64 FLRA No. 58

UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
(Respondent)

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
(Charging Party)

WA-CA-05-0095

DECISION AND ORDER

December 31, 2009

Before the Authority: Carol Waller Pope, Chairman and Thomas M. Beck and Ernest DuBester, Members [1]

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel (GC). The Respondent filed an opposition to the GC's exceptions.

The complaint alleges that the Respondent violated § 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute) by disqualifying a steward of the Charging Party (Union) from flying as a crew member on a particular test flight based on his protected activity. The complaint also alleges that the Respondent independently violated § 7116(a)(1) when the steward's supervisor (the supervisor) informed the steward that he was disqualified based on the steward's protected activity. The Judge recommended that the complaint be dismissed.

Upon consideration of the Judge's decision and the entire record, we find, contrary to the Judge, that the Respondent violated the Statute as alleged in the complaint**.** Accordingly, we issue an order and notice, as requested by the GC, including the requirement that the Respondent make the steward whole by paying him the hazardous duty pay he would have earned had he been allowed to participate in the Adam 500 flight test.

II. Background

The steward is an Aerospace Engineer whose duties involve, among other things, the certification of various types of aircraft, including conducting or observing the in-flight testing of aircraft. Judge's Decision at 4. He receives a 25 percent pay differential for any 8-hour work period in which he witnesses or performs in-flight testing. *Id.* at 4-5.

In the fall of 2004, [2] the supervisor stated to the steward that he (the steward) was not required to have a third class medical certificate to perform duties while in flight. The supervisor told the steward that, instead, the steward could provide a doctor's note indicating his fitness to perform those duties. *Id.* at 5. Thereafter, the steward presented, and the supervisor accepted, a doctor's note stating: "Patient in satisfactory condition for flight long distance." *Id.* As a result of the doctor's note, the supervisor approved the steward to participate in flight testing on a project that involved a trip to Brazil. *Id.* at 5- 6.

On October 24, while in Brazil, the steward sent an email to other Union representatives. The email concerned the supervisor's statements regarding the necessity for third class medical certificates and a doctor's note. *Id.* at 6. The steward's message read, in part:

> The agency has recently told me AND the [Federal Labor Relations Authority] that there is currently no longer ANY requirement for a[n] engineer, including those in flight test, to maintain a 3rd Class medical certificate in order to perform flight test related duties.
>
> However, the supervisor of the Flight Test Branch in [Los Angeles] told those of us without a 3rd class medical it is his responsibility to ensure that when he assign[s] a project that those he assigns it to are physically capable of performing the job. As such, we were told that he either requires us to show him that we posses[s] a 3rd Class medical certificate or provide him a doctor[']s note saying I and [sic] physically able to fly (those were his exact words).
>
> As such, I provided him a doctor[']s note that said precisely that "Patient is OK able to fly." I submitted this and made sure they knew that the doctor performed absolutely no extra tests or anything prior to giving me the note. I guess this

1. Member Beck's concurring opinion is set forth at the end of the decision.

2. All subsequent dates are in 2004, unless otherwise indicated.

> was satisfactory since just prior to leaving for Brazil he asked about flying down here and I told him I would [be] flying with Embraer since I had given him the doctor's note just as he had asked.
>
> Please let everyone know that the agency is now claiming that there is no requirement for an engineer to have a 3rd class medical and that if there [sic] supervisor assigns them work, they should assume the supervisor has satisfactorily carried out his responsibility of ensuring that the person is physically capable of [sic] do the job.
>
> If any person is told otherwise, i.e., they are told FAA policy or orders require them to hold one, please let me know immediately as this would demonstrate that what they are telling the [Federal Labor Relations Authority] is untrue.

Id.; [3] GC Ex. 3.

On October 28, the supervisor sent an email to several of the Respondent's supervisors that discussed and contained a copy of the steward's October 24 email. As relevant here, the supervisor's message stated:

> Due to the sensitive nature of this topic could you please comment on the following bold text I plan to send to [the steward]. I included in italics [the steward's] email for reference. (My use of the word "developments" is meant to indicate [the steward's] inappropriate, and partially inaccurate email which he only addressed to union personnel). FYI Adam 500 FAA flight testing is continuing next week and [the steward] will now not be participating until this is resolved. [4]
>
> **After further developments and scrutiny by, additional FAA personnel involved, the doctor [sic] note you submitted stating your fitness "to fly on long flights" has been determined not to meet the proper intent. The medical fitness determination needs to specifically attest to your fitness for flying as a crewmember. If your personal physician does not understand, or is unable to make such a determination a qualified flight surgeon should conduct the examination. As I explained previously, you also have the option of obtaining a Class 3 Medical Certificate.**

Judge's Decision at 7-8; GC Ex. 5 (emphasis in original).

On November 1, after the steward returned from Brazil, he read an email dated October 29 from the supervisor to him stating that the doctor's note submitted was no longer acceptable as proof of the steward's fitness to participate in flight tests. Judge's Decision at 7. The supervisor further advised that the steward was required either to undergo an examination by a flight surgeon or to obtain a third class certificate. In this regard, the supervisor stated:

> After further review, I do not consider the doctor's note you submitted regarding your fitness "for [f]light long distance" to be adequate. The medical determination needs to specifically attest to your fitness for flying as a crewmember. Since your personal physician cannot make such a determination, a qualified flight surgeon must conduct the examination. As I explained previously, you also have the option of obtaining a Class 3 Medical Certificate.

Id.; GC Ex. 4. On the same day, the steward received by facsimile a copy of the supervisor's October 28 email to other Respondent officials.

Also on November 1, the steward and the supervisor had a conversation regarding the email. The parties' versions of the conversation, which differ, are discussed in more detail below.

The GC issued a complaint alleging that the Respondent violated § 7116(a)(1) and (2) of the Statute by disqualifying the steward from participating in the Adam 500 flight test based on his protected activity. The complaint also alleges that the Respondent independently violated § 7116(a)(1) when the supervisor informed the steward that he was disqualified from flying as a crew member based on his protected activity.

III. Judge's Decision

In resolving the allegation that the Respondent violated § 7116(a)(1) and (2) of the Statute, the Judge applied the framework established in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). Under that framework, the GC establishes a *prima facie* case of discrimination by demonstrating that: (1) the employee

3. It is undisputed that the references to the FLRA pertain to a previously filed ULP charge alleging that the Respondent unilaterally implemented a change that required certain employees to obtain third class medical certificates. GC Ex. 2. There is no contention that the ULP charge, which was withdrawn, is relevant herein.

