

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PENNSYLVANIA STATE OFFICE, PHILADELPHIA, PENNSYLVANIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2032 Charging Party	Case No. BN-CA-50446

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. §§ 2423.26(c) through 2423.29, 2429.21 through 2429.25 and 2429.27.

Any such exceptions must be filed on or before MAY 22, 1996, and addressed to:

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

SAMUEL A. CHAITOVITZ
Chief Administrative Law

Judge

Dated: April 22, 1996
Washington, DC

MEMORANDUM

DATE: April 22, 1996

TO: The Federal Labor Relations Authority

FROM: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

SUBJECT: DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, PENNSYLVANIA STATE
OFFICE, PHILADELPHIA, PENNSYLVANIA

Respondent

and
CA-50446

Case No. BN-

AMERICAN FEDERATION OF GOVERNMENT
EMPLOYEES, AFL-CIO, LOCAL 2032

Charging Party

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

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PENNSYLVANIA STATE OFFICE, PHILADELPHIA, PENNSYLVANIA Respondent	
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 2032 Charging Party	Case No. BN-CA-50446

Anthony J. De Marco, Esq.
For the Respondent

Barbara S. Liggett, Esq.
For the General Counsel
of the FLRA

Martin R. Cohen, Esq.
For the Charging Party

Before: SAMUEL A. CHAITOVITZ
Chief Administrative Law Judge

DECISION

Statement of the Case

This case arose under the Federal Service Labor-
Management Relations Statute, Chapter 71 of Title 5 of the
U.S. Code, 5 U.S.C. § 7101, *et seq.* (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 American Federation of Government Employees, AFL-CIO, Local 2032 (Charging Party, AFGE Local 2032 or Union), against the Department of Housing and Urban Development (HUD), Pennsylvania State Office, Philadelphia, Pennsylvania (HUD Philadelphia or Respondent) a Complaint and Notice of Hearing was issued on behalf of the General Counsel (GC) of the FLRA by the Regional Director for the Boston Region of the FLRA. This complaint alleges that the Respondent violated section 7116(a)(1) and (2) of the Statute when it ordered the newly-elected Union President to pack her belongings and vacate her office because she was engaging in representational activities pursuant to a grant of 100 percent official time. The Respondent filed an answer admitting the factual allegations of the complaint, but denying that it had violated the Statute.

A hearing in this matter was held on in Philadelphia, Pennsylvania. All parties were afforded a full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. All parties filed post-hearing briefs which have been carefully considered.

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

Findings of Fact

A. Background

The American Federation of Government Employees, AFL-CIO (AFGE) is the exclusive representative of a unit of employees appropriate for collective bargaining at HUD. AFGE Local 2032 is an agent of AFGE for representing unit employees at HUD Philadelphia. AFGE and HUD are parties to a nationwide collective bargaining agreement which covers employees at HUD Philadelphia.

Article 7 of the collective bargaining agreement contains the parties' agreements on the subject of official time. Under Section 7.03 of the agreement, the Charging Party is entitled to one representative at 50 percent official time, who is usually the local president, plus four representatives at 10 percent. In addition, in November 1994, HUD, at the national level, issued a memorandum concerning its field reorganization effort, which granted an additional allotment of 50 percent official time to the local union in each field office while that field office is being reorganized. This additional 50 percent is presently

still in effect. The additional 50 percent can be used entirely by the local president, and added to the 50 percent provided by Article 7.03 of the collective bargaining agreement to give the local president 100% official time, or the local president can elect to divide it among other local union representatives.

B. HUD Philadelphia

The Office of General Counsel in HUD Philadelphia is headed by Peter M. Campanella, Assistant General Counsel for the Mid-Atlantic. Campanella reports to Deputy General Counsel George Weidenfeller in Washington, D.C. Campanella supervises 15 to 20 attorneys and has three supervisors under him who are the first line supervisors of the attorneys. One of those supervisors, Ann E. Harrison, supervises the Litigation Division consisting of five attorneys, including Irene Facha.

