

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 PEKIN, ILLINOIS Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 701, AFL-CIO Charging Party	Case No. CH-CA-90107

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 **MARCH 6, 2000**, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 3, 2000
Washington, DC

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

MEMORANDUM

DATE: February 3, 2000

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL CORRECTIONAL INSTITUTION
PEKIN, ILLINOIS

Respondent

and

Case No. CH-CA-90107

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, LOCAL 701, 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 Bench 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

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WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS FEDERAL CORRECTIONAL INSTITUTION PEKIN, ILLINOIS Respondent	Case No. CH-CA-90107
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 701, AFL-CIO Charging Party	

Jennifer A. Schmitt, Esquire
Scot Gulick, Esquire
For the Respondent

Greg A. Weddle, Esquire
John F. Gallagher, Esquire
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding arises 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.¹ and the Rules and Regulations issued thereunder, 5 C.F.R. § 2423.1, et seq. and concerns whether the Federal Correctional Institution, Pekin, Illinois (Respondent) violated § 16(a) (1) and (2) of the Statute by failing to select employee Paul Sailer for the position of Correctional Counselor,

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For convenience of reference, sections of the Statute hereinafter are, also, referred to without inclusion of the initial "71" of the statutory reference, i.e., section 7116 (a) (2) will be referred to, simply, as "\$ 16(a) (2)".

GS-9, because Sailer had engaged in representational activities on behalf of AFGE Local 701 (Union). Respondent denies that its failure to select Mr. Sailer for the position was unlawfully motivated (G.C. Exh. 1(j)).

This case was initiated by a charge filed on November 16, 1998 (G.C. Exh. 1(a)), alleging violation of §§ 16(a) (1), (2) and (4) of the Statute; the Complaint and Notice of Hearing issued July 21, 1999 (G.C. Exh. 1(c)), but alleged violation only of §§ 16(a) (1) and (2) of the Statute. The hearing was set for September 15, 1999, in Peoria, Illinois, at a place to be determined and by notice dated September 8, 1999 (G.C. Exh. 1(x)), the place of hearing was fixed, pursuant to which a hearing was duly held on September 15, 1999, in Peoria, Illinois, before the undersigned. All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issue involved and were afforded the opportunity to present oral argument which General Counsel waived and which Respondent exercised. At the conclusion of the hearing, October 15, 1999, was set as the date for filing post-hearing briefs, which time, subsequently, was extended, on motion of General Counsel, to which the other parties did not object, for good cause shown, to November 5, 1999. General Counsel and Respondent each timely mailed a helpful brief, received on, or before, November 10, 1999, which have been carefully considered.

The legal skirmishing in this case actually began on August 26, 1999, with Respondent's filing of a motion for summary judgment (G.C. Exh. 1(l)) and a motion for a more definite complaint (G.C. Exh. 1(p)). Additionally, on September 3, 1999, the Respondent petitioned to revoke a subpoena requiring the production of various correspondence pertaining to the selection of an applicant for the vacant Correctional Counselor position (G.C. Exh. 1(t)). Not surprisingly, General Counsel opposed such motions (G.C. Exhs. 1(n), (r), and (v)). The Chief Judge denied the first two motions but granted the third, in part, by Order dated September 9, 1999 (G.C. Exh. 1(dd)). Respondent also filed a motion on September 7, 1999, to suppress the testimony and witness statement of Kimberly Chermock (G.C. Exh. 1(z)), to which motion General Counsel responded on September 8, 1999 (G.C. Exh. 1(bb)).² On September 10, 1999, General Counsel petitioned to revoke Respondent's subpoenas which sought to compel specified FLRA employees to produce certain statements and documents obtained from Ms. Chermock during the investigation of the unfair labor practice charge in

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The undersigned denied the Respondent's motion to suppress at the hearing (Tr. at 10-12).

this case (G.C. Exh. 1(ff)). By Order dated September 13, 1999, the Chief Judge granted General Counsel's motion to revoke Respondent's subpoenas (G.C. Exh. 1(hh)).

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

Findings

A. The Parties' Relationship

The Federal Correctional Institution at Pekin, Illinois, is a large new Federal prison, having opened in 1994 (Tr. 19, 87-88). Mr. David Helman was appointed as its first Warden and served in that capacity until his retirement in April, 1999 (Tr. 19, 88). During his 26 years of service for the Federal Bureau of Prisons, Mr. Helman performed a number of functions. For example, prior to becoming the Warden at Pekin, Mr. Helman served as the Deputy Assistant Director of Human Resources Management Division at the Bureau of Prisons, Headquarters in Washington, D.C., where he was responsible for overseeing the nationwide labor-management relations program for the agency (Tr. 87). He also has had considerable experience in labor-management relations throughout his career with the Bureau of Prisons (Tr. 109).

