

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

INTERNAL REVENUE SERVICE NORTH ATLANTIC REGION BROOKHAVEN SERVICE CENTER HOLTSVILLE, NEW YORK Respondent and RAYMOND ERNST Charging Party	Case No. BN-CA-60018

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 7, 1997, and addressed to:

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

WILLIAM B. DEVANEY
Administrative Law Judge

Dated: April 7, 1997
Washington, DC

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

MEMORANDUM

DATE: April 7, 1997

TO: The Federal Labor Relations Authority

FROM: WILLIAM B. DEVANEY
Administrative Law Judge

SUBJECT: INTERNAL REVENUE SERVICE
NORTH ATLANTIC REGION
BROOKHAVEN SERVICE CENTER
HOLTSVILLE, NEW YORK

Respondent

and

Case No. BN-CA-60018

RAYMOND ERNST

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

INTERNAL REVENUE SERVICE NORTH ATLANTIC REGION BROOKHAVEN SERVICE CENTER, HOLTSVILLE, NEW YORK Respondent and RAYMOND ERNST Charging Party	Case No. BN-CA-60018

Patricia Chin Dagati, Esq.
For the Respondent

Peter F. Dow, Esq.
Deborah M. House, Esq.
For the General Counsel

Before: WILLIAM B. DEVANEY
Administrative Law Judge

DECISION

Statement of the Case

This proceeding, 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., concerns whether the Respondent violated §§ 16(a) (1) and (2) of the Statute by reassigning the Charging Party, from the position of Lead Computer Operator in the Operations Branch of its Information Systems Division to the position of Customer Service Representative in the

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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)."

Communications and Customer Service Branch of the same Division, because the Charging Party filed grievances under the negotiated agreement between the Internal Revenue Service and the National Treasury Employees Union. For reasons more fully set forth below, I find that the Respondent did not violate the Statute as alleged in the complaint.

This case was initiated by a charge, filed on October 10, 1995 (G.C. Exh. 1(a)), subsequently amended on November 6, 1995 (G.C. Exh. 1(c)); the Complaint and Notice of Hearing issued July 19, 1996, and the hearing was set for October 8, 1996 (G.C. Exh. 1(e)). A hearing was duly held on October 9 and 10, 1996, in New York, New York, before the undersigned.² All parties were represented at the hearing, were afforded full opportunity to be heard, to introduce evidence bearing on the issues involved, and were afforded the opportunity to present oral argument which each party waived. At the conclusion of the hearing, by agreement of the parties, November 12, 1996, was fixed as the date for mailing post-hearing briefs, which time was subsequently

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On September 26, 1996, Respondent filed a Motion to Dismiss for Lack of Jurisdiction, asserting that under § 16(d) of the Statute the Charging Party's prior appeal of his reassignment to the Merit Systems Protection Board (MSPB) and the United States Court of Appeals for the Federal Circuit (Federal Circuit) foreclosed his subsequent charge under § 18 of the Statute that the reassignment violated § 16(a)(1) and (2) of the Statute (G.C. Exh. 1(h)). General Counsel filed an Opposition to Respondent's Motion dated October 7, 1996 (G.C. Exh. 1(j)), and the Regional Director for the Boston Region of the Authority referred the matter to the undersigned for decision by Order of the same date (G.C. Exh. 1(I)). The matter was neither argued again at the hearing nor in the parties' post-hearing briefs. Nevertheless, I conclude that the motion to dismiss must be dismissed. The MSPB dismissed the Charging Party's appeal of his reassignment for lack of jurisdiction inasmuch as such action resulted in no loss of grade or pay to the employee (G.C. Exh. 1(h), Attachments C and E at p. 20), and the Federal Circuit in an unpublished decision (of which I take official notice) affirmed the MSPB's dismissal. See Ernst v. MSPB, Case No. 96-3216 (Fed. Cir. Oct. 15, 1996). Accordingly, as the reassignment issue could not properly be raised under an appeals procedure--i.e., before the MSPB--, the instant unfair labor practice proceeding is not precluded by the first sentence of § 16(d) which provides that "[i]ssues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section." (Emphasis added.)

extended, on Respondent's motion, unopposed by General Counsel, for good cause shown, to November 26, 1996. General Counsel and Respondent each timely mailed a brief, received on or before December 6, 1996, which have been carefully considered. Upon the basis of the entire record, including my observation of the witnesses and their demeanor, I make the following findings and conclusions:

Findings

A. Ernst's Career in the Respondent's Operations Branch

The Charging Party, Raymond Ernst, began working at the Respondent's Brookhaven Service Center in 1984 as a computer operator, and in 1987 was promoted to the position of lead computer operator, GS-9, in the Operations Branch of the Information Systems Division (ISD), a position he held continuously until his reassignment in October 1995 (Tr. 22-23, 45-46). Although his performance was rated "exceeds fully successful" each year and he received annual awards as a consequence under the negotiated agreement between the Internal Revenue Service (IRS) and the National Treasury Employees Union (Union) (G.C. Exhs. 13, 14, 24, 32, 34, 35, 38; Tr. 61-65, 81-82, 104-05, 108-111, 114-15), Mr. Ernst admittedly distrusted his supervisors and managers in the Operations Branch, and often commented to other employees and to managers outside the Operations Branch over the past 5 years that he thought his supervisors were trying to trap him into being insubordinate so they could fire him (Tr. 161-62, 226-28, 258). As Mr. Ernst testified, his "problems" with them began shortly after he was promoted to lead computer operator, at which point he started filing grievances under the parties' negotiated agreement as well

as appeals with the MSPB and complaints with the Equal Employment Opportunity Commission (EEOC) (Tr. 46).³

When Mr. Ernst started filing grievances against his supervisors, he was represented by the Union until 1994, at which point he chose to represent himself, as was his right under the negotiated agreement (Tr. 46-47). During the period that the Union represented him, Mr. Ernst filed about 35 grievances in addition to complaints and appeals under various statutory appeal procedures (Tr. 47, 116-17, 158-59). In 1995, after Mr. Ernst began representing himself, he filed an additional 6 grievances (G.C. Exhs. 4, 13, 15, 17-18, 28, 31; Tr. 48-49, 61-67, 70, 89-90, 93-94).⁴

Respondent was well aware of Mr. Ernst's activities because all grievances and supporting documents--sometimes voluminous--were reproduced by Mr. Ernst and submitted not only to his immediate supervisor (Michael Sullivan) at the first step of the negotiated grievance procedure as required, but also to the Director of ISD (Alexander

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Respondent presented considerable testimony and documentary evidence concerning its problems with Mr. Ernst in the Operations Branch. Among these were: Mr. Ernst's tendency to wander through the corridors of the Service Center rather than monitor the computer operators' work in the Computer Room as the lead computer operator was required to do (R. Exh. 5; Tr. 179-80, 187-89, 191-94, 204-05, 237); his abuse of and failure to follow the proper procedure in taking sick leave (R. Exh. 6; Tr. 194-95, 223); his improper examination of employees' personnel folders while serving as the Operations Branch's acting supervisor (Tr. 190-91, 264-65); his failure to follow instructions regarding the need for him--as lead computer operator--to attend "turnover meetings" at the end of his shift and before the beginning of the next shift (R. Exh. 4; Tr. 160, 176-79, 183-87); and his insubordination in going to the Union office instead of back to the computer room as directed (G.C. Exh. 18; R. Exhs. 3, 4; Tr. 97, 176-79, 181-82, 186-87). These matters are irrelevant to the ultimate disposition of the legal issue in this case, and therefore it is unnecessary to consider or refer to them further.

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Some of these grievances were not directed at Mr. Ernst's supervisors and managers in the Information Systems Division. For example, one grievance arose while Mr. Ernst was on detail to the Systems Management Branch, another Division of the Service Center and was filed with the supervisor of that branch, Paul Trava (G.C. Exh. 4; Tr. 48-49). Another grievance involved Mr. Ernst's non-selection as an EEO Counselor, to which the Service Center's Director responded (G.C. Exh. 28, 29; Tr. 89-90).

