

Office of Administrative Law Judges

WASHINGTON, D.C.

DEPARTMENT OF DEFENSE

Case No. WA-CA-90586

DEFENSE COMMISSARY AGENCY

LITTLE CREEK COMMISSARY

VIRGINIA BEACH, VIRGINIA

Respondent

and

NATIONAL ASSOCIATION OF GOVERNMENT

EMPLOYEES, LOCAL R4-45, SEIU, AFL-CIO

Charging Party

Frank A. Rodman, Esquire For the Respondent M. Jefferson Euchler, Esquire For the Charging Party Thomas F. Bianco, Esquire Tracy E. Levine, Esquire For the General Counsel Before: Eli Nash, Jr. Administrative Law Judge

DECISION

Statement of the Case

This proceeding arose under the Federal Service Labor-Management Relations Statute (the Statute), and the Rules and Regulations of the Federal Labor Relations Authority (the Authority). It was initiated by an unfair labor practice charge filed by the National Association of Government Employees, Local R4-45, SEIU, AFL-CIO (the Union) on July 7, 1999, and amended on May 3, 2000, against the Defense Commissary Agency (Respondent/DECA). A Complaint and Notice of Hearing issued on May 11, 2000. The Complaint alleges that Respondent violated section 7116(a)(1) and (2) of the Statute by terminating Elizabeth K. Radford because she engaged in protected activity.

A hearing was held in Norfolk, Virginia, at which time all parties were afforded a full opportunity to be represented, to be heard, to examine and cross-examine witnesses, and to introduce evidence.

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

law and recommendations.

Findings of Fact

- Elizabeth Radford's Employment at Little Creek Commissary

Elizabeth Radford began working at Little Creek Commissary (the Commissary) in November 1998. Radford was hired to fill a vacant Sales Store Checker, GS-03 (checker), position on a one-year temporary appointment beginning November 10, 1998. As a checker, Radford was responsible for customer sales, including ringing up customer purchases and taking coupons, cash and checks as payment. After about a week as a checker, Radford was reassigned to the salvage section (salvage). While working in salvage Radford did not work a cash register but instead repaired damaged product packaging if possible; rang up and scanned the products; determined a new price for the products; stamped the new prices on the products; shelved the products for sale outside the warehouse salvage area; placed the products that were not to be resold in baskets; and, ran tallies of all products off the register.

When she worked in the salvage section, Radford was the only checker allowed in the Commissary when it was closed every Wednesday, so that she could prepare credit memos for the vendors. These credit memos were documents showing the products salvaged, destroyed, out of date and/or removed from the shelves in order to obtain money back from the vendors for the Commissary. Relying on her experience in retail before coming to the Commissary, Radford established prices for the damaged products that were offered for sale higher than was customary. At the time Radford first started doing salvage duties, she discovered a backlog of approximately twenty to twenty-five baskets of damaged products in the warehouse salvage area. By the time she was told to go back to her checker position on February 17, it is undisputed that Radford had reduced the backlog to two or three baskets. The Commissary apparently received financial benefit from Radford's efforts not only as a result of her reduction of the excessive backlog of unsalvaged products, but also from higher-than-expected income from the sale of salvaged products. It is undisputed that Radford was highly praised for her salvage work. Radford testified that her supervisor during that period, Wendy Diaz, told her that she was doing a great job. Diaz left the Commissary in February, and did not testify. Michelle Canfield replaced Diaz sometime around March 28. Darlene Tarter managed the checkers at the Commissary between the time Diaz left and was replaced by Canfield. It is also

unchallenged that in January, Diaz told Radford that then-Commissary Store Officer Shultz and Joel Small, the Customer Service Manager, had expressed interest in promoting Radford to a higher graded position within three months.

Additionally, it is not denied that Shultz told Radford he heard from Diaz and Small that Radford was doing a great job and that she would be receiving a promotion within 90 days. Furthermore, Deputy Commissary Store Officer Russell Smith, testified that he told Union President Roy Morrisette that Radford's performance was outstanding. Despite these plaudits, Radford was removed from salvage and returned to her checker duties at a cash register on February 17 without any explanation for the action.

In view of all the accolades Radford received while working in salvage, it is quite clear that the removal was not based on Radford's lack of performance. What is clear is that Radford's removal came only a few days after she refused a request by Diaz to sign a document because Diaz denied Radford's request to consult with Morrisette about the document. The document in question concerned whether Radford was receiving training in salvage.

Upon her return from salvage, Radford worked at a cash register until April 22, the day she was given written notice of her termination. She was not disciplined during her tenure at the Commissary. Although Radford was reprimanded once by Canfield for allegedly talking on the phone in connection with personal matters while working at a cash register, she never had any disciplinary action taken against her for being tardy when returning from a break or lunch. Although Canfield testified that she reprimanded Radford on two occasions for being tardy in returning from a break, this contention is not supported by the record. Canfield cannot be credited with respect to prior reprimands. Thus Canfield alleged to labor relations in a written communication that she had documents of Radford's tardiness, however, she did not provide those documents to labor relations personnel who prepared Radford's notice of termination. Incidentally, labor relations requested all documentation from her. Nor did Canfield support any of her claims at the hearing with documentation or corroboration. Besides, Radford on rebuttal denied having been reprimanded about anything other than using the telephone for private matters.

