

**OFFICE OF ADMINISTRATIVE LAW JUDGES**

**WASHINGTON, D.C. 20424-0001**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, REGION IX,  
SAN FRANCISCO, CALIFORNIA

Respondent

and

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1450

Charging Party

Kim Marlia and Beverly G. Agee, Esqs. For the Respondent  
Stefanie Arthur, Esq. For the General Counsel  
Before: ELI NASH, JR. Administrative Law Judge

Case No.  
SF-CA-20537

**DECISION**

*Statement of the Case*

On August 28, 1992, the Regional Director of the San Francisco Region of the Federal Labor Relations Authority (herein called the Authority), pursuant to a charge filed May 17, 1992, and first amended on August 19, 1992<sup>(1)</sup> by the National Federation of Federal Employees, Local 1450 (herein called the Union), issued a Complaint and Notice of Hearing alleging that the Department of Housing and Urban Development, Region IX, San Francisco, California (herein called Respondent or SRO), engaged in unfair labor practices within the meaning of section 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (herein called the Statute). The Complaint alleged that Respondent violated section 7116(a)(1) of the Statute by issuing an overly broad rule prohibiting employees from discussing union business in the office; by prohibiting an employee from reading the union contract in the office; by proposing to discipline union steward Terry K. Aleshire, Sr., for possession of an attendance record which he had obtained in order to represent an employee; by proposing discipline for Aleshire's allegedly failing to obtain permission to go with an employee to the union office to assist the employee in a representational matter; and by proposing to charge union steward Aleshire with AWOL for having attended a union safety meeting on approved official time. It further alleges a violation of section 7116(a)(1) and (2) by issuing a reprimand and an AWOL to Aleshire.

A hearing on the Complaint was conducted in San Francisco, California at which all parties were afforded full opportunity to adduce evidence, call, examine and cross-examine witnesses and argue orally. All parties filed timely briefs which have been carefully considered.

Upon the entire record in this matter, my observation of the witnesses and their demeanor and from all the testimony and evidence at the hearing, I make the following:

Findings of Fact

1. There is no issue in this case as to jurisdiction or to the Union's status as the exclusive representative of Respondent's employees.

2. From July 1986 until he was detailed in May 1992,<sup>(2)</sup> Terry K. Aleshire, Sr., was a contractor industrial relations specialist in Respondent's Labor Relations Office (herein called LRO). In March, when the events occurred forming the basis for this case, Carol B. Clark was the Regional Labor Relations Officer and Aleshire's supervisor. The function of the Regional Labor Relations Office is to monitor HUD recipients and sub-contractors for compliance with federal labor standards provisions, such as the Davis-Bacon Act. At the time of the events involved in this case, in addition to Aleshire and Clark, there was another contractor industrial relations specialist in the office working part-time; a wage assistant, Martha Driskill; and a secretary, Adriene Mayfield. As secretary, Mayfield, had primary responsibility for answering the telephone. All incoming telephone calls to the LRO are handled by the secretary, as are most walk-in inquiries. The wage assistant, Driskill, served as her primary back-up.

3. Respondent and the Union are parties to a collective bargaining agreement. Article 4 of the agreement, is entitled "Union Representation and Official Time. Official time includes all representational functions including statutory functions." The agreement provides for a certain number of representatives in each office based on the number of employees. The SRO has a Principal Office Representative (herein called POR) who is allotted 50 percent official time, as well as several 10 percent stewards. Article 4, Section 9 contains the following procedure for use of official time:

1. When it is necessary for a representative to use official time or to leave his/her work area to perform representational functions, the representative shall first obtain approval from his/her immediate supervisor or designee, who has supervisory authority . . . Prior supervisory approval shall not be necessary for brief absences by UNION representatives so long as the representative assures that such absences do not unduly interfere with the performance of work.

2. Approval under this section shall be granted unless such absence would cause an undue interruption of work. If approval is denied or delayed, the reason shall be given as soon as practicable.

Article 6, Section 4 of the agreement, entitled "Telephone Usage", provides that "Union representatives may use telephones at their individual work stations for local calls or FTS long distance calls while performing representational functions."

4. Union representatives account for their use of official time on the Individual Daily Time Report (IDTRs) completed by each employee and submitted on a monthly basis.

5. On March 9, Aleshire was a 10 percent steward. Aleshire testified that when he became a steward, Clark told him that she wanted him to let her know when he was planning to conduct union business. Aleshire normally informed Clark when he was leaving the office for any scheduled meetings. When employees stopped by the office with questions or seeking advice, however, or when he received telephone calls from employees or other union officials, Aleshire handled the matters without requesting prior official time from Clark. Aleshire testified that it was his practice to keep track of his daily use of "any significant union business" on his desk calendar and then to aggregate it for recording on the monthly IDTRs report. Aleshire also acknowledged that he might not count brief telephone calls or a walk-in with a specific question, in accounting for his official time usage. In preparing his monthly IDTRs, however Aleshire included both time requested in advance and that which was not. I credit Aleshire.

6. John Kasper, the POR in the SRO, testified that both he and Gary Kahn, one of the 10% stewards in the office, regularly perform union representational functions at their desks. Kasper stated that he spends about 10-15 percent of his official time in so-called representational activities, i.e. meeting with employees and/or dealing with employee grievances, as opposed to dealing directly with management. According to Kasper, he does not obtain prior permission to use official time while performing work at his desk; and that for brief absences from the office, up to as much as a half hour, he neither obtains prior permission nor notifies anyone that he is leaving. In the case of longer absences, such as meetings, Kasper informs the secretary of his whereabouts. Also Kasper does account for all such official time, whether in the office or during a brief absence from the office, on his IDTRs at the end of each month. Another 10% steward, Thomas Gonzales, testified that he is constantly "putting out fires." Thus, if employees call him or come to his desk, he takes the time to find out what the problem is, particularly if it is a crisis situation. Where the matter can be handled right away, for instance, by looking something up in the contract, he does so; if it is a more serious situation, he will make an appointment to meet with the employee at a later time in the union office. Gonzales asserted that he does not notify his supervisor prior to talking to employees at his desk nor does he notify his supervisor of brief absences from the office in order to informally handle employee problems. He does so only when involved in more formal situations, such as a grievance meeting or attendance at a regional committee meeting. Gonzales also says that he tries to keep track of his official time usage on his desk calendar and then prepares a monthly accounting IDTRs form. I credit both Kasper and Gonzales.