Kaczor), the deciding official at the second step, and to the Service Center's Director (Carol Landy), the deciding official at the third and final step of the grievance procedure before arbitration (Tr. 120-21, 133, 253-55).⁵

The record further indicates that when Mr. Ernst filed a grievance to which there was no response within the time frame specified in the negotiated agreement, Mr. Ernst would, in accordance with the Agreement, submit the grievance to the next step of the grievance procedure. (Tr. 58-59, 69, 72-78, 250-51).⁶ On one occasion in late May or early June, 1995, Mr. Ernst submitted two separate grievances to the second step of the negotiated grievance procedure before Mr. Sullivan had responded within the contractual time limits at the first step (G.C. Exh. 22; Tr. 76-79), and when Mr. Sullivan became aware that the grievances already had been submitted to the second step, he discontinued working on his responses at the first step and gave Mr. Ernst an uncompleted draft version (G.C. Exh. 23; Tr. 76-77). Some time later, as Mr. Ernst was leaving the computer room, he overheard a conversation between Mike Sullivan and Frank Moon (Mr. Ernst's "section chief" (Tr. 176)) in which Mr. Sullivan stated, "All he does is file grievances" (Tr. 80). Mr. Ernst did not hear his name mentioned and had no independent basis for concluding that Mr. Sullivan was referring to him since other employees were filing grievances as well, but assumed that he was the subject of Mr. Sullivan's comment (Tr. 128-29). At the time, Mr. Sullivan had some papers in his hand, which Mr. Ernst could not see but assumed were his grievances (Tr. 80-81).

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Mr. Ernst's excessive use of the office copying machines to reproduce his grievance documents, and his hand delivery of these voluminous documents to various locations throughout the Service Center, resulted in his receiving a letter from ISD Director Kaczor on June 26, 1995, instructing him to file only one copy of such documents with his immediate supervisor, Mike Sullivan (R. Exh. 7), and a follow-up contact memorandum from Mr. Sullivan on June 30 to the same effect (R. Exh. 1).

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According to Mr. Kaczor, on grievances filed by the Union, the parties usually reach a reasonable accommodation with respect to the contractual time limits in order to allow for a management response before the grievance is processed to the next level; however, Mr. Ernst was the only employee filing and processing grievances on his own, without the Union's participation, and followed the contractual time limits (Tr. 250-51).

On June 16, 1995, Service Center Director, Ms. Carol M. Landy, sent a two-page letter to Mr. Ernst in which she suggested a meeting to talk about all of Mr. Ernst's grievances and complaints (G.C. Exh. 26). In her letter, Ms. Landy designated James Falcone, Director of the Center's Resource Management Division, as her representative at the meeting, and suggested that Mr. Ernst might wish to bring a Union representative with him in order to facilitate the discussion which she hoped would resolve all of his pending concerns as similar meetings had succeeded in the past (id.). Mr. Kaczor, who was Mr. Ernst's fourth level supervisor, saw the letter before Ms. Landy sent it and agreed that such a meeting with someone knowledgeable about labor relations but with no prior dealings with Mr. Ernst might serve to resolve existing problems (Tr. 252). Although Mr. Ernst testified that he was "desperate" to meet with a management official to discuss his problems, he nevertheless rejected Ms. Landy's suggestion (G.C. Exh. 27; Tr. 84-88). When asked why he did so, Mr. Ernst stated: "Because it appeared to me at the time that management was just trying to cover up and have a meeting and not resolve anything at all. . . . [A]t that point I did not want to just go to a meeting just so management could say, oh, we had a meeting" (Tr. 86).⁷

B. Ernst's Reassignment to the Communications and Customer Service Branch in October 1995

Mr. Kaczor became Director of the Information Systems Division in November, 1994, with responsibility for its three branches: Operations, Communications and Customer Service, and Systems Management (Tr. 19-20, 233). Prior to becoming the Director of ISD, Mr. Kaczor had served in various management positions at the Service Center for over
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Mr. Ernst never mentioned as a reason for rejecting Ms. Landy's suggested meeting the fact that her letter contained the following sentence: "We are not a grievance/complaint processing center." The paragraph in which that sentence appears is as follows:

"I trust you understand that I am charged with directing this Center towards its essential goal and mission of collecting taxes and servicing the taxpayer. We are not a grievance/complaint processing center. Nevertheless, I well understand our obligation to fully and fairly treat employees and live up to those policies and practices established through our contract with NTEU and through federal and agency regulations." (G.C. Exh. 26.)

10 years and knew Mr. Ernst, although he never directly supervised him (Tr. 20-23). As the Director of ISD, Mr. Kaczor met regularly with the supervisors and managers within his division, including Mr. Ernst's immediate supervisor, Mr. Mike Sullivan, and his Branch Chief, Mr. Mitchell. (Tr. 234-35). Although these meetings were largely technical in nature, Mr. Sullivan did discuss with Mr. Kaczor certain problems he was having with Mr. Ernst such as Mr. Ernst's absences from the computer room and personal distaste for Mr. Sullivan (Tr. 236-37). Apart from Mr. Sullivan's comments, Mr. Kaczor was well aware of Mr. Ernst's poor relationship with his supervisors in the Operations Branch having observed their interactions personally (Tr. 257-59).

