

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

U.S. DEPARTMENT OF THE AIR FORCE 437 TH AIRLIFT WING, AIR MOBILITY COMMAND CHARLESTON AIR FORCE BASE, SOUTH CAROLINA Respondent	Case No. AT-CA-90669
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1869 Charging Party	

NOTICE OF TRANSMITTAL OF DECISION

The above-entitled case having been heard before the undersigned Administrative Law Judge pursuant to the Statute and the Rules and Regulations of the Authority, the undersigned herein serves his Decision, a copy of which is attached hereto, on all parties to the proceeding on this date and this case is hereby transferred to the Federal Labor Relations Authority pursuant to 5 C.F.R. § 2423.34(b).

PLEASE BE ADVISED that the filing of exceptions to the attached Decision is governed by 5 C.F.R. §§ 2423.40-2423.41, 2429.12, 2429.21-2429.22, 2429.24-2429.25, and 2429.27.

Any such exceptions must be filed on or before **MARCH 20, 2000**, and addressed to:

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

JESSE ETELSON
Administrative Law Judge

Dated: February 17, 2000
Washington, DC

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

MEMORANDUM

DATE: February 17, 2000

TO: The Federal Labor Relations Authority

FROM: JESSE ETELSON
Administrative Law Judge

SUBJECT: U.S. DEPARTMENT OF THE AIR FORCE
437TH AIRLIFT WING, AIR MOBILITY COMMAND
CHARLESTON AIR FORCE BASE, SOUTH CAROLINA

Respondent

and

Case No. AT-CA-90669

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
LOCAL 1869

Charging Party

Pursuant to section 2423.34(b) of the Rules and Regulations, 5 C.F.R. § 2423.34(b), I am hereby transferring the above case to the Authority. Enclosed are copies of my Decision, the service sheet, and the transmittal form sent to the parties. Also enclosed are the transcripts, exhibits and any briefs filed by the parties.

Enclosures

FEDERAL LABOR RELATIONS AUTHORITY
Office of Administrative Law Judges OALJ 00-18
WASHINGTON, D.C.

U.S. DEPARTMENT OF THE AIR FORCE 437 TH AIRLIFT WING, AIR MOBILITY COMMAND CHARLESTON AIR FORCE BASE, SOUTH CAROLINA Respondent	Case No. AT-CA-90669
and AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 1869 Charging Party	

Phillip G. Tidmore, Esq.
Major Douglas C. Huff, Esq.
For the Respondent

Sherrod G. Patterson, Esq.
Paige Sanderson, Esq.
For the General Counsel

Ms. Brenda Stallard
For the Charging Party

Before: JESSE ETELSON
 Administrative Law Judge

DECISION

Statement of the Case

An unfair labor practice complaint alleges that the Respondent violated sections 7116(a)(1) and (2) of the Federal Service Labor-Management Relations Statute (the Statute) by taking a series of actions affecting employee Thomas Kamenicky because Kamenicky engaged in activities protected by the Statute, including the filing of safety reports on behalf of the Charging Party (the Union). The complaint also alleges that the Respondent committed further violations of section 7116(a)(1) by the coercive statements of two of its supervisors about Kamenicky's protected activities.

Respondent's answer denies that Kamenicky engaged in protected activities during the time period covered by the complaint. The answer admits that it took some of the actions alleged in the complaint, denies that it took other alleged actions, and denies that the alleged statements were made. It denies that the alleged actions were taken because Kamenicky engaged in protected activities and denies that Respondent committed unfair labor practices.

A hearing on the complaint was held on November 17 and 18, 1999, in Moncks Corner, South Carolina. Counsel for the General Counsel and for Respondent filed post-hearing briefs.

Findings of Fact¹

A. Organizational and Background Facts

As of the date of the hearing, Thomas Kamenicky had been employed by Respondent in the Sheet Metal Corrosion Shop (SMCO) for 24 years. Depending on the nature of the job assignment, Kamenicky reported to either Staff Sergeant Charles Carter or Technical Sergeant Stanley Simpson. At times, he is supervised by Staff Sergeant Downs (Tr. 223). These Staff Sergeants reported to Master Sergeant Dennis Ingold, who in turn reported to Senior Master Sergeant Grace Picicci, the Branch Chief, and Chief Master Sergeant Georgia Fallaw. Master Sergeant Ingold was Kamenicky's rating official. However, he assigned Master Sergeant Childers to perform Kamenicky's most recent rating. Picicci and Fallaw report to Major (now Lieutenant Colonel) Anthony Williams, Commander of the 437th Equipment Maintenance Squadron.

The Union is the exclusive representative of a unit of employees at Respondent. Kamenicky has served as the Union Safety Representative (USR) since 1996. Respondent was aware of his Union position at least in 1999, when the following events occurred.²

¹

These findings are based on the record as a whole, including stipulations, but primarily on the credited testimony of the witnesses. Wherever I have not expressly credited a witness or a document in support of a finding, that finding is based on undisputed evidence or evidence that was uncontroverted, under circumstances warranting an inference that the failure to controvert it supports its credibility.

²

All further dates not otherwise identified by year are in 1999.

As the USR, Kamenicky worked with Dave Luttrell, Civilian Chief of Wing Safety, on several safety-related matters. In 1998, Kamenicky also represented the Union on a joint union-management committee that examined 23 shops on Charleston Air Force Base and produced a report citing problems with safety quality in those shops. After the report was released, Master Sergeant Picicci told Kamenicky that those portions of the report regarding the SMCO shop were a "bunch of bullshit," and that she did not appreciate the committee's writing them up.³

B. Kamenicky Files Formal Safety Hazard Reports

Up until May 1999, all of the safety reports in which Kamenicky was involved were considered "informal." In May or June, Kamenicky advised Union President Richard Egal that there were several safety concerns that he had taken up with management informally over the preceding 18 months, but that management safety representatives at the shop and higher levels, and other supervisors with whom he had spoken, including Picicci, had not resolved these concerns to his satisfaction. Egal directed Kamenicky to file safety hazard reports about these matters.⁴

Kamenicky consulted Wing Safety Chief Luttrell, who advised him that the reports should be made on Air Force Form 457 (Form 457) and submitted to the Wing Safety Office. Kamenicky submitted seven of such reports, undated, but according to Kamenicky's credited testimony (Tr. 90) and surrounding circumstances, some time in the early part of June.⁵ Three of the Form 457s described alleged safety hazards in areas where Kamenicky worked, including his shop. The others dealt with hazards outside of Kamenicky's normal work areas.