The Office of General Counsel in HUD Philadelphia is responsible for all the legal work for the programs that HUD Philadelphia administers, for litigation under Title VIII of the Civil Rights Act (Fair Housing), for litigation in multifamily and single family foreclosures, and for all for all litigation where HUD is named as a party, including personnel matters that come before the Merit Systems Protection Board (MSPB), the FLRA, grievances and equal employment opportunity (EEO) matters under the contract and the Equal Employment Opportunity Commission (EEOC). In MSPB, FLRA and EEO cases occurring under the contract, the attorneys in the Office of General Counsel in HUD Philadelphia represent Respondent in matters concerning AFGE Local 2032. As an attorney in the Litigation Division, Facha's duties include handling a variety of litigation matters, primarily related to housing. The record fails to establish that Facha had handled any matters on behalf of HUD Philadelphia involving AFGE Local 2032.

C. Facha's Union activity.

During approximately the first or second week of March 1995, Facha learned that she would become the next President of AFGE Local 2032 effective April 3, 1995. Facha has been employed by the HUD Philadelphia in the Office of the General Counsel, as a trial attorney, since January 1989.

Prior to becoming President, Facha had not been a Union officer, but had served as a Union representative on two task forces dealing with the agency's reorganization activities and had used official time in these duties.

Facha had also filed grievances under the negotiated grievance procedure, including a grievance filed on November 30, 1994, alleging that her performance appraisal had been lowered from "outstanding" to "fully successful" in retaliation for her participation in Union activities. The grievance was denied at the first step by Campanella, the reviewing official on Facha's appraisal, on December 8, 1994. The grievance then was advanced to the second step where management official Jan Vagassky was designated to handle the grievance.

Vagassky investigated the grievance. At the end of March 1995, Vagassky issued the agency's second step grievance response sustaining Facha's allegations that the Office of Counsel had discriminated against her on the basis of her Union activity, and granted the relief requested in the grievance by raising her overall performance rating to "outstanding". The memorandum from Vagassky titled "Step 2 Grievance Response" is not dated at the top, but page 2 of that memorandum shows the date "03/24/95" next to the name of the Respondent's labor relations representative, Michael Maietta. Facha testified that she received the decision at the end of March 1995, but had earlier been informed by Vagassky of its contents during the third week of March 1995.

Harrison states that she did not receive a copy of the decision until after March 24, 1995, after she issued the order to Facha to vacate her office, as discussed below.

D. Order to Facha to vacate her office.

On March 13, 1995, after learning that she would become the Union President, Facha sent an electronic mail message to various agency personnel, including her first and second level supervisors, Harrison and Campanella, respectively. In the memorandum, Facha stated as follows:

We held the nomination for officers today for our local election. I was the only candidate nominated for President. The election itself will be held in two weeks. Officers will be sworn in on the 30th and my duties will commence April 3rd. I am going to use the 100% of time for union activity initially, until I can get things better organized. Then I hope to cut back to between 50

and 70% so that like Carolyn I don't loose [sic] touch with the legal work.¹

On March 24, 1995, in response to Facha's March 13, 1995 electronic mail message concerning becoming Union President, and her notice of her official time plans, Facha's immediate supervisor, Ann Harrison, sent Facha an electronic mail message. In that memorandum, Harrison stated, inter alia:

As you will be on 100% union time from April 3, 1995, it is essential that all of your open files be put in order so that other attorneys can pick them up and work on them. As you will have no obligation for any legal work, please pack up and remove from your office no later than April 3, 1995, all of your personal belongings. Mr. Campanella has arranged for use of that office by other staff. Whatever is not removed will be boxed and stored in the storage closet.

Harrison issued this memorandum after discussions with Campanella in which they agreed that Harrison would instruct Facha to leave her office. Prior to the issuance of the memorandum, Campanella spoke with labor relations representative Maietta and another local personnel official, and with agency officials in Washington, D.C. The March 24, 1995 electronic mail memorandum was the only communication Facha received from management concerning her election to Union office, her official time usage, or management's requirement that she vacate her office.