According to Mr. Kaczor, it was he alone--without any input from other supervisors or managers--who decided to reassign Mr. Ernst from his position as lead computer operator in the Operations Branch to the position of customer service representative in the Communications and Customer Service Branch, effective October 29, 1995 (Tr. 26-28, 196, 237). He was aware of the bad working relationship that existed between Mr. Ernst and his supervisors in the Operations Branch and thought that it would be better for all concerned if Mr. Ernst could start afresh with new supervisors in a different branch of the ISD which could use his extensive computer expertise (Tr. 237, 257-58, 271). Mr. Kaczor further testified that he had seen similar reassignments work well in the past (Tr. 41), and that he reassigned Mr. Ernst for these reasons and not because Mr. Ernst had filed a number of grievances in 1995 (Tr. 256).⁸

The reassignment was effectuated in two stages, the first being a memo dated October 6, 1995, setting forth Mr. Kaczor's intention to reassign Mr. Ernst; stating his reasons for proposing such action; and suggesting that if Mr. Ernst wished to discuss the matter, he should contact Mr. Sullivan, his immediate supervisor, who would arrange a meeting between Mr. Kaczor and Mr. Ernst (G.C. Exh. 2). Mr. Kaczor prepared the memo and had it delivered to Mr. Ernst by Mr. Donald Mitchell, Chief of the Operations

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I found Mr. Kaczor to be a thoroughly truthful and reliable witness, and I credit his testimony even where it may conflict with that of other witnesses. For example, Mr. Kaczor remained consistent in explaining his non-disciplinary reasons for reassigning Mr. Ernst despite the testimonial and documentary evidence submitted by others--who were not involved in making that decision--to justify the reassignment on disciplinary grounds (see n.3, supra).

Branch (Tr. 26-28). The letter was sealed in an envelope when Mr. Mitchell called Mr. Ernst into his office and presented it to him (Tr. 95, 195-96). At this point, there is a divergence in the testimony offered by Mr. Mitchell and Mr. Ernst, as set forth below.

Mr. Mitchell testified that he handed the envelope to Mr. Ernst and told him, "Raymond, I have the responsibility of presenting you with this letter. If you have any questions or concerns, just follow the instructions in the letter" (Tr. 196). He further testified that Mr. Ernst said "okay" and walked out of the office, but then returned a few moments later and said, "I disagree with this, this is unacceptable" (Tr. 196-97). According to Mr. Mitchell, Mr. Ernst's attention was then drawn to the fact that Mr. Kaczor was the author of the memo, and that Mr. Kaczor had directed Mr. Ernst to contact his immediate supervisor, Mike Sullivan, if he wished to have a meeting arranged to discuss the matter with Mr. Kaczor, at which point Mr. Ernst departed (id.).

Mr. Ernst testified that when he entered Mr. Mitchell's office, Mr. Mitchell handed him the document, i.e., "the envelope", and said, "How long have you been working here?"; when he, Ernst, replied, "12 years", Mr. Mitchell said, "We don't want to see you do it. We don't want to hear you can do it, we want to see you do it" (Tr. 95-96). Mr. Ernst said he left with the letter at that point because he didn't know what was in the letter. Mr. Ernst said the statement, "We don't want to see you do it. We don't want to hear you can do it, we want to see you do it", meant to him that, ". . . if I didn't stop filing complaints, I wasn't going to be working for the IRS much longer." (Tr. 96). Mr. Mitchell testified that he did not recall making such a statement (Tr. 198-99). I find that Mr. Mitchell did not ask Mr. Ernst how long he had worked at the Service Center and I do not credit Mr. Ernst's testimony concerning the statement set forth above. At the outset, it makes no sense. To the contrary, I credit Mr. Mitchell's testimony, that when Mr. Ernst returned to his office and said, "I disagree with this, this is unacceptable" (Tr. 197), he, Mitchell, replied,

". . . Raymond, it amazes me that you've been with us this long and you have a problem reading a memorandum"; that he, Mitchell, then said, "Raymond, who is it addressed to?" that Mr. Ernst replied, "It's addressed to me"; that he, Mitchell, then asked, "Raymond, who is it from?"; Mr. Ernst said, "It's from IS Division"; that he, Mr. Mitchell, then asked, "Now, who was it signed

by?"; and Mr. Ernst replied, "Oh, it's signed by Al Kaczor" to which he said, "Now, if you have any questions or concerns, just follow the memo. . . ." (Tr. 197).