7. In the morning of March 9, Driskill, the wage assistant in the LRO, had an testy encounter with Clark which left her upset and intending to resign from her position.<sup>(3)</sup> After leaving Clark's office, Driskill returned to her desk where she proceeded to prepare her resignation. When Clark left the office, Driskill went over to speak with Aleshire. Before they had the opportunity to talk, Clark returned to the office and interrupted their conversation, demanding to know if their conversation was work related. Rather than provoke another confrontation with Clark, Driskill returned immediately to her desk. When Clark left the office again, Driskill went over to Aleshire's desk to talk with him about her plans to resign. Aleshire attempted to dissuade her from doing so, suggesting that her complaints could be resolved through the grievance procedure. Aleshire also suggested that Driskill talk with Kasper about the problem. As they were speaking, Clark returned to Aleshire's desk and in a voice loud enough to be heard by Mayfield at the front of the office, asked whether they were conducting union business. When Aleshire replied that they were, Clark declared that she would not tolerate them discussing union business at his desk or in her office.<sup>(4)</sup> Aleshire then told Clark that he and Driskill would go upstairs to the Union office to "take care of this issue." Clark did not respond. Without a word, she turned and walked back to her office.<sup>(5)</sup> Aleshire told Mayfield, that they were going upstairs to the

union office and Aleshire and Driskill left. Aleshire and Driskill actually ended up talking with Union representative Gary Kahn about the matter in his office. Driskill and Aleshire returned to the LRO separately, about twenty minutes later. While they were gone, Mayfield remained in the office and covered the telephones. Mayfield testified that it was quiet during the short time Aleshire and Driskill were gone, with few calls and none for Aleshire.<sup>(6)</sup> The accounts of Aleshire, Driskill and Mayfield are credited.

8. Sometime, in the afternoon of March 9, Aleshire was at his desk reading the union contract in preparation for a safety meeting that afternoon. Clark, seemingly unable to let well enough alone, questioned what he was doing and told Aleshire that he could not conduct union business at his desk. Aleshire understood Clark to be telling him that he was prohibited from reading the contract at his desk and since that date, no one in management has informed Aleshire to the contrary.

9. In March, Aleshire was a member of the Regional Safety and Health Committee which consists of three union and three management members. Earlier in the year, the Committee commissioned an indoor air quality evaluation, in part because of employee complaints following the office move from the eighth to the ninth floor. That report was scheduled for discussion by the Committee on March 10. In preparation for this Committee meeting, on March 9, union members Aleshire and Thomas Gonzales met to review the report and to prepare their recommendations. At the meeting of the Committee on March 10, Aleshire and Gonzales' recommendations were adopted and Aleshire was assigned to prepare the Committee's report to the Regional Administrator. Aleshire notified Clark in advance that he was attending a safety committee meeting on March 9.<sup>(7)</sup> However, when he returned from the meeting, Aleshire learned from Mayfield that Clark was questioning his whereabouts. Aleshire went into Clark's office and told her that she could contact Thomas Gonzales or Joan Glassheim, the other union members of the safety committee, to verify that the union member had been meeting that day. Clark did not make an effort to do so.<sup>(8)</sup> Aleshire is credited.

10. On March 27, Aleshire received a Notice of Proposed Suspension from Clark which included a charge of "Failure to Follow Instructions" as well as "Absence Without Leave" (herein called AWOL) for discussing Union business in the Labor Relations Office and for leaving the office with Martha Driskill on the morning of March 9; a charge of "Failure to Follow Instructions" and "AWOL" for his use of official time to attend the meeting of the Union safety committee members on March 9; and a charge of "Unauthorized Acquisition and Possession of Government Property" because of his possession of a photocopy of the March 9, sign-in sheet. Aleshire submitted a reply to the proposed suspension. Thereafter, on May 5, Deputy Regional Administrator, John E. Wilson issued a Notice of Decision on Proposed Suspension, sustaining the specification of the charge of "Failure to Follow Instructions" and "AWOL" relating to the incident on the morning of March 9, and finding a reprimand to be warranted. The reprimand itself, issued that same date, finds that Aleshire, by "conducting Union business with Martha Driskill in the Labor Relations Office" had failed to comply with his supervisor's instruction to comply with Article 4 of the HUD Region IX/NFFE Local 1450 Labor-Management Agreement and obtain supervisory approval before performing representational functions during duty hours." In addition it states that, Aleshire left the office accompanied by Driskill without "supervisory approval to leave the office to conduct Union business."

### Conclusions

### **Positions of the Parties**

This case presented a situation where a union steward, Aleshire, was issued a Notice of Proposed Suspension containing three Charges: Failure to Follow Instructions; AWOL; and Unauthorized Acquisition and Possession of Government Property. The Charges were supported by five Specifications all of which occurred on either March 9 or 10. One of the Charges, Failure to Follow Instructions was totally sustained by the deciding official. One specification of Charge 2, AWOL was also sustained by the deciding official. Charge 3 was dismissed entirely, as was Specification 2 of Charge 2. The General Counsel maintains that all of the conduct forming the basis of the proposed suspension was protected activity under the Statute and since in none of these situations Aleshire's conduct was not so outrageous or flagrant as to remove it from the ambit of protection afforded by the Statute, issuance of a proposal to suspend, in and of itself, interfered with, restrained and coerced him in violation of section 7116(a)(1) of the Statute. Grounding a proposal to suspend an employee for protected conduct undeniably sends a message to bargaining unit members that discipline and/or harassment would follow as a direct result of the pursuit of legitimate union interests. National Institute for Occupational Safety and Health, Cincinnati Operations, Cincinnati, Ohio, 22 FLRA 1037 (1986).

Since the General Counsel felt that Aleshire's conduct did not exceed the bounds of protected activity afforded by the Statute, it argues further that the reprimand and AWOL sustaining Charge 1 and Specification 2 of Charge 2 in the proposal to suspend further violated section 7116(a)(1) and (2) of the Statute. Department of Housing and Urban Development, San Francisco Region, 4 FLRA 460 (1980); U.S. Air Force Logistics Command, Tinker Air Force Base, Oklahoma City, Oklahoma and American Federation of Government Employees, Local 916, 34 FLRA 385 (1990).

