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 FORREST CITY, ARKANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0922, AFL-CIO Charging Party	Case No. DA-CA-00507

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 **APRIL 22, 2002**, and addressed to:

Federal Labor Relations Authority
Office of Case Control
607 14th Street, NW., Suite 415
Washington, DC 20424-0001

ELI NASH

Chief Administrative Law Judge

Dated: March 20, 2002
Washington, DC

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

MEMORANDUM DATE: March 20, 2002

TO: The Federal Labor Relations Authority

FROM: ELI NASH
CHIEF ADMINISTRATIVE LAW JUDGE

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
FORREST CITY, ARKANSAS

Respondent

and Case No. DA-CA-00507

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 0922, 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 transcript, exhibits, and any briefs filed by the parties.

Enclosures

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

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION FORREST CITY, ARKANSAS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 0922, AFL-CIO Charging Party	Case No. DA-CA-00507

Ms. Sandra J. LeBold
For the General Counsel

Mr. Bryan Witt
For the Respondent

Before: ELI NASH
Chief Administrative Law Judge

DECISION

Statement of the Case

On September 28, 2000, the Regional Director for the Dallas Region of the Federal Labor Relations Authority, pursuant to a charge filed on May 4, 2000, by the American Federation of Government Employees, Local 0922, AFL-CIO (herein called the Union), and amended on September 22, 2000, issued a Complaint and Notice of Hearing. The complaint alleged that the Department of Justice, Federal Bureau of Prisons, Federal Correctional Institution, Forrest City, Arkansas (herein called Respondent) violated section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (herein called the Statute) on or about May 2, 2000, when a representatives of the Respondent gave

Union representative Kenneth Brown a Minimally Satisfactory (MS) log entry because he had engaged in protected activity.

A hearing in this matter was held in Memphis, Tennessee, on January 29, 2001. 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. Respondent and the General Counsel filed timely 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

At all times material to the complaint in this case, Kenneth Brown was employed by the Respondent as a correctional counselor. Brown also served as Chief Steward for the Union. At the time of the events underlying the complaint in this case, Brown was assigned to a "unit" under the supervision of Michelle Edge, unit manager. At that time, Edge had been a manager for only a matter of months. In addition to Brown, Edge supervised 4 other employees. The unit that Edge managed was responsible for working with approximately 320 inmates.

On or about May 1, 2000, Edge returned from approximately one week away at training. On her return, Edge learned that during her absence the units had been instructed to complete census forms on all inmates. On the morning of May 1, Edge advised those of her staff who were present for duty that the unit would need to begin working on the census as soon as possible.[1] Brown understood Edge to say that later that day the unit would have to stop everything and work on the census forms. Edge's recollection was that she indicated that work on the census forms must begin within the next day or two. Regardless of which of these two versions is more accurate, it is clear

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[1] Two of the employees under Edge's supervision were absent on leave at the time. Consequently, only Brown, and two others, Ms. Dawson and Ms. Rogers, were working on the days on which the events central to this case occurred.

that Edge called for prompt action by the staff to complete the census forms.[2]

Feeling that his workload was already heavy, Brown sought assistance from the Union President, Bryan Lowry, who told Brown that he would contact the acting Warden about bargaining over the matter. Brown's recollection was that Lowry called him back shortly thereafter and told him that Hector Ledezma, the acting Warden, agreed that bargaining should occur. Brown then received a memo drafted by Lowry that demanded that Respondent bargain and "cease and desist" from implementation until negotiations were completed. G.C. Exh. 2. Following Lowry's instructions, Brown took the memo to Ledezma to sign off on.[3]

Brown interpreted Ledezma's signature as indicating agreement to the demands in the memo. Ledezma, however, testified that his signature only indicated receipt and not that the Respondent agreed to either the bargaining or cease and desist request.

Brown testified that shortly after obtaining Ledezma's signature on the memo he gave Edge a copy of the signed memo and she thanked him without further comment. Edge's description of events is somewhat different. Under her version of the chronology, Brown initially advised her that the Union was going to invoke bargaining and later, toward the end of the day, gave her a copy of the bargaining request that was signed by Brown and Ledezma. Although there are differences in the details between the accounts of Edge and Brown with respect to when and how Edge learned of the bargaining demand, I find those differences insignificant. What is significant is that both accounts establish that Edge was aware of the Union's bargaining and cease and desist request.

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[2] Under questioning, Edge acknowledged that she did not have a specific deadline for completing the forms but thought that they should be finished as soon as possible and certainly within the week. It is clear that she felt a sense of urgency about getting them done and that she communicated this to her staff.

[3] Brown also signed and dated the memo.

According to Edge, she personally filled out the census

forms for half of the inmates assigned to her unit during the afternoon of May 1. Brown testified that toward the end of the day, he observed Dawson and Rogers, the only other employees in his unit who were on duty that day, working on the census forms. Edge was not sure whether Dawson and Rogers worked on the census forms on May 1 but did recall seeing the two completing the forms the next day.