C. Respondent's First Reactions to the Form 457 Reports

3

Under the protocols in effect, Kamenicky, as an SMCO employee, had not participated in the committee's work as it related to that shop.

4

Although Respondent urges that I discredit Egal's testimony that he so directed Kamenicky (testimony that has little or no bearing on whether Kamenicky's filing of these reports constituted protected activity), it provides no persuasive reason for me to do so.

5

The complaint alleges, and the answer admits, that Kamenicky filed the reports on June 7. I have been unable to ascertain the source of this date.

The Wing Safety Office informed Master Sergeant Ingold and (Squadron Commander) Major Williams about the Form 457 reports. Luttrell advised Master Sergeant Ingold, who was already aware that Kamenicky had filed them, that six of the reports were "ruled invalid" and one was "in work" (Tr. 206-10). These were the first such reports to be filed in Ingold's area since he assumed the position he then held. Luttrell informed Major Williams that Kamenicky had filed the Form 457s in his capacity as USR, but, as Williams testified, he understood it, that they were unfounded. One of Williams' subordinates, Chief Master Sergeant Fallaw, suggested to him that she, and perhaps others in the chain of command, thought that Kamenicky had acted "underhand[ed] ly[,] behind their back" (Tr. 250). Williams shared Fallaw's view that Kamenicky should have gone through the chain of command to talk about the safety complaints.

D. Luttrell's Response Angers Kamenicky; He Reacts

On or about June 9, Wing Safety Chief Luttrell called Kamenicky and told him that he had spoken with management concerning one of the Form 457 reports, alleging that spray-painting had occurred on the flight line without the proper safety equipment (Tr. 100). Luttrell reported to Kamenicky that management had told him that the painting was done in two and a half minutes and did not fall within the pertinent regulations, and that Luttrell was going to throw the report out because it was invalid (Tr. 123-24).

Kamenicky had been working on that incident, along with other issues of allegedly improper painting, for over a year and a half at that point. About 10 or 15 minutes after receiving this call, he saw Master Sergeant Ingold walking down the hall. Kamenicky told Ingold that everybody fights him as a union safety representative, and added some obscenities to his complaint. Further, he told Ingold that Sergeant Downs and Sergeant Carter should be "busted" because of their safety violations. Ingold described the scene more vividly. In his account, he was talking with someone when Kamenicky appeared, in an agitated state, screaming, "Where's Sergeant Downs?" Ingold answered that Downs was TDY. Kamenicky replied that Downs was a "lying son-of-a-bitch, [and] when I get through with him and Carter, they'll be lucky to have one stripe left." Ingold turned to leave, and Kamenicky said, "you'll find out, too, you wait until . . . Major Williams comes down looking for your ass." (Tr. 197-98).

Kamenicky confirmed the accuracy of Ingold's version of the incident except that he did not remember saying anything about getting Ingold's ass also. I credit Ingold, who

seemed to have a firmer grasp on what occurred, and whose written statement about the incident was supported by a virtually identical statement from the other person to whom Ingold had been speaking at the time (Tr. 131).

Later the same afternoon, Kamenicky went to Ingold's office and apologized for his outburst. He told Ingold that he was pretty upset and, according to Kamenicky's credible testimony, that he knew he should not have acted in that manner but that he was very frustrated about working on these issues. Ingold responded that he understood how Kamenicky would be frustrated. (Tr. 125).

E. Kamenicky is Summoned to a Meeting

On a date identified in the complaint as on or about June 11 and admitted in the answer, Master Sergeant Childers approached Kamenicky in his work area and told him that Ingold had Sergeant Mitchell, the squadron safety non-commissioned officer (NCO) with him and wanted to speak with Kamenicky in his office. Kamenicky proceeded there and found it occupied by a number of officers and NCO's, some of whom were in his chain of command. The Form 457 reports that Kamenicky had filed were spread out on a desk or table. Kamenicky asked Childers what this was all about. Childers answered by suggesting that Kamenicky get some union representation. (Tr. 103-04.)⁶ Kamenicky then left Ingold's office for that purpose.

Kamenicky tried to reach Union President Egal but could not find him. He found Trudy Pendergast, formerly a Union steward and more recently its first vice president. Pendergast accompanied Kamenicky back to Ingold's office. When they arrived, Pendergast recognized a number of those present as managers, and decided that she needed Egal's assistance, so she called him on her cell phone. Egal arrived and the three of them re-entered Ingold's office. (Tr. 46, 105-06.) Among the managers in the office at that time was Picicci.⁷

Safety NCO Mitchell stated that the purpose of the meeting was to get some information about the Form 457 reports. Ingold added that they had not called Kamenicky in

6

Childers did not testify. Ingold denied that he (Ingold) suggested to Kamenicky that he get a union representative. I credit Kamenicky that Childers did.