Facha has occupied her present office on the 11th floor of the Wannamaker Building, in the suite of offices assigned to the HUD Philadelphia's Office of Counsel, since January 1995 when HUD Philadelphia relocated from the Liberty Square Building to the Wannamaker Building. She selected her desirable window office on the basis of seniority, pursuant to an agreement between the Union and HUD Philadelphia concerning work space selection in the new building. In

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The "Carolyn" mentioned in the last sentence of the memorandum is Carolyn Federoff, an attorney in the Office of General Counsel in the agency's Boston office, who is also a local union president and the Regional Vice President for Region 1. Facha had worked extensively with Federoff on reorganization task forces and Federoff had told Facha several times that she did not want to lose touch with her legal work due to time spent on Union activities. Facha wanted to parallel Federoff's experience.

accordance with the agreement, all attorneys in the HUD Philadelphia's Office of Counsel have private offices.

Both before and after the move to the Wannamaker Building, HUD Philadelphia has provided an office for the Union. The present Union office is located on the 12th floor of the Wannamaker Building. This office is used by various Union representatives, including the President, the Vice President, the Chief Steward, and the other two stewards. The dimensions of the Union office are approximately 10 feet by 12 feet. Union representatives use this office to meet with supervisors concerning representational issues, to meet with employees, and to work on reorganization projects. In addition to this space, the Union has access to, but not exclusive use of, a conference room across the hall from the Union office.

On March 27, 1995, Facha sent another electronic mail message to various agency personnel, including Campanella. In that memorandum, Facha stated that she expected to reduce her Union representation time below 100% "once I stabilize the administrative structure of the union and complete my participation on the Headquarter's reorganization efforts".

On March 29, 1995, Facha sent another electronic mail message to agency personnel, including Campanella and Harrison. In this three page memorandum, Facha objected to Harrison's instruction to vacate her office, and set forth a detailed explanation for her objection. In the memorandum, Facha stated that she had no intention of giving up her job as an attorney in order to become local Union President, and again repeated that she did not plan to use 100 percent official time indefinitely. Facha asserted that it has been the custom throughout the field that Union officers retained their workstations and had access to the Union office. Facha asserted that if every supervisor decided to "exile" each of the elected representatives from their workstations to the Union office, even if only during the time spent on union activity, there would not be sufficient space, furniture or equipment in the Union office to accommodate the demand. Facha also pointed out that under section 8.04 of the collective bargaining agreement, Union representatives were entitled to use telephones at their individual work sites for local calls while performing local union representation functions, and that this provision would make no sense if Union representatives were required to perform all representation functions in the Union office. Facha asserted that evicting her from her office solely because of her assumption of duties as President of the Union was a penalty exacted for her

participation in the Union, "as was found to be the case in my grievance over my FY 1994 performance appraisal". Facha protested that her relocation would make more difficult the performance of her official duties when not on official time by distancing her from the library and other materials necessary for the completion of assignments. Facha asserted that she was entitled to a work station for performance of her official duties, that her present work station resulted from negotiations with the Union during the office move, and that management could not make this change without further bargaining with the Union. No management official ever responded to Facha's March 27 or 29, 1995 electronic mail messages.

Facha has not yet vacated her office as instructed by Harrison's March 24, 1995 memorandum. Following Facha's March 29, 1995 memorandum protesting the order to vacate, and the filing of the unfair labor practice charge, Facha waited for management to provide her with boxes to facilitate the move, or to take some further steps to enforce the move. The HUD Philadelphia has not taken any further actions to enforce the move, but has also never informed Facha that the March 24, 1995 memorandum has been withdrawn or rescinded.