I credit Mr. Mitchell's testimony for various reasons. First, I found him to be a wholly credible witness. Second, I do not find it credible that Mr. Mitchell would have asked Mr. Ernst how long he had been employed for the reason that Mr. Mitchell had known him for about nine years as his section chief and the balance of Mr. Ernst's employment as his branch chief (Tr. 175). Moreover, it would, in particular, be incredible that Mr. Mitchell would have handed Mr. Ernst the envelope and have asked how long he had been working here, before anything else was said, as Mr. Ernst stated. Third, Mr. Mitchell's annoyed response, in effect, pointedly telling Mr. Ernst to read instructions, was so responsive, albeit pedantic, to the circumstances that it rings true. There may be those who perceive the beat of wings of angles in the whisper of the leaves and Mr. Ernst may have perceived that Mr. Mitchell, in his response, asked how long he had been employed; but I find no credible evidence that he made any such inquiry and reject the assertion.

Nevertheless, presentation of a notice of reassignment, perhaps the tone of voice (Tr. 39), reasonably created in Mr. Ernst's mind apprehension and uncertainty.

In Mr. Ernst's version of these events, when he returned to Mr. Mitchell's office after having read Mr. Kaczor's memo on October 6, he presented Mr. Mitchell with a handwritten memo objecting to the reassignment (G.C. Exh. 3; Tr. 95, 99), at which point Mr. Mitchell asked him, "How long have you been working here?" and Mr. Ernst replied, "12 years" (Tr. 95). Mr. Ernst testified that he construed Mr. Mitchell's question to mean that if he did not stop filing grievances, Mr. Mitchell would try to get rid of him (Tr. 96, 139-40, 154). Mr. Ernst further testified that he wanted to discuss the impending reassignment with Mr. Mitchell, who insisted instead that Mr. Ernst make an appointment with his secretary, but when Mr. Ernst indicated that he wanted to discuss how the reassignment would affect his ability to continue taking classes after work, Mr. Mitchell instructed his secretary to call Mr. Kaczor's office to arrange for Mr. Ernst to see Mr. Kaczor right away, which Mr. Ernst did (Tr. 99-100).

The record shows that, after his meeting with Mr. Mitchell on October 6, Mr. Ernst met with Mr. Kaczor that same day (Tr. 29, 34, 100, 266). When Mr. Ernst and

his Union representative arrived at Mr. Kaczor's office, Mr. Ernst presented Mr. Kaczor with a handwritten memo protesting his proposed reassignment (G.C. Exh. 3; Tr. 35-36); stated that Mr. Kaczor had no right to reassign him; and indicated that he would not report to the new position (Tr. 29-30, 36, 266-67). Mr. Kaczor replied that he did have the right to reassign Mr. Ernst; that a failure to report as directed would constitute insubordination which could subject Mr. Ernst to severe consequences; and that he would give Mr. Ernst 24 hours to reconsider his position concerning the reassignment (Tr. 30, 267). The next day, Mr. Ernst informed Mr. Kaczor that he would accept the new position but litigate it, which was fine with Mr. Kaczor (Tr. 30, 36, 267, 269).

During the same meeting on October 6, Mr. Ernst raised the possibility of being reassigned to the Systems Management Branch, but Mr. Kaczor indicated that there were no vacancies available at Mr. Ernst's grade level since all positions in that branch were at GS-11 and above; that the only ISD vacancy at the GS-9 level was the position of customer service representative; but that Mr. Ernst would be eligible to apply competitively for positions in the Systems Management Branch as they became available (Tr. 30-31). Finally, Mr. Ernst asked how the reassignment would affect his school classes schedule, and Mr. Kaczor assured him that everything would be arranged so that Mr. Ernst could continue going to school without interruption (Tr. 32-33, 269).

By letter dated October 16, 1995, delivered to Mr. Ernst by Mr. Mitchell without further discussion, Mr. Kaczor made the reassignment final (Jt. Exh. 1; Tr. 39-44, 199-200). In his letter, Mr. Kaczor addressed the matters that were discussed on October 6, specifically reaffirming management's flexibility in establishing Mr. Ernst's work schedule so as to avoid interfering with school classes; reassuring Mr. Ernst that he would be considered competitively for future vacancies in the Systems Management Branch; and reminding Mr. Ernst that he was required to report as directed to his reassigned position (Jt. Exh. 1).