- Radford's Protected Activity

After Radford was told that she was being removed from salvage, but before she was actually removed, she approached Morrisette about filing a grievance. Radford believed that she was performing higher-graded duties, at the GS-4 level, while working in salvage. Morrisette filed a step one grievance on Radford's behalf on February 27 under Article 43, Section 6, of the parties' collective bargaining agreement.

The grievance alleged that Radford performed higher-graded duties than her GS-3 pay level while she was on detail performing salvage duties. A Commissary employee who performs higher-graded duties while on a detail of more than thirty days has a contractual right to the higher-level pay during the term of the detail, unless the employee requested the detail, for training purposes or otherwise. The remedy sought through the grievance was pay at the WG-4 level for Radford for the duration of her detail to salvage. The amount sought was \$1,200.00.

The grievance was addressed to Diaz, Radford's supervisor at the time, as required by the collective bargaining agreement. Morrisette also provided a copy of the step one grievance to Smith because of their previous discussion about Radford. The Commissary was required by the parties' contract to respond to the grievance within fourteen days. It did not do so.

When Morrisette did not receive a timely response from the Commissary at step one, he advanced the grievance to the next step. In a letter dated March 19, addressed to Ronald Early, Morrisette explained the basis of Radford's second-step grievance and the failure of Diaz to respond to the step one grievance, and he attached a copy of the step one grievance to the letter. While Early was the Commissary's second-step representative, Morrisette handed the second-step grievance to Smith because Early was not at the Commissary at the time. Morrisette had a specific recollection of giving this letter to Smith on March 19, because that day he gave Smith a ride to pick up his car at a shop that repaired a flat tire for him. Smith, who was evasive during his testimony, did not deny accepting the letter, he testified that he did not recall accepting it. He never informed Early or the Respondent's labor relations personnel of the step two grievance.

Amanda Wayman, a personnel management specialist employed by the Respondent, stated that she was contacted by Diaz about Radford's step one grievance, and dealt with Smith about it after Diaz left. Wayman spoke with "the supervisors, and told them to go ahead and investigate the grievance, go to a meeting if necessary, and then to get back with

[her]" to discuss their position. Wayman discussed the duties that Radford performed in salvage, as they were described by Smith, and offered advice to and prepared a step one response for Smith based on his description of those duties. Smith, however, failed to inform Wayman of all of the tasks Radford performed, including one task, dealing directly with vendors, the knowledge of which Wayman recognized might have affected her advice. The response denying the step one grievance, which was signed by Smith, was given to Morrisette and Radford on March 30.

Radford and Morrisette met with Smith on March 30, in his office and at his request, to discuss Radford's grievance. Morrisette and Radford testified, that the discussion focused on Smith's attempt to resolve the grievance by offering Radford a monetary award in lieu of the backpay sought in the grievance. Specifically, Smith said that she was doing a great job in salvage and offered her a \$250.00 award to settle the matter. Smith again being evasive, remembers giving the March 30 response to Morrisette, but did not recall having "a real sit-down meeting" with either Morrisette or Radford. He also denied making an offer to settle the grievance.

Smith, Radford and Morrisette met again in Smith's office on April 16. Morrisette testified that he intended to advance the grievance to the next step of the negotiated procedure because Early had not responded to the second-step grievance within the contractually-required fourteen days. The next step was arbitration. Smith asked for an extension of time because Early was out of town. Morrisette then prepared a written agreement stating that Early would not return from a Commissary Store Officer's Conference until the week starting Monday, April 26, and that the second-step grievance meeting with Early would be held on or about April 29. Smith and Morrisette signed the extension agreement in Radford's presence. Smith testified that did not recall signing the extension, but he did not deny that his signature was on the document.

When Smith signed the agreement extending the time for Early to attend a second-step meeting concerning Radford's grievance until April 29, he knew that Early would not be able to attend the meeting. Early was not at work during the week of April 26 because he was attending to his wife who was undergoing a surgical procedure that week. He had informed his managerial staff three or four weeks before that he would be on leave during the week of April 26. Radford was notified on Thursday, April 22 that here employment with the Commissary was terminated effective the next day.

The record clearly suggests that other checkers have taken lunch breaks exceeding thirty minutes, but none of them have been disciplined for

having done so. In any event, the General Counsel's motion to take an adverse inference that "other temporary employees-of a year, have taken lunch breaks, exceeding 30 minutes, and that no action has been taken against any of these employees" was granted since Respondent failed to comply with a valid subpoena request. Consequently, I reject Respondent's argument in its brief that such an adverse inference was unwarranted.