D. HUD Philadelphia's asserted reasons for order.

At the hearing, HUD Philadelphia, through Facha's supervisors Campanella and Harrison, presented a number of reasons to explain why Facha was asked to vacate her office. First, both testified that they believed that there was a conflict of interest between Facha's performance of her duties as a Union officer and her performance of duties as an attorney in the Office of General Counsel, and they were concerned about maintaining the confidentiality and security of documents and conversations in the Office of General Counsel. Neither of the supervisors raised these concerns with Facha at any time, nor took any action to have Facha excluded from the bargaining unit. Facha first learned of management's confidentiality or privacy concerns in late October 1995, as a result of discussions between the Respondent, the FLRA, and the Union's attorney in an attempt to reach a settlement of this unfair labor practice.

HUD Philadelphia supported its assertion of a conflict of interest or security breach by relying on an incident that occurred in October 1995. That incident occurred when Facha, following her usual practice and Harrison's instructions, went into Harrison's office to sign in for official time and discovered that a file concerning her own EEO case had been left on top of the official time sign in

sheet. Facha immediately informed management of this incident in an electronic mail message. The Respondent did not assert, and Facha is unaware of, any other situations which have arisen involving problems with security or confidentiality. The FAX machine and the photocopier of the Office of General Counsel in HUD Philadelphia are both directly outside Facha's office.

Campanella attended Facha's swearing in as President of AFGE Local 2032.² Campanella testified that he saw Facha pledge fidelity to the Union and that once a person pledges fidelity as an officer of the Union she is caught in a conflict situation on anything she might run across. Campanella stated that you can not serve two masters, the Office of General Counsel and the Union.

Harrison testified that Facha being a Union officer created a problem for management and Facha would be able to return to her office as soon as she stopped being a Union officer. The problem was the confidentiality and security of litigation and personnel files. None of these concerns were communicated to Facha.

There are no locks on any of the doors in the Office of General Counsel at HUD Philadelphia.³ No office files are kept locked, except those relating to standards of conduct opinions, and the attorneys leave their EEO cases and grievance files on their desks and in the law library.

Second, Campanella and Harrison testified that they needed Facha's office space for other personnel. Campanella first testified that at the time he decided that Facha should be instructed to leave her office, he thought there was a "possibility" that his office would receive a legal intern and he planned to use Facha's office for the intern. By March 1995, Campanella knew that there was no such intern coming. Campanella also testified that there was an attorney interested in transferring to Philadelphia and he planned to use Facha's office for this attorney. This attorney did transfer to Philadelphia in September 1995, and was given an office which had been vacated by an attorney who had departed about a month earlier.

From sometime prior to March 1995 until about August 30, 1995, another attorney in the HUD Philadelphia Office of

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This occurred after Facha had been ordered to vacate her office.

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There was a lock installed on the conference room after Facha had seen her EEO file.

General Counsel was absent from work for medical reasons. Her office was unoccupied during this absence and was not reassigned.

Third, Campanella and Harrison testified that they believed that since Facha would not be doing work for the Office of General Counsel, there was no obligation to provide her an office in the Office of General Counsel space and Facha should not have two offices (her work location and the Union office) assigned to her. Both testified that if and when Facha's use of official time was reduced so that she could perform work for the Office of General Counsel, they understood that they had an obligation to provide her a place to perform this work, somewhere in the building, outside the legal suite. Both acknowledge that Facha was never told this, and that no attempt was made to find a work location for Facha outside the Office of General Counsel area until the Respondent entered into settlement discussions concerning this unfair labor practice case.

The Union president prior to Facha, Howard Motley, was not asked to give up his work station during the time that he served as Union president. Motley was on 100% official time from November 1994 until he ceased being the Union president in March 1995. Motley was not an attorney and his work station was a modular area.

Discussion and Conclusions of Law

The GC of the FLRA contends that Respondent violated Section 7116(a) (1) and (2) of the Statute by ordering Facha, the Union President, to pack her belongings and vacate her office because of her participation in protected activity.

