

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

MEMORANDUM

DATE: September 22, 2005

TO: The Federal Labor Relations Authority

FROM: SUSAN E. JELEN
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF AGRICULTURE
FOOD SAFETY AND INSPECTION
SERVICE, WASHINGTON, D.C.

Respondent

and

Case No. SF-CA-05-0059

NATIONAL JOINT COUNCIL OF FOOD
INSPECTION LOCALS, AMERICAN
FEDERATION OF GOVERNMENT
EMPLOYEES, 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

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
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WASHINGTON, D.C. 20424-0001

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE, WASHINGTON, D.C. Respondent	
and NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO Charging Party	Case No. SF-CA-05-0059

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 her 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. §§ 2423.40-41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **OCTOBER 24, 2005**, and addressed to:

Office of Case Control
Federal Labor Relations Authority
1400 K Street, NW, 2nd Floor
Washington, DC 20005

SUSAN E. JELEN
Administrative Law Judge

Dated: September 22, 2005
Washington, DC

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

U.S. DEPARTMENT OF AGRICULTURE FOOD SAFETY AND INSPECTION SERVICE, WASHINGTON, D.C. <p style="text-align: center;">Respondent</p>	
and NATIONAL JOINT COUNCIL OF FOOD INSPECTION LOCALS, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO <p style="text-align: center;">Charging Party</p>	Case No. SF-CA-05-0059

Robert Bodnar, Esquire
For the General Counsel

James E. Varsalone, Esquire
For the Respondent

Paul Carney
For the Charging Party

Before: SUSAN E. JELEN
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 or Authority), 5 C.F.R. § 2411 *et seq.*

Based upon an unfair labor practice charge filed by the National Joint Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO (Union or Charging Party), a complaint and notice of hearing was issued by the Regional Director of the San Francisco Regional Office of the Authority. The complaint alleges that the U.S. Department of Agriculture, Food Safety and

Inspection Service, Washington, D.C. (Respondent) violated section 7116(a) (1) and (2) of the Statute by retaliating against a group of employees after one of the employees asserted rights protected by the Statute. The Respondent filed an Answer admitting in part and denying in part the allegations set forth in the Complaint.

A hearing was held in Portland, Oregon, on February 18, 2005, 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. Both the General Counsel and the Respondent filed timely post-hearing briefs which have been fully considered.

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

Findings of Fact

The U.S. Department of Agriculture, Food Safety and Inspection Service (FSIS), Washington, D.C. is an agency under 5 U.S.C. 7103(a) (3). The National Joint Council of Food Inspection Locals (NJC), American Federation of Government Employees, AFL-CIO is a labor organization under 5 U.S.C. 7103(a) (4) and is the exclusive representative of a nationwide unit of FSIS employees appropriate for collective bargaining at Respondent. AFGE, Western Council of Food Inspections Locals, AFL-CIO is an agent of NJC for the purpose of representing employees at the Respondent within the unit described above. (G.C. Exs. 1(c) and 1(d))

FSIS and NJC are parties to a collective bargaining agreement (CBA) covering employees in the above bargaining unit. Article 13 covers Hours of Work and contains the following provision:

Section 4. When Plants do not Operate for all or Part of the Day.

a. When these circumstances occur for an employee working at an official establishment, the Agency will take one or more of the following actions, as appropriate in the order listed:

1. Assign or detail the employee to other duties where services are needed
2. Hold "Work Unit" meetings

3. Assign the employee to meaningful on-the-job training, classroom training, or individual instructions

4. Grant the employee's request for leave to cover the time in nonwork status, that is:

(a) Annual leave, if available

(b) Leave without pay

b. An employee may not remain in a duty status at his/her residence without supervisory approval (*i.e.*, "on call").

c. Employees may be excused where appropriate after seven (7) hours of a scheduled eight (8) hour workday.

(G.C. Ex. 3; R. Ex. 1; Tr. 18, 24-25) Section 4(c) is commonly referred to as the seven-hour rule. Code 66 is used to document such administrative leave, which is paid leave even though the employee is not actually at work. (Tr. 18-19)

Richard Hensley, Timothy LaFollette, Michael MacDonnell and Steven Moser are employees under 5 U.S.C. 7103(a)(2) and are in the bargaining unit described above. (G.C. Exs. 1(c) and 1(d); Tr. 6) These four employees are food safety inspectors, and in September 2004¹ were assigned to the Foster Farms plant in Kelso, Washington and worked the 1:30 p.m. to 10:00 p.m. shift. Dr. Patricia Edie was the Inspector-in-Charge during the relevant time period. (Tr. 14-15, 38-39, 51, 61-62)