C. Radford's Termination From Employment on April 23

Radford was performing her duties at a cash register on the afternoon of April 15, when she asked if she and co-worker, Lisa Clark, could leave for lunch Billy Jo Safreed, another temporary part time checker, who was working the queue line that day and, therefore, authorized to grant checkers permission to go to lunch, granted Radford's request.⁽¹⁾ I reject the memorandum for the record of Darlene Tarter which was prepared on October 28, or after the unfair labor practice charge was filed in this case as unreliable. Consequently, I find no support in the record for Canfield's claim that Radford was not authorized for lunch. I therefore, credit Radford that once authorized she followed her routine of going to register, turning the light off at her station off, signed off her register, and taking the till out. She then sorted all of her coupons and checks, placed them in the appropriate bag, and went to the cash office. Radford testified that checkers always must wait in line at the cash office to turn in their tills. While at the cash office waiting for the cash clerk to take her till, Radford sorted the checks, coupons, and larger bills. She then calculated the amounts in each group and placed a rubber band around them with her initials and the amount on a receipt. She went to lunch after a clerk took her till.

Upon returning from her thirty-minute lunch, Radford went to the cash office and waited for the cash clerk to return her till. She then went to the cash office area to sort her money, checks and coupons to confirm that she was given what she had turned in. Radford was certain that she performed these steps on April 15 because she went through the same process every day. Furthermore, Lead Checker Gloria Jones' testimony supports Radford's claim that this is the routine normally engaged in by checkers. There is no disagreement over when a checker's lunch break begins and ends. Jones testified without contradiction the lunch break starts when the checkers have "given all their transactions with their monies and their funds, and turned it over to the collection agent[.]" Jones also testified without denial that the lunch break ends when the checker begins the process of picking up her tray to return to work. A checker is, of course, performing assigned work until the till is taken by the cash office clerk and commences to perform assigned work after it is returned by the clerk.

Both Radford and Jones explained that it commonly takes five to ten minutes to turn a till into the cash office after a checker turns off the cash register, and about ten to fifteen minutes to return to the register after coming back from lunch after obtaining a till from the cash office. Radford and Jones also asserted that checkers commonly spend all that time waiting at the cash office before turning in and receiving their tills not only because each checker must wait her turn in line, but also because the clerks in the cash office conduct business with customers and are required to give priority to the customers. Based on the credited testimony of Radford and Jones, I reject Canfield's unsupported claim that the process of turning in a till before leaving for lunch and receiving it after returning takes less time than Radford and Jones stated. First, Canfield's testimony lacks any corroboration. Furthermore, Canfield, was not at the Commissary and had no personal knowledge of whether Radford followed the procedure described by Radford and Jones, or how long Radford was off her register waiting to turn in her till before lunch and to receive it after returning from lunch. Further, as previously noted, Jones corroborated Radford's testimony about the checkers procedure.

D. Events Leading Up to the April 22 Incident

As previously disclosed, Canfield was not at the Commissary on April 15. Nor could Canfield recall whether she learned about the events that occurred that day in a telephonic conversation with Tarter on that same day, or some other day. Tater, in a memorandum, allegedly claims to have spoken with Canfield first when Canfield returned to work. Tater was not called by Respondent although she alleged was aware of the event for which Radford was terminated. Respondent also proffered an electronic journal report showing that Radford signed off her register on April 15 at 15:32 p.m. and was back on her register at 16:14 p.m., approximately forty-two minutes later. In my opinion, this report alone is insufficient to establish Radford's tardiness. It is clear from the record that a checker's thirty minute lunch period does not begin when they sign off a register which is all the electronic journal shows. Furthermore, it is obvious that the electronic journal report does not take into account the time an employee spends turning her till in and picking her till up from the cash office. These facts alone, adequately account for the twelve minutes during which Radford was working but not at her register, turning in and picking up her till. In light of the testimony of Lead Checker Jones, and Radford that the process of turning in the till to the cash office after signing off the register takes anywhere from ten to fifteen minutes, it is my view that the ten to fifteen minutes to perform these operations puts Radford back at work in a timely manner based on the electronic journal report.

Additionally, the record does not establish that Radford was not authorized to leave for lunch. Safreed allegedly provided Canfield with a statement. As previously stated, Tarter's alleged statement was also missing from the record. While both these employees may have corroborated Canfield's testimony, they did not testify at the hearing.