Section 7116(a) (1) and (2) of the Statute provides:

(a) For the purpose of this chapter it shall be an unfair labor practice for an agency-

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

Section 7102 of the Statute expressly gives employees the right "to form, join or assist any labor organization" including the right "to act for a labor organization in the capacity of a representative[.]" See *National Treasury Employees Union and U.S. Department of the Treasury, Office of the General Counsel, Internal Revenue Service*, 39 FLRA 27, 73 (1991) (IRS); *decision on reconsideration of other matters*, 40 FLRA 849 (1991), *petition for review filed sub nom. U.S. Department of the Treasury, Office of the Chief Counsel, Internal Revenue Service v. FLRA*, 960 F.2d 1068 (D.C. Cir. 1992); *Decision and Order on Remand*, 45 FLRA 1256 (1992).

A. Letterkenny

The Authority set forth the analytical framework to be applied in cases alleging violations of section 7116(a)(2) of the Statute in *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*). The framework set forth by the Authority provides that in all cases of alleged discrimination the GC of the FLRA must establish 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 in connection with hiring, tenure, promotion, or other conditions of employment." *Id* at 118. The Authority then provided that even if the GC of the FLRA makes the required *prima facie* showing an agency will not be found to have violated the Statute if it can demonstrate, 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 even in the absence of protected activity." *Id* at 118. See also *Social Security Administration, Inland Empire Area*, 46 FLRA 161 (1992) (SSA) at 172-73.

B. Discriminatory Motivation

It is clear that on March 13, 1995, Facha advised her superiors that she was about to be elected Union President and would be, as of April 3, 1995, initially spending 100% of her time on union representational activity, until she could get matters better organized. Then she hoped to cut back to between 50 to 70% of her time on union activity, so she would not lose touch with her legal work. Thus Facha was advising HUD Philadelphia that, as of April 3, 1995, she was going to be engaging in activity protected by the Statute and that she was initially going to be engaging in that activity 100% of her work time, although she intended

to cut back on this time commitment in order to continue to do legal work for HUD Philadelphia.

On March 24, 1995, HUD Philadelphia, through Facha's supervisor Harrison, advised Facha that because she would be spending 100% of her time on union business she should put her files in order and, because Facha would have no obligation to do any legal work, she should vacate her office by April 3, 1995. She was advised that Campanella had arranged for use of the office by other staff. This was the only communication Facha received from her superiors concerning her election to union office or explaining why she had to vacate her office.

On March 27, 1995, Facha again advised her superiors that she expected to reduce her Union representation time below 100% once she stabilized the structure of the union. Facha received no response, so on March 29, 1995, she advised her superiors that she objected to having to vacate her office and reiterated that she did not intend to give up her attorney position and that she did not intend to use 100% of her time on union matters indefinitely. Again, she received no reply from HUD Philadelphia.

The foregoing establishes that as of April 3, 1995, Facha would be engaging in protected union activity as President of AFGE Local 2032. She was to start out spending 100% of her work time engaging in this protected activity, but she planned to cut this work time spent on this activity as soon as she organized her tasks.

HUD Philadelphia ordered Facha to vacate her private office, with a window, apparently a very desirable office chosen because of her seniority, because, she was to be Union President and she would be spending 100% of her work time on Union matters. Accordingly, I conclude that HUD Philadelphia ordered Facha to vacate her office because she would be engaging in protected activities, as Union President.

Facha was ordered to vacate her desirable office, chosen through a collectively bargained procedure. In applying the test formulated by the Authority in *Antilles Consolidated Education Association and Antilles Consolidated School System*, 22 FLRA 235, 237 (1986), for determining whether a matter is a condition of employment I conclude that Facha's office assignment constituted a condition of employment.

As set forth in *Letterkenny*, the GC of the FLRA has met its burden of establishing that HUD Philadelphia

discriminated against Facha, with respect to a condition of employment, because she was engaging protected activity.

