UNITED STATES OF AMERICA

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

MEMORANDUM DATE: December 15, 1997

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: AIR FORCE MATERIEL COMMAND
WARNER ROBINS AIR LOGISTICS CENTER
WARNER ROBINS AIR FORCE BASE, GEORGIA

Respondent

and

Case No. AT-CA-60791

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987

Charging Party/Union

Pursuant to section 2423.26(b) of the Rules and Regulations, 5 C.F.R. § 2423.26(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
Office of Administrative Law Judges
WASHINGTON, D.C. 20424-0001

AIR FORCE MATERIEL COMMAND WARNER ROBINS AIR LOGISTICS CENTER WARNER ROBINS AIR FORCE BASE, GEORGIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987 Charging Party/Union	Case No. AT-CA-60791

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. § 2423.26(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 **JANUARY 14, 1998**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: December 15, 1997
Washington, DC

FEDERAL LABOR RELATIONS AUTHORITY

Office of Administrative Law Judges

WASHINGTON, D.C. 20424-0001

AIR FORCE MATERIEL COMMAND WARNER ROBINS AIR LOGISTICS CENTER WARNER ROBINS AIR FORCE BASE, GEORGIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 987 Charging Party/Union	Case No. AT-CA-60791

Richard S. Jones, Esquire
For the General Counsel

C.R. Swint, Jr., Esquire
For the Respondent

Before: JESSE ETELSON
Administrative Law Judge

DECISION

An unfair labor practice complaint issued by the Regional Director for the Atlanta Region of the Federal Labor Relations Authority (the Authority) alleges that Respondent "loaned out" certain employees described as WG-5 cleaners and required other employees described as WG-9 painters to work overtime because the painters engaged in certain activities that fall within section 7116(a)(4) of the Federal Service Labor-Management Relations Statute (the Statute). The complaint's concluding allegation is that Respondent's conduct violated sections 7116(a)(1) and (4) of the Statute. The answer denies these allegations. In an amended answer, Respondent asserts that the mandatory overtime preceded the loaning out and was not caused by it.

A hearing was held in Macon, Georgia, on July 16, 1997. Counsel for the General Counsel and for Respondent filed post-hearing briefs. Counsel for Respondent also filed a motion to correct minor errors in the transcript of the hearing. The motion was unopposed. It is granted and the transcript is corrected accordingly.[1]

Findings of Fact

The following findings are based on the record as a whole, the briefs, my observation of the witnesses, and my evaluation of the evidence. I have also taken official notice of the decision of Judge William B. Devaney, dated May 30, 1996, in Case No. AT-CA-50193 (exceptions pending), which has the same party caption as the instant case.

I. Institutional and Operational Background

A component of Respondent identified as "LJ" and described as the C-141 system program directorate is responsible for the worldwide management of the Air Force's C-141 cargo aircraft program. Among LJ's management functions is the "Program Depot Maintenance" (PDM) of each airplane in the C-141 fleet. A PDM is a "full-blown overhaul," performed on each C-141 once every five years. A C-141 is normally scheduled into a time slot of 150 to 180 days for a complete PDM. As the C-141 is an "aging aircraft," however, extensive repairs are usually found necessary, typically requiring nine or ten months rather than the slotted 150 to 180 days. Historically, each C-141 was repainted every ten years, or once every other PDM cycle.

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[1] The index to the transcript shows incorrect page numbers for the witnesses and the exhibits, in the format in which the "Original" transcript appears. I note here only certain basic corrections for the aid of readers of the transcript. The testimony of each witness begins at the page shown below after the witness's surname: Blackman - 22; Williams - 52; Hobbs - 60; Howell - 110; Sanders - 119; Hadden - 131; Blackman (rebuttal) - 136. General Counsel's Exhibits were identified at pp. 4-9 and were all received on p. 9. Respondent's Exhibits 1-6 were identified and received on pp. 57-59. Respondent's remaining exhibits were identified and received at the following pages: No. 7 - Id. 69, Rec. 75; No. 8 - Id. 78, Rec. 80; No. 9 - Id. 83, Rec. 86; No. 10 - Id. 86, Rec. 90; No. 11 - Id. 113, Rec. 114; No. 12 - Id. and Rec. 124; No. 13 - Id. 124, Rec. 125; No. 14 - Id. and Rec. 125; No. 15 - Id. and Rec. 126; No. 16 - Id. 132, Rec. 135.