Edge testified that on May 2, Brown came to her office very upset that the rest of the staff had not stopped work on the census forms as he asserted should have been the case. Edge stated that during the course of that particular conversation, Brown made clear to her that he was not going to work on the census forms. During the hearing in this case, Brown was not specifically questioned about whether this conversation occurred and his testimony did not describe any comparable conversation. Brown did testify as a general matter, however, that he never told Edge that he would not fill out the census forms.

Edge stated that no one in management instructed her to call a halt to work on the census forms in response to the Union's bargaining request. Based on the record, I find that after learning of the Union's bargaining and cease and desist request, Edge did not give any further instructions to her employees either reiterating or rescinding her earlier pronouncement about working on the census forms. It is uncontested that Dawson and Rogers worked on the census forms and that Brown did not.

After her conversation with Brown in which he allegedly indicated that he would not work on the census forms, Edge sought counsel from Edward Johnson, the Acting Associate Warden, Programs, who recommended that she give Brown a negative log entry.[4] Edge then gave Brown a minimally satisfactory, or MS, entry on his performance log, stating that on May 2, 2000, he failed to complete his duties as assigned when he did not participate in completing the census forms.[5] When Edge informed Brown of the MS entry, Brown refused to sign it. Brown asked Edge if the entry was

[4] Although the record does not explain it in detail, the log, or performance log, refers to a record in which notations about employee performance are kept. It appears that this log is relied on in making decisions about a number of personnel matters, such as annual performance appraisals, reassignments, promotions and awards.

[5] According to Brown's uncontested testimony, Dawson and Rogers received "on-the-spot" awards based on their work on the census forms.

because of the bargaining request and, according to Brown, she "didn't really say much." Tr. 21.

According to Brown, he learned from Lowry on May 2 that Ledezma had changed his mind about bargaining.

As to the conversation that Edge describes as transpiring between Brown and herself on May 2, I credit Edge that the conversation occurred. Brown's testimony shows that at the time he believed that the Respondent had agreed to the Union's bargaining and cease and desist request and knew that Edge was aware of the request. Brown had heard nothing from Edge to the effect that her directive to work on the census form still stood notwithstanding the Union's bargaining and cease and desist request. Consequently, from Brown's perspective "cease and desist" was a "done deal." It stands to reason that Brown would have been upset that bargaining-unit employees were proceeding to work on the census forms despite his apparently successful efforts to have the work halted. I find it highly probable that Brown would have approached Edge and raised the matter with her. I also find it highly probable given what he believed was an agreement to cease and desist that Brown expressed objection to doing the census work. In this regard, although Brown's statements may not have amounted to an express refusal to do the work, I credit Edge to the extent that he gave her the distinct impression that he was resistant to doing it.[6]

While Brown's mind-set was that any work on the census forms by bargaining-unit employees was stayed pending bargaining, Edge's mind-set was that it was not stayed. In this regard, although Edge was given a copy the Union's memo, it was, on its face, limited to a request to cease and desist pending bargaining and contained no clear statement that signified management's agreement to the request. Moreover, Edge received no instruction from management to call a halt to the work. Consequently, it is probable that she interpreted Brown's statements expressing his objections to doing the census work with the mind-set that the work was continuing rather than with Brown's mind-set that management had agreed to halt the work. I find that Edge's interpretation of the message she got from Brown as being that he was not going to work on the census forms within the time frame that she wanted the work done was a reasonable

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6 In addition to the probability of the events that Edge described, I base this credibility determination on the fact that I found Edge generally to be a forthright and reliable witness.

one. There is no dispute that Brown did not work on the census forms.

There was no action, other than the MS log entry, taken against Brown with respect to the census forms. In August 2000, he received an annual performance appraisal of fully satisfactory.

Edge testified without dispute, and I credit her, that she has had occasion to give MS entries to another employee under her supervision for failure to perform duties as instructed and not following directions.

Conclusions

The Arguments of the Parties

The General Counsel (GC) argues that Brown's actions in submitting the bargaining and cease and desist request to the Respondent constituted activity protected under section 7102 of the Statute. The GC alleges that the timing of the MS entry given Brown demonstrates that his protected activity was a motivating factor. The GC contends that it has established a *prima facie* case that Brown's protected activity motivated the MS entry. The GC asserts that the Respondent has failed to establish that it had a legitimate justification for giving Brown the MS entry or that it would have given Brown the MS entry in the absence of his protected activity.

The Respondent contends that the GC failed to establish by a preponderance of the evidence that Brown's protected activity was a motivating factor for Edge's action in giving him the MS log entry. The Respondent argues that even assuming that the GC established a *prima facie* case of such motivation, the Respondent has sufficiently shown that it had a legitimate justification for the negative log entry and would have made the same entry in the absence of Brown's protected activity. In support of this latter argument, the Respondent asserts that the log entry was motivated by Brown's action telling Edge that he was not going to work on the census forms.