The General Counsel also claims that on two separate occasions on March 9, Clark placed overly broad restrictions on employees which interfered with their rights to engage in activity protected by the Statute and these restrictions were in themselves violations of the Statute. The restrictions which both surfaced on March 9, involved Clark's statement to employees that they could not discuss union business in the office and her subsequent statement to Aleshire that he could not read the collective bargaining agreement at his desk. These events, it is alleged, improperly restricted employees in the exercise of rights guaranteed by the Statute and constituted independent unfair labor practices in violation of section 7116(a)(1) of the Statute. Naval Aviation Depot, Naval Air Station Alameda, Alameda, California, 36 FLRA 705 (1990).

Respondent is unyielding in its position that only a contract problem exists in the matter. It characterizes Aleshire's involvement here as an "impromptu counselling session" which required prior approval before he could use official time. In its view, Aleshire should have obtained permission before he stopped his work to counsel Driskill and before he left the work area to continue handling the matter with Driskill. As a consequence of this position, Respondent argues, in short, that the proposal to discipline was not an unfair labor practice because Aleshire did not have prior approval for his activities; that the proposal is subsumed in the final decision and is necessary to provide full due process to the employee; that the proposal and reprimand were fully supported not only by employee admissions, but by the collective bargaining agreement.

**A. Can a proposed disciplinary action form the basis of an unfair labor practice and is the proposed action subsumed in a final action?**

Both sides cite Bureau of the Census, 46 FLRA 526 (1992); Department of Commerce, Bureau of the Census v. FLRA, 910 F.2d 964 (4th Cir. 1992) Bureau of the Census, 41 FLRA 42 (1991) on the issue of whether a proposal to take disciplinary action may be an unfair labor practice. In Hanlon, *supra* is inapposite since there it was the specific statement in the proposal which was found violative, rather than issuance of the

proposal itself. Furthermore, this matter does not involve an adverse action issued under 5 U.S.C section 7513 for which there is a statutory appeals procedure and thus, this case does not raise the section 7116(d) statutory appeals procedure bar issue. What can be learned from Hanlon, however, is that the Authority did not find the final decision "subsumed" the proposal to suspend. Instead, the Authority considered whether the issues raised by the proposal and by the final decision were the same so as to preclude consideration of the proposal in the unfair labor practice charge. Thus, the Hanlon decision more likely should be read as showing that a proposed disciplinary action does, regardless of the final outcome, interfere with, restrain or coerce employees in the exercise of rights assured by the Statute.

While I am in total agreement with Respondent that it has an intractable interest in proposing and determining proper and fair discipline for its employees, its argument turns a blind eye to the main issues of this case. Reducing a proposed suspension to a reprimand, while ignoring the privileged protection of the Statute does little to ameliorate the proposal or affect a finding that issuance of the proposal itself constituted an interference with rights granted under the Statute. Clearly, where a proposal to suspend is grounded on protected activity, the Authority requires that it know whether that protection is lost by the actions of the employee. Where the statutory protection is unaltered, there can be no valid basis for disciplinary action, whether it is the action recommended by the proposing official or otherwise. See, Long Beach Naval Shipyard, 44 FLRA 1021(1992). Besides, if the threat to discipline an employee for protected activity violates the Statute, it logically follows that the issuance of a proposed action for that very same activity, is no less of a threat.

Here, Clark's proposal to suspend Aleshire for his protected representation of Driskill simply reinforces the threat, while sending an additional message that such protected activity would not be tolerated and would be severely dealt with if there was a reoccurrence. It is also inescapable, that any action taken by the deciding official on such a proposal is immaterial, unless it is evidence that the deciding official considered all of the statutory implications of the case before making his decision, and in fact provided relief consistent with statutory requirements. Unless this is done, it cannot be presupposed that the final decision in fact disposes of the unfair labor practice issue. This is essential, even where the final decision does not sustain any of the recommended action, but fails to consider the unfair labor practice issues, because the final decision would do nothing to eliminate the threat of the proposal itself or to assure that employees would not continue to be threatened when engaged in such protected activity by even more disciplinary actions in the future. National Institute for Occupational Safety and Health, supra.

As previously noted, since a final decision issued on the proposed suspension in this case, Respondent maintains that, as a matter of law, the proposed suspension may not form the basis of the instant unfair labor practice contention. I am in agreement with the General Counsel's reasoning that there is no basis in the Statute or case law for concluding that a proposal to suspend may not form the gist of an unfair labor practice.

Accordingly, it is found that the proposal to suspend Aleshire can indeed form the basis of an unfair labor practice and that a final decision on that proposal would not diminish the impact of a violation created by the proposal.

**B. Did the prohibition against union activity in LRO violate section 7116(a)(1) of the Statute?**



On March 9, Clark announced to the employees that all union activity was prohibited in the LRO. Such a statement, when the circumstances are considered, could only be seen as a sweeping prohibition against union activity, and not as just a reminder to Aleshire or others that he was to obtain permission prior to conducting union business. According to the General Counsel, support for such a finding literally jumps out of Clark's statement in the proposed suspension issued to Aleshire where she stated, as follows:

I have repeatedly advised you that you are not to conduct Union business in the LRO and, further, that you are not to leave your work station to conduct Union business without first obtaining my permission.

This statement it is argued shows Clark imposing two separate rules: first, a rule that Aleshire was not to conduct union business in the LRO at all; and a second rule, that he was not to leave his work station to conduct union business without first obtaining permission. Additionally, it is urged that not only did Clark attempt to prohibit Aleshire from engaging in representational activities in the LRO, but she actively interfered with any discussion by the employees of union related matters, as illustrated by her separate interruptions of Aleshire and Driskill's conversations on March 9. In my view, Clark's continued interference and her refusal to allow the discussion to continue, even outside the LRO, provides substance not only for the General Counsel's claim that the rule prohibited any union business in the LRO, but, also to its contention that there could be no legitimate reprimand in this case.