In late 1991 or early 1992 a decision was reached to change the color scheme of the entire cargo fleet. In order to minimize the time lag, the expense, and the disruption of cargo operations, the plan called for repainting each C-141 in conjunction with its next 5-year PDM, whether it had been painted at its last cycle or not. Since the plan envisioned doubling the number of C-141's requiring repainting during the next five years, Respondent hired some temporary employees to perform part of the repainting process. As the project progressed, as many as 50 to 52 C-141's were repainted in a year (Tr. 76-77).

The repainting process, described more thoroughly in the record in Case No. AT-CA-50193, and Judge Devaney's decision in that case, is performed in three stages.[2] The first stage, "depainting," is performed early in the PDM overhaul process, following "disassembly" (the removal of certain parts of the airplane). Depainting is the removal, or "stripping," of the old paint. Next, in the PDM process, each airplane is taken apart and inspected for necessary repairs and modifications. After the airplane is reassembled and flight-tested, it is ready for the second step of the repainting process, which is a paint preparatory operation called "wash, etch, and aladyne," or "WEA."[3] Within 72 hours of the completion of the WEA process, the third and final stage, painting, is begun. There were, however, at least historically, other substeps required, after the WEA process, to prepare the airplanes for the actual repainting, which is the final step before the

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[2] Exceptions to Judge Devaney's decision are pending before the Authority. Therefore, I cannot rely on his findings of fact. However, the record in the instant case, and the representations of both counsel, are consistent with Judge Devaney's evidentiary findings with regard to the overall repainting process.

[3] "Adalyne," or "alodine," as it was spelled in the transcript of the hearing in Case No. AT-CA-50193, is, technically, a neologism, but would appear to be a garbled version of "anodize" (to coat a metallic surface electrolytically with a protective oxide). Were the intended word, rather, the near-homonym, "anodyne," we would be dealing with a program to soothe or comfort the airplanes.

airplane is released (Tr. 23, 51, 68).[4] Depainting required approximately twice as many work hours as all the subsequent steps in the repainting process for each airplane. (Tr. 69-76, R Exh. 7).

II. Previous Litigation and Contemporaneous Events

Case No. AT-CA-50193 involved the allegation that Respondent reassigned WEA work to its employees who were classified as WG-09 painters without fulfilling its obligation to bargain with the Charging Party (the Union). Respondent admitted its reassignment of such work but defended its action by asserting on several grounds that it had no obligation to bargain. Judge Devaney rejected these defenses and concluded that Respondent violated sections 7116(a)(1) and (5) of the Statute by failing to provide the Union with notice and an opportunity to bargain over the impact and implementation of the work reassignment. He recommended an order including the usual cease and desist and "bargaining order" provisions, a make-whole remedy to WG-5 and WG-7 employees who were adversely affected by the reassignment of WEA duties, and a requirement that, on the Union's request, Respondent take certain steps to protect and make whole WG-9 painters who had been or would be assigned to WEA work. Judge Devaney did not recommend a general *status quo ante* remedy, that is, a rescission of the reassignment of WEA duties.

The WG-5 employees who Judge Devaney found to have been adversely affected by the reassignment of WEA duties were among the temporary employees hired, beginning in 1991 or 1992, as "equipment cleaners," to assist in the 5-year repainting plan. Apparently they were assigned to perform either depainting, WEA, or both. Their original terms of one year were extended for several years. However, in 1994 and 1995 it was discovered that many of the C-141's were aging more rapidly than anticipated. The Air Force decided to "retire" some of these airplanes. This resulted in fewer airplanes being scheduled for painting. (Tr. 65-66).