At the FCI in Pekin, employees included in the nationwide bargaining unit are represented by AFGE Local 701 (G.C. Exhs. 1(c) and 1(j)). Mr. Randy Martin is the Union's President (Tr. 19-20) and had a good relationship with Warden Helman, both during his tenure as the Union's Vice-President and after becoming President two years ago (Tr. 20, 23-24, 30-31, 111).

B. Paul Sailer's Arrival at FCI Pekin

Warden Helman and Mr. Paul Sailer both testified concerning the circumstances surrounding the latter's arrival at Pekin. To a great extent, their testimony does not overlap. That is, Mr. Sailer testified about a telephone conversation he had with Warden Helman before moving from the U.S. Penitentiary in Lompoc, California, to Pekin, a conversation about which Warden Helman was never questioned. Instead, Warden Helman testified to a separate telephone conversation he had with Lompoc's Warden, Patrick

Colhane, concerning Mr. Sailer's desire to relocate.³ Accordingly, I have no way of determining what Warden Helman would have testified about the purported telephone conversation between himself and Mr. Sailer if given the opportunity. I therefore credit Mr. Sailer's un rebutted testimony and find that the conversation occurred. The inferences to be drawn from that conversation are another matter, of course, and will be discussed below.

In the spring of 1995, Warden Helman received a telephone call from Warden Colhane in Lompoc, who explained that Mr. Sailer had requested a transfer, or reassignment, to the Pekin facility primarily for reasons of family hardship, i.e., a desire to be reunited with family in the area from whom he and his wife had been separated for a long time (Tr. 89).⁴ As Mr. Sailer describes it, Warden Colhane called him out of a training session, told him of a possible opening in Pekin, and instructed him to contact Warden Helman (Tr. 48). Mr. Sailer called Warden Helman that night from home and they discussed issues such as how inmates should be managed and what living arrangements Mr. Sailer would make upon being transferred to the Pekin facility (Tr. 49). According to Mr. Sailer, Warden Helman then, ". . . brought up my union activities, said he was concerned about my union activities" but did not explain what he meant by concerned (id.). In response, Mr. Sailer further testified that he explained to Warden Helman that he viewed the union as a tool to help wardens manage their institutions, a response which appeared to satisfy Warden Helman (id.). At some point after these conversations, although Warden Helman was under no obligation to honor the request, he agreed to Mr. Sailer's transfer and paid his moving expenses (Tr. 89).

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I found Mr. Helman to be a forthright and truthful witness who was neither evasive nor incomplete in his responses even when he had the opportunity to do so. Accordingly, whenever his testimony conflicted with that of other witnesses, I credited Warden Helman's version of events.

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Mr. Sailer testified that previously he had been promised a transfer to a different correctional facility in Greenville, Illinois, which failed to materialize; that he had filed an unfair labor practice charge over such failure; and that Warden Colhane was attempting to settle the pending charge by contacting Warden Helman about the possibility of transferring Mr. Sailer to Pekin, a facility located two hours from Greenville (Tr. 46-48). Warden Helman did not refer to any of this history in describing his conversation with Warden Colhane.

Mr. Sailer was officially transferred to the Pekin facility in May 1995 (Tr. 20-21, 50).⁵

C. Mr. Sailer's Union Activities at FCI Pekin

On his first day of duty at Pekin, Mr. Sailer was offered and accepted the position of Union Vice-President and served in that capacity until December 1995, when he became the Union President upon the incumbent's resignation (Tr. 50-51). Under his administration, membership in the Union increased from 98 to approximately 160, and he was involved in a number of representational activities (Tr. 50-52). For example, in July 1996, Mr. Sailer was interviewed by a reporter for an article which appeared in the local newspaper concerning allegations by minority employees at Pekin that they were hired by Warden Helman at lower salaries than non-minorities (Tr. 52-53). Mr. Sailer's comments elicited a rebuttal article from Warden Helman which appeared in a later issue of that newspaper and an appearance by the Warden about a month later at the next scheduled labor-management relations meeting to request that, in the future, Mr. Sailer should raise such concerns with the Warden before bringing them to the media (G.C. Exh. 2; Tr. 52-56).⁶ As Mr. Sailer described the exchange at that meeting, ". . . To prove a point, I got loud and talking over him and was explaining to him that I represented the employees. I would speak to the employees anytime I wanted and if that was the route I wanted to take care of an issue, I would go that way." (Tr. 56).