The record supports a finding that Aleshire was engaged in assisting Driskill, as a union representative on the morning of March 9 and that Clark was aware of, as well as upset about Driskill having gone to Aleshire with the problem. Clark's denials aside, there is little doubt, given the earlier clash between Clark and Driskill that morning, that Clark at least suspected Driskill had gone to Aleshire, the steward in the office, with complaints about Clark. Additionally, it is clear from the record that when Clark discovered Aleshire and Driskill discussing union matters, i.e. Driskill's complaints about Clark, on March 9, Clark loudly reminded all of the employees in the office that there was to be no union activity in her office. Here, it is worthy of note that the collective bargaining agreement in Article 4, section 9 also states that "the EMPLOYEE will likewise obtain advance approval from his/her supervisor. . . ." Although neither Driskill nor Aleshire had advance approval, Clark's complaint was not that they did not have permission, but that there was to be no union activity in her office. While Clark may have had several options to stop their conversation, at least until permission was obtained, banning all union activity by this broad prohibition was not one of them.

When viewed in the context of what occurred in the LRO that morning, it becomes abundantly clear that this prohibition against any union activity in the office, which clearly encompassed all discussion by the employees of representational matters, interfered with employees' rights protected by the Statute. The key to whether such a broad prohibition in a work area is valid is, can it be justified because without the rule, the activities it bans might interfere with employees in the performance of their duties. Naval Aviation Depot, supra. The record shows no justification for such a prohibition in this case. Nor did Respondent offer any valid justification for such a rule. Where there is no real necessity for such a broad prohibition it must be viewed with skepticism. In an office setting, such as here, where it is undenied that employees take "common sense" breaks, there is no doubt that these employees are free to and do regularly discuss all sorts of work and even non-work related matters. Therefore, establishing a broad prohibition against the discussion of union matters, without providing ample justification for the ban violates section 7116(a)(1) of the Statute.

If the lack of justification for the broad prohibition is not enough to establish a violation of the Statute, the prohibition here is contrary to the collective bargaining agreement, which specifically allows representatives to use telephones at their individual work stations while performing representational functions and, by extension endorses the handling of representational functions in the individual offices. Furthermore, the record shows that prior to the March 9 incident, Aleshire, as well as other stewards in the SRO, regularly conducted union business at their desks, as permitted by the collective bargaining agreement without obtaining prior permission. The undisputed evidence also disclosed that no permission was received when employees stopped by union representatives' desks seeking advice or asking questions and that permission was not sought when union representatives received telephone calls at their desks. I do not see and Respondent has not explained, how the situation between Aleshire and Driskill was any different from those contacts between union stewards and employees, which commonly occurred in the SRO, and which were conducted without permission.

Accordingly, it is found that the broad restriction imposed by Clark unduly restricted employees, including the steward, in their rights to discuss union related matters and thus, independently violated section 7116(a)(1) of the Statute.

**C. Was Clark's prohibition against reading the union contract in the office violative of section 7116(a)(1) of the Statute?**

On March 9, Clark also prohibited Aleshire from reading the collective bargaining agreement at his work station. Whether Clark was simply reinforcing her overly broad prohibition against Aleshire performing union activity at his desk, or objecting because he had not received prior permission for such activity, the General Counsel submits that Clark's prohibition against reading the contract in the office violated section 7116(a)(1). As discussed above, Clark's prohibition against union activity in the LRO constituted an overly broad restriction on employees' rights under the Statute. If Clark objected to Aleshire's activity because he had not received prior permission, then her objection was inconsistent with the terms of the collective bargaining agreement which permits brief absences from the office without prior permission and, again by implication, the conduct of union activity in the office without prior permission.

Respondent submitted no evidence at all to show that Aleshire's brief study of the contract interfered with or disrupted the performance of his work or in any way disrupted other employees in the office. Nor did Respondent offer any evidence to show that any other restrictions were imposed on what employees discussed or read in the SRO. Therefore, except for Clark's curb on the conduct of union activity in the LRO and her edict on reading the collective bargaining agreement, no other restrictions emerged. The clear implication being, that while the contract required permission in some matters, the practices of all the stewards modified the permission requirement almost out of existence. Thus, it is clear that stewards performed a number of representational functions without obtaining permission which were approved after the fact, by acceptance of their monthly accounting IDTRs form. Under these circumstances, it is found that Clark's prohibition on reading the collective bargaining agreement in the LRO imposed on March 9, was not consistent with the collective bargaining agreement or the practices of the office and, interfered with employees' rights under the Statute and constituted an independent unfair labor practice in violation of section 7116(a)(1) of the Statute.

**D. Did Respondent's issuance of a proposed suspension to Aleshire for conduct protected by the Statute violate section 7116(a)(1) of the Statute?**



1. Discussing A Representational Matter In The LRO And Failing To Obtain Permission To Go With An Employee To The Union Office Concerning A Representational Matter.

The General Counsel urges that management cannot propose a disciplinary action, such as here, for activity protected by the Statute, absent a showing that the steward's conduct exceeded the bounds of protected activity since such a proposal necessarily interferes with, restrains and coerces employees in the exercise of rights protected by section 7102 of the Statute and violates 7116(a)(1) of the Statute.

The proposed suspension charged Aleshire with "Failure to Follow Instructions" for discussing "Union business" in the LRO, contrary to Clark's instructions, and for leaving the office "to conduct Union business" without first obtaining Clark's permission, as she had previously instructed. Again the credited evidence reveals that Aleshire's discussion with Driskill on the morning of March 9, came on the heels of an argument between Clark and Driskill that very morning. Driskill sought his advice, as her union steward, on her intention to resign. It also shows that Aleshire and Driskill left the office to continue this discussion in the union office after telling Clark where they were going and without any objection from Clark. Furthermore, it is undisputed that the entire incident, including Aleshire's discussion with Driskill in the LRO, as well as his further discussion with her when they left the LRO, involved Aleshire's acting in his capacity as a union representative in assisting Driskill with the technicalities of her intended resignation as well as the possibility of filing a grievance.