The reassignment of WEA duties to the painters occurred in December 1994. In March 1995, the Union filed a grievance over the alleged "draft[ing]" of painters to work overtime on several weekends in February and March 1995. The grievance proceeded to arbitration. In November 1995, the arbitrator determined that Respondent had not violated the

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[4] There was testimony in Case No. AT-CA-50193, and apparently Judge Devaney so found (see his decision at 3) that at least some of these substeps were eliminated when, as noted below, the WEA work was reassigned to the painters.

Local Supplement to the Master Agreement and denied the grievance.

The total number of work hours for depainting and painting C-141's increased slightly from fiscal year 1994 to fiscal year 1995. However, for fiscal year 1996, which began on October 1, 1995, the total number of work hours dropped by approximately 35-40 percent. (Tr. 69-75, R Exh. 7.)

In January 1996, after the hearing in Case No. AT-CA-50193 but before Judge Devaney's decision, LJ declared a number of the temporary equipment cleaners to be "excess." The personnel department was notified and requested to place them elsewhere if possible. (Tr. 134-36.) Only six C-141's that arrived from January through April 1996, and one in May, were scheduled for a "full paint job" (Tr. 76-77, 83-85, R Exh. 9).

On May 2, 1996, the Union filed an unfair labor practice charge alleging that, on or about April 8, management implemented two changes in working conditions, one of which was "changing the duties of painters in C141." The designated contact person for the Union was Joe Blackman, a painter who was the General Counsel's main witness at the hearing in this case. The record contains nothing further about that unfair labor practice charge or its disposition.

For some time before May 1996, the depainting and repainting operations had been housed in separate buildings (Buildings 89 and 54, respectively).[5] On May 20, the depainting operation was moved into Building 54, which it then had to share with the repainting (including, presumably, the WEA) process. These operations continued to be housed together in Building 54 until October 1996, while Building 89 was under repair. By May 30, the date of Judge Devaney's decision, some WG-5 equipment cleaners had been loaned out to perform other work (Tr. 43, 103, 133-34).

III. Events Following Judge Devaney's Decision

Having loaned out some temporary WG-5 equipment cleaners in May 1996, LJ loaned out another 12 on July 21. The unfair labor practice charge in this case was signed on July 30 and filed on August 2. Ten more of these temporary employees were loaned out on August 5 (Tr. 132-33, R Exh 16). The supervisors for the depainting process were

5 Earlier, depainting operations had been divided between Building 89 and a third building (Tr. 79, R Exh. 8).

retained, while the painting supervisors were moved out (Tr. 32). Sometime during the period around August, WG-9 painters were being assigned depainting work and were required to work overtime on both painting and depainting. Twelve WG-5's having been loaned out on July 21, the unfair labor practice charge having alleged on July 30 that overtime had been imposed on the painters, and it being undisputed that painters were assigned mandatory overtime, I infer that the imposition of mandatory overtime began in July if not earlier.

The record does not indicate when depainting work was first assigned to painters, but the records for overtime work assignments in the summer of 1996 show a pattern of weekends of overtime for depainting and painting, alternatively, from July 20 to the end of August, with one weekend off in August. Overtime was assigned on three weekends in September, for both depainting and painting. I find that at least some of the mandatory overtime assigned to the painters, including at least some of the mandatory overtime for depainting, was the result of loaning out the WG-5 equipment cleaners.[6] In August 1996, WG-5 employees were paid between $11.28 and $13.15 an hour. WG-9 employees were paid between $13.03 and $15.69 an hour for regular time duty. (GC Exh. 3.)[7]

In October, Respondent issued an amended "Core Personnel Document" describing the position of its WG-9 painters. An introductory sentence setting forth the purpose of the position had previously specified: "perform painting and finishing duties of aircraft and aerospace vehicles" (GC Exh. 4). The amended purpose was: "to paint, clean, and or depaint a variety of parts installed or removed from aircraft; as well as the interior or entire exterior of the aircraft." Also added was a new "critical" duty: "May be required to perform paint removal task in the event there is no Aircraft available for painting." (GC Exh. 5.)