The four inspectors work at separate fixed inspection stands or stations along the evisceration line at the plant. Their stations are approximately 6 to 8 feet apart. The plant can process about 126,000 birds per day. For days where less than 126,000 birds are processed, the plant will not be in operation for the full duration of the swing shift; this is referred to as a short kill. (Tr. 19, 43-44, 90) The plant posts eight week planners to forecast the number of birds that will be processed each day. (G.C. Ex. 6) The eight week planners are used to estimate when short kill days may occur. (Tr. 23, 78)

The veterinary supervisors assigned to each plant rotate every six months. Dr. Edie began supervising the

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All dates are in 2004 unless otherwise specified.

inspectors on the swing shift at Foster Farms in August. (Tr. 95) Before Labor Day, Dr. Edie had a telephone conversation with her supervisor, James Stuart, Line Supervisor, regarding the short kills that had been forecasted by the recent eight week planner. Stuart instructed Edie not to grant Code 66 time, stating that the inspectors were to follow the options listed in Article 13, that is, if they could not be sent to other plants, they were to do meaningful training, use annual leave or use leave without pay. (G.C. Ex. 3; R. Ex. 1; Tr. 78-79, 84-85)

Friday, September 24, was a short kill day at the plant, and the plant's run time report estimated that slaughter operations for plant personnel would finish at 9:26 p.m.² (G.C. Ex. 2; Tr. 17) This would be the time that the last live hangers (Foster Farms employees) would leave their stations. It would then take about 12-13 minutes for the line to go through the entire evisceration process, including inspection. The inspections ended at approximately 9:38 p.m. (G.C. Ex. 2; Tr. 16-18, 40-41, 52-53, 62, 81, 87) As each inspector finished his last inspection, he would leave his station, wash his gloves and apron in the sink located directly behind his station, and walk to the government office. The government office has lockers where the inspectors stored all of their personal belongings, a table used as a break and lunch area, and the supervisor's office. (Tr. 20) It would take about two minutes for each inspector to wash up and less than two minutes for each inspector to walk to the government office. (Tr. 32, 34, 41, 63)

The inspectors apparently were aware that Dr. Edie was not in the government office and Moser went onto the plant floor to look for her to see if the inspectors could be released under the seven-hour rule. (Tr. 41) Moser found Dr. Edie on the floor and told her that there was roughly 20 minutes left in the day and she had four inspectors who wanted to leave early. According to Moser, Dr. Edie said that no one was leaving and that she would find something for them to do. (Tr. 20). Dr. Edie testified that Moser approached her on the floor, and said that if she wasn't going to be in the office to give them meaningful training that she had to give them Code 66 time. She told him that she would be in the office shortly. (Tr. 81)

Moser returned to the government office, where the other three inspectors were waiting. It took him about

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The transcript is corrected on page 17 to reflect that the actual time on the run time report was 9:26 p.m. and not 9:36 p.m.

three minutes to walk to the office. (Tr. 20) Dr. Edie arrived soon after that. All four inspectors were in the office and she told Moser not to ever come up to her on the floor like that again, since the plant thought there was an emergency. Moser told her that he didn't think there was anything wrong with him approaching her on the floor. According to the four inspectors, Dr. Edie then said they could leave that night on Code 66 time. She also told them that they would have to find something to do the next week if there were short kills, because they would not be going home. LaFollette then said he would probably be filing a grievance on that because the inspectors were not required to find something to do. Dr. Edie then said that they were not going home that night either. (Tr. 21, 42, 53-55, 59, 65-66)

The inspectors then sat at the table and attempted to watch instructional videos. Apparently Dr. Edie attempted to show two or three videos; one didn't work, the inspectors had seen another video, and maybe tried a third video. (Tr. 22, 44, 55, 66-67)

The inspectors did not leave early that night, but at their normal time of 10:00 p.m. (Tr. 23, 43, 56, 68)

According to Dr. Edie, several plant employees had told her that inspectors were looking for her. When she returned to the office, she told all of the inspectors that it was not professional for them to be out on the floor looking for her, when there were things they could do in the office. (Tr. 81) Dr. Edie denies that she told the inspectors they could go home on Code 66 that night. (Tr. 81) She did think that she told them that they would not be getting Code 66 time the next week. She also admitted that the words "grievance" or "grieve" came up when she talked about no Code 66 time for the next week, although she was unsure of the exact timing. (Tr. 86-88) Dr. Edie also denied that she took any reprisal action against the inspectors. (Tr. 94)

Issue

Whether the Respondent violated section 7116(a)(1) and (2) of the Statute by retaliating against bargaining unit employees for asserting rights protected by the Statute.