The Authority has found flagrant misconduct in situations where work stoppages or interference with emergency situations were present. Respondent only implies that Aleshire's conduct interfered with the work of the LRO. The evidence presented to show any interruption of office procedures is woefully inadequate to remove the conduct from the orbit of activity protected by the Statute. In this regard, it is noted that Respondent's contention that Aleshire left the office "inadequately staffed" is purely conclusionary. In defending its position, Respondent has an obligation to present affirmative evidence to support such a conclusion. Otherwise, it runs a clear risk that the finder of fact might draw a different conclusion. In contrast to Respondent's position, credited evidence reveals that the office was staffed. Thus, Respondent failed to show how Aleshire's short absence disrupted the LRO or had any influence on its work of that day. Absent any evidence of disruption to the office, it becomes even more doubtful that Aleshire's conduct was flagrant. E.g., U.S. Department of the Air Force, Tinker Air Force Base, Oklahoma and American Federation of Government Employees, Local 916, 35 FLRA 1146 (1990); Veterans Administration Medical Center, Birmingham, Alabama and American Federation of Government Employees, Local 2207, 35 FLRA 553 (1990).

In this case, Respondent could propose to discipline and could discipline Aleshire for his protected activity only if it shows that his actions exceeded the bounds of that protection. In such cases, it is inadequate merely to assert that the discipline is for failing to follow an instruction, which is tantamount to insubordination. When insubordination is claimed and the employee is involved in protected activity, the Authority will go on to examine whether the employee's actions constituted flagrant misconduct; or, whether the actions were "of such an outrageous or insubordinate nature to remove them from the protection of the Statute[.]" Federal Aviation Administration, St. Louis Tower, Bridgeton, Missouri, 6 FLRA 678, 687 (1981); Tinker AFB, supra, U.S. Department of Justice, Immigration and Naturalization Service and National Border Patrol Council, 43 FLRA 939, 949 (1992); Department of Justice, Bureau of Prisons, Butner, North Carolina, 18 FLRA 831 (1985).

It cannot be seriously disputed that all of Aleshire's conduct forming the basis of Clark's proposed suspension was protected by section 7102. Consequently, insofar as the proposal sought to discipline Aleshire for such protected activity, it is limited to activities which "are not specifically on behalf of the exclusive representative or which exceed the boundaries of protected activity such as flagrant misconduct." Long Beach Naval Shipyard and Long Beach Naval Station, Long Beach, California, 25 FLRA 1002, 1005 (1987). The undersigned was unable to find a single strand of evidence in this case which would support a finding that Aleshire's conduct involved any misconduct which would remove its statutory protection. Instead, it clearly reveals a steward who was sought out by an employee, who responded in an appropriate manner to an office "fire". Moreover, Clark's actions, appear to me, designed to intimidate both Aleshire and Driskill. Clark's hand is certainly tipped when she would not allow protected activity in the LRO and then sought to discipline Aleshire for taking the problem out of the LRO for discussion. Refusing to allow this steward and employee an opportunity to explore the situation on that morning is certainly not consistent with previous practices throughout SRO and do not appear to be consistent with the terms of the contract. In reality, the record as a whole supports, in my opinion, a finding that Clark's rampage of March 9 simply exacerbated an already touchy situation with Driskill. Her actions of that day, left a trail of intimidation and reprisals, ending in a proposal to suspend Aleshire which is hard to miss.

The issue of whether the alleged acts of Aleshire involved flagrant misconduct was completely ignored by Respondent. Even if it is true, and Aleshire failed to obey his supervisor's instructions, Clark's directions as already noted, improperly limited Aleshire's performance in his representational capacity. As already found, Clark's guidelines that Aleshire not conduct union business in LRO was overly broad, inconsistent with the practice of union stewards in the SRO and inimical with the spirit, if not the intent of the collective bargaining agreement. Further, Clark's requirement that Aleshire obtain permission before leaving the office to conduct representational activities is inconsistent with the plain language of the contract.

Additionally, and contrary to Respondent's assertion, Aleshire did not leave the office without obtaining permission because it is clear from the evidence that he informed Clark exactly where he and Driskill were going and Clark did not object. Under the contract, the only reason that Clark could deny such permission would be that Aleshire's absence would cause an "undue interruption of work." Clark never denied permission on that basis, but said nothing. Nor did Respondent establish that an undue interruption of work occurred in the LRO on March 9. Since the credited evidence showed that Mayfield was in the office to answer the telephones and greet visitors, and also showed that the work in the LRO was slow that day, there was no contractual basis on which Clark could deny permission to leave the LRO and discuss "union" business. Charging Aleshire with AWOL for attempting to defuse an already touchy situation certainly helps reveal Clark's true motivation.

Accordingly, it is found and concluded that Respondent failed to show that Aleshire engaged in any misconduct which would remove his privileged representational endeavors from protection of the Statute. Inasmuch as Respondent proposed to discipline Aleshire, absent any showing that his protected activity in seeking to represent Driskill on March 9, exceeded the bounds of protected activity, the proposal to discipline is found to have violated section 7116(a)(1) of the Statute.

2. The Proposal To Suspend For Possession Of An Attendance Record Which Was Obtained In Order To Represent An Employee.

It is undisputed that Aleshire obtained a photocopy of the March 9 sign-in sheet in his capacity as a union steward and for the sole purpose of representing Driskill and himself regarding the AWOL marked on the form. Although Clark was profoundly concerned over Aleshire's possession of the form, Respondent provided no basis for Clark's charge of "unauthorized acquisition and possession of government property." A sign-in sheet is not a confidential document, but, in this case was the very form that the employees signed in and out each day. Nothing on the form stated that it could not be copied and no reason whatsoever was provided to show any prohibition against copying it. Neither Driskill nor Aleshire removed or altered the original document, so no misconduct was involved concerning this particular document. Here, Respondent created a puzzle, which only it can solve.

The undisputed facts disclose, Driskill copied the document and gave it to Aleshire as part of her protected right to seek representation concerning her working conditions. Aleshire, consistent with his representational role, sought to use the form for precisely that purpose, i.e. to represent himself and Driskill concerning the alleged AWOL. In my view, Aleshire's possession of the attendance sheet was fully in accord with and protected by section 7102. It is no less than bewildering to me, for Respondent to make such a charge about a document which the employee has a clear right to have, without presenting any basis for the charge. Respondent's unsupported claim that Aleshire had a history of improper government document use provided no reason for proposed discipline in the case of the attendance record. In such circumstances, it can only be surmised that by proposing to discipline Aleshire for possession of a copy of this document, Clark was sending the message to Aleshire, Driskill and to other employees, that in her office, attempts to resolve problems through the Union would not be tolerated. Any reasonable employee, knowing that discipline was proposed against Aleshire just for copying a sign-in sheet in order to defend himself against discipline would surely think again, before attempting to exercise any protected right or even to complain. Furthermore, it is unimportant that the charge was not sustained since neither Aleshire nor the other employees have ever been informed that Aleshire's possession of the attendance sheet was a proper exercise of his protected right to engage in representational activities under the Statute. National Institute of Occupational Health and Safety, supra.