7

Although Ingold did not remember Picicci's being present, I credit the testimony of Egal, Pendergast, and Kamenicky that she was.

to discipline him, and that they just wanted to get some information about the reports. Management attendees asked Kamenicky about the reports and disputed them.⁸ Someone, identified by Egal and Kamenicky as Picicci, questioned Kamenicky about having gone to the extreme of filing these reports without going through shop supervision first. Kamenicky answered that he had gone through the chain of command but that, after a year and a half, no one seemed to be listening. Kamenicky also stated in response that he felt obligated, as the USSR, to file these reports, and that he hoped that they would not take it personally (Tr. 51, 113).⁹

At a certain point, when everyone appeared to be asking questions at once, Egal asked who was in charge of the meeting. Picicci left the room. Then Ingold said that he was in charge (Tr. 28, 47, 109). Ingold also stated that the management safety representatives wanted to talk to Kamenicky about their concerns (Tr. 29). Egal asked Ingold how he wanted to proceed. Ingold said that he wanted to be able to work with the USSR--that the USSR should start the process of making safety reports by bringing them to the attention of the immediate supervisor. Ingold asked Kamenicky and Egal if they would do that in the future. Egal asked Kamenicky if he would agree to that and Kamenicky said that he would. The meeting ended on that note. (Tr. 48, 50, 109.)

F. Events of June 15

1. The Evidence Presented

Kamenicky was working under Sergeant Carter's supervision on June 15. They had a job to perform on the flight line. While Carter was driving the truck that took them to their destination, Kamenicky and Carter got into a discussion about how the job was to be done. Carter told Kamenicky how he wanted it to be done. Kamenicky questioned Carter's decision based on his own work experience. Carter responded that they were just going to do it his way. (Tr. 132.)

8

Ingold, asked whether they discussed the reports with Kamenicky, denied that they discussed "each one" (Tr. 212-13). I do not consider this an effective denial that they discussed at least some of them.

9

I credit Pendergast and Kamenicky with respect to Kamenicky's statement that it was nothing "personal" or should not be taken "personally." Ingold's failure to recall such a statement (Tr. 220) does not persuade me otherwise.

Kamenicky had to go back to the shop to get a rivet gun (Tr. 132, 166). Between 9:30 and 10:00 in the morning (Tr. 194), he met Sergeant Simpson in the tool room. Simpson, observing that Kamenicky appeared to be upset, asked him how things were going (Tr. 132) or what the problem was (Tr. 174). Kamenicky's response is in dispute.

According to Kamenicky, he responded that the situation was "crappy." Later, he acknowledged that he told Simpson that Carter had a "shitty attitude," (Tr. 167-68) which, I believe, supersedes the somewhat milder synonym in his original description. In Kamenicky's account, he went on to tell Simpson that it was ridiculous that people with a lot of experience were being treated like apprentices, and that he did not appreciate being treated like that. Kamenicky testified that (although he did not refer to having mentioned Sergeant Carter by name) Simpson responded that he had heard a lot of complaints about Carter's attitude, and that Carter was new and just had to get broken in (Tr. 132), or that he would eventually "work out of this anger or whatever his problem was" (Tr. 167).

Simpson's account of Kamenicky's response begins, consistent with Kamenicky's testimony, with Kamenicky stating that "we had incompetent supervision on the flight line, and [Kamenicky] was tired of it" (Tr. 175). Then, however, according to Simpson, Kamenicky hesitated for a moment and proceeded:

I probably shouldn't say this to you, but Sergeant Carter's a stupid son-of-a-bitch and I'd like to shoot him in the back of the head with a rivet gun.

Simpson testified that he responded to this by telling Kamenicky that they were having a hard day and that Carter was probably doing the best he could. (*Id.*)

Kamenicky returned to work on the flight line with Carter (Tr. 195). Simpson did nothing about his conversation with Kamenicky immediately. At approximately 11:30 a.m., he told Ingold about it (Tr. 213). That afternoon, in response to that information, Ingold removed Carter from the flight line but did not inform him of the reason for his removal.

Kamenicky testified that Carter drove him back to the shop from the flight line at the end of his work day. According to Kamenicky, Carter told him that he (Carter) had been called up to Wing Safety, that he had been told that Kamenicky had turned in the Form 457's, that he didn't think

much of Kamenicky anymore for doing that, and that he didn't appreciate having to get called up (Tr. 111).

2. Resolutions of Credibility on Material Facts

Although Kamenicky denied that he called Carter a stupid son-of-a-bitch and that he said he would like to shoot him with a rivet gun, I credit Simpson. First, I credit his observation that Kamenicky was very upset at the time, as being compatible with Kamenicky's testimony. In that state, I believe that Kamenicky was capable of making such statements without necessarily being able to remember that he did.¹⁰ The unlikely choice of a rivet gun as a weapon is consistent with its being the tool that Kamenicky was picking up at the time to use on a job that was the subject of Kamenicky's displeasure with Carter. Further, Simpson did not strike me as someone who would simply make up such a story. More importantly for the purposes of this case, I credit Simpson and Ingold that Simpson reported to Ingold that Kamenicky had made these statements. Ingold then relied on that report.

In the absence of testimony from Carter, I credit Kamenicky's otherwise credible testimony about his conversation with Carter at the end of the day.

G. Management's Actions in the Following Days

1. Detail to Another Location

Major Williams received informal reports containing different versions of Kamenicky's statement. Then he heard Simpson's first-hand report and received one or more written statements about the incident. (Tr. 237, 255, 263-65.) It is not clear whether he was informed about the conversation on June 15 or on June 16. On the evening of one of those days (apparently) Williams or his secretary drafted a memorandum placing Kamenicky on a temporary detail, effective June 17, to Maintenance Flight, Cube C, until further notice (Tr. 252, 256, G.C. Exh. 16). The memorandum specified that, during the duration of the detail, Kamenicky was not to enter the building where he had been working, and explained that "[t]his assignment is being accomplished to allow management time to investigate an alleged incident

¹⁰

Kamenicky admitted that he had called Sergeant Downs a "lying son-of-a-bitch" in his June 9 conversation with Ingold.

between you and SSgt Carter on 15 June 99" (G.C. Exh. 16).¹¹

On June 17, Williams had Sergeant Ingold summon Kamenicky to Williams' office to give him the memorandum.¹²

Williams informed Kamenicky that he had statements about him and that an investigation was being conducted. Kamenicky asked to see the statements. Williams, according to Kamenicky, told him that first he had to sign an acknowledgment that he would be moved to a different section (Tr. 115-16). Kamenicky stated that he preferred not to sign anything without union representation. Testimony about Williams' response to this came in three different versions.