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Mr. Sailer's arrival at the Pekin facility was delayed while he participated on behalf of AFGE at the national level in the negotiations which resulted in a nationwide collective bargaining agreement between AFGE and the Federal Bureau of Prisons covering all bargaining unit employees including those located at the Pekin facility (Tr. 50).

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Warden Helman admitted that he was bothered by the article because prisons rarely get good press anyway, and he felt the allegations of racial discrimination were inaccurate; however, as with many other similar situations, he took the allegations in stride and responded to them (Tr. 112-13).

Mr. Sailer filed between 30 and 40 grievances while Mr. Helman served as the Warden at Pekin (Tr. 58)⁷ and was the Union's representative at arbitration hearings where he cross-examined Warden Helman who was testifying as a witness (Tr. 61-62). On one such occasion, involving the discipline of a unit employee for using profanity, Warden Helman was asked (for purposes of comparison) about a different employee who had used profanity in the past and testified that there had been two such instances, whereas Mr. Sailer was attempting to establish by questioning the Warden that in fact there had been three previous occurrences (Tr. 62-64). At that point, Mr. Bob Will, the agency's representative at the arbitration, accused Mr. Sailer of calling the Warden a liar (Tr. 64). Mr. Helman testified credibly herein that he did not interpret Mr. Sailer's questioning as Mr. Will did because Mr. Sailer was proceeding in a civil and professional manner to establish the facts (Tr. 113).

Several grievances were filed on Mr. Sailer's behalf. In one such case occurring in 1995, Mr. Sailer was charged with using abusive and insulting language toward a woman in an elevator, for which his supervisor had recommended a three-day suspension (Tr. 90-91). Warden Helman reduced the discipline to a letter of reprimand in light of Mr. Sailer's excellent work record and his expression of remorse over the incident in a discussion with the Warden (R. Exh. 5; Tr. 91-92). On two other occasions, grievances involving Mr. Sailer's performance evaluations were granted and the ratings raised by the Warden to the highest possible level of "outstanding" (R. Exh. 1, G.C. Exh. 4; Tr. 28-29, 66-68, 96-97). On the basis of such action, Mr. Sailer was awarded a retroactive pay-enhancing quality step increase which was presented to him by the Warden in a large staff meeting so that the award could be shared with his colleagues (R. Exh. 9; Tr. 95-96, 97-98).

D. Meeting of Supervisors and Managers on April 15, 1998

It is undisputed that Warden Helman called a meeting of all managers and supervisors at the Pekin facility for April 15, 1998, to discuss the significant new terms contained in

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One grievance filed by Mr. Sailer also involved allegations that Warden Helman had made inappropriate remarks about blacks and hispanics (G.C. 3; Tr. 59-61). Warden Helman testified that he did not like it when the grievance was filed, because he found the allegations to be inaccurate (Tr. 112). There is no further record evidence concerning this grievance.

the recently-completed nationwide agreement negotiated between the Federal Bureau of Prisons and AFGE's Council of Prison Locals (Tr. 35, 108-09, 135-36). The testimony differs as to what Warden Helman said at the meeting. As previously noted, I credit Warden Helman's version of these events to the extent that the witnesses disagree. In this instance, the Warden's testimony is corroborated by John Copley, who was at that time FCI Pekin's Human Resources Manager and was present at the meeting to conduct the substantive training on the contract's provisions (Tr. 135-36).⁸ Ms. Kimberly Chermock, who was then the Assistant Safety Manager at FCI Pekin and was present at the meeting in her supervisory capacity,⁹ testified to a somewhat different version of the same meeting (Tr. 35-38). I was unpersuaded by Ms. Chermock's testimony not only on the basis of her demeanor, but also because of certain internal inconsistencies and imprecise recollections on her part. For example, Ms. Chermock testified that she took notes of the meeting and thought that Warden Helman's comments were "completely inappropriate" (Tr. 39-40), but threw her notes away because she did not believe they were important enough to keep (Tr. 40-41). Additionally, she waited for more than a year to tell Mr. Sailer what the Warden allegedly said at the meeting and even longer to give a statement about those events to a representative of the General Counsel (Tr. 39-41). She also could not remember when she told Mr. Sailer about the Warden's comments or when she gave a statement to the General Counsel (id.).