Mr. Ernst reported to his reassigned position as directed and had been serving as a customer service representative in the Communications and Customer Service Branch for about a year at the time of the hearing (Tr. 101). As Mr. Kaczor testified, Mr. Ernst's reassignment resulted in no loss of grade or pay to him (Tr. 238). Moreover, Mr. Ernst lost no opportunity for promotion--and may, in fact, have had his promotional

opportunities enhanced--as a result of the reassignment (Tr. 247-48).⁹

In his new position, Mr. Ernst is one of 6 employees working at the "help desk," 5 of whom previously had worked as computer operators in the Operations Branch since operations experience is necessary to perform the duties required at the help desk (Tr. 243-44). As described by Mr. Kaczor, these duties primarily involve assistance to other employees at the Service Center who call with computer-related technical problems which the customer service representatives are expected to resolve (Tr. 243-45, 248-49).¹⁰ Ideally, the help desk employees should be able to provide one-stop service and resolve the caller's problem without referring the matter elsewhere (Tr. 248-49).¹¹ In Mr. Kaczor's opinion, as the Director of ISD, Mr. Ernst's years of experience as a lead computer operator in the Operations Branch made him very well suited to work at the help desk (Tr. 244, 247, 249).

Discussion and Conclusions

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As Mr. Kaczor testified, not only would Mr. Ernst have another skill to offer as a result of experience gained in his new position (Tr. 248), but he would be serving in a position that the Service Center planned to retain after completion of an impending reorganization which will eliminate the function of processing taxpayer returns and, hence, any future need for computer operators at the Service Center (Tr. 245-47).

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About 90% of the calls received at the help desk are internal--i.e., from other employees: 75% are from employees in the Operations Branch, 15% from employees outside Operations, and the remainder are inquiries from taxpayers or the general public (Tr. 243-45).

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Mr. Ernst described his experience at the help desk in starkly different terms. That is, he testified that he has no real responsibility at the help desk and provides no technical assistance, but merely answers the phone and directs the caller to another unit (Tr. 101-02). I credit Mr. Kaczor's description of what the customer service representative's role should be, and find that if Mr. Ernst has not been providing technical assistance to callers, it is because he preferred the lead computer operator position; he did not want the customer service representative position and thinks it should be eliminated; and he views his current position as a step down for himself (Tr. 102-03).

§ 7116(a)(2) of the Statute provides that it is an unfair labor practice for an agency, "to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment[.]" In determining whether Respondent violated section 7116(a)(2) of the Statute, the General Counsel must establish that the employee against whom the alleged discriminatory action was taken was engaged in protected activity and that consideration of such activity was a motivating factor in connection with hiring, tenure, promotion, or other conditions of employment. If General Counsel makes this required prima facie showing, Respondent may seek to establish, by a preponderance of the evidence, that there was a legitimate justification for its action and that the same action would have been taken even in the absence of the consideration of protected activity. Letterkenny Army Depot, 35 FLRA 113, 118 (1990).

It is well established that employees have a protected right under the Statute to file grievances. Equal Employment Opportunity Commission, 24 FLRA 851 (1986), aff'd sub nom. Martinez v. FLRA, 833 F.2d 1051 (D.C. Cir. 1987); 410th Combat Support Group, K.I. Sawyer Air Force Base, Michigan, 45 FLRA 755, 768 (1992). It is also clear and undisputed that employees may not be reassigned for exercising such a protected right. United States Customs Service, Region IV, Miami District, Miami, Florida, 36 FLRA 489, 495-96 (1990). The issue in this case is whether Mr. Ernst's filing, therefore, of grievances was a motivating factor in Respondent's decision to reassign him. For the reasons stated below, I conclude that the General Counsel has failed to establish that it was, and, therefore, find it unnecessary to determine whether the Respondent would have reassigned Mr. Ernst for legitimate reasons if his protected activity had been considered.