The Analytical Framework

The analytical framework that the Authority articulated in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*) is relevant to the 7116(a)(1) and (2) allegations in this case. Under that framework, the General Counsel must establish by a preponderance of the evidence that an employee against whom an alleged discriminatory action is

taken was engaged in protected activity and that consideration of such protected activity was a motivating factor in connection with hiring, tenure, promotion and other conditions of employment. *See, e.g., U.S. Department of the Air Force, 437th Airlift Wing, Air Mobility Command, Charleston Air Force Base, Charleston, South Carolina,* 56 FLRA 950, 953 (2000); *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia,* 55 FLRA 1201, 1205 (2000) *(Warner Robins).* Under *Letterkenny*, if the General Counsel makes such a *prima facie* showing, the respondent may seek to establish by a preponderance of the evidence that there was a legitimate, nondiscriminatory justification for its action and the same action would have been taken even in the absence of the consideration of protected activity. *See, e.g., Warner Robins*, 55 FLRA at 1205.

In determining whether a *prima facie* case of discrimination has been established, it is consistent with Authority precedent to consider the record as a whole. *See, e.g., id.* Although closeness in time between an agency's employment decision and protected activity engaged in by a union may support an inference of illegal anti-union motivation, it is not conclusive proof of a violation. *See, e.g., id.*

Application of the Letterkenny Framework

The General Counsel has established that Brown engaged in protected activity shortly before Edge gave him the MS log entry. Namely, Brown played a prominent role in the Union's request to bargain before bargaining-unit employees performed work on the census forms. Additionally, the GC has established that Edge was aware of Brown's activity.

Application of the next step in the *Letterkenny* framework, i.e., whether Brown's union activity was a motivating factor for the MS log entry, is more complex.

It is complicated by the nature of the relationship between

Brown's union activity and the MS entry that he received. As discussed above, Brown's union activity and, more importantly, the beliefs that he acquired in the course of that activity appear to have motivated certain behavior on his part, specifically, not working on the census forms and expressing resistance to doing so. In turn, Brown's behavior in not working on the census forms and his communication to Edge that she interpreted as a refusal to work on them motivated her to give Brown the MS entry. Thus, the role that Brown's union activity played in the log entry was limited to motivating behavior on Brown's part that produced a response from Edge. Considering the record as a whole, I find that the General Counsel has not established by preponderance of the evidence that Brown's *protected activity* was a *consideration* on the part of Edge *that motivated* her to give him the MS log entry. Put another way, in analyzing the chain of events for the purpose of determining motive, I find that the link exists between Brown's protected activity and Brown's behavior with respect to not working on the census forms rather than between Brown's protected activity and Edge's behavior with respect to giving the MS entry to Brown. In finding that the GC has failed to establish that Brown's protected activity motivated the MS entry, I note in particular that there is no evidence that Edge indicated to Brown that the MS entry was motivated by his union activity or that Edge had demonstrated union animus in some other way.

Even if I were to infer from the closeness of the timing between Brown's union activity and the MS log entry and the relationship that existed between the two, that union activity was a motivating factor in the MS entry, I would find that the Respondent has shown by preponderance of the evidence that it had a legitimate, nondiscriminatory, reason for its action. Reiterating the credibility determinations that I made above, Brown, believing that the Respondent had agreed to stay work on the census forms until bargaining was completed, failed to participate in completing the forms. Additionally, Edge reasonably interpreted a communication from Brown as indicating that he was not going to participate in completing the forms during the time frame that she wanted the work completed.[7] Brown's failure to participate in the work, coupled with Edge's reasonable interpretation that Brown indicated that he had

[7] I do not mean to suggest that Brown was insubordinate toward Edge. Rather, I find that imperfect communications may have resulted in misunderstandings on the part of Brown as to whether he was expected to participate in completing the census forms and on the part of Edge as to Brown's willingness to participate in that work.

no intention of participating in the work constituted a legitimate, non-discriminatory, reason for the action that Edge took. Any perceived failure on the Respondent's part to bargain regarding the performance of the work would not excuse a failure on Brown's part to comply with Edge's directive to perform the work. *See Veterans Administration West Los Angeles Medical Center, Los Angeles, California*, 23 FLRA 278, 280 (1986) (unilateral implementation does not excuse an employee's failure to follow supervisory instructions; procedures exist for remedying the failure to bargain).

I also find that Respondent has shown by preponderance of the evidence that it would have taken the same action, i.e., given Brown an MS entry, in the absence of consideration of Brown's protected activity. Specifically, Edge provided unrebutted testimony that she took similar action against another employee for a failure to perform duties as instructed. Moreover, the MS entry does not appear to be a disproportionate response to Brown's behavior as it was interpreted by Edge.

Based on the foregoing, I recommend that the Authority issue the following Order:

ORDER

IT IS ORDERED that the Complaint be, and hereby is, dismissed.

Issued, Washington, D.C., March 20, 2002.

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ELI NASH
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by ELI NASH, Chief Administrative Law Judge, in Case No. DA-CA-00507, were sent to the following parties:

_____

CERTIFIED MAIL AND RETURN RECEIPT **CERTIFIED NOS:**

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Dated: March 20, 2002
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