At the meeting on April 15, 1998, attended by some 30 to 40 of FCI Pekin's managers and supervisors, Warden Helman gave some introductory remarks which lasted about 30 minutes (Tr. 36, 108-09, 137). He explained that FCI Pekin was a new institution with young and inexperienced supervisors, many of whom had never received training in labor-management relations and did not understand the importance of a master agreement in dealing with labor issues which were bound to arise, whereas he had a quarter century of experience in those areas which he wanted to convey to them. In particular, he wanted them to know the importance that he and the Director of the Federal Bureau of Prisons attached to the master agreement, and his expectation that the managers and supervisors ". . . understand it, read it, study it, abide by it." (Tr. 109).

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Mr. Copley is currently the Assistant Human Resources Administrator for the Federal Bureau of Prisons' South Central Region headquartered in Dallas, Texas (Tr. 135-36).

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Ms. Chermock was no longer a supervisor at the time of the hearing in this case (Tr. 35).

Warden Helman also mentioned and discussed several of the Union's representatives, including Randy Martin, the Union's President, and Paul Sailer, its Chief Steward (Tr. 110-11). With regard to Mr. Sailer, Warden Helman described him as, ". . . an expert on labor/management relations"; ". . . well versed on the master agreement"; ". . . very active in pursuing grievances he felt needed to be pursued"; ". . . very assertive"; and as a "tenacious" individual who ". . . would certainly not hesitate to challenge management when he thought it was appropriate." (id.).¹⁰ His purpose in describing Mr. Sailer in these terms was to ensure that his managers understood the need for them to learn the master agreement as well as Mr. Sailer did, and that they should not shy away from their responsibilities in dealing with him (Tr. 111).¹¹ Warden Helman then described Union President Martin as less experienced in both prison work and in union representational responsibilities than Mr. Sailer, and therefore as someone who would rely heavily on Mr. Sailer to resolve labor problems at the facility (id).¹² Warden Helman also made it clear that the Union had the right to represent unit employees, and that he expected them to act within the confines of the master agreement in keeping with the good labor-management relationship at the facility (Tr. 137-38).

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I find, contrary to Ms. Chermock's testimony, that Warden Helman did not call Mr. Sailer a "pit bull" but rather that such description was Ms. Chermock's more colorful paraphrasing of the word "tenacious." In this regard, I credit Human Relations Director Copley's testimony that the term "pit bull" was not used, but that Mr. Sailer was described as a very active union representative (Tr. 138).

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I specifically discredit Ms. Chermock's testimony to the effect that the Warden described Mr. Sailer as a hater of all managers -- even those at Wal-Mart -- simply because they are managers (Tr. 38).

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Although there is no indication that Warden Helman brought up at the April 15 meeting how he personally interacted with the two men, Mr. Martin testified credibly that in a private conversation with the Warden in January 1998, the Warden said that Mr. Sailer was too aggressive or too direct in his approach, and demonstrated for Mr. Martin how Mr. Sailer would come into his office, stand in front of his desk while the Warden was seated behind it, and begin immediately to present a labor problem, whereas Mr. Martin would always sit at the side of the Warden's desk and engage in pleasantries before presenting a substantive issue for discussion (Tr. 24-27).

E. Doris Haymon's Selection as Correctional Counselor

Early in September 1998, Respondent posted Vacancy Announcement No. 98-PEK-017 to select a GS-9 Correctional Counselor at FCI Pekin (G.C. Exh. 6). Among the employees who filed timely applications were Paul Sailer and Doris Haymon (G.C. Exhs. 8 and 9), and both subsequently were included on the Best Qualified list of 5 employees (G.C. Exh. 7) forwarded to Warden Helman as the selecting official, along with the 5 relevant application packages, for his consideration (Tr. 71-72, 99-101, 125). The applicants were listed in alphabetical order rather than according to their relative ranking under the qualification factors for the vacant position, and, consistent with established practice, Warden Helman was not furnished the applicants' scores (R. Exh. 11; Tr. 101-02, 124-29). Thus, Warden Helman did not know which applicant had been ranked highest by the rating panel. (Tr. 102, 131).