Painters Joseph Blackman and Louis Williams were presented with the new job description. They sought an

[6] Assignment of depainting work to the painters, aside from its being required during overtime hours, is not part of the complaint in this case, nor does the underlying unfair labor practice charge, although it refers to "other retaliatory acts," specify such assignment.

[7] There is no evidence regarding premium pay for overtime, nor any request to take official notice of whatever regulations, if any, are applicable.

explanation from Ms. Hollingsworth (whose name appears on the document as having "classified" the position) as to how these changes had been made without first talking to the painters about it. Hollingsworth told them that Roger Hobbs, the painters' branch chief, had authorized it. The painters referred Hollingsworth to the previous unfair labor practice case. Hollingsworth then said that she could not discuss the matter any further. She phoned Labor Relations Officer Dale Foster and the painters continued their protest with him. Foster responded to the effect that the painters just had to do what they were assigned to do if they wanted their jobs.

Building 89 (and perhaps Building 110) again became available in October. However, the projected schedule for fiscal year 1997 then showed a further winding down of the C-141 painting program to the extent that only six airplanes would arrive for full paint jobs during the whole year. (Tr. 86-90, 93, 114-15, R Exh. 10.)[8]

Branch Chief Hobbs was replaced around the beginning of November by Jackie Howell. Shortly after Howell took over, a Union steward informed him that some painters were complaining about being drafted to work overtime on depainting. Howell decided that all of the overtime depainting could be handled by volunteers. From that time to the date of the hearing, no painters were assigned to mandatory overtime for depainting.

IV. Respondent's Explanation for its Course of Action

Roger Hobbs, who was responsible for the decisions that effected the reassignments and the mandatory overtime, testified at length, and cogently, about the operational considerations that dictated these actions. He explained his loaning out the WG-5 employees at the times that he did on the basis of a lack of work and the availability of only one building for both depainting and painting (Tr. 78, 96).

Building 54, to which the depaint/paint operations were confined from May to October, could accommodate only one C-141 at a time. Thus, after an airplane was depainted, it was moved to another shop for its overhaul, and another airplane, ready for repainting, was moved in. Depainting of one airplane and repainting of another could not be performed simultaneously (Tr. 41, 79). Hobbs might, then, either have assigned one group of employees to a continuous operation, working on each airplane as it became ready for

[8] Several previously depainted airplanes still awaited repainting (Tr. 74-75).

either depainting or repainting, or have divided the work between two crews and found something to occupy the repainting crew while the depainters were at work and *vice versa*. Hobbs chose the first option. Since the painters, but not the equipment cleaners, were "PAC certified" to paint, and were thus deemed capable of performing both operations, he assigned the work to the painters. Moreover, according to Hobbs, none of the other LJ components needed painters, but some had asked him for depainters. (Tr. 92-93.)

With respect to the apparent paradox of loaning out employees for lack of work while assigning overtime to higher-paid employees, Hobbs testified that it was not the overall workload level that dictated overtime, but the nature of the process and the priority of returning each airplane to its mission in the shortest possible time. Thus, once certain chemicals or coatings are applied to an airplane's exterior, the next step in the process must follow within a certain time frame. It cannot wait until the next available slot of regular duty time. Further, once an airplane was ready for any stage in the overhaul process, including depainting or repainting, its return to its previously scheduled missions depended on expeditious completion of each stage in the process, minimizing periods in which the airplane awaited its turn. Finally, the airplane had to be moved promptly through the depainting stage in order to ensure the timely ordering of any replacement parts found to be required during its post-depainting inspection, and to enable the completion of depainting in time to pass the airplane along to other crews of employees who would otherwise be waiting to perform their parts of the overhaul. (Tr. 67, 81-83.)

The amendment of the painters' job description, according to Hobbs, was part of a project that he assigned to Jackie Howell (who was about to become Hobbs' successor) when Howell was assigned to him during a 2-week tour as an Air Force reservist. Hobbs directed Howell to update a number of job descriptions, including that of the painters. (Tr. 96-97, 111-12.) Howell conformed the painters' job descriptions to those used in other components of LJ, where the painters' job descriptions included depainting (Tr. 97, 112, 115-16).