4. The steward did not participate in the Adam 500 flight test. It is undisputed that, if he had, he would have received between $1000 and $1500 in hazardous duty pay. Judge's Decision at 7 n.6.

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 . . . conditions of employment." *Id.* Once the GC makes the required *prima facie* showing, an agency may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of the protected activity.

Applying the foregoing framework, the Judge noted that, prior to the events in this case, the steward had acquired, but then allowed to expire, a third class medical certificate. Judge's Decision at 10. In addition, the Judge found that the evidence "strongly suggest[ed]" that, at the time of the steward's disqualification, "engineers were at least required to undergo extensive medical testing" to maintain eligibility to participate in flight tests. *Id.* at 11. The Judge acknowledged that "[t]he Respondent did not, and apparently could not, produce any regulation or statement of policy showing that Aerospace Engineers were required to have third class medical certificates at the time of [the steward's] disqualification from flight status." *Id.* at 10. Nevertheless, the Judge found that it "strain[ed] credibility" to find that the steward would have undergone the extensive testing necessary to obtain his (expired) medical certificate if "such examinations were not a requirement for maintaining his flight status." *Id.* at 11. Therefore, according to the Judge, the steward "knew or should have known that [the supervisor] acted improperly in accepting a perfunctory note from his personal physician[.]" *Id.*

The Judge added that "[a]fter having mistakenly accepted the doctor's note from [the steward], [the supervisor] corrected the mistake by insisting that [the steward] either undergo the necessary examination or obtain a third class medical certificate." *Id.* Summarizing, the Judge stated:

> [T]he credible evidence shows that [the supervisor's] disqualification of [the steward] was neither discipline nor other adverse action, but the correction of an obvious error which amounted to an improper exemption of [the steward] from medical standards which had been uniformly applied to all other Aerospace Engineers. [The steward], as a Union representative and an Aerospace Engineer of long experience, knew or should have known that he had received special treatment which was contrary to standard practice by the Respondent.

Id. at 11-12.

For the foregoing reasons, the Judge concluded that the GC failed to establish a *prima facie* case of discrimination. *Id.* at 13. The Judge further concluded that, in these circumstances, he was not required to address the Respondent's affirmative defenses and that the Respondent did not violate § 7116(a)(1) and (2) of the Statute. *Id.*

In resolving the allegation that the Respondent independently violated § 7116(a)(1) of the Statute, the Judge cited *United States Department of Agriculture, United States Forest Service, Frenchburg Job Corps, Mariba, Ky.*, 49 FLRA 1020, 1034 (1994) (*Frenchburg*). *Frenchburg* provides that, in resolving an allegation that a statement violated the Statute, the test is whether, under the circumstances, the statement tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. *Frenchburg*, 49 FLRA at 1034. Although the circumstances surrounding the making of the statement are considered, the standard is not based on the subjective perceptions of the employee or on the intent of the employer. *Id.*

With regard to this allegation, the steward testified that, during his conversation with the supervisor on November 1, the supervisor explained to him that the doctor's note was no longer acceptable as proof of his medical fitness. Judge's Decision at 8. The steward also testified that, after he told the supervisor that the Union had copies of emails indicating otherwise, the supervisor "changed his story" and told the steward that he had been grounded because his email had "pissed off" a number of other managers. *Id.* The steward further testified that the supervisor told him that he would have continued to accept the doctor's note if the steward had not sent the October 24 email message to other Union representatives. *Id.* The supervisor testified "that, although he did not deny having had a conversation with [the steward], he had no specific recollection of the conversation and did not remember saying that the steward had made people [angry] or words to that effect." *Id.* at 8-9.

The Judge concluded that, even assuming the supervisor "stated that he would have accepted the doctor's note were it not for the email message to other Union representatives," the GC failed to establish an independent violation of § 7116(a)(1) of the Statute. *Id.* at 13. The Judge based this conclusion on his finding that "[the steward] knew or should have known that [the supervisor's] statement of disqualification was no more than the application of the same medical criteria that had been applied to all other Aerospace Engineers." *Id.* The Judge added that, in these circumstances, the "statement

could not reasonably have been construed as being coercive or threatening as is required by the Authority in *Frenchburg*." *Id.*

For the foregoing reasons, the Judge concluded that the Respondent did not independently violate § 7116(a)(1) of the Statute. As a result, he recommended that the complaint be dismissed in its entirety.

IV. Positions of the Parties

A. GC's Exceptions

The GC contends that the Judge erred in failing to find that the Respondent violated § 7116(a)(1) and (2) of the Statute. The GC argues that the steward's October 24 email to Union representatives constituted protected activity and was a motivating factor in the supervisor's decision to ground the steward on October 29. The GC also asserts that the Judge erred in failing to find, consistent with the steward's uncontested testimony, that the supervisor stated to the steward that he was grounded because of the email. Exceptions at 16. Additionally, the GC argues that the Respondent did not show that the steward's October 24 email to other Union representatives constituted flagrant misconduct or "exceeded the boundaries of protected activity[.]" *Id.* at 18.

Furthermore, the GC contends that the Judge erred in not finding an independent violation of § 7116(a)(1) of the Statute. According to the GC, the Judge erred by failing to make a finding of fact as to what was stated by the supervisor to the steward. *Id.* at 27. The GC also argues that the Judge erred in failing to find that the supervisor's statement to the steward would have a "reasonable tendency to coerce employees." *Id.* at 28.

B. Respondent's Opposition

The Respondent contends that the Judge found correctly that the Respondent did not discriminate against the steward based on protected activity in violation of § 7116(a)(1) and (2) of the Statute. The Respondent argues that the policy requiring employees including the steward to have third class medical certification was in place at the time of the incident involved in this case and that the subsequent July 2005 policy statement was merely a clarification of "any misinterpretation" of that policy. Opposition at 10. The Respondent asserts that a doctor's note stating that the employee is "fit to fly" is not equivalent to a third class medical examination by a doctor "designated by the [Respondent.]" *Id.* at 7.