It is undisputed that Mr. Ernst was engaged in protected activity within the meaning of the Statute when he filed and processed grievances under the negotiated grievance procedure contained in the agreement between IRS and NTEU. It is also undisputed that the Respondent was well aware of Mr. Ernst's protected activity. Indeed, Mr. Ernst had been exercising his protected rights to file grievances, complaints and appeals for a number of years while employed as a lead computer operator in the Respondent's Operations Branch. Not only is there no evidence that any reprisals were taken against Mr. Ernst for having been a "multi-filer" prior to October 1995, but the record establishes that he received consistently high evaluations from his supervisors and commensurate awards

from the Respondent through the years.¹² While Mr. Ernst filed 6 grievances in 1995, I find that such activity was merely a continuation of the pattern that Mr. Ernst had followed without suffering any adverse consequences ever since he was promoted to the position of lead computer operator in 1987. Moreover, at the time of his reassignment, all of these grievances had gone through the various steps of the negotiated grievance procedure and were no longer active, since the Union was not involved in representing Mr. Ernst during the preliminary stages and was not invoking arbitration on his behalf at the conclusion of the process. Inasmuch as Mr. Ernst was processing his grievances as an individual he could not, as an individual, advance them to arbitration. As a result, Mr. Ernst's grievances had no practical adverse consequences for Respondent. Accordingly, Respondent had no reason to

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General Counsel appears to contend that Mr. Ernst's superior performance as a lead computer operator demonstrates that his reassignment was discriminatorily motivated. I find such reasoning unpersuasive. In fact, if the Respondent were "out to get" Mr. Ernst for filing so many grievances, it might be expected to be less effusive in its praise of Mr. Ernst's job performance and less generous in issuing awards to him. In my judgment, Respondent's honest assessment of Mr. Ernst's performance supports Mr. Kaczor's testimony that the reassignment was designed to retain Mr. Ernst's computer expertise in a new, but important, position while at the same time allowing him to be supervised by individuals in another branch rather than by those in the Operations Branch whom he strongly distrusted.

retaliate against Mr. Ernst for filing inconsequential grievances.¹³

According to the previously credited testimony of Mr. Kaczor, he alone decided to reassign Mr. Ernst without first discussing the matter with any other management

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Mr. Ernst's practice of filing his grievances and supporting documents with his immediate supervisor, his Division Director and the Service Center Director at each step of the grievance process did have the consequence of tying up the Respondent's copying machines as Mr. Ernst duplicated his voluminous papers, and disrupted each office to which Mr. Ernst hand delivered these documents. General Counsel argues that the Respondent's directives to Mr. Ernst that his grievances and supporting materials should be filed only with his immediate supervisor for duplication and distribution as appropriate constitute evidence of discriminatory motivation. I disagree. In my judgment, the Respondent was within its rights to require Mr. Ernst to follow the contractually agreed upon procedure for filing and processing his grievances. In other words, the Respondent was not obligated to permit Mr. Ernst to deviate from the contract merely because he was representing himself rather than having the Union represent him and was overly concerned that management might claim that he had failed to serve his grievances on the appropriate management official.

official at the Service Center.¹⁴ His motivation was solely to defuse a volatile situation caused by Mr. Ernst's admitted and widely known dissatisfaction with and distrust of his superiors in the Operations Branch. As Mr. Kaczor testified, he had been successful in the past when reassigning employees under similar circumstances, and he thought the reassignment of Mr. Ernst to the "help desk" would benefit the Respondent by providing expert assistance to other employees who were experiencing technical computer-related problems and would benefit Mr. Ernst as well by providing him a fresh start with new supervisors whom he did not distrust. Accordingly, as the new Director of the Respondent's ISD, and having observed the poor relationship between Mr. Ernst and his supervisors in the Operations Branch, Mr. Kaczor decided to reassign Mr. Ernst even though Mr. Ernst made it clear that he did not want to become a

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I credit Mr. Kaczor's testimony that he had no unlawful discriminatory motive in reassigning Mr. Ernst, and the record contains no support for the opposite conclusion. Accordingly, even if other management officials at the Service Center had such unlawful motivation, they had no role in the decision to reassign Mr. Ernst and their animus cannot be attributed to Mr. Kaczor and, ultimately, to the Respondent. I further find, however, that no evidence of unlawful motivation for the reassignment has been demonstrated. While General Counsel relies on Mr. Ernst's testimony that he overheard a conversation between his immediate supervisor, Mr. Sullivan, and another supervisor in which Mr. Sullivan declared that "all he does is file grievances," Mr. Ernst conceded that he never heard his name mentioned but merely assumed that Mr. Sullivan was referring to him even though other employees had filed grievances as well. Similarly, General Counsel's reliance on one out-of-context sentence in a two-page letter written by Service Center Director Landy to Mr. Ernst suggesting a face-to-face meeting to discuss and try to resolve all of Mr. Ernst's grievances and complaints does not demonstrate to me the existence of unlawful motivation for the reassignment. Although Ms. Landy would have been well advised to avoid making the gratuitous comment that "we [the Service Center] are not a grievance/complaint processing center," in the very next sentence she stated in unequivocal terms Respondent's commitment to preserving its employees' rights under the negotiated agreement with NTEU and federal law (see n.7, supra). Ms. Landy's entire letter bespeaks a desire to address Mr. Ernst's concerns rather than a desire to punish him in some way for exercising his protected right to file grievances.