According to Kamenicky, Williams said that he did not speak to the Union--that he was the Commander, made the decisions, and would not deal with the Union (Tr. 118-19). According to Williams, Kamenicky asked for union representation and Williams responded, "Mr. Kamenicky, I'm just asking you to cooperate with me. I feel like, from what I'm hearing, there are some things going on that I need to reassign you temporarily, until we can check out potential problems in this area" (Tr. 259). Williams' testimony continued by paraphrasing himself as stating that "this is a commander utilizing the initiative to sustain and maintain good discipline order and what he feels is safe, where some of it could be having some problems" (*Id.*). According to Ingold, who was present, Williams stated that union representation was not necessary during such a procedure.

Williams' remarks at this meeting are not alleged to constitute an independent violation of section 7116(a)(1) of the Statute, and it is not necessary for me to perform the difficult task of determining exactly what he said. The version presented by Kamenicky is alleged as part of the section 7116(a)(1) and (2) discrimination case. I take it, therefore, that its purpose is to show anti-union animus, and I do not believe it does. Kamenicky and Williams agree that Williams referred to his action in essence as a command decision. Whether or not its implementation, or the meeting

11

In the earliest version of the incident reported to Williams, Kamenicky had pointed the rivet gun at Carter as Carter walked by (Tr. 255).

12

Ingold had expressed about Kamenicky to Williams and, according to Williams, had some input into Williams' decision to detail him (Tr. 262). Ingold, however, denied that he recommended this action or that he discussed the prospective decision with Williams (Tr. 217-18).

with Kamenicky, required Union participation (neither of which is alleged), Williams' refusal to deal with the Union in this matter was no more than an expression of his opinion that this was not a Union matter. It did not otherwise disparage the Union or union activity.

In any event, the meeting ended by Kamenicky's leaving, without signing the acknowledgment. He then consulted Egal as to how to proceed. On Egal's advice, he reported to the supervisor in Cube C. Kamenicky remained on this detail for approximately a month. During this time, he saw some of his former supervisors, including Carter (who had at some point been informed of Kamenicky's "rivet gun" statement), in or around Cube C occasionally (Tr. 121-22). Kamenicky was returned to his old job after a month, when, in Ingold's estimation (although Major Williams authorized the return), "time [had] allowed cooler heads to prevail" (Tr. 226).

2. Counseling and Urinalysis; Not "Personal"

Also on June 17, Ingold issued a memorandum referring Kamenicky for counseling ("psychiatric evaluation," Tr. 260) and another informing him that he had been scheduled for a "reasonable suspicion urinalysis." Ingold (Tr. 201, 218-19) and Major Williams (Tr. 260-61) each claimed the decision to order these actions as his own, although Ingold acknowledged that Williams concurred with his (Ingold's) decision (Tr. 202). Both cited what they considered to be a recent pattern of erratic behavior, consisting of the statements attributed to Kamenicky on June 9 and June 15, as requiring these kinds of inquiries into the source of his conduct. The memorandum referring him for counseling stated that "[t]hese outbursts of anger, cursing and threatening remarks made to me and others, are alarming to all concerned and totally unacceptable in the workplace. . . . In view of the above, it would appear that you may have a personal problem that is contributing to your unacceptable behavior." (G.C. Exh. 9.)

Ingold, accompanied by Sergeant Simpson, delivered the memoranda to Kamenicky at his new temporary workplace. Kamenicky testified that, upon receiving these papers, he looked at them and said, "you've got to be kidding," and that Ingold responded, "don't take it personal, just like you say your safety write-ups aren't personal" (Tr. 126-27). Ingold and Simpson both confirmed that Ingold told Kamenicky that it was not personal, but denied that he added anything about Kamenicky's previous "not personal" statement (Tr. 178, 203-04). Ingold also denied any recollection that Kamenicky had said "nothing personal" about the safety reports (Tr. 220).

I credit Kamenicky, who appeared in general to be a highly credible witness notwithstanding his denial of the rivet gun statement. That denial may well have reflected his honest belief. I do not believe he fabricated his account of Ingold's statement, any more than that Simpson fabricated his account of Kamenicky's rivet gun statement. There are several possible explanations for Simpson's supporting Ingold's version of the June 17 "not personal" statement, and I find it unnecessary if not impossible to select one. In any event, I believe that Ingold found it impossible to resist extracting his verbal revenge for Kamenicky's "not personal" statement. He may have regretted it later and denied it in his own mind.

Kamenicky complied with both memoranda. On June 18 he met, as scheduled, with the Commander of the Medical Operations Squadron, identified on the same document (G.C. Exh. 11) both as Major and as Lt. Colonel Frank Budd, and submitted to the urinalysis. On June 24, Dr. Budd sent this report of his evaluation of Kamenicky to "Workforce Relations" official Tony Owens:13

I spoke with Mr. Kamenicky on 18 June 99 at the request of his supervisor MSgt Ingold. I do not believe Mr. Kamenicky poses a danger to himself or others. I do not believe he has any loss of contact with reality, is unduly paranoid or manifesting any psychiatric disturbance at this time. I do not feel he has a drug or alcohol problem. I have communicated my assessment to his commander, Maj. Williams, with the written consent of the patient.

(G.C. Exh. 11.) On July 1, Respondent was sent the report of results of Kamenicky's urinalysis. It showed "Negative Results" from his June 18 specimen.14

H. Reprimand

On or about July 14, management contacted either Kamenicky or the Union that it wished to meet with Kamenicky and his union representative. Kamenicky attended this

13

Not only is this report in evidence, and therefore now a public record; I believe that Mr. Kamenicky has been more than willing to waive any privacy right he has in its contents.