C. Alleged legitimate justification and motivation.

HUD Philadelphia contends that it had legitimate justification for its action and submitted a number of grounds to justify its action.

At the hearing HUD Philadelphia's witnesses, Campanella and Harrison stated that Facha was asked to move because they were concerned that Facha's being a Union officer constituted a conflict of interest with her duties as an attorney for HUD and because they were concerned for the security and confidentiality of matters that involved or were of interest to the Union.

1. Conflict of Interest.

With respect to the alleged conflict of interest HUD Philadelphia contends that upon becoming Union President Facha would have divided loyalties and had a conflicting responsibility to assiduously represent members of the bargaining unit who were opposed by other attorneys in the same office suite, one of whom shared a common office wall. Campanella testified that he attended Facha's swearing in as Union President and saw her swear fidelity to the Union and he stated that a person (Facha) can not serve two masters. HUD Philadelphia contends that if Facha stayed in her office it would appear that she had access to confidential management information or that the Office of General Counsel supports the Union.

HUD Philadelphia refers to ABA Opinion 342, the Pennsylvania rules for professional conduct and cases involving ABA Opinion 342 in support of the conflict of interest contention. These cases involved attorneys moving from the Government to firms, or firms to firms. Such attorneys are disqualified from handling matters they had previous knowledge about or had worked on for an adverse client, and such disqualified lawyers must be screened from participation in the matter. I find these references inapposite and do not justify HUD Philadelphia's conduct. Thus, although the record establishes that, along with other matters, labor relations litigation is handled in the HUD Philadelphia's Office of General Counsel, the record does not establish that Facha, an experienced and senior attorney ever handled any such matters⁴. Thus, I conclude, the ABA

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Facha testified that most of her work involved fair housing cases.

and state bar requirements do not require the reassignment of Facha out of her office because Facha's acting as Union President while in the HUD Philadelphia legal office created some real or apparent conflict of interest. I do not perceive any real or apparent conflict of interest.

Section 7101 of the Statute expressly recognizes the rights of employees, including attorney's, to participate through labor organizations of their own choosing in decisions which affect them, and § 7102 of the Statute gives them the right to assist any labor organization, including the right to act as a representative. The participation of an Agency attorney as a designated union representative does not impair the public's confidence or damage the attorney's ability to carry out the functions which he or she is employed to execute. *IRS* at 73.

Thus I conclude that as Union President Facha did not *per se* have a conflict of interest with her job in the Office of General Counsel. In this regard I note that attorneys in the Office of General Counsel are in the collective bargaining unit represented by AFGE Local 2032 and that Facha who had previously done work on behalf of the Union, had not previously been considered by HUD

Philadelphia to be in conflict of interest situations⁵. The fact that Facha is both the Union President and an attorney in HUD Philadelphia's Office of General Counsel does not create a conflict of interest that would justify the actions of HUD Philadelphia in ordering her to vacate her office.

2. Security.

HUD Philadelphia argues that, under § 7106(a)(1) of the Statute⁶ they were permitted to expel Facha from her office in the legal suite because of the possibility of security lapses that would permit her to see and learn management's

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The subject case is distinguishable from *U.S. Department Of Labor, Office of the Solicitor, Arlington Field Office and American Federation Of Government Employees, Local 12, 37 FLRA 1371 (1990) (DOL)*. In *DOL* the Authority held that General Attorneys in the Solicitor's office were excluded from a collective bargaining unit because they were confidential employees. In so holding the Authority relied on the conclusion that confidential employees include employees who, in the normal performance of their duties, may obtain advance information of management's position with regard to contract negotiations, the disposition of grievances, and other labor relations matters. The Authority concluded that the General Attorneys had access to such information as part of their duties and thus were confidential employees within the meaning of § 7103(a)(13) of the Statute. The General Attorneys were therefore excluded from the unit. In the subject case, although the record establishes that labor relations matters were handled in the Office of General Counsel, headed by Campanella, the record does not establish that Facha ever handled any such work as part of her duties, that she would be likely to handle such matters, or that she had access to the labor relations matters and information as part of her duties. In this regard I note that attorneys in the HUD Philadelphia Office of General Counsel are included in the collective bargaining unit.