Accordingly, it is found that Clark's proposing to suspend Aleshire for possession of the March 9 attendance sheet interfered with, restrained and coerced employees in the exercise of rights protected by the Statute and, thereby, independently violated section 7116(a)(1).

### 3. AWOL For Attending Union Safety Meeting On Approved Official Time.

The uncontroverted evidence on this issue is illuminating because it reveals, in my opinion, the continuation of a pattern of harassment and intimidation exercised by Clark on March 9. It shows that on the afternoon of March 9, Aleshire met with union representative Thomas Gonzales to review the air quality report in preparation for a meeting of the Regional Safety and Health Committee the following day. Aleshire's meeting with Gonzales was clearly undertaken in a representational capacity and undeniably constituted activity protected under section 7102. Thus, Clark's proposing to mark Aleshire AWOL for attending the union safety meeting on the afternoon of March 9, when he was, in fact, engaged in protected activity can only be found as a further independent violation of section 7116(a)(1) of the Statute.

Respondent argues, in essence, that Aleshire did not go to a Safety Committee meeting with three members from the Union and three members from management that afternoon and, as such the meeting which Aleshire

did have permission to attend, never occurred. Such an argument is disingenuous when viewed in the setting of what actually occurred. The undisputed fact is that Aleshire was involved in his representational capacity for the period of time that he was marked for AWOL.

Clearly this proposal was not based on any misunderstanding which might lead Clark to include such a specification in the proposal. Aleshire specifically told Clark that if she had any doubts about his whereabouts, she could check with the other union members of the committee. Instead Clark chose not to investigate the matter. She also chose not to confirm that Aleshire was meeting with another union representative or to find out that the recommendations Aleshire and Gonzales arrived at that day were adopted by the Committee the following day. Clark did choose not to find out whether Aleshire's attendance at such a union meeting would be a proper use of official time and she also chose not to try to resolve the dispute with Aleshire at the time. In short, Clark chose to do nothing except add another specification in a proposed disciplinary action. Forging ahead with a disciplinary action which could have easily been resolved, certainly sheds some light on Clark's motives for proposing disciplinary actions for Aleshire's activities on March 9. Respondent all but concedes that Aleshire's attendance at the March 9 meeting was a proper use of his official time under the contract and implicitly acknowledges that Aleshire was engaged in protected activity in the process. Under these circumstances, this specification is so plainly unsupported that any claim by Respondent that there was misunderstanding, must be disregarded. Again, it appears to be part of Clark's effort to intimidate Aleshire about his representational functions.

In any event, the test for determining whether Respondent's threat to mark Aleshire AWOL violates the Statute is not a subjective one. If Aleshire was engaged in activity protected by the Statute when he attended the union safety meeting, then the proposal to discipline him for that protected activity is nothing less than a threat which violates the Statute, as alleged. Long Beach Naval Shipyard, *supra*.

As with the Charge for possession of the attendance record, it is immaterial whether this specification was sustained or not, since nothing in the final decision explained the reason for not sustaining the charge or assured Aleshire of his right to fully engage in such protected activity free of threats or harassment from a supervisor. Accordingly, the proposal to suspend Aleshire for activity fully protected by the Statute, interfered with Aleshire's protected right to act as a representative of the employees and is also found to constitute an independent violation of section 7116(a)(1) of the Statute.

**E. Respondent's issuance of a reprimand to Aleshire violated section 7116(a)(1) and (2) of the Statute.**

Regarding this section 7116(a)(1) and (2) allegation, the General Counsel need only make a prima facie showing that there was protected activity and that such activity was a motivating factor in the discriminatory treatment involved. Then the burden shifts to the respondent to establish by a preponderance of the evidence that there was justification for its action and that the same action would have been taken in the absence of the protected activity. Letterkenny Army Depot, 35 FLRA 113 (1990). In my view, the General Counsel showed Aleshire engaged in a protected situation and, because of that privileged action the supervisor engaged in a course of intimidation and harassment resulting in a proposed disciplinary action and a reprimand and AWOL. Further, Respondent failed to show, by a preponderance of the evidence, any justification for proposing to suspend Aleshire for engaging in protected activity and in disciplining him for that activity. Moreover, it was unable to show that the same action would have been taken if Aleshire had not been engaged in protected

activity.

Deputy Regional Administrator Wilson issued his decision on Clark's proposed suspension on May 5, finding that Aleshire had failed to follow his supervisor's instructions on March 9 when he and Driskill spoke in the LRO about her work related complaint and thereafter, left the office to continue their discussion; and further, that he was AWOL for leaving the office. Wilson decided that Aleshire should receive a reprimand for the alleged misconduct and therefore, a reprimand issued that same day. The General Counsel's theory here is that the reprimand issued to Aleshire is unlawful because, as discussed above, it was based solely on activity protected by the Statute. Very simply, if the grounds for the proposed suspension were invalidated there would be absolutely no basis for a reprimand. I agree with the General Counsel that no reprimand should have issued in this matter.

Wilson's suggestion that he was not aware of all of the facts which, he agreed, might warrant a conclusion that Aleshire's conduct was protected, does not affect the above conclusion. This admission, with a single swipe, wipes out Respondent's assertion that a "fair and appropriate decision" was reached in this case. Although Wilson can be credited with finding no merit in several of the obviously unwarranted Charges and Specifications, he presumably swallowed Clark's representation on the very core of the case, that Aleshire was acting without "approval" and did not follow instructions, hook, line, and sinker. The very basis of the charges Wilson sustained in reprimanding Aleshire involved activity Aleshire was undertaking as a union steward, i.e. Aleshire's admitted conducting of "Union business" in the LRO, as well as his leaving the office to conduct "Union business." With this clearly outlined for him, Wilson had to be aware of, or should have been aware that Aleshire was engaged in activity which was protected and that Aleshire's action might be entitled to some special consideration. Instead, Wilson relied solely on the collective bargaining agreement. In so doing, he ignored or saw no connection with the string of threats and reprisals engaged in by Clark. The flaw in Wilson's assessment of the matter is, that he did not really consider whether Aleshire was engaged in protected activity and whether or not he was engaged in any outrageous or flagrant misconduct which removed his Statutory protection. Therefore, since Aleshire was engaged in conduct fully protected by the Statute, Wilson's professed ignorance of the total picture, even if true, neither changes the protection afforded to Aleshire nor otherwise renders the reprimand privileged. Absent any evidence that Respondent even considered whether Aleshire's alleged misconduct was protected or sufficiently outrageous or insubordinate to lose its privileged status, it is found that the reprimand issued to him was in violation of the Statute.