Furthermore, the Respondent contends that the Judge correctly found no independent violation of § 7116(a)(1) of the Statute. In the Respondent's view, the GC did not demonstrate that the steward could reasonably have drawn a coercive inference from the supervisor's alleged statement. Initially, the Respondent argues that the GC has not established by a preponderance of the evidence that the statement actually occurred. *Id.* at 11. In the alternative, the Respondent argues that, even if it did occur, the statement does not constitute an independent violation of § 7116(a)(1). *Id.* at 12.

V. Analysis and Conclusions

In determining whether an ALJ's factual findings are supported, the Authority looks to the preponderance of the record evidence. *U.S. Dep't of the Air Force, Air Force Materiel Command, Space and Missile Systems Ctr., Detachment 12, Kirkland Air Force Base, N.M.*, 64 FLRA 166, 171 (2009) (Member Beck concurring in part); *U.S. Sec. and Exch. Comm'n*, 62 FLRA 432, 437 (2008), *enforced sub nom. U.S. Sec. and Exch. Comm'n v. FLRA*, 568 F.3d 990 (D.C. Cir. 2009); *U.S. Dep't of Justice, Fed. Bureau of Prisons, Fed. Corr. Inst., Marianna, Fla.*, 59 FLRA 3, 5 (2003); *Dep't of Transp., Fed. Aviation Admin., Ft. Worth, Tex.*, 57 FLRA 604, 607 (2001).

On review of the record, we find, in disagreement with the Judge, that the preponderance of the record evidence establishes that the Respondent's conduct violated the Statute, as alleged in the complaint.

A. The Respondent violated § 7116(a)(1) and (2) by disqualifying the steward from flying as a crew member based on protected activity

Section 7116(a)(2) of the Statute provides that it is an unfair labor practice for an agency to encourage or discourage membership in a union by discrimination in connection with hiring, tenure, promotion, or other conditions of employment. The *Letterkenny* framework applies in resolving allegations of discrimination claimed to violate § 7116(a)(2). Under that framework, whether the GC has established a *prima facie* case is determined by considering the evidence in the record as a whole, not just the evidence presented by the GC. *See Dep't of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Ctr., Robins Air Force Base, Ga.*, 55 FLRA 1201, 1205 (2000). The timing of management actions may be significant in determining whether an employee's protected activity was a motivating factor, within the meaning of *Letterkenny*. *U.S. Dep't of Veterans Affairs Med. Ctr., Northampton, Mass.*, 51 FLRA 1520, 1528 (1996) (*VA Northampton*);

Frenchburg, 49 FLRA at 1033; *U.S. Dep't of Transp., FAA, El Paso, Tex.*, 39 FLRA 1542, 1552 (1991); *U.S. Customs Serv. Region IV, Miami Dist., Miami, Fla.*, 36 FLRA 489, 496 (1990). Moreover, when the alleged discrimination is based on conduct occurring during protected activity, "a necessary part of the respondent's defense is that the conduct constituted flagrant misconduct *or otherwise exceeded the boundaries of protected activity.*" *U.S. Dep't of Defense, Defense Contract Mgmt. Agency, Orlando, Fla.*, 59 FLRA 223, 226 (2003) (*DoD*) (emphasis in original) (citation omitted).

With respect to the *prima facie* case's first prong under *Letterkenny*, there is no dispute that the steward's October 24 email to other Union representatives constituted protected activity under § 7102 of the Statute. Judge's Decision at 13 n.12. The first requirement for establishing a *prima facie* case of discrimination is therefore satisfied. *See* 35 FLRA at 118, 126.

To satisfy the *prima facie* case's second prong, the GC must show that the protected activity was a motivating factor in the Respondent's treatment of the employee in connection with conditions of employment. We find that this showing has been made.

A preponderance of the record evidence supports the finding that the steward's protected activity was a motivating factor in the activity's decision to disqualify the steward from the Adam 500 flight test. As set forth above, on October 28, the supervisor sent an email to several of the Respondent's supervisors that discussed and contained a copy of the steward's October 24 email to other Union representatives. Judge's Decision at 7-8; GC Ex. 5. *The next day*, by email dated October 29, the supervisor notified the steward that a doctor's note was no longer acceptable as proof of the steward's medical fitness for flight tests. Judge's Decision at 7; GC Ex. 4. This timing strongly suggests that the steward's email was a motivating factor in the Respondent's decision.

Moreover, the supervisor's October 28 email makes an *explicit connection* between the steward's protected activity and the decision to disqualify the steward from participating in the Adam 500 flight test. Judge's Decision at 7-8; GC Ex. 5. In particular, the supervisor expressly stated that he proposed to notify the steward that the steward's doctor's note would not be acceptable because of "developments" and that "the word 'developments' is meant to indicate [the steward's] inappropriate and partially inaccurate email[.]" *Id.* at 7. This evidence supports a finding that the steward's protected activity was a motivating factor in the activity's disqualification of the steward from the Adam 500 test flight.

We find the evidence to the contrary unpersuasive. In determining that the October 24 email was not a motivating factor in the activity's treatment of the steward, the Judge viewed the activity's decision to ground the steward as merely a correction of an obvious error. Further, in the Judge's view, the steward knew or should have known that his doctor's statement was insufficient. Judge's Decision at 11-12.

The Judge's determinations lack a foundation in the record. As the Judge acknowledged, at the time of the steward's disqualification, there were no written requirements that employees such as the steward have third class medical certificates. Judge's Decision at 10. In fact, the Respondent did not issue such a requirement until July 2005, well after the steward's disqualification. Respondent's Ex. 3.

At most, any policy that was in place at the time of the incident was unclear. The Respondent argues that its July 2005 issuance was only a clarification of "any misinterpretation" of the activity's policy existing at the time of the incident. Opposition at 10. However, the Respondent's argument is an admission that any such policy was so unclear that it required clarification. Further, the supervisor's initial acceptance of the steward's doctor's note was consistent with the supervisor's prior statement to the steward that, in lieu of a third class medical certificate, the steward could provide a doctor's note indicating his fitness to perform his duties while in flight. Judge's Decision at 5.