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§ 7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency

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(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency

confidential information regarding labor relations matters. However, § 7106(a)(1) does not authorize an agency to use security considerations as a pretext to justify discriminating against an employee for engaging in protected conduct.

HUD Philadelphia did not show that fundamental and simple steps to secure files and communications would not have pre-vented any confidential labor-management information from being communicated to Facha. In this regard the record establishes that Facha had done work for the Union in the past and no instances were established that she came into custody of information that was inappropriate. Prior to her being elected President of the Union, HUD Philadelphia did not raise security concerns with respect to Facha's previous work on behalf of the Union.

The only instance to establish the possibility of Facha seeing matters that would be improper in involved her seeing her own EEO file, well after this case was initiated. Facha saw the file when she went into Harrison's office to sign-in on a sheet that was on Harrison's desk, as Facha had been directed by Harrison. The file was on Harrison's desk, near the sign in sheet. Upon seeing the file Facha brought it to Harrison's attention that the file had been left lying on the desk. It is clear simple and fundamental security would have prevented this occurrence. Thus simple file security and care in the use of fax and copying machines could prevent Facha from coming into contact with privileged labor-management information, without resorting to the drastic step of excluding her from her office and from the legal suite.

HUD Philadelphia chose to expel Facha from her office for some possible security considerations when simple security steps could have easily obviated any possible problem. To take the drastic and disproportionate step of ordering Facha to vacate her very desirable office, which she earned because of her seniority, because she had been elected President of the Union, when simple steps by management could have resolved any problems, is evidence that security is raised as a pretext to justify this action. This action would clearly discourage other employees from supporting the Union and serving as officers.

When considered in conjunction with the other less drastic means of resolving any security concerns, the fact that these reasons justifying its conduct were not communicated to Facha, that security consideration had not been raised previously when Facha had done Union work, and that other pretextual reasons were also given, I conclude

the security concerns were not the reasons for ordering Facha to vacate her office. Security concerns were a pretext used by HUD Philadelphia to conceal its real reason.

3. 100% Time and Need for Office.

With respect to HUD Philadelphia's argument that they did not feel that they were obliged to furnish Facha an office because she would be spending 100% of her time on Union matters, I find this to be a pretext. In this regard I note that Facha indicated that the 100% time commitment was only temporary and she planned to cut back on this commitment to Union work as quickly as possible and that she hoped to keep her hand in her legal assignments⁷.

Further, I note that another attorney was on sick leave or leave without pay from before March 1955 until about August 30, 1955 and her private office was left vacant. In this regard I further note that Motely, an employee in HUD Philadelphia, although not in the Office of General Counsel, was not ordered to vacate his work station when he, as Union President, was devoting 100% of his time to Union matters.

Thus it is clear HUD Philadelphia's Office of General Counsel did not instruct Facha to vacate her office because she would be spending 100% of her work time on work not related to her official duties, and this justification for HUD Philadelphia's conduct is another pretext.

Similarly HUD Philadelphia's contention that it ordered Facha to vacate her office because they needed it for other staff was a pretext. Campanella at first testified that he needed Facha's office for an intern, but Campanella also

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Respondent witness Harrison testified that based on holidays, break time, sick leave and annual leave to which Facha was entitled, one third of Facha's time was paid but not actually worked. Accordingly, Harrison testified that on a 100% work time basis Facha would actually work only about two-thirds time. From this, Harrison concluded that if Facha worked two-thirds time for the Union she would never work any time on government business. I conclude this interpretation of work time as compared to time spent on Union work is not realistic or consistent with the communications between Facha and HUD Philadelphia. Thus Facha made clear she would reduce her Union time so she could keep her hand in her legal work. Thus she was clearly saying that she planned to reduce the time actually spent on Union matters so that she could spend time actually working on the government legal matters.

testified that he knew in March 1995 that the intern was not coming. Campanella then stated that an attorney might come. That attorney did come to HUD Philadelphia in September or October 1995, some 5 or 6 months after Facha was ordered to vacate her office. Noting the timing of the order to Facha and the fact there was an open office in the legal section from before March to September 1995, I conclude Respondent did not order Facha to vacate her office because they needed it for another staff member and this reason proffered by HUD Philadelphia is another pretext.