14

What I said in explanation of publishing the psychological evaluation report applies to this report as well.

meeting with a union representative in Sergeant Ingold's office. Ingold was present, along with Tony Owens, whose office, Work Force Relations, deals with disciplinary actions, among other things (Tr. 221, 268). The purpose of the meeting was to discuss disciplinary action against Kamenicky for the June 9 and June 15 incidents. The discussion focused on a letter of reprimand, which Ingold stated that he intended to issue. The union representative was given the opportunity to, and did, submit a written rebuttal. Ingold considered that rebuttal and, at some point, offered to "drop" the discipline to an oral admonishment. Kamenicky declined this offer.

On August 16, 1999, Ingold issued a memorandum constituting a formal "Notice of Reprimand" to Kamenicky. The letter was drafted, at Ingold's request, by Tony Owens.¹⁵ It recited a description of the two incidents in which Kamenicky made the statements discussed above. It stated further that:

After careful consideration of your reply, it is my determination that the above misconduct is supported by the evidence and warrants your being reprimanded effective 2 Aug 99. . . . A copy of this reprimand will be placed in your Official Personnel File for a period of two years, 2 Jul 99 - 1 Jul 01, at which time it will be removed and destroyed. (G.C. Exh. 14.)

Ingold, in explaining the basis of the reprimand in his testimony, referred to Kamenicky's "[erratic] and unacceptable behavior" (Tr. 203). Major Williams testified that he discussed the matter with Ingold, that he would have preferred firmer action, that Ingold made the decision, and that the reprimand was appropriate to the "[erratic] actions that [Kamenicky] had demonstrated" (Tr. 242).

Analysis and Conclusions

A. June 11 Safety Reports Meeting

The complaint alleges that Respondent violated sections 7116(a)(1) and (2) of the Statute by virtue of Kamenicky's, Pendergast's, and Egal's attendance at the meeting called on or about June 11 to discuss the safety reports Kamenicky had
15

Ingold testified further that he went to Owens for help in writing the letter of reprimand, among other letters. The two of them formulated the content of the letters and Ingold signed them. (Tr. 222.)

filed. I find that the circumstances of that meeting resulted in a violation of section 7116(a)(1). I find it unnecessary to decide whether calling Kamenicky to that meeting, and Pendergast's and Egal's attendance, also constituted "discrimination in connection with hiring, tenure, promotion, or other conditions of employment," in violation of section 7116(a)(2).

An agency violates section 7116(a)(1) when, under all the circumstances, the conduct that was directed at an employee tends to coerce or intimidate the employee, or when the employee could reasonably have drawn a coercive inference from it. *Department of the Air Force, Ogden Air Logistics Center, Hill Air Force Base, Utah*, 35 FLRA 891, 895 (1990) (*Hill AFB*). Kamenicky was ordered to attend a meeting at which he was required to defend the safety reports that he had filed. The filing of these reports, as the USR, constituted protected activity whether or not Egal specifically directed him to file them.

When Kamenicky arrived at the meeting, Master Sergeant Childers, the person who had been sent to summon him to the meeting, and who had been Kamenicky's most recent rating official, advised him that he should get some union representation. This advice reasonably gave Kamenicky the impression that he had something to fear, an impression that was reinforced when one or more management official admonished him for filing the reports. The coercive tendency of this experience more than meets the Authority's standard for a section 7116(a)(1) violation.

B. Temporary Detail, Counseling, and Urinalysis

As noted, Respondent relocated Kamenicky on a detail and had him tested for drugs and for psychological disorders. That these actions resulted essentially from Kamenicky's statement about wanting to shoot Sergeant Carter with a rivet gun is not totally unbelievable, and this appears to be enough for the Authority, which exercises considerable restraint in questioning an agency's assertion that the actions it took were based on security concerns, to exonerate Respondent.

Thus, in *U.S. Penitentiary, Leavenworth, Kansas*, 55 FLRA 704, 712-14 (1999) (*Leavenworth*), the agency had placed the union's president, a prison employee, on "home duty" pending the investigation of an allegation that he had made statements inciting inmates and other staff members to fight each other. During the many months in which this investigation was asserted to have continued (10 months and still running as of the date of the hearing, *Id.* at 741,

743), the agency had refused to permit the union president inside the penitentiary to perform representational duties ordinarily performed there. The agency did not suggest any special security arrangements or other alternatives that would have permitted the union president to perform these duties. Nor did the agency present any evidence that, at the time it refused his requests to enter for those limited purposes, and thereafter, the facility remained in the condition of "acute security risk" (*Id.* at 714) that existed when he allegedly had made these statements.

The Authority concluded that the General Counsel had not established, by a preponderance of the evidence, that the agency had precluded the union's president from entering the penitentiary in order to prevent the union from carrying on its representational activities. Rather, the Authority found that the agency's security concerns constituted the legitimate motivation for the preclusion.¹⁶

Arguably, *Leavenworth* is distinguishable from the instant case because the Authority found that a Federal correctional facility has special security concerns that may not be present at other work locations and found that, at correctional facilities, internal security concerns are of paramount importance. *Id.* at 714. However, since we are dealing here with a real and immediate situation rather than a generic condition, the comparison that must be made is with the actual facts of the cases. That is, I am not inclined to believe that the Authority intended to create a presumption, applicable only to correctional facilities, that any assertion of security concerns is legitimate. Nor would granting such special status to certain agencies appear to be defensible. Rather, I read *Leavenworth* as demonstrating the Authority's reluctance to conclude that an agency's assertion of a security concern, at least if the concern is over potential violence, is pretextual.

With respect to the instant case, the risk posed by Kamenicky's "rivet gun" statement appears to me rather slight. Yet, slight as it was, it presented a more credible cause for concern than any risk that I can imagine arising from the union president's limited presence inside the *Leavenworth* facility, under escort or other appropriate

16

Although the pertinent complaint allegation in *Leavenworth* was a refusal to negotiate in violation of section 7116(a) (1) and (5) of the Statute, and not of section 7116(a) (2) discrimination, the Authority used what it found to be the agency's motivation as a basis for its decision, thereby making *Leavenworth* a precedent to contend with in section 7116(a) (2) cases.

safeguards if deemed necessary. Here, Kamenicky's anger had a specific target, and there was a finite possibility of serious injury if he acted out his expressed desire.