Moreover, the record does not provide a basis for concluding that the steward knew or should have known that his doctor's statement was insufficient because the doctor was not a flight surgeon. As discussed previously, the supervisor told the steward that a doctor's note was sufficient, and indeed accepted such a note. It was not until the time of the incident that the supervisor told the steward in an email message that the steward was required to obtain a statement from a different doctor — a qualified flight surgeon. Judge's Decision at 7; GC Ex. 4. Similarly, the fact that the steward previously held a third class medical certificate does not support a conclusion that the steward should have known that his supervisor was mistaken in both soliciting and accepting his doctor's note.

It is also clear that the activity's improper treatment of the steward was "in connection with . . . conditions of employment." *Letterkenny*, 35 FLRA at 118. The Authority has held, and the parties do not dispute, that the distribution of hazardous duty pay constitutes a condition of employment within the meaning of the Statute. *See U.S. Air Force, Loring AFB, Limestone,*

Me., 43 FLRA 1087, 1101, 1131 (1992) (distribution of environmental differential pay is a condition of employment). It follows that the activity's grounding of the steward, depriving him of the opportunity to receive hazardous duty pay for witnessing or performing in-flight testing, was treatment in connection with a condition of employment. The *prima facie* case's second prong is therefore substantiated by the record.

In these circumstances, we conclude that the GC has established a *prima facie* case of discrimination under *Letterkenny.* As the discrimination is based on protected activity itself, a necessary part of the Respondent's defense is to establish that the steward's action (here, the email) exceeded the bounds of protection. *See DoD*, 59 FLRA at 226. However, the Respondent makes no such claim and does not respond to the GC's exceptions on this point in its opposition. Therefore, consistent with *Letterkenny*, we conclude that the Respondent violated § 7116(a)(1) and (2) of the Statute by disqualifying the steward from flying as a crew member on the Adam 500 flight test.

B. The Respondent violated § 7116(a)(1) when the supervisor informed the steward that he was disqualified from flying as a crew member based on protected activity

Under § 7102 of the Statute, an employee has the right to form, join, or assist any labor organization freely and without fear of penalty or reprisal. An agency's interference with this right violates § 7116(a)(1). *Nuclear Regulatory Comm'n*, 28 FLRA 820, 831 (1987).

The standard for determining whether management's statement or conduct independently violates § 7116(a)(1) is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could reasonably have drawn a coercive inference from the statement. *Frenchburg*, 49 FLRA at 1034. Although the circumstances surrounding the making of the statement are considered, the standard is not based on the subjective perceptions of the employee or on the intent of the employer. *Id.* The standard is satisfied where, *inter alia*, a statement explicitly links an employee's protected activity with treatment adverse to the employee's interests. *See, e.g.*, *Frenchburg*, 49 FLRA at 1034-35 (statement linking employee's use of official time with negative perceptions of employee's performance violates § 7116(a)(1)); *Dep't of the Treasury, U.S. Customs Serv., Region IV, Miami, Fla.*, 19 FLRA 956, 968-69 (1985) (statements linking employee's position as a union official with the denial to the employee of new, challenging, and interesting job assignments, and with limitations on the employee's career opportunities violates § 7116(a)(1)).

The record establishes that the supervisor made a statement to the steward that violated § 7116(a)(1). As noted by the Judge, the steward testified that the supervisor stated to the steward that he (the steward) was grounded because his email had "pissed off" a number of other managers. Judge's Decision at 8. The supervisor also allegedly said that he would have continued to accept the steward's doctor's note if the steward had not sent the email to other Union representatives. *Id.*

The Respondent failed to offer evidence to rebut this testimony. Rather, as also noted by the Judge, the supervisor testified "that, although he did not deny having had a conversation with [the steward], he had no specific recollection of the conversation and did not remember saying that [the steward] had made people [angry] or words to that effect." *Id.* at 8-9. Thus, the supervisor did not dispute the testimony by the steward as to what the supervisor said to the steward. Based on the evidence in the record, we conclude that the supervisor made a statement to the steward that explicitly linked the steward's protected activity to the decision to disqualify the steward from participating in the Adam 500 flight test.

We further conclude that the supervisor's statement violated § 7116(a)(1). The logical conclusion to be drawn from the supervisor's statement was that assignment to flight status was being denied the steward solely because the steward had sent an email to other Union representatives. The supervisor's statement conveyed the clear implication that participation in this type of union activity would affect an employee's opportunity to earn hazardous duty pay. Such a statement, linking the steward's protected activity with treatment adverse to his interests, reasonably may be construed as having interfered with, restrained, and coerced the steward in the exercise of § 7102 rights.

We reject the contrary view of the Judge on this point. The Judge reasoned that the supervisor's statement could not reasonably be construed as coercive or threatening because the steward knew or should have known that the supervisor's statement of disqualification was no more than the correction of an error. Judge's Decision at 13. However, as set forth above in section V.A., a preponderance of the record evidence does not support this determination.

Accordingly, we conclude that the Respondent violated § 7116(a)(1) of the Statute when the supervisor

informed the steward that he was disqualified from flying as a crew member on the Adam 500 flight test based on the steward's protected activity.

VI. Summary

We find, contrary to the Judge, that the Respondent violated the Statute, as alleged in the complaint. Therefore, we issue an order and notice, as requested by the GC, including the requirement that the Respondent make the steward whole by paying the steward the hazardous duty pay the steward would have earned had he been allowed to participate in the Adam 500 flight test.

VII. Order

Pursuant to § 2423.41 of our Regulations and § 7118 of the Federal Service Labor-Management Relations Statute, the United States Department of Transportation, Federal Aviation Administration shall:

1. Cease and desist from:

(a) Discriminating against employees by denying them the opportunity to perform their assigned flight test duties because they have represented employees or have engaged in other protected activity on behalf of the National Air Traffic Controllers Association, the exclusive bargaining unit representative.

(b) Making statements that interfere, restrain, or coerce employees in their exercise of protected activity.

(c) In any like or related manner, interfering with, restraining or coercing bargaining unit employees in the exercise of their rights assured by the Statute.

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

(a) Make Scott Odle whole by awarding him hazardous duty pay along with any other allowances equal to that which he would have earned had Odle been allowed to perform flight test duties for the Adam Aircraft Company project.

(b) Post copies of the attached Notice for 60 days at all facilities where bargaining unit employees are assigned on forms to be furnished by the Authority. The Notice is to be signed by John J. Hickey, Director, Aircraft Certification Service, and is to be posted in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that such Notices are not altered, defaced or covered with other material.