customer service representative but instead would prefer a transfer to the Systems Management Branch.¹⁵

Mr. Ernst's reassignment was accomplished with no loss of grade or pay; with no loss of promotional opportunities in the future; and with no restrictions on his right (if necessary) to file grievances. Moreover, in light of an impending reorganization at the Service Center which will eliminate the function of reviewing taxpayer returns and thus the need for computer operators, Mr. Ernst's reassignment to a position as customer service representative may well have enhanced his career.

For all of the foregoing reasons, I find that General Counsel has not established a prima facie case that Mr. Ernst was reassigned at least in part because he engaged

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I find nothing sinister in Mr. Kaczor's decision to reassign Mr. Ernst against the latter's wishes. As Mr. Kaczor explained, all employees in the Systems Management Branch were at a higher grade level than Mr. Ernst and, in any event, there was no vacancy for him at the time. Nevertheless, Mr. Kaczor went out of his way to reassure Mr. Ernst that he would be given every consideration for a position in that branch if and when a vacancy subsequently became available and Mr. Ernst chose to apply for it on a competitive basis. Mr. Kaczor transferred Mr. Ernst to the only available position which preserved his grade level and made use of his computer expertise.

in the protected activity of filing grievances.¹⁶ Having found that Respondent did not violate §§ 16(a)(1) and (2) of the Statute as alleged in the complaint, I recommend that the Authority adopt the following:

ORDER

The complaint in Case No. BN-CA-60018 be, and the same is hereby, dismissed.

WILLIAM B. DEVANEY
Administrative Law Judge

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In reaching this conclusion, I am mindful that there appears to be a discrepancy between the testimony from all the witnesses in this case--including Mr. Ernst--that he disliked and distrusted all of the supervisors in the Operations Branch and, on the other hand, the language in his performance appraisal which praised Mr. Ernst for being able to "usually maintain[] an effective relationship with his manager, peers, and subordinates." I credit the unanimous testimony that Mr. Ernst's working relationship with his supervisors was not good, and attribute the apparent inconsistent statement in his performance evaluation to his supervisors' interest in emphasizing Mr. Ernst's positive attributes as a valuable employee rather than creating further relationship problems in the Operations Branch. In this regard, I note his immediate supervisor's remark that Mr. Ernst "usually" maintains an effective relationship not only with his "manager" but also with his "peers and subordinates," thereby leaving room for the interpretation that Mr. Ernst sometimes does not maintain an effective relationship with his manager or that he usually maintains effective relationships only when his "peers and subordinates" are considered along with his "manager."

Dated: April 7, 1997
Washington, DC

CERTIFICATE OF SERVICE

I hereby certify that copies of this DECISION issued by WILLIAM B. DEVANEY, Administrative Law Judge, in Case No. BN-CA-60018, were sent to the following parties in the manner indicated:

CERTIFIED MAIL:

Patricia Chin Dagati, Esq.
Senior Attorney, Regional Counsel
Internal Revenue Service
Northeast Region
7 World Trade Center, 25th Floor
New York, NY 10048

Deborah M. House, Esq.
Peter F. Dow, Esq.
Federal Labor Relations Authority
99 Summer Street, Suite 1500
Boston, MA 02110-1200

Mr. Raymond Ernst
4-14 Greenway Street
Manorville, NY 11949

REGULAR MAIL:

Carol M. Landy, Director
Internal Revenue Service
Brookhaven Service Center
1040 Waverly Avenue
Holtsville, NY 11742

Assistant Director of Personnel
(Labor Relations)
U.S. Department of Treasury
Room 514, Washington, Building
15th & Pennsylvania Avenue, NW
Washington, DC 20220

Dated: April 7, 1997
Washington, DC