It is not that I believe that the management officials who were involved thought there was much likelihood that Kamenicky would act it out. I do believe that, as they testified (Tr. 199, 237), the Columbine High School massacre earlier that year was on their minds, and that they felt obligated, faced with an unusual situation, to improvise a series of prompt steps to minimize the possibility of a worst-case scenario. In *Leavenworth*, the agency got by with nothing more than a bare assertion that its security concerns justified its actions. Here, Respondent at least took steps that had a plausible connection with its asserted security concerns. The results of these actions were reassuring and resolved the concerns in short order compared with the Authority-approved pace at which the putative investigation in *Leavenworth* proceeded.

Nor were these measures particularly harsh or excessive in the circumstances. While it was understandably demeaning to be required to undergo a "reasonable suspicion" urinalysis and psychological counseling, there is no evidence that, in the culture of this Air Force Base, either of these was considered particularly a mark of disgrace or was likely to subject an employee to ridicule or other social disadvantage. There is not even evidence that, but for Kamenicky's volunteering the information, or for whatever publicity this case produces, these events would have been known to his co-workers. The month-long detail was, of course, apparent to everyone. While it arguably could have been ended a week or two earlier, it was brief under *Leavenworth* standards and its imposition would have been apparent in any event.

One may, as the General Counsel does, question the efficacy of the steps Respondent took to ensure Carter's safety and to prevent any other "erratic behavior" by Kamenicky. However, while these arguable shortcomings may suggest that the responsible officials did not believe there was a serious and imminent risk of violence, I am persuaded that, at the very least, they thought they risked criticism if they appeared to ignore the potential for harm. Thus I conclude, on the record as a whole, *Department of the Air Force, Air Force Materiel Command, Warner Robins Air Logistics Center, Robins Air Force Base, Georgia*, 55 FLRA No. 194, slip op. at 12-13 (Jan. 11, 2000) (*Warner Robins*), that, using *Leavenworth* as a relevant basis for comparison if not as a controlling precedent, the General Counsel has not established a *prima facie* case that Respondent engaged

in unlawful discrimination when it took these nondisciplinary measures.

C. Letter of Reprimand

1. Applicable Principles

Unlike the nondisciplinary measures discussed above, the letter of reprimand Respondent issued to Kamenicky was in no reasonably arguable sense a protective measure and cannot enjoy the benefit of the lenient approach suggested by *Leavenworth*. Instead, it must be given the scrutiny the Authority usually requires under *Letterkenny Army Depot*, 35 FLRA 113 (1990) (*Letterkenny*).¹⁷

Under *Letterkenny*, the General Counsel establishes a *prima facie* showing of discrimination by establishing that: (1) the employee against whom the alleged discriminatory action was taken was engaged in protected activity; and (2) such activity was a motivating factor in the agency's treatment of the employee. In determining whether a *prima facie* showing has been made, the Authority looks to the entire record; it does not limit its consideration to the evidence presented by the General Counsel. *Warner Robins*. Once such a showing has been made, an agency may seek to establish the affirmative defense that: (1) there was a legitimate justification for the action; and (2) the same action would have been taken even in the absence of protected activity. *Id.*, slip op. at 12.

2. The *Prima Facie* Case

Kamenicky engaged in protected activity that included his filing of the formal safety hazard reports in June 1999. This filing, including the fact that such filing went outside the chain of command, was the subject of discussion among management officials and engendered the June 11 meeting at which Kamenicky was admonished for this. There can be little question that representatives of management at the shop, branch, or squadron level felt defensive about having their safety practices presented at the Wing Safety level, and that there was some degree of resentment about it. Such feelings were expressed by Picicci at the June 11 meeting, by Ingold in his later reference to Kamenicky's "not personal" statement at that meeting, and, albeit less

17

This is not to suggest that the framework for analysis set forth in *Letterkenny* is inapplicable to the nondisciplinary actions alleged to violate section 7116(a)(2) in this case. I have employed that analysis, but, given the analogous circumstances, have done so in the abbreviated manner modeled after *Leavenworth*.

emphatically, in Major Williams' opinion that Kamenicky should have gone through the chain of command (on the assumption that he had not).

The letter of reprimand was issued approximately one month after the end of the temporary detail given in response to the same "erratic behavior" cited as the basis for the reprimand. I find the combination of: (1) some management hostility to the protected activity; and (2) the reprimand's having been added to the series of actions to which Kamenicky had already been subjected for (purportedly) the same conduct, sufficient to establish a *prima facie* case that protected activity was a motivating factor. In this connection, although the Authority does not judge the *fairness* of an employee's treatment, it may, in assessing motivation, properly compare such treatment with what in its view might normally have been expected in the circumstances.

The August 16 reprimand, after all that Kamenicky had been put through, is not exactly what one might have expected, even allowing for the exigencies of a military culture, absent any underlying hostility.¹⁸ It evokes, rather, the image of what in certain contact sports is called "piling on." Thus, while the earlier, nondisciplinary actions might have been appropriate responses to "erratic behavior," the reprimand was more akin to punishment, albeit in a mild form, and would hardly seem to have been necessary, at that point, as an additional deterrent to Kamenicky or anyone else who might consider engaging in such behavior in the future.

3. The Absence of a *Letterkenny* Defense

As restated in *Warner Robins* and noted above, the *Letterkenny* defense is an affirmative defense that "an agency may seek to establish." Has Respondent sought to

18

William Tecumseh Sherman (well known, though perhaps not fondly, to residents of that part of the country in which these events occurred) has been quoted as saying that "[t]he purpose of military law [as opposed to civil law] is to govern armies of strong men, so as to be capable of exercising the largest measure of force at the will of the nation." Or, as described by Georges Clemenceau, the French premier during World War I, "Military justice is to justice as military music is to music." (Both quotations are found in a book review by Jonathan Yardley in the *The Washington Post Book World*, Feb. 13, 2000.) Nevertheless, I believe that in the present era, and especially when dealing with civilian employees, the norms in imposing discipline are at least somewhat closer to those of civilian society.

establish it here? Although it never addresses such a defense specifically, there is no doubt that, in substance, Respondent asserts that there was a "legitimate justification for the action," the first prong of the *Letterkenny* defense. One searches in vain, however, for any evidence or assertion with respect to the second prong--that "the same action would have been taken even in the absence of protected activity." In fact, Respondent makes no reference whatsoever to the protected activity that is the foundation for this case, the filing of the safety reports.