(c) Pursuant to § 2423.41(e) of the Authority's Regulations, notify the Regional Director of the Chicago Regional Office, Federal Labor Relations Authority, in writing, within 30 days of this Order, as to what steps have been taken to comply.

NOTICE TO ALL EMPLOYEES
POSTED BY ORDER OF THE
FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the United States Department of Transportation, Federal Aviation Administration violated the Federal Service Labor-Management Relations Statute (the Statute) and has ordered us to post and abide by this notice.

WE HEREBY NOTIFY EMPLOYEES THAT:

WE WILL NOT discriminate against employees by denying them the opportunity to perform their assigned flight test duties because they have represented employees or have engaged in other protected activity on behalf of the National Air Traffic Controllers Association, the exclusive bargaining unit representative.

WE WILL NOT make statements that interfere with, restrain, or coerce employees in their exercise of protected activity

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce bargaining unit employees in the exercise of their rights assured under the Statute.

WE WILL make Scott Odle whole by awarding him hazardous duty pay along with any other allowances equal to that which he would have earned had Odle been allowed to perform flight test duties for the Adam Aircraft Company project

_____
(Respondent Representative)

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, Chicago Regional Office, whose address is: Federal Labor Relations Authority, 55 W. Monroe St., Suite 1150, Chicago, Illinois, 60603-9729, and whose telephone number is: (312) 886-3465.

Concurring opinion of Member Beck

For the reasons stated in my separate opinions in *U.S. Dep't of the Air Force, 12th Flying Training Wing, Randolph Air Force Base*, San Antonio, Tex, 63 FLRA 256 (2009) and *U.S. Dep't of the Air Force, Air Force Materiel Command Space and Missile Sys. Ctr., Detachment 12, Kirtland Air Force Base, N.M.*, 64 FLRA 166 (2009), I review the ALJ's factual findings using a "substantial evidence in the record" standard rather than the Majority's "preponderance" standard. However, the Judge's ultimate factual finding does not survive scrutiny even under the more deferential "substantial evidence" standard. The Judge concluded that "the circumstances of Odle's disqualification indicate that neither he nor any other member of the bargaining unit had a reasonable basis for feeling coerced or intimidated on account of protected activity." Judge's Decision at 12. This conclusion cannot be squared with the evidence establishing that Odle was initially given a dispensation (approval of flight status based on a note from his personal physician) by his supervisor and that dispensation was then withdrawn in direct response to Odle's protected activity. This behavior by a supervisor sends a message to employees that "if you engage in protected activity, you'll suffer for it." Such messages are impermissible under §§ 7116(a)(1) and (a)(2) of our Statute.

Office of Administrative Law Judges

U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
Respondent

and

NATIONAL AIR TRAFFIC
CONTROLLERS ASSOCIATION
Charging Party

Case No. WA-CA-05-0095

Gary W. Stokes, Esquire
Greg A. Weddle, Esquire
For the General Counsel

Patrick Daniel McGlone, Esquire
For the Respondent

Marc S. Shapiro, Esquire
For the Charging Party

Before: PAUL B. LANG
Administrative Law Judge

DECISION

Statement of the Case

On November 16, 2004, the National Air Traffic Controllers Association (Union) filed an unfair labor practice charge against the U.S. Department of Transportation, Federal Aviation Administration (Respondent or FAA) (GC Ex. 1(a)). On January 27, 2006, the Regional Director of the Chicago Office of the Federal Labor Relations Authority (Authority) [1] issued a Complaint and Notice of Hearing in which it was alleged that the Respondent committed an unfair labor practice in violation of §7116(a)(1) of the Federal Service Labor-Management Relations Statute (Statute) by informing its employee Scott Odle that he was disqualified from flying as a crew member because of his protected activities on behalf of the Union. It was further alleged that the Respondent committed a second unfair labor practice in violation of §7116(a)(1) and (2) of the Statute by disqualifying Odle from flying as a crew member because of his protected activities on behalf of the Union (GC Ex. 1(d)). The Respondent filed a timely answer denying that it had violated the Statute as alleged (GC Ex. 1(f)).

A hearing was held in Chicago, Illinois on June 7, 2006. The parties were present with counsel and were afforded the opportunity to present evidence and to cross-examine witnesses. This Decision is based upon consideration of the evidence, including the demeanor of witnesses, and of the post-hearing briefs submitted by each of the parties.

Positions of the Parties

The General Counsel and the Union

The General Counsel maintains that Odle, a Union steward, was disqualified as an aircrew member because he had communicated with other Union representatives by an e-mail message that was not addressed to any management representative of the Respondent. The e-mail message was protected activity under the Statute. Furthermore, Odle's supervisor, who initiated his disqualification, informed Odle that his message was the cause of the action. According to the General Counsel, she has presented a *prima facie* case of unlawful discrimination.

The General Counsel further maintains that the Respondent has failed to support an affirmative defense because the evidence does not show that its action against Odle was justified and that it would have disqualified him regardless of his protected activity.

The General Counsel also argues that the Respondent committed a separate unfair labor practice by virtue of the statement of Patrick Power, Odle's immediate supervisor and a management representative of Respondent, informing Odle that he was being disqualified from his status as an aircrew member because of his e-mail to Union representatives. Regardless of Power's intent or Odle's perception, that statement would tend to coerce or intimidate a reasonable employee and discourage the employee from engaging in protected activity.

As a remedy the General Counsel proposes an order directing the Respondent, among other actions, to make Odle whole for the loss of a 25 percent pay differential which he would have earned had he not been disqualified from participation in the Adam Aircraft Company project in which he was scheduled to participate at the time of his disqualification. The General Counsel also proposes that the Respondent be directed to post a notice at its facility in Lakewood, California to which Odle was assigned.

The Union, which filed a separate post-hearing brief, has espoused a position identical to that of the General Counsel with regard to the allegedly unlawful conduct of the Respondent. However, the Union pro-

1. The case was transferred from the Washington Regional Office of the Authority to the Chicago Regional Office by Order dated December 16, 2004 (GC Ex. 1(b)).

poses that the Respondent be directed to post an appropriate notice at its facilities nationwide, that any record of Odle's disqualification be expunged from his personnel file and that he be awarded the 25 percent pay differential for all flying assignments which he missed since the time of his disqualification. [2]

The Respondent

The Respondent emphasizes the importance of effective medical screening of aircrew members to maintain safety. According to the Respondent, Power had incorrectly told Odle that a doctor's note would be sufficient to establish that he could safely perform his duties as an aircrew member. Power later corrected his mistake and informed Odle that he would need to obtain a third class medical certificate. Power's action was not in retaliation for Odle's e-mail to other Union representatives. All similarly situated employees have third class medical certificates and Odle had previously been disqualified for the same reason by a different supervisor. That supervisor had also disqualified another employee because he did not have a third class medical certificate.