Positions of the Parties

General Counsel

The General Counsel asserts that the Respondent violated section 7116(a)(1) and (2) of the Statute when Dr. Edie rescinded the Code 66 leave she had granted moments earlier for that Friday night. Dr. Edie refused to let her inspectors leave early right after one of them said that he might file a grievance over her prospective denial of Code 66 time the following week. The inspectors were well within their rights to voice their opinion as to the applicability of the seven hour rule contained in the CBA and they should not have had to suffer retaliation at the hands of the Respondent for stating that they might file a grievance. *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*). The General Counsel asserts that the inspectors were engaged in protected activity of which the Respondent was aware. Further, the inspectors' protected activity caused Dr. Edie to rescind the Code 66 time that she had granted moments earlier.

As a remedy, the General Counsel requests a posting of an appropriate Notice To All Employees and that the Respondent be directed to restore the 20 minutes of Code 66 time that was initially approved on September 24 and then rescinded unlawfully. The General Counsel asserts that the inspectors should each be provided a credit of 20 minutes of Code 66 time to be substituted for any annual leave that may have been taken on some subsequent short kill day where Code 66 time was not granted, or on some future short kill day where Code 66 time would be appropriate.

Respondent

The Respondent asserts its action in this situation was proper under the Statute and under Article 13, Section 4 of the CBA. Article 13, Section 4 does not give employees the unfettered right to be excused when the plant does not operate for the full eight hours on a specific day. Dr. Edie was attempting to follow Article 13, Section 4, and since there was meaningful training that could be provided, it was not an option to give Code 66 time. The Respondent denies that Dr. Edie told the inspectors that they could have Code 66 time for the remainder of their tour on September 24.

The Respondent asserts that the General Counsel's witnesses gave inconsistent testimony and should not be credited. The inspectors differed on whether or not they had discussed the incidents on September 24 with each other. They were also inconsistent concerning the number of videos that Dr. Edie attempted to show that evening. Therefore, the testimony of Dr. Edie should be credited.

The Respondent asserts that the General Counsel failed to establish, as required under *Letterkenny*, that the employees against whom the alleged action was taken were engaged in a protected activity. Dr. Edie denied that she took any reprisal action against the inspectors. The Respondent would have taken the same action notwithstanding the protected activity. The Respondent showed through evidence and testimony that Dr. Edie was going to show videos which she considered to be meaningful training. Thus, through a preponderance of the evidence, the Respondent showed a legitimate justification for the action taken.

The Respondent further asserts that there was no evidence or testimony given at the hearing that would lead one to conclude that Dr. Edie acted out of "anti-union" sentiment.

Analysis and Conclusion

In *Letterkenny*, the Authority set forth the framework for resolving complaints of alleged discrimination in violation of section 7116(a)(1) and (2) of the Statute. Under that framework, the General Counsel establishes a *prima facie* case of discrimination by demonstrating that (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. Once the General Counsel makes the required *prima facie* showing, an agency may establish the 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 protected activity. *United States Department of the Air Force, 60th Air Mobility Wing, Travis Air Force Base, California*, 59 FLRA 632 (2004) (*Travis AFB*).

In this matter, the General Counsel has established that one of the inspectors told Dr. Edie that he might have to file a grievance after she stated that the employees would not be receiving any Code 66 time the following week. It is well established that an employee's right to file and process grievances under a collective bargaining agreement is a protected activity under section 7102 of the Statute. See *United States Department of the Air Force, Aerospace Maintenance and Regeneration Center, Davis Monthan Air Force Base, Tucson, Arizona*, 58 FLRA 636, 645 (2003); *U.S. Department of Health and Human Services, Social Security Administration, Baltimore, Maryland and Social Security Administration, Detroit Teleservice Center, Detroit*,

Michigan, 42 FLRA 22 (1991); *Equal Employment Opportunity Commission*, 24 FLRA 851 (1986) affirmed sub nom., *Martinez V. FLRA*, 833 F.2d 1051 (D.C. Cir. 1987)

The evidence clearly reflects that the plant operation closed early on Friday, September 24, and that the inspectors were interested in leaving early under the provisions set forth in Article 13 of the collective bargaining agreement. The Authority has long held that when individual employees assert a right emanating from a collective bargaining agreement that those employees are engaging in protected activity under section 7102 of the Statute. *U.S. Department of Labor, Employment and Training Administration, San Francisco, California*, 43 FLRA 1036, 1039 (1992). These inspectors asserted their contractual rights by threatening to file a grievance over perceived violations of Article 13.