As already found, Aleshire's conduct on the morning of March 9 was protected activity. Furthermore, it has also been found that not one iota of evidence supports a finding that Aleshire was engaged in any misconduct on the morning of March 9, which would cause him to lose the protection afforded him by the Statute. Driskill approached him as a steward seeking his assistance concerning her work crisis. Thus, even if it is true that Aleshire's talking with Driskill in the LRO that morning, or leaving when Clark refused to permit them to continue, were contrary to Clark's instructions, those instructions interfered with the performance of his protected status and under the circumstances, were not permissible. Moreover, as I view the record, Aleshire did not leave the LRO that morning without obtaining approval. Thus, Aleshire told Clark exactly where he and Driskill were going and Clark did not object. It is also my view that Aleshire could readily interpret Clark's silence as a grant of approval. Lastly, it is absurd for Clark not to have said anything when Aleshire told her where he was going and then attempt to discipline him for going there without permission. Control of that situation was in her hands and if anyone bobbled the ball, it was Clark.



A look at the actual practices in SRO and the collective bargaining agreement provides additional grounds to invalidate the reprimand. The record demonstrated that union representatives in the SRO, operating under the same collective bargaining agreement, do not obtain permission before conducting union activity and that such use of official time is routinely approved, after the fact, by their supervisors. Additionally, notwithstanding language in the contract dealing with obtaining permission from the supervisor, the contract also clearly permits the performance of representational activities without obtaining prior permission. Therefore, it is reasonable to assume that where brief absences from the office are allowed without prior permission under the contract, brief conversations in the office must also be sanctioned. Certainly, contractual language granting union representatives the right to use telephones at their work stations for representational activities clearly implies or, at least, acknowledges that such activities will and do take place without prior permission.

Added to the above, Wilson's statement that he was sustaining Specification 1 of the "Failure to Follow Instructions" charge, he actually modified the basis in the proposal. The proposal itself did not state that Aleshire had not followed Clark's instructions which "required [Aleshire] to comply with Article 4 of the HUD Region IX/NFFE Local 1450 Labor-Management Agreement and obtain supervisory approval before performing representational functions during duty hours" as stated in the reprimand; rather, the proposal simply faulted Aleshire for failing to follow Clark's instruction that he not conduct union business in the LRO, as well as that he obtain permission before leaving the office. In failing to offer any well-grounded reason for its action, Respondent left the General Counsel's case untouched.

On the instant record, it is not unreasonable to assume that the reprimand issued to Aleshire for his failure to obtain permission before responding to Driskill's work-related concerns, is inconsistent with either the collective bargaining agreement or the established practice in SRO. While there might be a contractual dispute about whether a steward needs to obtain prior approval before engaging in any representational activities, this is not such a case. In this particular situation, there is no dispute at all, that on March 9 Driskill twice solicited Aleshire's advice on her plan to resign from her job because of her complaints about Clark. There is also no debate that Aleshire was engaged in one of the most vital functions of a union steward in advising and assisting Driskill in a serious work-related conflict. A conflict involving the very supervisor who was undaunted in her efforts to stop them, without realizing what was involved at that juncture, was protected activity. Respondent's contention that what was involved in this case was an "impromptu counselling session" shows its lack of understanding of the protected status of union stewards attempting to solve typical work place problems. Absent that awareness, it comes as no surprise that Respondent might overlook a well marked trail of threats, intimidation and reprisals by its supervisor and see this only as a contractual problem. In view of the whole record, this approach is rejected.

In conclusion, it is my opinion that, even if Aleshire's actions were somehow at variance with the collective bargaining agreement, under all the circumstances it would still be inappropriate to find that his handling of Driskill's work related complaint was not protected activity. Thus, Aleshire allegedly needed approval from a supervisor, who played a major role in the conflict giving rise to the incidents for which he was disciplined, the supervisor engaged in a course of discriminatory treatment against him which was clearly retribution for his handling the Driskill matter and, Aleshire engaged in no outrageous or insubordinate misconduct. In considering these facts, it is concluded that Aleshire did nothing which could be found to remove his otherwise protected status. Bureau of Prisons, supra. Accordingly, it is found that issuance of a reprimand for Aleshire's protected conversation with employee Driskill in the LRO on March 9, violated section 7116(a)(1) and (2) of the Statute.



For the same reasons already discussed, it is also found that Aleshire's leaving the LRO with Driskill did not constitute outrageous or insubordinate misconduct. Accordingly, since it is found that the AWOL issued for engaging in protected activity, it too violated section 7116(a)(1) and (2) of the Statute.<sup>(9)</sup>

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's Rules and Regulations and section 7118 of the Statute, it is hereby ordered that the Department of Housing and Urban Development, Region IX, San Francisco, California, shall:

1. Cease and desist from:

(a) Promulgating rules which prohibit employees from reading their collective bargaining agreement or discussing union representational matters, during non-work time in work areas where there is no disruption of work.

(b) Proposing to discipline union steward Terry K. Aleshire, Sr., for "unauthorized possession" of an attendance sheet when he was using the attendance sheet for representational activity.

(c) Proposing to mark union steward Terry K. Aleshire, Sr. absent without leave for having attended a union safety meeting on approved official time.

(d) Proposing to discipline union steward Terry K. Aleshire, Sr., for discussing a representational matter in the office and for not obtaining permission to go with an employee to the union office to discuss the representational matter when Aleshire told the supervisor he was leaving and she did not object.