According to the Respondent, Power's statement to Odle that a note from his doctor would be acceptable might have been made on the assumption that his doctor had been certified by the FAA to perform medical screening. If that had been true, the doctor would have performed the tests which were necessary to determine Odle's fitness for service as an aircrew member. As soon as Power became aware that Odle had not been properly screened he disqualified him until such time as Odle could be properly certified. The Respondent maintains that Odle's disqualification was justified and was necessary to preserve his safety as well as the safety of his fellow crew members.

The Respondent also maintains that Power's statement to Odle regarding his disqualification did not create a reasonable basis for an inference of coercion. Even if Powers had, as claimed by Odle, stated that Odle's e-mail had "pissed off" a number of the Respondent's managers, it was no more than a statement of his personal opinion which did not include either a threat or promise of future benefit. The lack of coercive effect is corroborated by the fact that similarly situated employees were grounded by other supervisors for the same reason and that Odle himself had previously been grounded for the same reason by another supervisor.

Findings of Fact

The Respondent is an agency within the meaning of §7103(a)(3) of the Statute. The Union is a labor organization as defined by §7103(a)(4) of the Statute and is the exclusive representative of a unit of the Respondent's employees which is appropriate for collective bargaining. Odle is an employee of the Respondent as defined by §7103(a)(2) of the Statute and is a member of the bargaining unit represented by the Union. At all times pertinent to this case, Odle was a representative of the Union (GC Exs. 1(d) and 1(f)).

Odle's Status with the Respondent and the Union

Odle was employed as an Aerospace Engineer at the Respondent's facility in Lakewood, California (Tr. 16); at the same time he served as the Transport Airplane Directorate Representative and as one of two Los Angeles Aircraft Certification Office Facilities Representatives for the Union (Tr. 19). Odle was one of 25 or 26 Aerospace Engineers employed by the Respondent throughout the country (Tr. 55). His duties involved the certification of various types of aircraft. This was accomplished by working directly with the aircraft companies in reviewing reports, test plans and test results. Aerospace Engineers also witness or perform tests of aircraft, some of which are performed while the aircraft is in flight (Tr. 16-18). Aerospace Engineers receive a 25 percent pay differential for any 8 hour work period in which they witness or perform in-flight testing regardless of the duration of the test (Tr. 18, 19).

Odle's Disqualification from Flight Status

In July of 2004 [3] Odle, on behalf of the Union, filed an unfair labor practice charge against the Respondent which was designated as SF-CA-04-0543 (Tr. 20, 21; GC Ex. 2). [4] In the charge the Union alleged that the Respondent had violated the Statute by unilaterally establishing a requirement for "certain FG-861 engineers" to obtain third class medical certificates. There is no direct evidence that Aerospace Engineers such as Odle are included in that group, but the Respondent has not challenged that proposition. Odle testified that the charge was resolved when he received a telephone call from an investigator from the Authority who informed

2. It is undisputed that Odle has not attempted to obtain a third class medical certificate or otherwise qualify for flight status since the incident which gave rise to the unfair labor practice charge upon which this case is based.

3. All subsequently cited dates are in 2004 unless otherwise indicated.

4. This exhibit is the amended charge; the date of filing of the original charge was not specified.

him that the Respondent was "on record" that there was no requirement for engineers to have a third class medical certificate, but that a supervisor could request that the employee submit a "doctor's note" (Tr. 22, 23). Neither the General Counsel nor the Union introduced any written evidence that the charge had been settled or withdrawn, nor is there any written or oral evidence that the terms of the settlement were promulgated to the supervisors to whom the affected engineers reported.

Some time in the fall of 2004 Power, who became Odle's supervisor in July or August of that year, told him that he did not need to have a third class medical certificate, but that, in lieu of the certificate, he was required to provide a doctor's note indicating his fitness to perform his duties while in flight. Odle obtained the doctor's note and presented it to Power in or around October (Tr. 23, 24, 63; Resp. Ex. 5). The note is handwritten on a prescription pad and states that, "Patient in satisfactory condition for flight long distance." Power then cleared Odle to participate in in-flight testing.

Odle's Message to Union Representatives and Its Aftermath

Odle was assigned to perform in-flight testing in October on a project that involved a flight to Brazil. While in Brazil on October 24 Odle sent an e-mail message (GC Ex. 3) to other Union representatives (Tr. 25, 26) stating:

> The agency has recently told me AND the FLRA that there is currently no longer ANY requirement for a[n] engineer, including those in flight test, to maintain a 3rd Class medical certificate in order to perform flight test related duties.
>
> However, the supervisor of the Flight Test Branch in La told those of us without a 3rd class medical it is his responsibility to ensure that when he assign[s] a project that those he assigns it to are physically capable of performing the job. [5] As such, we were told that he either requires us to show him that we posses[s] a 3rd Class medical certificate or provide him a doctor[']s note saying I and [*sic*] physically able to fly (those were his exact words).
>
> As such, I provided him a doctor[']s note that said precisely that "Patient is OK able to fly". I submitted this and made sure they knew that the doctor performed absolutely no extra tests or anything prior to giving me the note. I guess this was satisfactory since just prior to leaving for Brazil he asked about flying down here and I told him I would [be] flying with Embraer since I had given him the doctor's note just as he had asked.
>
> Please let everyone know that the agency is now claiming that there is no requirement for an engineer to have a 3rd class medical and that if there [*sic*] supervisor assigns them work, they should assume the supervisor has satisfactorily carried out his responsibility of ensuring that the person is physically capable of [*sic*] do the job.
>
> If any person is told otherwise, i.e., they are told FAA policy or orders require them to hold one, please let me know immediately as this would demonstrate that what they are telling the FLRA is untrue.