Canfield testified that she took a written statement from Safreed about the events of April 15. The taking of such a statement would have been consistent with Commissary Store Officer Early's expectation that a new supervisor would obtain written statements from witnesses before taking steps to terminate an employee. She could not recall whether Tarter prepared a written statement on or about April 15. Canfield does not, however, refer to a statement by Tarter in her own written statement of April 18. As previously noted, Wayman asked Canfield to provide all documentation on which she relied in connection with the decision to terminate Radford. Wayman, however, was not given a statement by Safreed or Tarter. Again, Respondent offered no statement or testimony from Safreed although there was, as previously noted, a statement allegedly prepared by Tarter in April. Further, Safreed told Morrisette that she did not provide Canfield, or any other Commissary representative with a written statement.⁽²⁾

Canfield also testified that she spoke with Radford before taking steps toward terminating her. She further testified that Radford said that she had been given permission to go to lunch on April 15, but that Radford refused to identify the individual who gave her permission. Radford, on the other hand, denies having spoken with Canfield, or anyone else, about the events of April 15 before she was terminated. I credit Radford since Canfield prepared a statement about the events on April 18, that is inconsistent with her testimony, which makes no reference to any discussion with Radford. Thus, the statements and testimony of Respondent's witnesses differ.

Prior to terminating Radford, Canfield asked Wayman what, if any, disciplinary action should be taken against Radford for leaving the register without authorization and taking an excessively long lunch break.⁽³⁾ Wayman recommended that Radford be terminated for such misconduct because she was a temporary employee. Wayman testified that she relied on the documentation supplied by Canfield to make a decision in the case. Canfield as noted, while contending to Wayman that Radford had previously been late returning from breaks, only submitted documentation for the April 15 incident. The record suggests, however,

that other temporary checkers have been late returning to their registers and there is no evidence of any disciplinary action being taken against them. Wayman prepared a termination letter for Radford on Canfield's behalf, using documentation provided by Canfield which did not include any other reprimands or problems that she had with Radford. Wayman relied on what Canfield supplied to her.

Canfield provided Wayman with the April 18 statement and an electronic journal report that showed when Radford turned her register off before leaving to turn her till in, before she went to lunch, and when Radford turned her register on after obtaining her till upon returning from lunch. The electronic journal report, again it is noted, records only the time a checker is logged off her register. The electronic journal report showed that Radford was logged off her register for forty-two minutes on the afternoon of April 15. Record evidence, however, reveals that a checker's lunch period might actually exceed that forty-two minutes because of the time it sometimes takes to collect and turn in the checker's till. That report was the only evidence on which the Commissary based its determination that Radford took a lunch break of more than thirty minutes on April 15. Canfield asserted in her statement that Radford had been late reporting to work and returning to work after breaks and lunch, and that she "had additional documentation showing her excessive times she's been gone for breaks or lunches." She never provided such documents to Wayman nor were any such documentation offered at the hearing.

The notice of termination prepared makes no reference to Radford having taken or having been counseled about taking excessively long breaks before April 15. Nor is there any documentation showing that Radford was tardy at any time before April 15. Absent such a showing, it cannot be found that Radford was reprimanded for returning late.

Analysis and Conclusions

- Legal Standards

Letterkenny Army Depot, 35 FLRA 113, 118 (1990) (Letterkenny), contains the analysis applied to all cases of alleged discrimination under the Statute, whether "pretext" or "mixed motive." Under Letterkenny, the General Counsel has to establish a prima facie case of discrimination by showing that the employee against whom the alleged discriminatory action was taken against was engaged in protected activity and that the protected activity was a motivating factor in the agency's treatment of the employee. Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia, 55 FLRA 1201, 1205 (2000) (Warner Robins). In determining

whether a *prima facie* case has been established, the entire record must be reviewed. Contrary to Respondent's contention in its brief, *Letterkenny* requires the General Counsel to prove two elements not three, to establish a *prima facie* case. Once a *prima facie* showing has been made an agency may seek to show by a preponderance of the evidence that there was a legitimate justification for its action and that the same action would have been taken even in the absence of protected activity. The General Counsel may then establish that the agency's reasons for taking the action were pretextual. *Id.* (quoting *U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Service, Coast and Geodetic Survey, Aeronautical Charting Division, Washington, DC, 54 FLRA 987, 995 (1998)*).

In essence, Respondent claims that there was no showing by the General Counsel that Radford's protected activity was a motivating factor leading to her termination. Therefore, Respondent asserts that a legitimate reason for Radford's termination existed. The General on the other hand, believes that the reasons advanced by the Respondent for its action in terminating Radford, is a pretext.

An administrative law judge may conclude that a respondent's asserted reasons for taking these actions are a pretext even if those reasons were not asserted to be such during the unfair labor practice hearing. If Respondent's motivation for its action is found to be a pretext, "unless the respondent establishes that there was an additional law (nonpretextual) motive for its allegedly discriminatory action, it is not necessary to determine whether the respondent would have taken the disputed action event without the unlawful motive." *Letterkenny*.

- There is a *Prima Facie* Showing that Radford's Termination Was Discriminatory

It is uncontested that Radford requested to consult with her Union representative before signing a document presented to her by her supervisor, Diaz. The right of employees to seek to consult with their exclusive representative on conditions of their employment, and to have that representative speak on their behalf is fundamental. See *Department of the Navy, Charleston Naval Shipyard, Charleston, South Carolina, 32 FLRA 222, 233 (1988)*. The evidence that Radford filed a grievance under the parties collective bargaining agreement concerning her work in salvage is also undisputed. The Authority has consistently held that the filing of a grievance under a negotiated grievance procedure is protected activity under the Statute. See, e.g., *United States Department of Transportation, Federal Aviation Administration, El Paso, Texas, 39 FLRA 1542, 1551 (1991)*.