Warden Helman selected Doris Haymon for the position (Tr. 102). He was aware that Mr. Sailer had a higher performance rating as a Correctional Officer and more seniority than Ms. Haymon, but his own educational training and experience in the field of correctional counseling led him to conclude that fine performance by an officer in maintaining custody of inmates and preserving security at a prison facility does not equate necessarily with excellence as a counselor (Tr. 105-08, 118-19). In his judgment, the most important attributes of a successful counselor, who is involved with programs for and treatment of inmates, are good communication and interpersonal skills (Tr. 103-04). Warden Helman had observed Ms. Haymon's career since 1994, when he selected her as a member of his staff at the inception of FCI Pekin's operations (Tr. 102). At that time, Ms. Haymon had been employed at an FCI facility in Florida which, like FCI Pekin, housed female inmates who present management approaches different from those applicable to male inmates (Tr. 102-03). He worked with her during the start-up phase of FCI Pekin's operations, and ". . . was impressed with her interpersonal skills. She reached out to inmates from a community level. She showed no unwillingness to work in housing units which is probably the toughest job in terms of dealing with inmates . . ." (Tr. 103). Warden Helman also observed Ms. Haymon as she served in a temporary capacity as a correctional counselor, for which she had volunteered, and found her skills in communication and interaction very

suitable to the successful performance of that job (Tr. 104-05).¹³ Accordingly, he selected her for the position.

Shortly thereafter, the Union filed an unfair labor practice charge which led to the issuance of the instant complaint alleging that Mr. Sailer was not selected because of his protected union activities.

Conclusions

§ 16(a) (2) of the Statute makes it an unfair labor practice for an agency,

“(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;” (5 U.S.C. § 7116(a) (2)).

In order to establish a violation of § 16(a) (2), General Counsel must establish by a preponderance of the evidence that: (1) the employee against whom the alleged discriminatory action was taken had been engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee in connection with hiring, tenure, promotion, or other conditions of employment. Internal Revenue Service, Washington, DC, 6 FLRA 96, 99 (1981); Letterkenny Army Depot, 35 FLRA 113, 118 (1990) (Letterkenny). If General Counsel fails to make the required prima facie showing, the case ends without further inquiry. United States Customs Service, Region IV, Charleston District, Charleston, South Carolina, 42 FLRA 177 (1991) (Customs Service); Letterkenny, supra. Even if General Counsel makes the required “prima facie” showing, an agency may show by a preponderance of the evidence that it would have taken the same action in the absence of protected activity, i.e., no violation of § 16(a) (2) will be found if the agency demonstrates, by a preponderance of the evidence that: (1) there was a legitimate justification for its action; and 2) the same action would have been taken in the absence of protected activity. Letterkenny, supra, 35 FLRA at 118-19; American Federation of Government Employees, Local 1345, Fort Carson, Colorado (In Trusteeship) and American Federation of Government Employees, AFL-CIO, 53 FLRA 1789, 1793, 1794-95

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Warden Helman further testified that he appreciated Ms. Haymon's willingness to volunteer for a variety of tasks, her initiative in taking courses to augment her counseling and related job skills, and her neat appearance in uniform (Tr. 104).

(1998); Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 55 FLRA No. 194, slip opinion p. 12 (January 11, 2000).

The record is clear that Mr. Sailer engaged in protected activity and that Mr. Sailer, although among the five on the Best Qualified List, was not selected for the posted vacancy for a GS-9 Correctional Counselor; but, for reasons more fully set forth hereinafter, General Counsel has not established by a preponderance of the evidence that Mr. Sailer's protected activity was a motivating factor in his non-selection. General Counsel has strained mightily to show that protected activity was a motivating factor in Mr. Sailer's non-selection but has brought forth only a mote. For example, General Counsel's reliance on Mr. Sailer's assertion that Warden Helman in 1995 demonstrated anti-union proclivity when he expressed concern about his, Sailer's, union activities at Lompoc, not only is not supported by the record but is shown by the record to be wholly fallacious. At the outset, if Warden Helman, in fact, had had any concerns about Mr. Sailer's union activity at Lompoc, he need only decline his request for a transfer. Not only did Warden Helman approve his transfer but arranged for the payment of his moving expenses. Then, Mr. Sailer's reporting date at Pekin was delayed while Mr. Sailer was engaged as a member of the Union negotiating team. Further, from the day he arrived at Pekin, Mr. Sailer has been an active official of the Union.