On or about November 1, which was Odle's first day back at his office after the trip to Brazil, he opened an e-mail message from Power dated October 29 (GC Ex. 4) which stated:

> After further review, I do not consider the doctor's note you submitted regarding your fitness "for light long distance" to be adequate. The medical determination needs to specifically attest to your fitness for flying as a crewmember. Since your personal physician cannot make such a determination, a qualified flight surgeon must conduct the examination. As I explained previously, you also have the option of obtaining a Class 3 Medical Certificate.

On the same day Odle received by facsimile from Matthew Lystra, a Union representative in Seattle, a copy of an e-mail message dated October 28 from Power to a number of the Respondent's supervisors (GC Ex. 5). The message stated:

> Due to the sensitive nature of this topic could you please comment on the following bold text I plan to send to Scott Odle. I included in italics Scott's email for reference. (My use of the word "developments" is meant to indicate Scott's inappropriate, and partially inaccurate email which he only addressed to union personnel). FYI Adam 500 FAA flight testing is continuing

5. There is no evidence that Power had such a conversation with any employee other than Odle. Power testified without challenge that all other Aerospace Engineers on flight status held third class medical certificates (Tr. 55).

next week and Scott will now not be participating until this is resolved. [6]

After further developments and scrutiny by, additional FAA personnel involved, the doctor note you submitted stating your fitness "to fly on long flights" has been determined not to meet the proper intent. The medical fitness determination needs to specifically attest to your fitness for flying as a crewmember. If your personal physician does not understand, or is unable to make such a determination a qualified flight surgeon should conduct the examination. As I explained previously, you also have the option of obtaining a Class 3 Medical Certificate.

Regards,

Pat

Power's e-mail message ends with a copy of the text of Odle's message of October 24 to Union representatives. There is no evidence as to how the Respondent obtained Odle's message or how the Union obtained Power's message.

Odle testified that he was in Power's office later that day discussing other matters when Power asked him if he had received his e-mail message of October 29 and whether he had any questions or concerns. According to Odle, Power explained that the doctor's note was no longer acceptable as proof of his medical fitness. Odle then suggested that the Union had copies of e-mails indicating otherwise; at that point Power "changed his story" and told Odle that he had been grounded because his e-mail had "pissed off" a number of other managers. Odle further testified that Power told him that he would have continued to accept the doctor's note if Odle had not sent the e-mail message to the other Union representatives (Tr. 30, 31).

Power testified that Odle had previously held a third class medical certificate because it was a requirement for him to perform his in-flight duties. He acknowledged that he had told Odle that a doctor's note was sufficient, but indicated that "in hindsight" it was a mistake. Power stated that he rescinded his acceptance of the doctor's note after he learned that the note was "less than what [he] had taken it for" (Tr. 53, 54). Power denied that he grounded Odle because of his status in the Union or his activities on behalf of the Union. He further stated that, although he did not deny having had a conversation with Odle, he had no specific recollection of the conversation and did not remember saying that Odle had made people mad or words to that effect (Tr. 56).

The Respondent's Medical Standards

Although the parties have tacitly agreed that, at all times pertinent to this case, engineers such as Odle were subject to medical examinations to determine whether they were physically qualified to perform in-flight testing, they differ over the necessary form of medical certification. Dr. Nestor Kowalsky, the Respondent's Regional Flight Surgeon for Great Lakes (which does not include California), testified that he reviews third class medical certificates for the Respondent's employees, but played no part in establishing the requirements for such certificates. Dr. Kowalsky had no part in the decision to ground Odle and did not communicate an opinion on whether Odle should have been grounded (Tr. 45-47). He did indicate that an examination for a third class medical certificate may only be conducted by a physician who has been designated by the Respondent as an Aviation Medical Examiner. He also testified that the failure to conduct such an examination properly could have an impact on flight safety (Tr. 45).

Although Dr. Kowalsky had never before seen Odle's FAA medical record (Resp. Ex. 1) he was able to authenticate it by testifying that it was in a typical format for such a record (Tr. 48, 49). [7] The top page of the record indicates that Odle applied for a third class medical certificate on August 28, 2000, and that Aviation Medical Examiner Francis C. Hertzog, Jr., M.D. reviewed the medical record and issued the certificate on the same date. The medical record is on a two-page (or front and back) printed form indicating the results of a comprehensive physical examination. The record also contains an identical form showing the issuance of a third class medical certificate on April 9, 1996.

Over the objection of the Union the Respondent was allowed to introduce an e-mail message to Respon-

6. Adam 500 FAA flight testing refers to the testing of a new aircraft in which Odle had been scheduled to participate. Odle testified without challenge that he did not participate in this project and that, if he had done so, he would have earned between $1,000 and $1,500 of hazardous duty pay (Tr. 32, 33).

7. The General Counsel maintained that Dr. Kowalsky could not offer relevant testimony because of his lack of familiarity with the events of 2004 that are at issue in this case. However, Odle's medical record is further authenticated by the attached Certificate of True Copy signed by Jerry K. Bowen, Supervisor, Medical Records Section, Aerospace Medical Certification Division, on May 16, 2006. Bowen's status as legal custodian of Odle's medical record was certified by Stephen L. Carpenter, M.D., Acting Manager, Aerospace Medical Certification Division.

dent's counsel from Kay Hatcher of the Respondent's FOIA (presumably Freedom of Information Act) Desk. Hatcher indicated that Odle had held third class medical certificates since April 19, 1990. His most recent certificate had been issued on August 28, 2000, and had expired on August 31, 2003. [8]

The Respondent did not, and apparently could not, produce any regulation or statement of policy showing that Aerospace Engineers were required to have third class medical certificates at the time of Odle's disqualification from flight status. During Power's cross-examination the General Counsel introduced FAA Order 8110.41 which was dated November 3, 1993, and was entitled "FLIGHT TEST PILOT TRAINING, RESPONSIBILITIES, AND PROCEDURES" (GC Ex. 6). Power identified the Order as stating the policy of the Respondent with regard to medical certifications. Power acknowledged that the Order "probably" did not mention medical certification (Tr. 67-69). My examination of this document confirms that there is no mention of medical certification. There is no evidence that the Respondent had a formal policy regarding medical qualifications for employees other than pilots at the time of Odle's disqualification. [9]

Power testified without challenge that, as of the time of the hearing, all of the Respondent's 25 or 26 Aerospace Engineers had third class medical certificates, other than one or two who had elected not to fly (Tr. 55). Power stated that he had also disqualified Frank Hoerman, another Aerospace Engineer who reported to him, because his medical certificate had expired; the date of Hoerman's disqualification was not specified. Hoerman subsequently renewed his certificate and was returned to flight status (Tr. 66, 67).