The timing of Radford's termination is an integral part of the General Counsel's *prima facie* case. The Authority has said that timing of agency action following protected activity is sufficient evidence to establish a *prima facie* showing that the protected activity was a motivating factor for the retaliatory action. *Warner Robins, 55 FLRA at 1201; NOAA, 54 FLRA at 987. See also U.S. Department of Veterans Affairs Medical Center, Northampton, Massachusetts, 51 FLRA 1520, 1528 (1996); Department of Veterans Affairs Medical*

Center, Brockton and West Roxbury, Massachusetts, 43 FLRA 780 (1991). In this regard, it appears that Diaz acted hastily once Radford began to complain about how she was being compensated for her work in salvage. Thus, within a week after Radford asked to see a Union representative, she was removed from salvage and returned to a cash register. Less than two months after Radford began her protected activity she was terminated. Radford was terminated although up to that point her work had been applauded by supervision and she had never been disciplined while working at the Commissary.

Accordingly, it found that the timing of Respondent's actions herein following Radford's protected activity furnishes sufficient evidence to conclude that there is a *prima facie* showing that the protected activity of Radford was a motivating factor for Respondent's discriminatory action herein. *NOAA*, 54 FLRA at 987. Timing is only one element however, and I am in agreement with the General Counsel, that even if timing alone does not demonstrate a causal connection between Radford's protected activities and her termination then Respondent's pretextual reasons for Radford's termination supplies the needed connection.

In this matter, the only evidence Respondent offered concerning its reasons for the dismissal of Radford was the testimony of Canfield who had only been Radford's supervisor for a few weeks before making the decision to terminate her. Although Canfield testified that she had no knowledge of Radford's filing a grievance and she terminated Radford for valid reasons, Canfield's testimony is totally unsupported by any documentation or corroboration. Unfortunately, Respondent offered no corroborating evidence although it clearly appears from the record that at least two other individuals witnessed Radford's alleged misconduct. Furthermore, Wayman who prepared the termination letter relied on what she was told by Canfield and testified that she saw no connection between the termination and the grievance filed by Radford because the grievance was filed prior to the termination and Canfield was not involved in the grievance. Thus Wayman asserts that the grievance was not connected to the termination of Radford. Wayman, however, was not privy to any of the conduct that Canfield suggested to her had occurred. Furthermore, Canfield apparently told Wayman that there was a history of Radford's tardiness, but did not supply that history to Wayman.

It is clear from the record that Radford engaged in protected activity and that those supervising her were well aware of that activity. There is also sufficient record evidence to conclude that Canfield knew of Radford's protected activity. In this regard, other Commissary supervisors, as well as labor relations employees, with whom Canfield was dealing with concerning Radford's termination were fully aware of the grievance. Thus, Smith and Wayman were aware of Radford's step one grievance. Also Diaz and Tarter were aware of and involved in DECA's investigation of Radford's grievance. Wayman told "the supervisors, and

told them to go ahead and investigate the grievance[.]" At that time, Diaz was leaving her position as supervisor and Tarter was managing on her behalf until Canfield took the position on March 28. Wayman and Smith responded to the grievance on March 30, two days after Canfield took over for Tarter.

In all the circumstances, it is unlikely that Smith would deny Radford's step one grievance and not communicate that decision in some way to her direct supervisor, Canfield. It is equally unbelievable that Tarter, then Canfield's assistant, would not have mentioned the situation to Canfield, as she was directly involved in investigating the grievance on Wayman and Smith's behalf.

In any event, a decision to deny an employee grievance, especially a grievance involving backpay can affect an employee's attitude, morale and work ethic. Employees faced with a negative grievance determination might even become hostile. It is certainly reasonable to assume that these are things that an employee's supervisor should be made aware of, especially in a commissary store where the employee's entire job requires dealing with customers. Actually both Early and Smith stated that they expect new supervisors to be made aware of such things. Early also confirms that he would have expected that Canfield be briefed on everything going on at the Commissary, including potential problems. Early also stated that he would not expect a new supervisor to act on their own without telling the supervisor above them when they are "getting ready to take this kind of action." Notwithstanding Canfield's testimony that she could terminate employees on her own, at the very least she needed to clear this kind of action with higher supervision, according to Early.