Second, General Counsel's assertion that Mr. Sailer's criticism of Warden Helman in newspaper articles, a grievance and during an arbitration hearing created motivation for Warden Helman's refusal to select Mr. Sailer, i.e., that Warden Helman refused to select Mr. Sailer because of his protected activity which was underscored by Warden Helman's comments at a labor-management meeting in April 1998, is not supported by the record which, contrary to General Counsel's contention, affirmatively demonstrates an absence of bias towards Mr. Sailer on the part of Warden Helman. As noted above, Warden Helman did not take any action against Mr. Sailer over the 1996 newspaper article; Warden Helman did not rail at Mr. Sailer for allegations that Warden Helman viewed as untrue, but, to the contrary, responded factually to Mr. Sailer's allegations in a rebuttal article and waited almost a month to raise the issue with Mr. Sailer at a regularly scheduled labor-management meeting when he requested that, in the future, Mr. Sailer raise such concerns with the Warden before going to the media. Mr. Sailer needlessly became loud and confrontational at the meeting. By contrast, Warden Helman

exercised admirable control and did not engage in a provocative manner or raise his voice. While the record shows that Mr. Sailer filed a grievance on, or about, January 8, 1998, accusing Warden Helman of projecting ". . . a very negative image of Blacks and Hispanics" on December 10, 1997, which allegations Warden Helman found to be inaccurate (Tr. 112), the record is silent as to the disposition of the grievance and, certainly, does not show any adverse action taken against Mr. Sailer. As to the cross-examination of Warden Helman by Mr. Sailer in the Carter arbitration, Warden Helman very credibly testified that,

". . . I recall the exchange which I felt was very civil, very professional. I think the record would bear that out." (Tr. 113). Plainly, the record shows that whatever the agency advocate, Mr. Bob Will (Tr. 65), may have said, Warden Helman, as he testified, did not feel Mr. Sailer's cross-examination attacked his veracity but had been civil and professional. Further, I have examined with care, as set forth above, the record concerning the meeting of April 15, 1998, which Warden Helman called to review the changes recently negotiated in the new nationwide master agreement and find nothing which occurred at that meeting gave rise to any inference of animus by Warden Helman towards the Union in general or towards Mr. Sailer in particular.

On the other hand, the record affirmatively shows that Warden Helman consistently, and on repeated occasions, treated Mr. Sailer fairly, and without rancor which actions dispel any bias for animus. Thus, Warden Helman granted Mr. Sailer's transfer from Lompoc, California, on the grounds of family hardship and paid for his moving expenses; in 1995, Warden Helman reduced a recommended three day suspension of Mr. Sailer for disrespectful conduct and use of insulting and abusive language, to a letter of reprimand (Res. Exh. 5); in 1997, selected Mr. Sailer as a temporary Counselor (Tr. 105), which position Mr. Sailer was assigned from October, 1997, until January 3, 1998 (Tr. 70); and on two occasions, grievances involving Mr. Sailer's performance evaluations were granted by Warden Helman who, on each occasion, raised Mr. Sailer to the highest possible level of "outstanding" and on the basis of such action Mr. Sailer was awarded a retroactive pay-enhancing quality step increase first, in June, 1996 (Res. Exh. 8) and again in September, 1998 (Res. Exh. 9; Tr. 97-98).

Not only is the record devoid of any evidence of animus by Warden Helman towards Mr. Sailer because of his protected activity, but the record shows that Warden Helman, for wholly legitimate reasons, selected Ms. Haymon. First, Ms.

Haymon was on the Best Qualified List and the Warden was lawfully entitled to select any person on the Best Qualified List. Second, the record shows without contradiction that Warden Helman was not given, and did not know, scores or rankings of candidates. Third, while aware that Mr. Sailer received "Outstanding" on his performance appraisal, while Ms. Haymon received "Exceeds", on the basis of his personal observation of Ms. Haymon's work as a Counselor during her temporary assignment to the position, from June, 1998, until October, 1998, the Warden was impressed by her skill in communication and interaction which skills made her very, very, suitable for the Counselor's job. On the other hand, while he saw Mr. Sailer during the period Mr. Sailer served as temporary Counselor, from October, 1997, until January 3, 1998 (Tr. 70), Warden Helman stated that he saw Mr. Sailer somewhat less frequently during this period than he had seen Ms. Haymon and was not as impressed with his skills as a counselor, although as a correctional officer Mr. Sailer was recognized as outstanding. Fourth, because Pekin houses both male and female inmates, Ms. Haymon, as a female, and on the basis of her experience at the Federal Correctional Institution in Marianna, Florida, with female offenders, offered impressive credentials in handling female inmates inasmuch as, ". . . There are definitely differences in managing female inmates from male inmates. I liked the experience that Ms. Haymon brought" (Tr. 103). Fifth, Ms. Haymon had completed training programs directly in line with the Counselor's role, including, ". . . the American Correctional Association [program] in suicide prevention and communication and in special needs offenders" (Tr. 104). While Mr. Sailer had Unit Disciplinary Committee (UDC) certification and Central Inmate Monitoring (CIM) certification, which Ms. Haymon did not, neither was a prerequisite for this job and the training may be achieved, ". . . once you're on the job." (Tr. 120). Consequently, Ms. Haymon's course qualifications for the job of Counselor were at least as significant as Mr. Sailer's and perhaps, because of specific relation to job content, even a bit more significant than Mr. Sailer's UDC and CIM certifications.