Discussion and Conclusion

The General Counsel's interpretation of Respondent's actions is that, in response to Judge Devaney's decision, Hobbs transferred the WG-5 equipment cleaners out and thereby required the WG-9 painters (those presumed to be

responsible for the unfair labor practice charge that resulted in the Devaney decision) to assume the duties of the equipment cleaners while denying the equipment cleaners the opportunity to earn overtime. I find insufficient support for this theory, or any other theory that would warrant the inference of an unlawful motivation. I find no connection between Judge Devaney's decision and the reassignments that underline the instant case. However, even apart from the issue of motivation, the General Counsel faces a serious obstacle to the finding of a violation.

I. The Statutory and Precedential Landscape

Section 7116(a)(4) of the Statute, the provision on which the substantive allegations of the complaint are based, prohibits discrimination against an employee "because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter." The Authority uses the same analytical framework for resolving complaints alleging discrimination in violation of section 7116(a)(4) of the Statute as it does for resolving complaints alleging discrimination in violation of section 7116(a)(2), namely, the framework set forth in *Letterkenny Army Depot*, 35 FLRA 113 (1990)(*Letterkenny*). *Department of Veterans Affairs Medical Center, Brockton and West Roxbury, Massachusetts*, 43 FLRA 780 (1991)(*Brockton*).

Although the Authority uses the same "analytical framework" in section 7116(a)(4) cases, certain textual differences between sections 7116(a)(2) and (a)(4) suggest that the materials needed to complete the structure that is to be built on that framework are not necessarily the same. Among those textual differences are two that are potentially significant for purposes of the instant case.

The first of these differences is that section 7116(a)(2) prohibits discrimination "to encourage or discourage membership in any labor organization," while section 7116(a)(4) prohibits only discrimination against an employee "because the employee" has done certain things. The Authority, however, has incorporated a similar limitation on the scope of section 7116(a)(2). Thus, in *Letterkenny*, the Authority outlined the necessary elements in the "*prima facie* showing" that the General Counsel is required to establish in order to withstand a motion to dismiss. *Id.* at 119. These elements are:

> (1) [T]he employee against whom the alleged discriminatory action was taken was engaged in protected activity[.]

(2) [S]uch activity was a motivating factor in the agency's treatment of the employee . . . .

Id. at 118. Taken at face value, the first element excludes from the scope of section 7116(a)(2) any discrimination that occurs because of protected activity by persons other than the discriminatee or because of any *suspected* or *anticipated* protected activity. *But see Electro-Voice,* Inc., 320 NLRB 1094, 1095 n.4 (1996); F&E *Erection Co.*, 292 NLRB 587 (1989).[9]

The second potentially relevant textual difference between these two subsections is that section 7116(a)(4) prohibits only discrimination that responds to certain specified activities--filing a complaint, affidavit, or petition, or giving information or testimony under "this chapter" (the Statute). This textual limitation has not received a rigid construction, however. The filing of an unfair labor practice charge under the Statute, while not specifically mentioned in section 7116(a)(4), has been held to be covered by that provision. *See Brockton*, 43 FLRA at 780-81. However, the complaint in the instant case alleges that

Respondent took the alleged discriminatory actions because the painters engaged in the activity described in paragraph 10 of the complaint. Paragraph 10 states that:

> A complaint issued on July 31, 1995, involving the WG-4102-9 Painters. On May 30, 1996, Judge William Devaney issued a decision finding that the Respondent had violated the Statute. Also, the Painters have filed numerous group grievances during this same period.