Even if, as Wayman testified, temporary employees are more readily expendable, it is hardly reasonable to believe that Canfield, a new supervisor who had been in administration prior to taking her position, would act independently without contacting her supervisors and asking for their guidance, or at least approach them with her recommendation. Finally, Wayman testified that she did not recommend the termination of any other temporary employee while they worked for Canfield. In my view, it is unrealistic to believe that Canfield was not made aware of Radford's grievance when she began acting as Radford's supervisor. Consequently, it is concluded that there is sufficient record evidence to find that Canfield was aware that Radford recently filed a grievance. Furthermore, there is absolutely no requirement that the grievance had to be filed against Canfield. Accordingly, it is found that Canfield as a

new supervisor did not terminate Radford without contacting her supervisors and asking for their guidance or at least clearing the termination with them.

In my opinion, Respondent's reasons for terminating Radford are pretextual. Radford was an exemplary employee who was praised for her work in salvage and, even though taken off salvage without explanation, continued to do a good job on the cash register. There is also no showing that Radford had been disciplined or even reprimanded, as Canfield claims, for returning late from breaks or lunch during her employment at the Commissary, other than on April 15. According to Canfield, Tarter told her that Safreed told her that Radford did not have authorization to leave for lunch that day and returned from lunch late. Canfield was not at the Commissary that day, so she had no personal knowledge of this, nor did she have a clear recollection about when Tarter spoke with her about the incident.

Canfield stated that she spoke with both Tarter and Safreed personally about the incident and took their statements. Those statements are missing from the record.⁽⁴⁾ Canfield also claimed that she reprimanded Radford about the incident on April 15, but Radford's credited testimony is that no one spoke to her about the events of April 15 until her termination. Furthermore, Canfield's own letter dated April 18, while indicating that she took statements from Tarter and Safreed makes no reference to speaking with Radford. Finally, the April 18 letter indicates that Radford had been late coming back from breaks and lunch in the past, but does not refer to any reprimands that Radford might have received for these alleged infractions. Canfield in a critical inconsistency testified, however, that she reprimanded Radford for these violations, but produced no documentation to suggest that she had done so.

It is also undisputed that other checkers with temporary appointments returned late from breaks and lunch and the record does not show that they faced any discipline, whatsoever. Since this is established by the record, it is unnecessary to draw an adverse inference concerning the discipline of other checkers with temporary opportunities who went undisciplined when they returned late from lunch and breaks. Yet Radford was terminated from employment at the Commissary in part for allegedly engaging the same or similar behavior. Radford's termination, technically effective April 23, occurred just two workdays before Smith said that Early was to return to the Commissary, and five days before her second-step grievance meeting was scheduled. Her termination totally eliminated the need for the grievance meeting on April 29.

Again, the Respondent's reasons for terminating Radford are pretextual. There is no showing that Radford had been disciplined or even reprimanded, as Canfield claims, for returning late from breaks or lunch during her employment at the Commissary, other than on April 15. Canfield admittedly was not at the Commissary that day, so she had no personal knowledge of Radford's alleged infractions, nor did she have a clear recollection about when Tarter spoke with her about the incident. The statements that Canfield allegedly obtained from Tarter and Safreed were submitted into evidence or a part of the record.

Accordingly, it is concluded that the General Counsel established the required *prima facie* case under *Letterkenny*, i.e., that Radford engaged in protected activities and, that Radford's protected activities were the motivating factors in Respondent's decision to remove her from the salvage section and terminate her.

- The Reasons Advanced for Radford's Termination Were Pretextual

Where it is established that protected activity was a motivating factor in a discriminatory action, as in this case, the respondent has an opportunity to show by a preponderance of the evidence that it had a legitimate justification for the action. *Letterkenny*.

Radford's removal from the salvage section almost immediately after she sought union assistance is uncontested and constitutes the cornerstone of the General Counsel's case that once Radford sought union assistance Respondent began to discriminate and retaliate against her for protected activity, and the retaliation subsequently resulted in her termination.

Respondent suggests that the General Counsel failed in its burden of proof since there was no showing of disparate treatment due to protected activity in this case. Respondent erroneously insists that disparate treatment is one of three essential elements of a *prima facie* case and, therefore, argues that the General Counsel failed to prove any connection between Radford's protected activity and her termination. Recently, the Authority held that a showing of disparate treatment is not always a necessary element of a discrimination case. *305th Air Mobility Wing McGuire Air Force Base, New Jersey*, 54 FLRA 1243, 1245 n.2 (1998); *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704 (1999). Furthermore, Respondent's disparate treatment argument lacks merit, for where a respondent invokes the requirement of showing disparate treatment, it "must shoulder the burden in the first instance" of establishing that there were "similarly situated employees." In this matter, Wayman testified that DECA traditionally gives temporary employees a letter which identified why they are being terminated. If so, Respondent should have been able to produce some documentation or reasons for terminating temporary employees similarly situated to Radford. When no similarly

situated employees are disclosed by a respondent, discriminatory treatment cannot be shown, however discriminatory treatment may have occurred because such treatment would not have been rendered but for the protected activity. Such discriminatory treatment contains all the section 7116(a)(2) elements set out in *Letterkenny*. Although Respondent does not dispute the record evidence that temporary checkers other than Radford returned from lunch breaks without being disciplined, it did not on its own, point to any temporary employees who returned late from breaks or lunch who were disciplined in any manner. Accordingly, it is concluded that it was unnecessary for the General Counsel to establish disparate treatment as an element of this matter.