Because I find that General Counsel has failed to make the required prima facie showing that Mr. Sailer's non-selection was motivated by his protected activity, the complaint must be dismissed. Customs Service, supra; Letterkenny, supra. Should it be determined, contrary to my finding, that Mr. Sailer's protected activity was a motivating factor for his non-selection, nonetheless, Respondent has shown by a preponderance of the evidence that: (1) there was a legitimate justification for its selection of Ms. Haymon. Justification for the selection of

Ms. Haymon has been discussed fully above and need not be repeated in detail. These reasons include: First, Ms. Haymon was on the Best Qualified List; Second, Warden Helman was not given and did not know the scores or rankings of candidates on the Best Qualified List; Third, Warden Helman's personnel observation of Ms. Haymon's work as a Counselor during her temporary assignment to the position demonstrated her skill in communication and interaction with inmates which made her very, very suitable for the position. On the other hand, his observation of Mr. Sailer's work as a Counselor during his temporary assignment to the position was not impressive. Fourth, Pekin houses both male and female inmates and Ms. Haymon offered impressive credentials in handling female inmates which Mr. Sailer did not. Fifth, Ms. Haymon's completed training programs were at least as significant as Mr. Sailer's and perhaps, because of specific relation to job content, even a bit more significant than Mr. Sailer's UDC and CIM certification; and (2) that respondent would have made the same selection in its absence of Mr. Sailer's protected activity. Warden Helman testified, in part, as follows:

"A: I selected Ms. Haymon because I thought she was best suited for this correctional counselor position. I had known Ms. Haymon since she arrived at Pekin when we opened the institution in early -- excuse me -- late 1994. I was the selecting official for her to come there."

"Ms. Haymon brought excellent experience from the Federal Correctional Institution in Marianna, Florida where she had worked before. Marianna is in many ways like our institution, and one of the attributes I was particularly impressed with was that Marianna is one of the other few institutions that houses female offenders. We, of course, have the mission of housing female offenders. There are definitely differences in managing female inmates from male inmates. I liked the experience that Ms. Haymon brought to this post."

"The factor that I was most impressed with was that I had interacted with Ms. Haymon throughout our activation or opening process. I observed her dozens of times interacting with inmates. I was impressed with her interpersonal skills. She reached out to inmates from a community level. She showed no unwillingness to work in housing units which is probably the toughest job in terms of dealing with inmates"

. . .

"I also was impressed with Doris' willingness to volunteer. She was one of the few women willing to volunteer on a disturbance control team, and that's noteworthy. She also, on her own initiative, completed a number of training programs that were not expected of her, and those training programs were directly in line with the counselor's role. She completed programs with the American Correctional Association in suicide prevention and communication and in special needs offenders, which we had our share of at Pekin.

"Ms. Haymon always has impeccable uniform wear. She has an excellent attendance record. She willingly volunteered for activities. But most important, I looked at her skills in communication, interaction and found them very, very suitable to this particular job which was a counseling job. . . ." (Tr. 102-04).

Accordingly, even if Mr. Sailer's engagement in protected activity had been a motivating factor in his non-selection, the record shows that Respondent had legitimate justification for its selection of Ms. Haymon and would have made the same selection in the absence of protected activity by Mr. Sailer. Therefore, it is recommended that the Authority adopt the following:

Order

The complaint in Case No. CH-CA-90107 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: February 3, 2000
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case

No. CH-CA-90107, were sent to the following parties:

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DATED: FEBRUARY 3, 2000
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