Although there is no direct evidence as to when the Aerospace Engineers other than Odle first acquired their third class medical certificates, the evidence in the record strongly suggests that, on and before the date of Odle's disqualification, the engineers were at least required to undergo extensive medical testing to maintain their eligibility to conduct and observe in-flight testing. It strains credibility to assume that, prior to his disqualification, Odle would have undergone extensive examinations by an FAA certified physician as part of his application for his now expired medical certificates if such examinations were not a requirement for maintaining his flight status. Accordingly, Odle knew or should have known that Power had acted improperly in accepting a perfunctory note from his personal physician, especially if, as claimed by Odle, Power was aware that the physician had not performed any of the required tests. The issue of the requirement of a third class medical certificate is immaterial since Power did not require that Odle obtain a certificate, but only that he be examined by an Aviation Medical Examiner and certified as being eligible to serve as part of an aircrew. The alleged settlement of the Union's prior unfair labor practice charge(GC Ex. 2) [10] , assuming that it actually occurred, is consistent with this conclusion since the charge only complains of the requirement for a third class medical certificate rather than the need for an acceptable medical examination.

In summary, the credible evidence shows that Power's disqualification of Odle was neither discipline nor other adverse action, but the correction of an obvious error which amounted to an improper exemption of Odle from medical standards which had been uniformly applied to all other Aerospace Engineers. Odle, as a Union representative and an Aerospace Engineer of long experience, knew or should have known that he had received special treatment which was contrary to standard practice by the Respondent. The circumstances of Odle's disqualification indicate that neither he nor any other member of the bargaining unit had a reasonable basis for feeling coerced or intimidated on account of protected activity.

Discussion and Analysis

The Legal Framework

Each of the parties recognize that the standard for determining the existence of unlawful discrimination is set forth in *Letterkenny Army Depot*, 35 FLRA 113, 118 (1990) (*Letterkenny*). Under *Letterkenny*, in order to prove discrimination under §7116(a)(1) and (2) of the

8. The Union did not contest the dates indicated on the message, but objected to the fact that Hatcher was not present at the hearing and could not be cross-examined (Tr. 52, 53). Power testified that he was familiar with the effective period of Odle's most recent medical certificate (Tr. 53). Neither the General Counsel nor the Union attempted to challenge or rebut the evidence of Odle's medical history.

9. Section 3c(10), page 5, of Order 8110.41 required physiological training for all FAA personnel participating in flight tests above 10,000 feet. Power acknowledged that Odle was not scheduled to engage in such testing at the time of his disqualification (Tr. 69, 70).

10. Odle's testimony as to the resolution of the prior charge is questionable to say the least. If the charge had been settled or withdrawn, the Union would have received a settlement agreement and/or a notice of withdrawal from the Regional Director in accordance with §§2423.1 or 2423.12 of the Rules and Regulations of the Authority. Even if the Union had not received or retained such documentation, it certainly could have been obtained by the General Counsel.

Statute, the General Counsel must show that the discriminatory action was motivated, wholly or in part, by the protected activity of the employee against whom the action was taken. Once the General Counsel has presented a *prima facie* case of discrimination, the agency may rebut the General Counsel's case by showing that its action was justified and that it would have taken the action even in the absence of the protected activity. In determining whether the General Counsel has presented a *prima facie* case, it is appropriate to examine the record as a whole, *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA 1201, 1205 (2000).

With regard to the allegations of interference, restraint or coercion under §7116(a)(1) of the Statute, the Authority has adopted an objective standard in determining the effect of the statement made on behalf of the agency. The test is whether, under the circumstances, the employee concerned could reasonably have drawn a coercive inference from the statement. Neither the agency's motive nor the employee's actual perception is controlling, *U.S. Department of Agriculture, U.S. Forest Service, Frenchburg Job Corps, Mariba, Kentucky*, 49 FLRA 1020, 1034 (1994) (*Frenchburg*).

Odle's Disqualification

As shown above, I have found as a fact that all of the Respondent's Aerospace Engineers were required either to undergo an examination by a FAA certified Aviation Medical Examiner or to obtain a third class medical certificate (presumably also after an examination by an Aviation Medical Examiner) in order to maintain their flight status. After having mistakenly accepted the doctor's note from Odle, Power corrected the mistake by insisting that he either undergo the necessary examination or obtain a third class medical certificate. In so doing, Power was only subjecting Odle to the same standards that applied to all other Aerospace Engineers. Power's action was not discriminatory and, consequently, the General Counsel has not presented a *prima facie* case of discrimination. [11] In accordance with the analysis in *Letterkenny*, there need be no further inquiry. [12]

Power's Statement to Odle

Even if, as claimed by Odle, Power stated that he would have accepted the doctor's note were it not for the e-mail message to other Union representatives, the General Counsel has not established a necessary element of a *prima facie* case of discrimination under §7116(a)(1) of the Statute. Odle knew or should have known that Power's statement of disqualification was no more than the application of the same medical criteria that had been applied to all other Aerospace Engineers. Therefore, the statement could not reasonably have been construed as being coercive or threatening as is required by the Authority in *Frenchburg*. The most that Odle could have inferred from Power's statement was that he should not have told anyone about his preferred treatment.

For the foregoing reasons, I have concluded that the Respondent did not commit unfair labor practices by disqualifying Odle from flight status or by informing him of its intent to do so. Accordingly, I recommend that the Authority adopt the following Order:

ORDER

It is hereby ordered that the Complaint be, and hereby is, dismissed.

Issued, Washington, DC, August 11, 2006.

Paul B. Lang
Administrative Law Judge

11. According to *305th Air Mobility Wing, McGuire Air Force Base, New Jersey*, 54 FLRA 1243, 1245 n.2 (1998), proof of disparate treatment of similarly situated employees is not a necessary element of a *prima facie* case of discrimination under §7116(a)(2). However, the Authority has not held that a finding of discrimination may be made in the absence of any supporting evidence.

12. The Respondent does not dispute the proposition that Odle's e-mail message to the other Union representatives was protected activity under §7102 of the Statute.