With regard to Respondent's argument that there was no connection between Radford's protected activity and her termination, it is worth reiterating that the pretextual reasons offered by Respondent provide a sufficient link between those activities. The evidence proffered by Respondent reveals in my opinion, that it had no legitimate reason to terminate Radford. Accordingly, it can only be concluded that since no legitimate reason was supplied, it is reasonable to find that Radford's termination was discriminatory.

As already found, the General Counsel established a *prima facie* case by showing that Radford was engaged in protected activity by seeking union assistance and by filing a grievance. The General Counsel also proved by a preponderance of the evidence that Respondent's motivation for terminating Radford was because she sought Union assistance and filed a grievance.

Although the record discloses that other checkers returned late from breaks or lunch with impunity, Radford was terminated because she allegedly went to lunch without permission and that she returned late from lunch once. Respondent's claim notwithstanding, there is no corroborating evidence that Radford left for lunch without permission. Furthermore, Canfield's claim that Radford was reprimanded by her on two occasions about returning late from lunch or breaks prior to her termination, is unsupported by the record. Likewise, the uncontested evidence that cashiers are required to spend 10 to 15 minutes dealing with their till when they go to and return from lunch, reveals that Radford was not even late returning from lunch on April 15. Accordingly, it is concluded that Respondent's position that Radford was terminated because she left for lunch without permission and that she returned late from lunch does not withstand scrutiny.

The record in this case reveals that Radford was considered an outstanding employee, who was doing a great job, and could expect a promotion "within three months." Suddenly even though highly praised prior to beginning her protected activity, Radford became dispensable after she started such activity.

In my opinion, Respondent presented no persuasive reason for terminating Radford. In this respect, Respondent relies on the testimony of Canfield to establish justification for terminating Radford. While Canfield was an articulate and convincing witness, it has been consistently noted that there is no documentary support or corroboration for her testimony. Thus, I find no evidence to support Radford's termination other than Canfield's uncorroborated testimony that Radford left for lunch without permission and returned late from lunch on April 15. First, there is no documentary support for Canfield's claim that Radford had been previously reprimanded. The lack of such documentation is even more detrimental to Respondent's case since Canfield stated there was documentation of Radford's earlier reprimands for returning late from breaks or lunch. Secondly, there is no claim other than Canfield's unsupported testimony that Radford left for lunch on April 15 without permission. If such evidence was available, it was incumbent on Respondent to present the documentation to support Canfield's assertion. The Authority looks with disfavor on testimony that is not supported by documentary evidence or corroborating testimony to sustain a justification for alleged discriminatory actions against an employee. *See, for example, Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah, 35 FLRA 891 (1990)*. Accordingly, since there was no documentation or corroboration of Respondent's termination of Radford, the undersigned credits the testimony of Radford, Jones and Morrisette where there are inconsistencies between their testimony and that of Canfield. Accordingly, it is concluded that Canfield's testimony, standing alone does not supply the necessary legitimate justification to overcome the General Counsel's case.

In summary, Respondent's reasons for terminating Radford are pretextual. Additionally, Respondent proffered no evidence regarding Radford's removal from the salvage section because she sought the assistance of the Union. The credited testimony reveals that Radford was praised for her work in salvage and, although taken off salvage without explanation, continued to do a good job on the cash register. There also is no showing that Radford had been disciplined or even reprimanded, as Canfield claims, for returning late from breaks or lunch during her employment at the Commissary, other than on April 15. According to Canfield, Tarter told her that Safreed told her that Radford did not have authorization to leave for lunch that day and returned from lunch late. Canfield was not at the Commissary that day, so she had no personal knowledge, nor did she have a clear recollection about when Tarter spoke with her about the incident. Canfield stated that she spoke with both Tarter and Safreed personally about the incident and took their statements. Those statements are missing from the record. Canfield also claimed that she reprimanded Radford about the incident on April 15, but Radford's credited testimony is that no one spoke to her about the events of April 15 until her termination. Furthermore, Canfield's own letter dated April 18, while indicating that she took statements from Tarter and Safreed makes no reference to speaking with Radford. Finally, the April 18 letter indicates that Radford had been late coming back from breaks and lunch in the past, but does not refer to any reprimands which Canfield claims were given for these infractions. Thus, the lack of documentation provides sufficient reason to support a finding that Radford's termination was discriminatory.

Finally, it is clear that other checkers with temporary appointments were tardy in returning from breaks and lunch but there is no showing on the record that they faced any discipline, whatsoever. Yet Radford was

terminated from employment at the Commissary in part, for allegedly engaging in the same or similar behavior. In addition, Radford was terminated only five days before her second-step grievance meeting was scheduled, thereby, eliminating any need for the grievance meeting on April 29.

