yovichin, President of the American Federation of Government Employees, Local 3974, AFL-CIO, or any other Union official, by sending them home to change their apparel and placing them on annual leave for the time taken to do so, because they engaged in activity protected under the Statute.

(b) Making statements to its employees to the effect that the chief Union negotiator is being sent home to change his apparel due to his conduct during collective bargaining on a related matter.

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19 The fact that Yovichin, Siffrinn and Labesky were all grizzled veterans of the labor-management relations wars and may not have been intimidated or otherwise discouraged from continuing to exercise their protected rights under the Statute is of no moment in reaching this decision, since the standard is an objective one. *Id. See also U.S. Penitentiary, Florence, Colorado*, 53 FLRA 1393, 1404 (1998).

20 Since Yovichin's leave balance has been restored already, and no disciplinary action has been taken against him arising out of the events recounted in this decision, the only affirmative action to be ordered herein is the posting of a Notice to all employees.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of their rights assured by the Statute to form, join, or assist the Union, including their right to act as representatives of the Union, freely and without fear of penalty or reprisal.

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

(a) Post at the Federal Bureau of Prisons, Federal Correctional Institution (FCI) McKean, Bradford, Pennsylvania, 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 Warden and shall be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted, and shall be maintained for 60 consecutive days thereafter. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(b) 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.

Issued, Washington, DC, March 31, 2000.

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SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the U.S. Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution (FCI) McKean, Bradford, Pennsylvania, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY BARGAINING UNIT EMPLOYEES THAT:

WE WILL NOT discriminate against Richard D. Yovichin, the President of American Federation of Government Employees, Local 3974, AFL-CIO, or any other Union official, by sending them home to change their apparel and placing them on annual leave for the time taken to do so, because they engaged in activity protected under the Statute.

WE WILL NOT make statements to our employees to the effect that the chief Union negotiator is being sent home to change his apparel due to his conduct during collective bargaining on a related matter.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of their rights assured by the Statute to form, join, or assist the Union, including their right to act as representatives of the Union, freely and without fear of penalty or reprisal.

_____

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(Activity/Respondent)

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 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, Massachusetts 02110, and whose telephone number is: (617)424-5731.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case No. BN-CA-90247, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT **CERTIFIED NOS:**

Lawrence Kuo, Esquire P168-060-165
Richard Zaiger, Esquire
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110

Elizabeth Long, Esquire P168-060-166
DOJ, FBOP, Suite 726
320 First Street, N.W.
Washington, DC 20534

Joseph Corcoran, Representative P168-060-167

AFGE, Local 3974
P.O. Box 611
Irwin, PA 15642

REGULAR MAIL:

President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

_____
CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: MARCH 31, 2000
WASHINGTON, DC