The evidence further establishes that Dr. Edie reacted to the threat of a grievance over the projected unavailability of Code 66 time the following week by rescinding her approval of the inspectors leaving early on September 24. Although Dr. Edie denies that she granted Code 66 time for the inspectors on the Friday evening or that she retaliated against them by then reversing the granting of Code 66 time, I specifically credit the testimony of the General Counsel's witnesses in this regard. I found the testimony of the inspectors to be sincere and candid and I find only slight differences in testimony on essentially inconsequential matters.

Under these circumstances, I find that the General Counsel has met its *prima facie* burden by establishing that the inspectors engaged in protected activity that was known to the Respondent and that this protected activity was the motivating factor in the rescission of the Code 66 time. I further find that the Respondent has not established that there was a legitimate justification for the action that it took or that the same action would have been taken even in the absence of the protected activity. While the Respondent further asserts that its actions were proper under Article 13 of the CBA, the interpretation of this section is not an issue in this unfair labor practice and is not a valid defense for the allegations before me.

In conclusion, based on the record as a whole, I find that the Respondent violated section 7116(a)(1) and (2) of the Statute when it rescinded the Code 66 time that had been granted after one of its employees said that they might file a grievance.

Remedy

The General Counsel requests that the Respondent be directed to restore the 20 minutes of Code 66 time that was initially approved on September 24, 2004, and then rescinded unlawfully. While I am in agreement that the restoration of Code 66 time is necessary in order to adequately remedy the unfair labor practice in this matter, the evidence does not support that the inspectors actually lost 20 minutes of Code 66 time. According to Moser's testimony, he finished work at 9:38 p.m., took two minutes to wash up, another three minutes to find Dr. Edie, talk to her and then return to the office. Dr. Edie came into the government office immediately after that and spoke with the four inspectors. Even assuming these conversations took less than five minutes, the time would be approximately 9:45 p.m. Therefore, at the earliest, it appears that the inspectors would have been allowed to leave on Code 66 time at 9:45 p.m. Therefore, the remedy in this matter should include 15 minutes of Code 66 time.

Having found that the Respondent violated section 7116 (a)(1) and (2) of the Statute, it is recommended that the Authority adopt the following:

ORDER

Pursuant to section 2423.41 of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the U.S. Department of Agriculture, Food Safety and Inspection Service, Washington, D.C., shall:

1. Cease and desist from:

(a) Discriminating or retaliating against employees in the bargaining unit represented by the National Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO, by rescinding previously approved administrative leave (Code 66 time) because they said they would file a grievance or have otherwise engaged in protected activity within the meaning of the Statute.

(b) In any like or related manner, interfering with, restraining, or coercing unit employees in the exercise of their rights assured by the Federal Service Labor-Management Relations Statute.

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

(a) Provide a credit of 15 minutes of Code 66 time to each of the four inspectors who worked the swing shift at the Foster Farms plant in Kelso, Washington on Friday, September 24, 2004, a day where the plant did not operate for the full duration of the swing shift (short kill day). Each inspector may substitute this credit for any annual leave that may have been taken on some subsequent short kill day where Code 66 time was not granted, or on some future short kill day where Code 66 time would be appropriate.

(b) Post at its facilities, where bargaining unit employees are employed, 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 Boulder District Manager, and they shall be posted and maintained for 60 consecutive days thereafter in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, San Francisco Region, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, September 22, 2005

SUSAN E. JELEN
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 United States Department of Agriculture, Food Safety and Inspection Service, Washington, D.C., violated the Federal Service Labor-Management Relations Statute and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT discriminate or retaliate against employees in the bargaining unit represented by the National Council of Food Inspection Locals, American Federation of Government Employees, AFL-CIO, by rescinding previously approved administrative leave (Code 66 time) because they said they would file a grievance or have otherwise engaged in protected activity within the meaning of the Statute.

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.

WE WILL provide a credit of 15 minutes of Code 66 time to each of the four inspectors who worked the swing shift at the Foster Farms plant in Kelso, Washington on Friday, September 24, 2004, a day where the plant did not operate for the full duration of the swing shift (short kill day). Each inspector may substitute this credit for any annual leave that may have been taken on some subsequent short kill day where Code 66 time was not granted, or on some future short kill day where Code 66 time would be appropriate.

(Agency)

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, San Francisco Regional Office, whose address is: Federal Labor Relations Authority, 901 Market Street, Suite 220, San Francisco, CA 94103-1791, and whose telephone number is: 415-356-5002.

CERTIFICATE OF SERVICE

I hereby certify that copies of the **DECISION** issued by SUSAN E. JELEN, Administrative Law Judge, in Case No. SF-CA-05-0059, were sent to the following parties:

—
CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

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DATED: September 22, 2005
Washington, DC