In light of the foregoing, it is concluded that the General Counsel has established that Radford's termination was motivated by her protected activity. Thus, where the agency does not establish that there was an additional law (nonpretextual) motive for its action, it is unnecessary to determine whether it would "have taken the disputed action event without the unlawful motive." *Letterkenny*.

Based on the record as a whole, it is found that the General Counsel has established by a preponderance of the evidence that Radford's termination was motivated solely by her protected activity. Furthermore, it is found that Respondent's proffered reasons for Radford's termination are pretextual and unsupported by the instant record. Accordingly, it is found that Respondent violated section 7116(a)(1) and (2) of the Statute by terminating Radford during her one-year temporary appointment because she engaged in protected activities.

The Remedy

The General Counsel seeks a remedy including an offer of full reinstatement to her temporary appointment with backpay for Radford, and the expunging of all references to this action from Radford's personnel files together with a requirement to post the attached notice to employees.

Make whole relief is warranted since any loss of pay and benefits by Radford resulted directly from the Respondent's

unlawful and unwarranted personnel action, i.e., its termination of Radford because of her protected activities. The Authority has repeatedly recognized that remedies should be designed to "restore, so far as possible, the status quo that would have obtained but for the wrongful act." *Department of Defense Dependents Schools*, 54 FLRA 259, 269 (1998).

Accordingly, it is found that the recommended remedy does effectuate the purposes and policies of the Statute. Therefore, it is recommended that the Authority issue the following Order:

ORDER

Pursuant to section 2423.41(c) of the Authority's Rules and Regulations and section 7118 of the Federal Service Labor-Management Relations Statute, the Department of Defense, Defense Commissary Agency, Little Creek Commissary, Virginia Beach, Virginia, shall:

◆ Cease and desist from:

(a) Terminating Elizabeth K. Radford, or any other employee, during her one year temporary appointment as a Sales Store Checker, GS-03, because she filed a grievance through the National Association of Government Employees, Local R4-45, SEIU, AFL-CIO, thereby engaging in activity protected by the Federal Service Labor-Management Relations Statute.

(b) 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) Offer to reinstate Elizabeth K. Radford to her former position as a Sales Store Checker, GS-03, and make her whole for all losses she incurred as a result of her unlawful termination on April 23, 1999, as required by the Federal Service Labor-Management Relations Statute.

(b) Expunge from Elizabeth K. Radford's personnel files all references to any discipline and removal from Federal Service.

(c) Post at its facilities in Virginia Beach, Virginia, where bargaining unit employees represented by the National Association of Government Employees, Local R4-45, SEIU, AFL-CIO, 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 Director, Defense Commissary Agency, 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 ensure that such Notices are not altered, defaced, or covered by any other material.

(d) Pursuant to section 2423.41(e) of the Authority's Rules and Regulations, notify the Regional Director, Washington Regional Office, in writing, within 30 days from the date of this Order, as to what steps have been taken to comply.

Issued, Washington, DC, April 13, 2001.

ELI NASH, JR.

Administrative Law Judge

NOTICE TO ALL EMPLOYEES

POSTED BY ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

The Federal Labor Relations Authority has found that the Department of Defense, Defense Commissary Agency, Little Creek Commissary, Virginia Beach, Virginia, violated the Federal Service Labor-Management Relations Statute, and has ordered us to post and abide by this Notice.

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT terminate Elizabeth K. Radford, or any other employee, for filing a grievance through the National Association of Government Employees, Local R4-45, SEIU, AFL-CIO, thereby engaging in activity protected by the Federal Service Labor-Management Relations Statute .

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, offer to reinstate Elizabeth K. Radford to her former position as a Sales Store Checker, GS-03, and make her whole for all losses she incurred as a result of her unlawful termination on April 23, 1999, as required by the Federal Service Labor-Management Relations Statute .

WE WILL, expunge from Elizabeth K. Radford's personnel files all references to any discipline and her removal from Federal Service.

(Respondent/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 its provisions, they may communicate directly with the Regional Director, Washington Regional Office, Federal Labor Relations Authority, whose address is: 800 "K"

Street, N.W., Suite 910, Washington, DC 20001, and whose telephone number is: (202)482-6700.

1. The person responsible for the queue line, typically the lead checker or a supervisor, stands at the front of the store and directs customers to available registers. This person also authorizes checkers to take lunch and other breaks.
2. Safreed was terminated on July 6, the same day that Morrisette filed the unfair labor practice charge in this case.
3. Canfield testified that she had terminated other temporary employees for overages and shortages of \$50.00 or more, and for attendance problems. Although Wayman testified that Canfield called her regularly for advice, her testimony does not support Canfield's assertion that she had terminated other employees.
4. Tarter prepared a statement on October 28, 1999, regarding the April 15 incident. This statement obviously prepared during an investigation of the matter has no evidentiary value since Tarter did not testify at the hearing and there was no opportunity to cross-examine her concerning the contents of her statement.