It is true that both Sergeant Ingold, who issued the reprimand, and Major Williams, with whom Ingold discussed the matter before issuing it, denied that any of Kamenicky's union activity played any role in the actions taken involving him (Tr. 202, 242). (In finding that a *prima facie* case of discrimination has been established, of course, I have found those denials unpersuasive.) Are those denials, combined with the statement in the letter of reprimand, and the testimony that the reprimand was issued because of Kamenicky's June 9 and June 15 statements, sufficient to constitute an assertion of the *Letterkenny* defense? Not if one is to be guided by the Authority's conclusion in *Social Security Administration, Region VII, Kansas City, Missouri*, 55 FLRA 536, 539 n.3 (1999) (*SSA Kansas City*) that the respondent had not raised a particular defense, and that the complaint should not have been resolved on the basis of that defense, notwithstanding that the defense specifically asserted by the respondent arose from the same claim with respect to the permissibility of the action taken by the respondent, but had a different label than the defense the Authority found not to have raised. *Id.* at 544.

On the other hand, in the same footnote in which it stated that the complaint should not have been resolved on the basis of the mislabeled defense, the Authority noted that it may address questions that it finds relevant and necessary in any case before it, citing *U.S. Department of Justice*, 52 FLRA 1093, 1098 (1997), where the Authority stated explicitly that it may raise such questions *sua sponte*. And in *SSA Kansas City* itself, at n.3, the Authority's majority (Member Cabaniss abstaining) found a way to reach and dispose of the defense that it found not to have been raised. See also *U.S. Food and Drug Administration, Northeast and Mid-Atlantic Regions*, 53 FLRA 1269, 1275 (1998) (Authority resolved case on the basis of an issue that involved a "basic principle" that "[n]either

the parties' arguments nor the Judge's analysis . . . specifically address[ed]").¹⁹

I do not know what to make of all of this, but I have no choice but to take a stab at it. I extrapolate and hypothesize that the Authority is open to addressing issues, either *sua sponte* or by broad construction of arguments made on other issues, when it determines that the issue is important enough that public policy would benefit from its being put to rest. Cf. *Warner Robins*, slip op. at 12-13 n.4 ("Although we recognize that the General Counsel did not except to the judge's determination [that one should consider the record as a whole in determining whether a *prima facie* case of discrimination was established], we address this matter in the interest of avoiding any uncertainty on this point.")²⁰

However, one might not expect the Authority to exhibit the same alacrity in reaching and deciding issues, not addressed by the parties, that are fact-specific and the resolution of which will have limited, if any, precedential value. See, for example, *U.S. Army Armament Research Development and Engineering Center, Picatinny Arsenal, New Jersey*, 52 FLRA 527, 534 (1996) ("[W]e conclude that section 7118(a)(4) of the Statute is an affirmative defense that was not properly before the Judge because the Respondent failed to raise it prior to the close of the hearing."). Cf. *Department of the Navy, Naval Facilities Engineering Command, Western Division San Bruno, California*, 45 FLRA 138, 158 (1992) ("[W]e find no basis in the record for the Judge's conclusion, which was not argued by the Respondent, that the selections . . . were based on "'homer" preference' [.]") I find that the instant case falls into the latter category, and, Respondent not having addressed the second prong of the defense set forth in *Letterkenny*, that I may not resolve the complaint on the basis of that defense.

4. An Alternative Analysis: Treating the *Letterkenny* Defense on the Merits

Since I cannot predict whether the Authority will adopt my analysis of its policy regarding unargued issues, I here

19

But see Id. at 1292 n.5 (Judge's Decision), dealing with the issue on which the Authority resolved the case.

20

The very issue under discussion here--the propriety of resolving issues not specifically raised by the parties--is a recurring one and, in my view, greatly in need of clarification.

take the precaution, designed to minimize the necessity for a remand, of treating the *Letterkenny* defense as though it had been asserted. Having considered the entire record in determining that there is a *prima facie* case, much of what went into that finding also has relevance to the issue of whether Respondent has established a *Letterkenny* defense.

First, while in the abstract Kamenicky's behavior might have provided a legitimate justification for the reprimand, it is more difficult to determine whether it was a legitimate justification in these circumstances. Two separate events were cited as the basis for the discipline. The first was Kamenicky's outburst to Ingold on June 9. However, I regard this as a makeweight, and a particularly light one.

Kamenicky apologized to Ingold for that outburst and Ingold, in effect, accepted that apology, at least at the time it was made. To have cited that incident later, in conjunction with the June 15 "rivet gun" statement, as part of a "pattern of erratic behavior" (G.C. Exh. 9) that warranted referring Kamenicky for counseling was one thing. To have included the incident as part of a justification for discipline after: (1) the apology; (2) the counseling results failed to reveal any continuing problem; and (3) "time [according to Ingold, had] allowed cooler heads to prevail"-- seems disingenuous. Moreover, to have given that incident equal billing with the "rivet gun" statement as the stated basis for the letter of reprimand suggests a lack of confidence in the sufficiency of the later statement.

The weightier ground for the reprimand is, of course, the "rivet gun" statement. Had it been treated as a disciplinary matter from the outset, there would be little basis for questioning its adequacy as a legitimate justification. Having treated it, rather, as "erratic behavior," of a kind "that is out of character for you, when compared to your normal behavior" (G.C. Exh. 9), suggesting the need for psychological counseling, urinalysis, and temporary separation, management's justification for taking a fourth bite at it, this time as a disciplinary matter, is less compelling. I make no final determination as to whether Respondent has satisfied this, the first prong of the *Letterkenny* defense, because I conclude in any event that it has not carried its burden with respect to the second prong.