I pass quickly over the sentence concerning the painters' filing of grievances, which does not fall within

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[9] The Authority appears to have entertained an approach broader than the one articulated in *Letterkenny* in *U.S. Department of Labor, Washington, D.C. and U.S. Department of Labor, Employment Standards Administration, Boston, Massachusetts*, 37 FLRA 25, 37 (1990), where it stated that "the issue is whether the General Counsel has proved by a preponderance of the evidence that the Respondent's decisions to remove the water coolers . . . were in retaliation for the Union's filing of a grievance . . . ."

section 7116(a)(4) and which the evidence did not connect with Respondent's actions. Counsel for the General Counsel, in his brief, seeks to connect Respondent's actions with "the employees' involvement in the prior unfair labor practice charge, which resulted in the decision adverse to Respondent
. . . ." Br. at 11.

The record in this case gives no indication of the employees' "involvement" in the prior charge except that at least two painters who testified in this case had testified in the prior case. Their prior testimony does not appear to have been seriously contested and, on the record as a whole, does not appear to be the "involvement" that the instant case was about. The focus of the instant case was, rather, the fact that the charge filed in the earlier case (*see Brockton*) resulted in a complaint and a decision adverse to Respondent. That charge, however, was not filed by any employee who is an alleged discriminatee but by the Union.

Given the textual limitation in section 7116(a)(4) to discrimination "because the employee" did certain things, and the Authority's similar limitation even of discrimination under section 7116(a)(2), it is difficult to find a rationale under which the alleged discrimination in the instant case can be placed within section 7116(a)(4). One possible approach, in which the Authority acquiesced prior to *Letterkenny* but which may no longer be viable, is to consider any covered activity that is initiated for the benefit of an employee as the equivalent of activity by that employee. *See Department of the Navy, Navy Resale System, Field Support Office, Commissary Store Group, Norfolk, Virginia*, 16 FLRA 257, 265-66 (1984) (*Navy Resale System*). The Authority failed to disavow a judge's reliance on *Navy Resale System* in one post-*Letterkenny* case, *U.S. Department of the Navy, Naval Aviation Depot, Naval Air Station Alameda, Alameda, California*, 38 FLRA
567, 581 (1990). However, in that case, the filing of an

unfair labor practice charge by the union was only one of several actions found to have motivated the discrimination. The discriminatee was found to have been retaliated against for that and for his seeking the union's assistance and giving a statement to the Authority. *Id.* at 567, 569, 581.

Even assuming that the *Navy Resale System* analysis is still viable, its applicability to this case is, in light of

Letterkenny, questionable. The charge that was found to have motivated the discrimination in *Navy Resale System* was over a matter that affected the discriminatee, and no other employee, directly. There was no question but that the charge had been filed on that employee's behalf. Here, however, the matter alleged to have caused the discrimination involved no rights personal to the painters (or to any other employees). The right sought to be vindicated was that of the Union, as exclusive bargaining representative, to be given the opportunity to negotiate over the impact and implementation of certain changes. While those changes had affected the painters, among others, and while the Union's right to negotiate was ultimately for the purpose, as stated in section 7114(a)(1) of the Statute, of "representing the interests of all employees in the unit it represents," the Union's action in filing the charge here cannot be attributed to the alleged discriminatees in the same way as the filing in *Naval Research System* could.

As a matter of policy, the Authority might wish to reaffirm *Naval Resale System* and to apply it generously so as to protect employees who, as here, can be linked to the filed charge as potential beneficiaries. However, such an approach appears to be inconsistent with the existing *Letterkenny* formulation. For if discrimination is considered to fall within section 7116(a)(2) only when committed against an employee who actually engaged in protected activity, and not when committed against an employee whom the agency somehow associates with protected activity, it would be difficult to justify construing the textually more restrictive section 7116(a)(4) more expansively. *But cf. NLRB v. Scrivener*, 405 U.S. 117 (1972). I feel constrained, therefore, to recommend dismissing this complaint for failure to establish any basis, consistent with the pleadings and the evidence presented, for finding discrimination against a protected employee. However, recognizing and even hoping that the Authority will not adopt this recommendation, I shall state my conclusions as to whether the General Counsel has otherwise established a *prima facie* case under *Letterkenny*.