D. Pretexts and discriminatory motivation.

HUD Philadelphia submitted as reasons and justifications for its action excuses that I have found to be pretexts. It is appropriate for me to conclude that HUD Philadelphia, because it offered pretexts to justify its action, in fact, had an unlawful reason for its conduct. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Williams Contracting, Inc.*, 309 NLRB 433 (1992). See also, *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993). In this regard the Supreme Court, in a case arising under Title VII of the Civil Rights Act of 1964, stated,

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required" *Id.* at 2749 (emphasis omitted).

In the current case, noting that Facha was ordered to vacate her office because of her election as Union President, I find the pretexts are further evidence of HUD Philadelphia's unlawful motivation. Thus I find that Campanella and Harrison were not credible witnesses and that

they did not want Facha around simply because she had been elected Union President⁸.

In light of the foregoing I conclude HUD Philadelphia had no legitimate reason for ordering Facha to vacate her office and that she would not have been ordered to vacate her office had she not been elected Union President. I conclude Respondent violated § 7116(a)(2) and (1) of the Statute by ordering Facha to vacate her desirable office because she had been elected President of AFGE Local 2032. See *Letterkenny*. Accordingly, I recommend that the Authority issue the following:

ORDER

Pursuant to § 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and § 7118 of the Statute, Department of Housing and Urban Development, Pennsylvania State Office, Philadelphia, Pennsylvania, shall:

1. Cease and desist from:

(a) Ordering Irene Facha to vacate her office because she was elected President of American Federation of Government Employees, Local 2032, or otherwise discouraging membership in American Federation of Government Employees, Local 2032, or any labor organization, by discriminating against any employee in connection with hiring, tenure, promotion, or other conditions of employment.

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

2. Take the following affirmative action in order to effectuate the purposes and policies of the Federal Service Labor-Management Relations Statute:

(a) Rescind its order to Irene Facha that she vacate her office because she was elected President of American Federation of Government Employees, Local 2032.

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The record does not establish that when Facha was first ordered to vacate her office, that either Campanella or Harrison knew that Facha had won her grievance against them. However the circumstances are suspicious and they clearly were aware of it when Facha sent her subsequent E mail messages.

(b) Post at its facility in Philadelphia, Pennsylvania, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the office Director and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the Boston Regional Office, Federal Labor Relations Authority, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, D.C., April 22, 1996

—

Judge

SAMUEL A. CHAITOVITZ
Chief Administrative Law

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations authority has found that Department of Housing and Urban Development, Pennsylvania State Office, Philadelphia, Pennsylvania, 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 order Irene Facha to vacate her office because she was elected President of American Federation of Government Employees, Local 2032, or otherwise discourage membership in American Federation of Government Employees, Local 2032, or any labor organization, by discriminating against any of our employees in connection with hiring, tenure, promotion, or other conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of rights assured by the Federal Service Labor-Management Relations Statute.

WE WILL rescind our order to Irene Facha that she vacate her office because she was elected President of American Federation of Government Employees, Local 2032.

(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, Boston Region, Federal

labor relations Authority, whose address is: 99 Summer
Street, Suite 1500, Boston, MA 02110-1200.

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by SAMUEL A. CHAITOVITZ, Chief Administrative Law Judge, in Case No. BN-CA-50446, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

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80 F Street, NW
Washington, DC 20001

Dated: April 22, 1996
Washington, DC