Assuming that Kamenicky's "erratic" and "out of character" conduct provided a legitimate and sufficient justification for disciplining him, one must wonder (in the absence of any specific explanation) why, at the point that

such action was decided upon, it would have seemed necessary and appropriate to do so. Kamenicky was then viewed by management not only as someone who had made some erratic and uncharacteristic statements, but as someone who had made such statements *and* had, uncharacteristically, gone outside the chain of command with his safety reports.

That this aspect of his behavior entered into the decision I have already found. That the same decision would have been made without consideration of the protected activity was for Respondent to prove. Not every infraction elicits discipline. Nor, as the second prong of the *Letterkenny* defense is framed, is there a presumption that the discipline administered in a particular case would have been administered in the absence of the protected activity. I find it insufficient for Ingold and Williams to have stated that the discipline was imposed because of Kamenicky's erratic behavior and that his union activity played no role.²¹ I am not persuaded that, absent that activity, they would have thought that anything more than the steps already taken was necessary to deal with the situation. In conclusion, I find that Respondent has not sustained its burden and that the *prima facie* case stands to establish that the reprimand was motivated by Kamenicky's protected activity, thus constituting discrimination in violation of sections 7116(a)(1) and (2) of the Statute.

D. Remaining Section 7116(a)(1) Allegations

The complaint alleges that Respondent committed independent violations of section 7116(a)(1) of the Statute when Sergeant Carter told Kamenicky that he did not appreciate Kamenicky's having caused Wing Safety to contact him and that he did not think much of Kamenicky anymore, and when Ingold told Kamenicky that referring him for counseling and for urinalysis was nothing personal, just like when Kamenicky said that the safety reports were not personal.

Each of these statements by Kamenicky's supervisors, suggesting that he was being viewed less favorably because he filed the safety reports, has the coercive tendency that, under the standard set forth in *Hill AFB*, requires a finding that it interfered with, restrained, or coerced Kamenicky in the exercise of his statutory rights, in violation of section 7116(a)(1). Accordingly, I recommend that the Authority issue the following Order:

21

This is not to suggest that their specific statements that they would have imposed this discipline even in the absence of the filings would have established that it was so.

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 Statute), the U.S. Department of the Air Force, 437th Airlift Wing, Air Mobility Command, Charleston Air Force Base, South Carolina, shall:

1. Cease and desist from:

(a) Discriminating against Thomas Kamenicky and interfering with, restraining, or coercing its employees by disciplining Thomas Kamenicky or any representative of the American Federation of Government Employees, Local 1869, the exclusive representative of a unit of its employees (the Union), for protected activity engaged in while performing union representational duties.

(b) Forcing any of its employees to attend meetings at which they are admonished for filing formal safety hazard reports on behalf of the Union.

(c) Telling any of its employees that the results of their filing formal safety hazard reports are not appreciated and that they are regarded less favorably because they did so.

(d) Telling any of its employees that their being referred for examination of their erratic behavior is not personal just as an employee stated that his filing of safety hazard reports was not personal.

(e) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of rights assured them by the Statute.

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

(a) Rescind and expunge from its files all records of, and references to, the reprimand given to Thomas Kamenicky on August 16, 1999.

(b) Post at its facilities where bargaining unit employees represented by the American Federation of Government Employees, Local 1869, 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 Commanding Officer of the 437th Airlift Wing, and they 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.

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

Issued, Washington, DC, February 17, 2000.

JESSE ETELSON
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 U.S. Department of the Air Force, 437th Airlift Wing, Air Mobility Command, Charleston Air Force Base, South Carolina, has 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 discriminate against Thomas Kamenicky and interfere with, restrain, or coerce our employees by disciplining Thomas Kamenicky or any representative of the American Federation of Government Employees, Local 1869, the exclusive representative of a unit of our employees (the Union), for protected activity engaged in while performing union representational duties.

WE WILL NOT force any of our employees to attend meetings at which they are admonished for filing formal safety hazard reports on behalf of the Union.

WE WILL NOT tell any of our employees that the results of their filing formal safety hazard reports are not appreciated and that they are regarded less favorably because they did so.

WE WILL NOT tell any of our employees that their being referred for examination of their erratic behavior is not personal just as an employee stated that his filing of safety hazard reports was not personal.

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

WE WILL rescind and expunge from our files all records of,

and references to, the reprimand given to Thomas Kamenicky on August 16, 1999.

(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, Atlanta Regional Office, Federal Labor Relations Authority, whose address is: Marquis Two Tower, Suite 701, 285 Peachtree Center Avenue, Atlanta, GA 30303, and whose telephone number is: (404) 331-5212.

CERTIFICATE OF SERVICE

I hereby certify that copies of this **DECISION** issued by
JESSE ETELSON, Administrative Law Judge, in Case No.
AT-CA-90669, were sent to the following parties:

CERTIFIED MAIL & RETURN RECEIPT

CERTIFIED NOS:

Sherrod Patterson, Esquire
Federal Labor Relations Authority
Marquis Two Tower, Suit 701
285 Peachtree Center Avenue, NE
Atlanta, GA 30303

P168-060-147

Phillip G. Tidmore
Maj. Douglas C. Huff
AFLSA-CLLO
1501 Wilson Blvd, 7th Flr
Arlington, VA 22209

P168-060-148

Brenda Stallard, Business Agent
AFGE, Local 1869
5003A Tennessee Avenue
P.O. Box 4465
Charleston AFB, SC 29404

P168-060-149

REGULAR MAIL:

President
AFGE, AFL-CIO
80 F Street, NW.
Washington, DC 20001

CATHERINE L. TURNER, LEGAL TECHNICIAN

DATED: FEBRUARY 17, 2000
WASHINGTON, DC