(e) Issuing a reprimand to union steward Terry K. Aleshire, Sr., for his protected activity in discussing a representational matter with an employee in the office and for leaving his work place to meet with the employee at the union office concerning the same representational matter.

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

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

(a) Rescind the reprimand issued to union steward Terry K. Aleshire, Sr., because of his protected activity in discussing a representational matter with an employee in the office and for leaving his work place

to meet with the employee at the union office concerning the same representational matter; and expunge all references to the unauthorized absence without leave and reprimand from all records.

(b) Post at its facilities at Department of Housing and Urban Development, Region IX, San Francisco, California where bargaining unit members represented by the National Federation of Federal Employees, Local 1450, are located, copies of the attached Notice on forms to be furnished by the Federal Labor Relations Authority. Upon receipt of such forms, they shall be signed by the Regional Administrator, and shall be posted and maintained for 60 consecutive days thereafter, in conspicuous places, including all bulletin boards and other places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such Notices are not altered, defaced, or covered by any other material.

(c) Pursuant to section 2423.30 of the Authority's Rules and Regulations, notify the Regional Director of the San Francisco Region, 901 Market Street, Suite 220, San Francisco, CA 94103, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply herewith.

Issued, Washington, DC, November 15, 1993

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ELI NASH, JR.

Administrative Law Judge

**NOTICE TO ALL EMPLOYEES**

**AS ORDERED BY THE FEDERAL LABOR RELATIONS AUTHORITY**

**AND TO EFFECTUATE THE POLICIES OF THE**

**FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE**

**WE HEREBY NOTIFY OUR EMPLOYEES THAT:**

WE WILL NOT promulgate rules which prohibit employees from reading their collective bargaining agreement or discussing union representational matters, during non-work time in work areas where there is no disruption of work.

WE WILL NOT propose to discipline union steward Terry K. Aleshire, Sr., for "unauthorized possession" of an attendance sheet when he was using the attendance sheet for representational activity.

WE WILL NOT propose to mark union steward Terry K. Aleshire, Sr., AWOL for having attended a union safety meeting on approved official time.

WE WILL NOT propose to discipline union steward Terry K. Aleshire, Sr., for discussing a representational matter in the office and for not obtaining permission to go with an employee to the union office to discuss the representation matter when Aleshire told the supervisor he was leaving and she did not object.

WE WILL NOT discriminate against union steward Terry K. Aleshire, Sr., or any other employee, because of his union activities, by issuing an absent without leave and a reprimand to union steward Terry K. Aleshire, Sr., for his protected activity in discussing a representational matter with an employee in the office or for leaving his work place to meet with the employee at the union office concerning the same representational matter.

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

WE WILL rescind the May 5, 1992 absent without leave and reprimand issued to union steward Terry K. Aleshire, Sr., for his March 9, 1992 protected activity of discussing a representational matter in the office and for leaving the work place to conduct representational activity at the union office; and expunge all references to the unauthorized absence without leave and reprimand from all records.

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(Activity)

Date: \_\_\_\_\_ 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 any of its provisions, they may communicate directly with the Regional Director of the Federal Labor Relations Authority, San Francisco Region, 901 Market Street, Suite 220, San Francisco, CA 94103, and whose telephone number is: (415) 744-4000.

1. The Complaint was also amended at the hearing.
2. All dates hereinafter are 1992 unless otherwise noted.
3. Clark's saying that she was unaware that Driskill was upset as a result of their meeting is incredible. Her write-up of the incident, in a reprimand issued to Driskill, reveals an agitated Driskill, responded to Clark that she "could not tolerate it anymore"; pointed her finger at Clark; and, told Clark that she did not like her tone and that Clark had a personal problem. Thus, Driskill was in an agitated state that was hard to miss.
4. Mayfield's recollection of Clark's statement might well be the most accurate since she was the least involved in the situation. Further, it is fully corroborated by Aleshire's reply to the proposed suspension, prepared closer in time to the event, in which Aleshire states that Clark said "that [he] could not conduct any union business at [his] desk on (sic) in her office." Aleshire's testimony at hearing, that Clark said "you cannot conduct union business at your desk" carries much the same meaning, i.e. that there will be no union discussion in this office. Moreover, Mayfield's recollection is fully consistent with Clark's admission in the proposed suspension that she had "on repeated occasions told [Aleshire] not to conduct Union business in the Labor Relations Office." The second page of the proposed suspension, in which Clark makes her position crystal clear states as follows: "I have repeatedly advised you that you are not to conduct Union business in the Labor Relations Office, and, further, that you are not to leave your work station to conduct Union business without first obtaining my permission."
5. Under these circumstances, it is my opinion that Aleshire can hardly be faulted for continuing his effort to deal with Driskill's immediate work crisis.
6. Clark's testimony that there was no one in the LRO, except her, during Aleshire and Driskill's absence cannot be credited over the consistent credited testimony of Aleshire, Driskill and Mayfield, both at hearing and previously in Aleshire's appeal to the proposed suspension, that Mayfield was present in the office while they were gone. Surely, if there was no one in the office, Clark's proposal would have stated that Aleshire left the office unstaffed, or similar wording, rather than "inadequately staffed." More to the point, since the attendance sheet shows that Mayfield was at work on March 9, Clark's failure to offer any explanation for Mayfield's alleged absence during the relevant time, exposes the spurious nature of her claim. Respondent's attempt to impeach Mayfield by showing that she was not working at the computer she claimed to have been at is lamentable, since it offered nothing to show that Mayfield was not in a position to overhear the events of March 9.
7. Clark's testimony that Aleshire told her he had a meeting with Beverly Hollingsworth, one of the management members of the committee, on March 9, is inconsistent with Clark's description of the incident in the proposed suspension, where she merely stated that he was absent without her permission.
8. Whether this conversation occurred on March 9, as Aleshire states or March 10, as Clark testified, is immaterial since there is no question that Aleshire told Clark he had been meeting with Gonzales long before

Clark ever issued the March 27 proposal to suspend.

9. Respondent filed a motion for summary judgment prior to the hearing and renewed that motion at the hearing. After taking the motion under advisement and reviewing the record as a whole, it is my conclusion that not only were factual issues in dispute here, but credibility issues as well. Therefore,

a motion for summary judgment is inappropriate in this case. Accordingly, Respondent's motions are denied.