II. A *Prima Facie* Case Has Not Been Established[10]

Conceding the absence of any direct evidence of antiunion animus, Counsel for the General Counsel relies largely on the timing of Respondent's actions in relation to Judge Devaney's decision, as if to suggest that it was not so much the filing of the charge as the (still not final) fruits of that filing, some 18 months later, that spurred Hobbs to invidious action. There are several problems with this reliance.

The loaning out of the WG-5 equipment cleaners began before Judge Devaney's decision, although well after the charge was filed, the complaint was issued, and the hearing was held. These loans began after, although not immediately after, the WG-5 employees were declared "excess." While the General Counsel contends that the delay between this declaration and the actual loaning out (which, as the General Counsel fails to acknowledge, occurred in stages) should raise doubts about the timing, there is nothing inherently suspect in such a delay.[11] Moreover, the loaning out corresponded to an actual decrease in the number of arriving airplanes that required depainting, even while airplanes that had already been depainted remained at the facility. These airplanes, after several months of mechanical overhaul, would require repainting work that only the painters were qualified to perform.[12]

Respondent's amendment of the painters' job descriptions in October 1996, which the General Counsel

[10] In making this determination, I have relied on the evidence in the record as a whole and not the General Counsel's evidence viewed in isolation. *See Portsmouth Naval Shipyard, Portsmouth, New Hampshire*, 49 FLRA 1522, 1532, 1558-59 (1994); *Golden Flake Snack Foods*, 297 NLRB 594 n.2 (1990).

[11] According to the unfair labor practice charge filed by the Union on May 2, 1996, Respondent did something around April 8 that the Union construed as a change in the painters' duties.

[12] Counsel for the General Counsel notes that there was at least some work available that the WG-5 employees were qualified to perform, so that Respondent had options other than assigning all of it to the painters. This is insufficient, however, to warrant the inference that the option Respondent chose was motivated by protected activities described in section 7116(a)(4).

finds suspicious as an attempt by Hobbs to portray the change as one that is "covered by the contract," was satisfactorily explained as a routine exercise in updating the job descriptions to conform to those of the painters' counterparts in other LJ components. Moreover, these amendments, adding "depainting" to the painters' official duties, were made after the events covered by the complaint. The General Counsel's theory presumes Hobbs' expectation that he could mislead the Authority into finding that, somehow, the new job descriptions retroactively legitimized the assignment of depainting duties to the painters. I find it highly improbable that Hobbs acted in accordance with such an impression of naivete on the Authority's part.

Finally, the General Counsel attributes to Hobbs the motivation of avoiding future awards of backpay to the WG-5 employees. This Hobbs supposedly sought to accomplish by "banish[ing]" these employees from the area in which the C-141's were depainted. It is debatable whether such a motivation is proscribed by section 7116(a)(4) or is pertinent under *Letterkenny*. In any event, while Hobbs understandably would have found avoidance of future backpay awards desirable, the entire history of Respondent's treatment of the WG-5 equipment cleaners tends to negate any inference that such a motivation contributed to its decision to loan them out.

In this connection, as with all the issues raised by the General Counsel with respect to timing, it must be remembered that the equipment cleaners were hired on a temporary basis, for the purpose of a project designed to last five years. It became apparent, at least by the early part of 1996, not only that the 5-year estimate would not be exceeded, but that the project might well wind down even sooner. Lending the temporary employees out, and thus delaying any final decision as to their placement or termination, appears to have been not only justifiable but prudent.

Finding none of the General Counsel's points persuasive, and perceiving no other basis for inferring a discriminatory motivation, I conclude that the General Counsel has not established a *prima facie* case and recommend that the Authority issue the following order.

ORDER

The complaint is dismissed.

Issued, Washington, DC, December 15, 1997.

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JESSE ETELSON
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that copies of this **DECISION** issued by JESSE ETELSON, Administrative Law Judge, in Case No. AT-CA-60791, were sent to the following parties:

CERTIFIED MAIL, RETURN RECEIPT **CERTIFIED NOS:**

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_____

Dated: December 15, 1997
Washington, DC